THE

4719

ONTARIO REPORTS,

VOLUME XVIII.

CONTAINING

REPORTS OF CASES DECIDED IN THE QUEEN'S BENCH, CHANCERY, AND COMMON PLEAS DIVISIONS

OF THE

HIGH COURT OF JUSTICE FOR ONTARIO.

WITH A TABLE OF THE NAMES OF CASES ARGUED,
A TABLE OF THE NAMES OF CASES CITED,
AND A DIGEST OF THE PRINCIPAL MATTERS

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JAMES F. SMITH, Q. C.

REPORTERS:
QUEEN'S BENCH DIVISION.....E. B. BROWN.
CHANCERY DIVISION.....A. H. F. LEFROY, GEORGE A. BOOMER,
COMMON PLEAS DIVISION .....GEORGE F. HARMAN,
BARRISTERS-AT-LAW.

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JUDGES

OF THE

HIGH COURT OF JUSTICE.

DURING THE PERIOD OF THESE REPORTS.

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" WILLIAM PURVIS ROCHFORT STREET, J.

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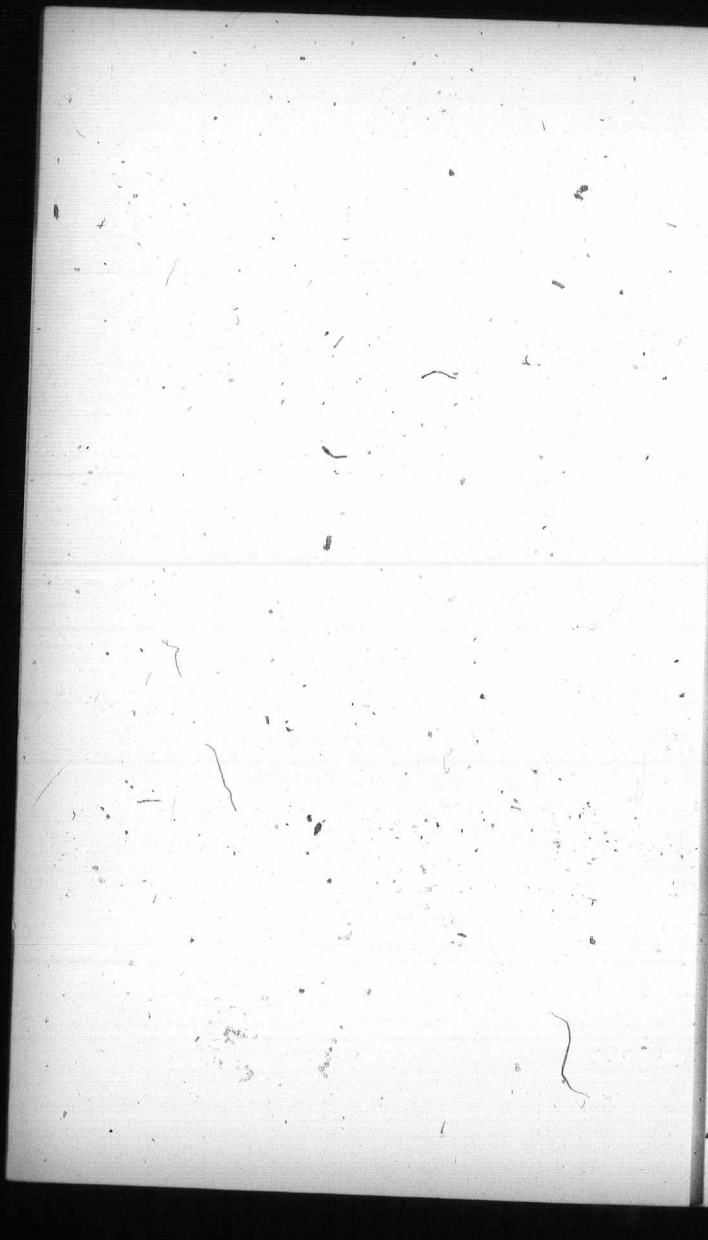

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ERRATA ET ADDENDA.

Page 372, line 18 from top of page, for "recovered" read "required."

Page 400, add as a note to line 6 from top—"The judgment appealed from proceeded upon the ground that the Division Court Judge certified that the order for substitutional service was made on the primary debtor, not because he believed that she had absconded or was evading service, but because he was satisfied that 'the summons would come to her knowledge.' The Divisional Court refused to receive this certificate."

Page 546, line 5 from bottom of head-note, for (1887) read (1877).

REPORTS OF CASES

DECIDED IN THE

QUEEN'S BENCH, CHANCERY, AND COMMON PLEAS DIVISIONS.

OF THE

HIGH COURT OF JUSTICE FOR ONTARIO.

[CHANCERY DIVISION.]

MASON V. BERTRAM ET AL.

Master and servant—Damages—Workman's Compensation for Injuries Act—Lord Campbell's Act—Reasonable expectation of pecuniary or material benefit.

The plaintiff's son who had just come of age was killed by an accident in the defendant's machine shop, where he had been temporarily employed. For about two years previously he had, while attending school, worked on his father's farm, as farmers sons usually do, without wages, and it was intended that he should study medicine, at an expense to his father of about $1000, the course lasting three or four years, and in the vacations, while so engaged in acquiring his intended profession, it was expected that he would work at home as usual.

In an action by his father as administrator to recover damages for the death of his son:

Held, that he could have no reasonable expectation of pecuniary or material benefit from the son's life, and a nonsuit was ordered to be entered.

Per PROUDFOOT, J., a notice of action under the Workman's Compensation for Injuries Act does not require to be signed or to be on behalf of any one.

Statement.

THIS was an action brought under "The Workmen's Compensation for Injuries Act, 1886," R. S. O. ch. 141, and by amendment also under R. S. O. ch. 135, "An Act respecting Compensation to the Families of Persons killed by accident and in duels," by Walter Mason as adminis-

Statement. trator of Frank Mason, deceased, against John Bertram, Alexander Bertram, and Henry Bertram.

The deceased, who was just of age, was the son of the plaintiff and had for about two years before the accident while attending the High School worked on his father's farm for the benefit of his father and family, as most farmers sons do, without wages. His father intended to educate him as a doctor, at an expense which he admitted would amount to $1,000, and it was contemplated, that in the vacations he would do such work for his father as he could find time for. Just before he was to enter on his medical studies he went to work in the machine shop of the defendants for the purpose of earning money to buy books; and while there he was injured by the falling of a pile of iron lathes, which resulted in his death.

The action was tried at the Winter Assizes, 1889, at Hamilton, before FALCONBRIDGE, J., and a jury, on the 9th and 10th January, when a verdict was rendered in favour of the plaintiff for two hundred dollars.

The defendants moved against this verdict on the ground, among others, that there was no evidence of any pecuniary damage or loss to the plaintiff, by reason of the death of his son, so as to entitle the plaintiff to maintain the action, and the motion was argued on March 4th, 1889, before a Divisional Court, composed of PROUDFOOT and FERGUSON, J.J.

Osler, Q.C., for the defendants. There is no evidence on the whole case which justifies a recovery of any damages. The evidence shews rather a pecuniary gain than a loss or damage, as the plaintiff was to have educated the deceased as a doctor at an expense of $1,000. There was no reasonable expectation of the receipt of any money by the father from the son; *Grand Trunk R. W. Co.* v. *Jennings*, 13 App. Cas. 800; *Lett* v. *St. Lawrence and Ottawa R. W. Co.* 11 A. R. 1. No action can lie under the circumstances here: The *Bernina* 11 P. D. 31. The notice of

action was not sufficient. It was given by the father in his individual capacity, and letters of administration were not taken out until afterwards, and the action is brought by the father as adminstrator. As to liability under Lord Campbell's Act, I refer to *The Bernina*, 12 P. D. 58. Argument.

Lynch-Staunton, for the plaintiff. Any notice is sufficient, even a solicitor's letter that instructions for suit had been given, and any one can give a notice: *Cox* v. *Hamilton Sewer Pipe Co.*, 14 O. R. 300. No notice is necessary under the Factory Act: *Dean* v. *The Ontario Cotton Mills Co.*, 14 O. R. 119; *Clark* v. *Holmes*, 7 H. & N. 937; *Penhallow* v. *The Mersey Docks and Board*, 30 L. J. Ex. 329 The prospect of the son helping his father afterwards, is sufficient to support the judgment: *The St. Lawrence and Ottawa R. W. Co.* v. *Lett*, 11 S. C. R. 422.

Osler, Q. C., in reply.

June 12th, 1889. PROUDFOOT, J.:—

The notice that injury has been sustained seems sufficient.

R. S. O. ch. 141, sec. 7, (1887), only requires notice of the accident within twelve weeks: sec. 10, to state the cause of injury, and the date at which it was sustained sec. 10, sub-sec. 6, gives form. It does not require to be on behalf of any one, and apparently it may be given by any one in the same interest as the workman: Roberts & Wallace on the Duty and Liability of Employers, 317; and it is not necessary that it should be signed.

I am unable to see that the plaintiff had any reasonable expectation of benefit from the continuance of the life of the deceased. The jury have assessed the damages under the Act which limits the amount to the equivalent of the estimated earnings during the three years preceding the injury of a person in the same grade, &c., at $200.

In the present case the deceased had reached twenty-one years and was endeavoring to raise means to enable him to study for a physician; he had left his father's house

Judgment.

PROUDFOOT, J.

and was working for the defendants; the sessions of the college would take up eight months of the year for three or four years, and he would also have to attend in a doctor's office, so that the time he could spend at home would be very limited, even if inclined to do so and to work, and the plaintiff expected he would have to pay for his education, probably $1,000, as he says he intended to put him through. The plaintiff had no right to require his son to stay at home.

The statute sec. 3, provides that the workman and the legal personal representatives of the workman, and any persons entitled in case of death, that is, the persons who are entitled under Lord Campbell's Act, shall have the same right of compensation as if the workman had been a member of the public; so that the right of the representatives of a deceased workman are not more extensive than the rights of the representatives of other persons. Roberts & Wallace, 373.

Adopting the rules to be found in cases upon Lord Campbell's Act, it is sufficient if a reasonable expectation of benefit to the plaintiff can be deduced from the facts; but the expectation must be a reasonable one; the jury are not entitled to make it a mere matter of guess work: *Franklin* v. *South Eastern R. W. Co.*, 3 H. & N. 211.

In the case of a parent suing in respect of the death of a child dependent upon him, there should be some evidence that the pecuniary benefit derived by the parent from the child is such as to exceed the costs of the latter's maintenance. But the jury may consider the probability of a future benefit. And although there is an absence of distinct evidence with respect to the actual expense of maintaining and clothing the child, the Court will not interfere after a verdict for the plaintiff, if the facts are consistent with there having been some balance in favor of the plaintiff after deducting the bare maintenance of the child.

Thus, in one case the only direct evidence upon this point was that the deceased, the son of a mason, had been earning four shillings a week wages which went into the com-

mon stock of the family. The jury found a verdict for plaintiff of £20, which the Court refused to disturb, though two of the Judges thought that this case went to the extreme verge of the law: *Duckworth* v. *Johnson*, 29 L. J. Ex. 25. The fact that the child has rendered trifling household services, on which it is impossible to place any pecuniary value, is not sufficient: *Holleran* v. *Bagnell*, 4 L. R. Ir. C. L. 740. Judgment. PROUDFOOT, J.

In the present case the son had been working on his father's farm and doing any work required about the farm; and before going to the defendant's foundry, he had never worked for wages; just worked at home "like a son does." When he proceeded to study for a doctor, the plaintiff's expectations of what the son would earn would be the work he would be able to do when he was not at college, or was not studying in a doctor's office. The business of the son's life in the succeeding three or four years was to get his profession and at the plaintiff's expense. Just previous to his death, for two years he had been attending a high school in Dundas, and had to study at home also. The board and maintenance and schooling of a son till he is of age, is generally considered equivalent to anything he can do, working "as a son does." But that was all past, the son had left home with the intention of getting a profession, a profession to be paid for by the plaintiff; and although meaning to spend his intervals of freedom from study at his father's house, the short time of such intervals, and the change in habit from the nature of his studies, must necessarily have prevented his services being of much value.

The limit of three years fixed by the statute would seem to point to the deceased being likely to live and serve for that time; but during those three years this son was to be most of the time from home, and instead of producing an income to aid the plaintiff personally or in support of the family, was to be a constant source of expense.

I arrive at the conclusion, therefore, that the plaintiff could have no reasonable expectation of benefit from the son's life, and that a nonsuit should be entered.

Judgment. FERGUSON, J.:—

FERGUSON, J.

The action was brought apparently under the provisions of the Act known as "The Workman's Compensation for Injuries Act, 1886." An amendment was, however, allowed, after which it appears to have been understood that the action was as well under the provisions of the statute known as "Lord Campbell's Act," or rather a similar enactment now contained in ch. 135 R. S. O. 1887, the father being the administrator suing to recover damages arising, as he says, by reason of the death of his son who it is alleged lost his life in consequence of the negligence or improper conduct of the defendants, or of a person or persons in the service of the defendants.

The deceased was, according to the evidence of the plaintiff, over twenty-one years old. He had, up to a very short time before he commenced working for the defendants, been living with his father and working as most young men do. He had been a student at the High School in Dundas, and had been studying at home. It was intended he should be educated for the medical profession, and that the plaintiff, his father, should pay the expenses of such education, and support and maintain him during the period of his studies, and it was said that there was an expectation that the deceased would, during the intervals when he was not attending school or college, and not in the office or place of business of a medical practitioner for the purpose of learning the profession, perform certain work at home with his father and the family.

This expectation may be quite natural, but I think common experience shews that the thing so expected would be of little if any consequence, and that such an expectation, if it really existed, would be greatly liable to disappointment; and I cannot think its existence, if it did exist at all, sufficient to enable the plaintiff to maintain an action such as the present one.

The amount that the plaintiff said he would have to pay for and in respect of the education of the deceased for the

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FERGUSON, J.

profession and maintenance, was about $1,000, and this, I think, was a very low estimate. It was sought to be made out that an expectation existed that after the deceased had obtained the profession, he would, by the practice of it, earn money that he would give the plaintiff, his father; but assuming that such an expectation on the part of the plaintiff did exist—(I do not say that the evidence shows that it did exist), I think the facts disclosed in the evidence, do not indicate or show that it rested upon any reasonable foundation.

It is not shown that the plaintiff or any of the family were dependant upon the deceased or placed reliance upon him for support or maintenance; or that he had done anything more in this regard then young men usually do.

Upon a perusal of the evidence, I fail to find anything to show that there was a reasonable expectation of pecuniary or material benefit or advantage to the plaintiff by the continuance of the life of the deceased. I think there is not any evidence supporting the contention in favour of the existence of such an expectation.

I think the evidence shows the contrary of this, and that the reasonable expectation of the plaintiff would be one of a pecuniary disadvantage rather than a pecuniary or material benefit by reason of the continuance of the life of the deceased; and, after perusing a large number of decided cases on the subject, (which is a subject upon which I may say much has been written), I am of the opinion that it was incumbent upon the plaintiff to show that there was this reasonable expectation of pecuniary or material benefit or advantage, in order to sustain the action; and of this, venture to say, that there is really no evidence.

The evidence, I think plainly points in a contrary direction. I am, therefore, of the opinion that there should have been a nonsuit, and that the motion made by defendants' counsel for a nonsuit should have succeeded.

G. A. B.

[CHANCERY DIVISION.]

RE WALLIS AND VOKES.

Mechanic's lien—Prior conveyance—Notice of lien to purchaser—Validity of lien—Proceedings to realize—Summary application to discharge.

S. was the owner of a lot upon which he was building four houses and W. was his plumbing contractor doing the work on all at a specified sum for each house. He commenced his work in September, 1887, and finished about May, 1888. V. was the contractor for the brickwork and as such was on the premises from time to time, as the work was going on and was not paid by S. V. purchased one of the houses, which was conveyed to him by S. by deed, dated December 1st, 1887, and registered February 20th, 1888. On February 24th, 1888, W. registered his lien on the whole property. Both V. and W. alleged that they knew nothing of the other's transaction.

On an appeal from ROBERTSON, J., who held (affirming the Master in Chambers) that V. had notice of W.'s claim, and that his summary application to have W.'s lien discharged must be dismissed with costs, the Court were evenly divided.

Per PROUDFOOT, J. A lien should be registered against anyone whose rights are acquired during the progress of the work, and if not so registered it becomes absolutely void, unless proceedings are taken to realize within thirty days: no proceedings were taken within that time by W. and the lien not being registered against the subsequent owner ceased to be a lien at all.

Hynes v. *Smith*, 27 Gr. 150, and *McVean* v. *Tiffin*, 13 A. R. 1, followed.

Per FERGUSON, J. The real question is not whether there was a valid registration of the lien, but whether the judgment of ROBERTSON, J. affirming the refusal of the Master to discharge the lien on a summary application was right. The Master was justified in so refusing.

Wanty v. *Robins*, 15 O. R. 474, referred to.

Statement. THIS was an appeal from the judgment of Robertson, J. dismissing an appeal from the Master in Chambers.

It appeared from the affidavits filed that one Edward Sewell was the owner of a lot of land on Robert Street in the city of Toronto, upon which he was building four houses, and that one George Wallis was his contractor for the plumbing work therein at $133 for each house; that he commenced his work in September, 1887, and completed it about May, 1888; that one Samuel Vokes was the contractor for the brickwork, and, as such, was frequently on the premises while the work was going on, and had not been paid for his brickwork, although he had repeatedly applied to Sewell for payment; that Vokes had purchased one of the houses from Sewell, which was conveyed to him

by deed dated December 1st, 1887, and registered February 20th, 1888, and that Wallis had on February 24th, 1888, registered a lien for his work on the whole lot. Wallis and Vokes each alleged that he knew nothing of the other's transaction. When Vokes discovered the registration of Wallis's lien, he moved for an order discharging and vacating it, and the application was heard before the Master in Chambers on May 10th, 1888. Statement.

George MacDonald, for the motion.
Masten, contra.

On May 14th, the Master in Chambers gave judgment.

MR. DALTON.—From the opinion I have arrived at from reading all the papers in this case as to the facts of the case and the conduct of the respective parties, it is impossible for me to grant this summary application to set aside the mechanic's lien of Wallis.

I think Vokes, the purchaser, had great reason to know, and did in fact know, that Wallis was not paid. Of course he knew that Wallis did the plumbing which was chiefly done, in fact all but $33 worth of it, after Vokes had purchased on December 1st, and while his deed was unregistered. Wallis knowing nothing whatever of the sale.

The case of *Wanty v. Robins*, 8 C. L. T. (O. N.) 185,* decided by the Chancery Division in March last, is a sufficient authority. I cannot think Vokes an innocent purchaser. I must dismiss this motion with costs. The whole claim on this house, it is understood, is $133.

From the judgment Vokes appealed, and the appeal was argued on June 11th, 1888, before ROBERTSON, J.

The same counsel appeared.

December 1st, 1888. ROBERTSON, J.—After carefully reading the affidavits and cross-examinations thereon, and

*Reported in 15 O. R. 474.—REP.

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ROBERTSON, J.

the examination of Edward Sewell, I am of the opinion that the learned Master came to a proper conclusion in dismissing the application, and I now dismiss the appeal from his order with costs.

From this judgment Vokes appealed to the Divisional Court, and the appeal was argued on March 5th, 1889, before PROUDFOOT and FERGUSON, JJ.

George MacDonald, for the appeal. The lien registered is irregular. It describes Sewell as the owner while it should have mentioned Vokes, who had purchased nearly three months before, and had registered his deed four days before. The owner should be named: sec. 16 of the Mechanics' Lien Act. The lien is a cloud on the title of the subsequent purchaser and should be removed. "Owner" is defined in *Reinhart* v. *Schutt*, 15 O. R. at p. 327. In *Makins* v. *Robinson*, 6 O. R. 1, "owner" was defined as any one claiming through the owner. The right to a lien is given by the statute and is limited by the statute. There are three houses with a separate contract price for each, while the lien is registered for the whole amount against the whole land; that is, against each of the three houses. One-third should be charged against each house, and a description of each given; *Currier* v. *Friedrick*, 22 Gr. 243; *Oldfield* v. *Barbour*, 12 P. R. 554. The description is imperative, as the words "shall state" are used in sec. 16. Vokes's deed is good as against the lien, but it has been held he had notice. The evidence does not justify such finding, and even if it did, there was no fraud or connivance to defeat the lien holder. The effect of the Registry Act is discussed in *Rose* v. *Peterkin*, 13 S. C. R. 677. The lien could have been registered before the work was done. I refer also to *McVean* v. *Tiffin*, 13 A. R. 1, and *Wanty* v. *Robins*, 15 O. R. 474.

Masten, contra. It is contended the lien is bad in form, because it claims a joint lien for work done on three separate houses against each house. The lien reads as

follows: "For work done and material supplied for the plumbing and gas-fitting of three brick houses known as numbers 219, 221 and 223, on the East side of Robert street, under a contract to do such plumbing and gas-fitting at the price of $133 for each house." The contract was a single contract to do the plumbing on all three houses: Phillips on Mechanics' Liens, 2nd ed., 603; *Wall* v. *Robinson*, 115 Mass. 429; *Worthly* v. *Emerson*, 116 Mass. 374; *Batchelder* v. *Rand*, 117 Mass. 176; *Childs* v. *Anderson*, 128 Mass. 109, and *Pennock* v. *Hoover*, 5 Rawle Pa. 291. In *Currier* v. *Friedrich*, a row of five buildings and a separate cottage were erected, and a lien filed indiscriminately on all. The report indicates that the claim on the row was good, but that the difficulty lay in joining the cottage. As regards the word "owner" and its meaning, and the necessity of registering the lien as against Vokes, the case of *Makins* v. *Robinson, supra*, is not overruled by *McVean* v. *Tiffin*, or by *Reinhart* v. *Schutt*, and is a binding authority here. Vokes had notice, and is not protected by sec. 76 of the Registry Act, R. S. O. ch. 114: *Wanty* v. *Robins*, 15 O. R. 474, and *Rose* v. *Peterkin*, 13 S. C. R. 677. Sewell's deed is void as giving a fraudulent preference under sec. 2 R. S. O. ch. 124, and should not be given effect to. Sec. 7 of that Act does not apply to Wallis because he is a lien holder. The jurisdiction on a summary application should be exercised only in plain simple cases. Here difficult questions both of fact and law arise. In any case the greater part of the work was done by Wallis under the employ of Sewell who had agreed to deliver the house over to Vokes in a complete condition, so that the relative position of the parties is merely changed one step in this view; Vokes being owner, Sewell the contractor and Wallis a sub-contractor, and the lien must hold good to that extent. Argument.

MacDonald, in reply. Constructive notice is not sufficient: the lien holder must have actual notice. As to notice see sec. 76 of the Registry Act, in connection with sec. 83. As to knowledge being sufficient, see *Graham* v. *Williams* 8 O. R. 478, and 9 O. R. 458.

Judgment. June 12th, 1889. PROUDFOOT, J. :—

PROUDFOOT, J.

The Mechanics' Lien Act, R. S. O. 1887, ch. 126, sec. 2, defines "owner" to include a person having any estate or interest in the land upon whose credit the work was done or materials furnished, and all persons claiming under him, whose rights are acquired after the work, in respect of which the lien is claimed, is commenced, or the materials furnished have been commenced to be furnished.

The 16th section provides for the registry of the claim, which is to state, among other things, the name and residence of the claimant and of the owner of the property to be charged.

The 21st section says that the claim may be registered before or during the progress of the work, or within thirty days from the completion thereof. And the 22nd section, that every lien not duly registered, shall absolutely cease to exist on the expiration of the time limited for the registration, unless in the meantime proceedings be instituted, &c.

In the present case, Wallis contracted with Sewell the owner of the land to do the plumbing on four houses in the course of erection at the price of $133 for each house. On the 24th February, 1888, he registered a lien upon the estate or interest of Edward Sewell for $363, for work done and materials furnished, and for $36, for work to be done and materials to be furnished, and described the land to be charged as the whole area of the lot upon which the four buildings were being erected.

It seems that Vokes had purchased one of the four houses from Sewell, and it was conveyed to him by a deed dated the 1st December, 1887, and registered on the 20th February, 1888, four days before the registry of the lien.

In *Makins* v. *Robinson*, 6 O. R. 1, my brother Ferguson has held, following the American case of *Jones* v. *Shawhan*, 4 Watt's and Sergeant's R. (Pa.) 257, that it is sufficient to state the name of the owner with whom the contract was made, and that the name of the purchaser from him may

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be disregarded. It is difficult to understand the true meaning of cases in the American Courts decided upon special statutory enactments without a more intimate acquaintance with them than can be had from the mere perusal of a case; and the opinion expressed upon this point in *Jones* v. *Shawhan*, was not necessary for the decision of the case, which was disposed of upon another point, viz., that there could not be a joint execution of an apportioned lien on distinct dwellings. The Pennsylvania statute referred to in the judgment, appears to have required no more than the name of the reputed owner.

It appears to me, that our statute requires the lien to be registered against any one whose rights are acquired during the progress of the work, and that if not so registered, it becomes absolutely void, unless proceedings be taken to realize the lien within the time mentioned in the Act—thirty days from the completion of the work. The work seems to have been finally completed about the 1st May.

No proceedings appear to have been taken by Wallis to realize his lien within that time. Vokes applied to the Master to vacate the lien, and the Master on the 14th May, 1888, dismissed the application; and upon appeal to my brother Robertson, the Master's decision was affirmed upon the ground apparently that Vokes had notice of the lien, and Wallis said to have known nothing of the sale.

As to the knowledge of Wallis. If he is to claim the benefit of the Registry law in favour of his lien, he must also be subject to the provision of that law that registration of Vokes' deed was notice to him: R. S. O. ch. 114, sec. 80, 1887: *Richards* v. *Chamberlain*, 25 Gr. 402. Wallis must be taken to claim an interest in the land subsequent to the registration of Vokes's deed, as the preservation of his lien against subsequent purchasers or mortgagees, under the cases referred to in *Reinhart* v. *Schutt*, 15 O. R. 325, seems to depend upon the registration.

As to Vokes's knowledge. I entirely subscribe to the decision of the Chancellor in *Wanty* v. *Robins*, 15 O. R. 474, that a purchaser with notice of the equitable lien is

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bound by it. And in the view I take of this case, Vokes may be assumed to have had notice of the work being done; and had Wallis taken the proper steps to make it effectual as a lien, Vokes would have been subject to it. But Wallis neglects to register his lien properly, and it ceased to be a lien at all.

It is not necessary, therefore, that I should refer to some other questions argued upon the appeal, as to the validity of the registry against the entire block, &c., but at present I am not prepared to say that *Currier* v. *Friedrick*, 22 Gr. 243, applies.

As to the argument that the deed from Sewell to Vokes was void as against creditors, being made when Sewell was in insolvent circumstances, if it were a fact, it is impossible to give effect to it upon this appeal.

I think the appeal should be allowed.

In arriving at this conclusion, I am not acting upon my own view of the true construction of the statute; but I am giving effect to what I understand to be the effect of the decisions in *Hynes* v. *Smith*, 27 Gr. 150, and *McVean* v. *Tiffin*, 13 A. R. 1.

FERGUSON, J.:—

Wallis made his agreement with Sewell and commenced the work early in September, 1887. The work was completed, so far as can be discovered from the evidence, about the first day of May, 1888. Sewell conveyed the property—one of the houses—to Vokes by a deed executed, as it is said, about the first day of December, 1887, while Wallis was proceeding with the work. This deed was not registered till the 20th February, 1888. Wallis says that he had in fact no knowledge of this deed or of the sale to Vokes, until he was asked to remove the registration of his lien from the registry, which was much later and shortly before the motion was made before the Master: and such may, I think, he assumed to be the actual fact.

Wallis registered his lien in the way that he did on the

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24th February, four days after the registration of the conveyance from Sewell to Vokes. This was done by Wallis because he began to fear that he would not get his pay from Sewell.

It is, I think, reasonably clear that Vokes had knowledge and notice of Wallis's lien which was given him by the statute for he knew both Sewell and Wallis; he knew the property; was frequently at the house while the work was being done. He seems to have known much about it. The greater part of the time during which it was being done he had, if his transaction with Sewell was a reality, and the deed executed to him as early as is said, an interest in the work, and he was present when Sewell told Wallis that he could not pay him. At the time he took his conveyance, he was aware that the work was being done, and I think the Master and Mr. Justice Robertson were right in their opinions that he had notice. At the time of the application to the Master, Wallis had by force of the statute an existing lien unsatisfied, and was in good time to take proceedings upon it.

Such seem to have been the facts and circumstances when Vokes made the motion in Chambers, and his complaint is, that the learned Master did not, upon his application, without any merits whatever on his part, make an order for the removal from the registry of the registration of Wallis's lien, because he said it was irregular and defective, and not a fulfilment of the requirements of the statute in respect of such registrations.

One of his complaints against the registration of the lien being that he was not named as owner therein, he having had for over two months, while the work was going on, and up to within four days of the day of the registration of the lien under the circumstances that I have before stated, or stated in part, a secret conveyance of this house of which Wallis knew nothing; and the other being that the lien had been registered upon the whole of the

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land on which were the houses on which Wallis had contracted to do the work: whereas he, Vokes, had become as before stated, the purchaser of only one of the three houses.

The Master was asked, under these circumstances to dispose in a summary way, of all rights that Wallis might have by reason of this registration, and deprive him of the right to make his contentions in the ordinary way before the Courts in which such contentions are commonly disposed of, and this for the convenience of one standing in the position which Vokes occupied.

This, the learned Master refused to do; and the real question here is, not whether there was a valid registration of this lien, but whether or not the Master was right in doing as he did, and leaving the contentions to be disposed of in the ordinary way in an action to enforce payment of the lien; or rather whether or not, my brother Robertson was right in affirming the Master's conclusion.

The Master in his judgment says he cannot consider Vokes an innocent purchaser; and he refers to the case of *Wanty* v. *Robins*, 15 O. R. 474. In that case the Chancellor said: "It appears now to be the law that the lien which arises by virtue of being employed and doing work upon the land, is, if not registered, liable to be defeated by the owner conveying to a subsequent purchaser who registers his conveyance. This, however, in my opinion, must be restricted to the case of an innocent purchaser who is entitled to the benefit of the Registry Acts. By that I mean one who has not actual notice of the prior lien before he pays his money and registers his deed:" and I do not see that anything in the case of *McVean* v. *Tiffin*, 13 A. R. 1, or in *Hynes* v. *Smith*, 27 Gr. 150, is really against this.

I do not understand any of the cases to decide or shew that as against a purchaser, who has purchased and registered his deed with full notice of the rights of the mechanic, &c., a registration of the mechanic's lien, subsequent to such registration with notice, makes any difference so long as there is registration of the lien or proceedings taken

within the time mentioned in the 22nd section of the Act; and, according to the evidence in this case, the thirty days mentioned in section 21, and referred to in section 22 of the Act, had not expired at the time of the making of the application to the Master. And the matter of this appeal is to be considered now, just as it was when before the Master. Judgment. FERGUSON, J.

I think the Master was justified in refusing to make the order asked, and that the judgment affirming the Master's decision which is now in appeal, should be affirmed with costs.

As to the jurisdiction of the Master, see *Re Moorehouse and Leak*, 13 O. R. 290; and section 30, sub-secs. 8 and 9 of the Act.

G. A. B.

[CHANCERY DIVISION.]

THE CORPORATION OF THE CITY OF KINGSTON
v.
THE CANADA LIFE ASSURANCE COMPANY.

Assessment and Taxes—Insurance Company—Head Office and branch office—Meaning of "branch" or "place of business" in Assessment Act—Assessment of income at branch office.

The defendants were a life insurance company with their head office at H., in this Province, and transacted business by agents in K. who received applications for insurances which they forwarded to the head office from which all policies issued, ready for delivery: the premiums on same also being collected by the agents in K. In an action by the corporation of the city of K. to recover taxes, assessed against the defendants on income, it was contended that the defendants only place of business was in H. and that their business was of such a nature that they could not be assessed at K., and that they had elected under R. S. O. ch. 193, sec. 35, sub-sec. 2, to be assessed at H. on their whole income.

Held, that the defendants had a branch or place of business at K.

Held, also, that the amount of premiums, received year by year at K. being ascertainable was assessable at that branch or agency as "gross" income.

Statement. THIS was an action brought to recover municipal taxes assessed by the plaintiffs against the defendants upon the income or business done at the branch or agency of the defendants in the municipality of the plaintiffs under the circumstances set out in the judgment.

The action was tried at Kingston on May 22, 1889, before FERGUSON, J.

Walkem, Q.C., and *Agnew*, appeared for the plaintiffs and cited the different sections of R. S. O. ch. 193, on the following subjects: Sec. 7, *all* property liable to taxation unless exempt by the statute, and defendants' income is not exempt; sec. 14, column 15, income; sec. 31, mode of assessing income and other personal property; sec. 34, corporations; sec. 35, partnership; and they contended that there was no difficulty in this case in making a separate assessment at Kingston for the income received there as

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mentioned in sec. 35, sub-sec. 2. The schedules of the statute as to *gross* income, D. E. G. and H., sec. 64, sub-sec. 14. The defendants had a branch or place of business in Kingston: *The Phœnix Ins. Co. of London* v. *The Corporation of the City of Kingston*, 7 O. R. 343. That gives jurisdiction to the assessor who was bound to make the assessment, and the assessment is conclusive. The County Judge's decision on the assessment appeal is final: *Nickle* v. *Douglas*, 35 U. C. R. 126; 37 U. C. R. 31; *Shaw* v. *Shaw*, 12 C P. 456-9. It is for the Court of Revision or County Judge on appeal to decide that the assessment should be made at the branch or place of business: *Brantford* v. *Ontario Investment*, per Mr. Justice Burton in the Court of Appeal.* The defendants' assessment is too low: *Last* v. *The London Assurance Corporation*, 10 App. Cas. 438, although decided against the English income Acts shows that the amount reserved for participating policy holders is assessable in the hands of the company. The company could be assessed even as trustees under sec. 41. The gross income which should be assessed is the whole of the premiums received at Kingston without any deductions, except those allowed and specified in sec. 31. *Lawless* v. *Sullivan*, 6 App. Cas. 373, was decided under a different statute and does not apply. They also cited *The Corporation of the City of Toronto* v. *The Great Western R. W. Co.*, 25 U. C. R. 570; *McCarrall* v. *Watkins*, 19 U. C. R. 248; *The Niagara Falls Suspension Bridge Co.* v. *Gardner*, 29 U. C. R. 194; *The Municipality of the Township of London* v. *The Great Western R. W. Co.*, 16 U. C. R. 500; *The Corporation of the Town of Welland* v. *Brown*, 4 O. R. 217; *Middlefield* v. *Gould*, 10 C. P. 9; Cooley on Taxation, 1st ed., 158, 160, and *n*, 161, 163, 168, 169, 170, 272 *n*, 392 *n*.

Bruce, Q. C., for the defendants. The assessment should not be made both against the agent and the company, as the latter and the property to be assessed are both within the Province, R. S. O. 193, ch. sec. 33. A corporation, such as defendants, carries on business at its head office only, and

* 15 A. R. 608.

Argument.

on that ground should be assessed there : *Attorney-General* v. *Alexander*, L. R. 10 Ex. at p. 30 ; *The Attorney-General* v. *Sulley*, 4 H. & N. 769, 5 H. & N. 711 ; *The Carron Iron Proprietors Company* v. *McLaren*, 4 H. L. C. 416 ; *The Cesena Sulphur Co.* v. *Nicholson*, 1 Ex. D. 428 ; *The Alexandria Water Co* v. *Musgrove*, 11 Q. B. D. 174. The death rate being uncertain, the income of the company can only be ascertained by the average of a certain number of years, and that can only be done at the head office on the result of the company's whole business. No one year would be any criterion of income even at the head office, much less would the income of any branch be any criterion where the losses in one year might exceed the income. Premiums received are not income as the company becomes debtors for the same or larger amounts to the policy holders. Income is the amount that comes to the hands of the company, *i.e.*, the shareholders to do as they like with after all expenses, etc., are paid : *Lawless* v. *Sullivan*, 6 App. Cas. 373 ; *The Mersey Docks and Harbour Board* v. *Lucas*, 8 App. Cas. 891. Money payable under a policy is not trust money : *Mathew* v. *Northern Assurance Co.*, 9 Ch. D. 80. The plaintiffs have not complied with the requirements of the Assessment Act.

Walkem, Q.C., in reply.

August 29. 1889. FERGUSON, J.

The action is brought by the corporation of the city of Kingston against the defendants, an insurance company, to recover the amount of taxes assessed by the plaintiffs against the defendants for the years 1883, 1884, 1885, 1886, and 1887, together with certain percentages thereon imposed by by-law, for default in not paying such taxes and interest on the same. The amount claimed for taxes and the percentage for the year 1883 is $17.12 ; for the year 1884, $86.40 ; for the 1885, $94.50 ; for the year 1886, $95.37 ; and for the year 1887, $89.42. Interest is claimed on the taxes and percentages for the years 1883, 1884, and

1885 from the 31st day of May in the years 1884, 1885, and 1886 respectively, and on the taxes and percentage for the year 1886, from the 30th day of June, 1887, and on the taxes and percentage for the year 1887 from the 2nd day of June, 1888.

The plaintiffs allege that the defendants are a corporation doing a life insurance business in this province, having their head office at the city of Hamilton in this province, and that during the years from the year 1882 inclusive, to the present time, the defendants have carried on such a business in the municipality of the city of Kingston, at their agency there, by an agent who received applications for policies and collected the premiums charged for and payable for and under the same at the city of Kingston during the the said years, the defendants receiving at the said city of Kingston during the said years a large yearly income from such business. The other allegations of the plaintiffs are apparently for the purpose of stating that the assessments were regularly and properly made and the obligation to pay the taxes regularly imposed upon the defendants, it being assumed that the defendants were doing the business as alleged in the city of Kingston and that there was the legal right and authority to assess them and impose the taxes.

The defendants deny the plaintiff's allegations. They say that the plaintiffs had no jurisdiction to assess or tax them as alleged under the provisions of the assessment Acts or otherwise. They say that during each and all these years, their head office was and still is at the city of Hamilton aforesaid and that they had no other place of business in Ontario: that they had no personal property or taxable income within the municipality of the city of Kingston: that they were assessed for the whole of their personal propery and income at the said city of Hamilton: and that they produced in each of such years to the proper authorities at the city of Kingston a certificate thereof showing the amount of personal property and income assessed against them at the city of Hamilton.

Judgment.

FERGUSON, J.

The plaintiffs take the issue, and further say by way of reply that by the provisions of the assessment Act, in and during these years, if the defendants had more than one place of business, each such place of business or branch should be assessed, as far as might be, where it was situate, for the portion of the personal property of the defendants which belonged to that particular branch; and if this could not be done the defendants might elect at which of its places of business it would be assessed for the whole personal property, producing a certificate at each of the other places of business of the amount of personal property assessed against them elsewhere: that the defendants had more than one place of business in the Province in these years; that one such place of business or branch of their said business, being their agency aforesaid, was situate at the city of Kingston in and during these years: that the amount of the defendants' income and personal property received at and belonging to the branch, agency or place of business in the city of Kingston was easily ascertained, and was well known to the defendants and to their agent at the said branch or agency at Kingston: and that the assessment of the defendants' said branch or agency at Kingston could be and was duly made for the portion of their personal property belonging thereto, namely, the income received at their said branch or agency at Kingston aforesaid by the defendants, from their said insurance business carried on there in these years. They further say that the said income and personal property was lawfully and properly assessed at Kingston aforesaid, and that if it was also assessed at the city of Hamilton, such assessment at Hamilton was illegal and void so far as they, the plaintiffs are concerned.

Evidence was given respecting the business alleged to to have been carried on in the city of Kingston by the defendants during these years.

Wm. McCraney says he was the defendants' agent in Kingston in the year 1882: that he ceased to be such agent in the year 1883: that he had been agent from the year

1876 : that during the first few years he had no office for the defendants : that he did the defendants' business in his own office which was that of a lumber yard : that there was however a notice in the office that the defendants' business would be done and transacted there : that he got a letter from Mr. Cox about 1880 and that in consequence he moved the defendants' business to Clarence street but continued to do his own business at the lumber yard : that he does not recollect doing any business in the office on Clarence street, but that of the defendants : that in 1883 he was succeeded by Mr. White who occupied the same office on Clarence street, and that Buck & Booth, (subsequent agents), went into the same office after White : that he paid the rent of the office out of his own pocket until he ceased to be agent, but that there was a certain increase by reason of his getting five per cent. on renewals of risks taken by White as well as himself, and this he considered as partly in lieu of the office rent that he paid for an office in which o do the defendants' business : that he had no bookkeeper at Clarence street, but had one at the office of the lumber yard, and that he himself was part of the time at each place.

Judgment.

FERGUSON, J.

L. W. Buck says he was agent of the defendants from September, 1884, to the end of January, 1886 : that Mr. White was special agent all the time : that when he moved into the office on Clarence street he had no connexion with the defendants, but only rented a part of the office from White : that it was not until September, 1884, that he had any connexion with the defendants : that there was a fire insurance business done by White in the same office : that he and Booth were appointed agents of the defendants and gave bonds to the defendants : that he and Booth paid the rent of the office, and got so much a month for collecting the premiums : that they were to have a commission on the new business : that when he and Buck moved down to the lower office on Clarence street they had the name of the defendants on their sign : that Frazer succeeded them as agent : that the defendants

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FERGUSON, J.

wanted an agent who would do more canvassing for their business and Frazer was appointed and he (the witness) and Booth retired: that Frazer has the defendants' name on his sign now and that he (the witness) supposes he had had it so "all along." He says that he and Booth countersigned the receipts and accounted to Mr. Cox every month. He says that he was assessed in the year 1885: that he got a demand of taxes from Middleton the collector that year, which he handed to Mr. Britton: that he cannot say whether the defendants' name appeared in their, (Buck & Booth's) advertisement: that they did not advertise for the defendants: that they got nothing from the defendants for office rent, which they paid themselves: that White or his son, while they occupied the office with us, (Buck & Booth), were doing business for other companies as well as the defendants.

D. Frazer says that he was first appointed agent of the defendants in January, 1886, and that he continued agent for two years: that he is a private banker and his office is on King street: that he did the business of the defendants there as well as his own: that he had the defendants' name put on his window: that he got the notice of the defendants' assessment for 1887, and that he thinks he got instructions to appeal: that he had been carrying on the banking business in the same office from the year 1880: that the building was his own, and that he is yet carrying on the banking business there: that he got from the defendants no compensation for rent of the office: that the decisions as to accepting a risk upon a life were always at the head office in Hamilton: that the premiums received, largely represent moneys owing to policy holders, payable *in futuro:* that any one year may be a "fatal year" in any particular place: that to carry on a life insurance business the average of life and the average of years is required, and that in life insurance the losses are certain: that it is in this respect different from fire insurance, and that there must be a reserve to meet these. He further says that the income cannot be arrived at, for this liability has to be deducted in order to ascertain the income.

Judgment.
FERGUSON, J

Wm. S. Gordon says that he has been assessor ever since 1882: that he made the several assessments in question, and that the defendants had no "tangible property" in Kingston that he knew of. The plaintiffs then read as bearing upon the case generally, as I understood, some parts of an examination of Mr. Ramsay, an officer of the defendants, he said "The moneys received for premiums is the property of the policy holders." "The assessment in Hamilton was upon the amounts paid to the stockholders as dividends, not to policy holders." The agent at Kingston could show each year the gross amount of his receipts.

The defendants called Mr. Alexander Ramsay, superintendent of their company. He said that he had been six and a half years such superintendent: that he had been in defendants' employment long before he became superintendent: that the head office is in Hamilton: that the policies issue from Hamilton: that the directors meet only in Hamilton: that the policies leave the head office complete: that no policies are issued or countersigned but at the head office: that much is done in Hamilton which enures to the benefit of all offices wherever they may be: that the stationery, etc., and the advertising are all paid for at Hamilton: that a part of the business is to make investments of moneys in lands: that these are all made at Hamilton and enure to the benefit of all: that there are 147 agencies in Ontario: that these are all in the same position as Kingston, except perhaps the Toronto one: that as far as he knows, if one of these is assessed all may be assessed on "income." The witness produces a statement of the death losses, paid in cases of insurances at Kingston from 1883 to 1887, showing a total amount of $32,221.85. He says that there was paid in the year 1885, $26,813.61, and that the gross receipts at Kingston that year were $13,225.43: that the moneys received on premium receipts are kept to pay the policies, except what will pay the expenses, etc.: that the defendants issue most largely the participating policies: that their paid up capital stock is only $125,000. He then shows that what the defendants

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FERGUSON, J.

consider their annual income for the years 1883, 1884, and 1885 was $29,927, and that they were assessed at Hamilton for these years at $30,000 income: that such annual income for the years 1886 and 1887 was $31,250: that the defendants were assessed at Hamilton for one of these years upon an income of $30,000, and for the other upon an income of $34,000. He says the quinquennial investigation is the better way of getting at the income: that an insurance company cannot deal with one year and ascertain its income: that there must be a series of years and a large number of lives to calculate upon before one can arrive at the "income." The witness then speaks of other things which seem to have a bearing upon the position of the defendants, and to me, at least, appear to show that the defendants' financial condition or position is very satisfactory indeed.

He says the premium income for 1883 was the sum of $880,023: that the premium income at Kingston in 1883 was $13,672, from which a calculation was made, the result of which seemed to be that if the mode of ascertaining the defendants' income adopted by them were the correct mode for the purposes of taxation, and if it were conceded that each agency throughout the country, or at least the agency at Kingston, could properly be assessed for income, the income at Kingston to be assessed would be only $243.

In cross-examination this witness says that the money standing for the benefit of policy holders is not assessed at all at Hamilton: that in 1883 the sum received was $880,023: that in that year dividends were paid to shareholders amounting to $18,750: that this last is the amount returned for assessment: that of this $880,023, the defendants paid death claims, $232,685.06; for cancelled policies, $24,561.15; for expenses, $175,394.64; and two or three other smaller items, thus leaving in the hands of the defendants about $300,000, which was invested as best the defendants could do so, and the witness says this was not assessed at all.

The witness then amongst other things says that the defendants have not hitherto paid taxes anywhere but in

Hamilton. He also says that it is not absolutely impossible to determine what the income—assuming that it is to be arrived at on the principle or according to the mode adopted by the defendants—is every year and year after year. He says that this could be done, and that the amount to be appropriated or rather apportioned to each agency is capable of being estimated or calculated. He also says that there are only two agencies, Ottawa and Brockville, at which the defendants make any allowance for office rent.

Judgment
FERGUSON, J.

In re-examination this witness says that each annual investigation would involve as much labor and trouble as the quinquennial one, and would not be so good as showing the affairs of the company. But he says he does not see how the profit made at each office annually could be ascertained.

The evidence of Mr. Lacey is chiefly corroborative of that of Mr. Ramsay. He says, however, that some companys do investigate every year, but the most of them have adopted the quinquennial plan.

This evidence on the part of the defence seemed to be given with the view, in part at least, of showing the unreasonableness of assessing the defendants at branches or agencies even if there was, during these years, a branch or agency at Kingston.

The question which, as it appears to me, is the first one to be determined, is whether or not the defendants had during these years a "branch" or place of business in the city of Kingston, for if they had not there was not, so far as I am able to perceive, any jurisdiction or power to make the assessments or impose these taxes.

It was agreed between counsel that the provisions contained in the Assessment Act, ch. 193, of the Revised Statutes of 1887, are the same as far as they relate to the subject of contention here, as the provisions that were actually in force at the time of these assessments, and that these provisions in the R. S. O., 1887, may be looked at as showing the enactments that govern the case. Sec. 34 provides

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FERGUSON, J.

that the personal property of an incorporated company other than the companies mentioned in sub-sec. 2 of that section, (of which the defendants are not one), shall be assessed against the company in the same manner as if the company were an unincorporated company or partnership * *. Sec. 35 provides that the personal property of a partnership shall be assessed against the firm at the usual place of business of the partnership, * * and

Sub-sec. 2 of this section provides that if a partnership has more than one place of business, each branch shall be assessed, as far as may be, in the locality where it is situate, for that portion of the personal property of the partnership which belongs to that particular branch; and if this cannot be done, the partnership may elect at which of its places of business it will be assessed for the whole personal property, and shall be required to produce a certificate at each of the other places of business of the amount of personal property assessed against it elsewhere.

This question as to there being a branch or place of business in Kingston is one of fact, or perhaps mixed of law and fact. It is much similar to the one raised in the case *The Phœnix Insurance Co. of London* v. *The Corporation of the City of Kingston*, 7 O. R. 343, in which I expressed the opinion that in that case there was a place of business in Kingston.

I have set forth the evidence, or the greater part of it, bearing on this question. There does not seem to be any conflict of testimony. The case does not appear to me at all like cases suggested by counsel in that case such as that of a travelling agent, or of putting money day by day into a post office.

Here is a business, and I think no one can reasonably call it other than a business, done day by day for years: not all the time in the same office, but always in the city of Kingston. This city was the place and the only place in which the transactions took place, and if the transactions whereby so much money was annually received can properly be denominated "business,"

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FERGUSON, J.

this belonged to the defendants, and the only conclusion I can arrive at is, that it has been shown that the defendants had a place of business in Kingston during all the years in question, and I do not see that the answer to the question should be the contrary of this merely because each transaction could not be finally consummated or carried out to the end without reference to the head office in Hamilton.

Then assuming the conclusion or opinion that the defendants had a branch or place of business in Kingston, there was the jurisdiction and power to assess them and impose taxes there. The assessment rolls have, I think, been reasonably proved, at least no point was urged on the ground that they were not so proved, and in such case the assessment roll is final and conclusive as to to such questions as the names of the persons assessed and the amounts contained in it and all such matters as would constitute the subject of an appeal under the provisions of the statute.

The defendants, however, endeavoured to show that they had availed themselves of the provisions of the statute, enabling them to elect at which of the places of business they should be assessed, and contended that according to their mode of ascertaining the income, the portions of the personal property (income) at Kingston could not be assessed there, because it could not be ascertained year by year, contending that the case fell under the expression in the statute : "and if this cannot be done, the partnership may elect * * ."

The uncontradicted evidence is that the agent at Kingston could show each year the gross amount of his receipts.

The seventh section of the statute provides that all property in the province is liable to assessment with the exceptions there pointed out, (this case is not any of those exceptions). The 14th section points out the duties of the assessor and provides for the kind and character of the assessment roll, the 15th column of which is "taxable income."

Sec. 31 is as to the manner of assessing personal property and so far as material here, provides that no person deriv-

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FERGUSON, J.

ing an income exceeding $400 per annum from * * or any other source whatsoever * * shall be assessed for a less sum as the amount of his net personal property, than the amount of such income during the year then last past, in excess of the said sum of $400, *but no deduction shall be made from the gross amount of such income by reason of any indebtedness, save such as is equal to the annual interest thereof* * *.

Sub-sec. 14 of sec. 64, providing for proceedings when the person assessed complains of overcharge in the assessment of his personal property, contains these words "and no abatement shall be made from the amount of income on account of debts due, nor from the value of personal property, other than income in respect of debts, except debts due for or on account of such personal property.

Schedule D. referred to in this sub-section, which presents the form of declaration, mentions "gross income" derived from all sources not exempt from taxation. Schedule E., also referred to in the same sub-section, mentions again "gross income" derived from all sources. Schedules G. and H. also respectively mention "gross income." These schedules are referred to in the same sub-section.

As it appears to me, the legislature seems to have (by repetition) emphasized the words "gross income."

The contention of the defendants on this immediate subject appears to me to involve or employ the meaning of the words "net profits" rather than "gross income," the words used in the statute. Lord Bramwell, in the case *Last* v. *London Assurance Corporation*, 10 App. Cas. at p. 446, says: "There is no such thing as gross profits."

The cases under the statutes in England do not appear to me to cast much light on this subject as the statutes are not in the same comprehensive and apparently emphatic words as is our statute. The case before the Privy Council, *Lawless* v. *Sullivan*, 6 App. Cas. 373, reversing the judgment of the Supreme Court, is under a statute employing the word "income." In the judgment which

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was delivered by Sir Montague E. Smith, at p. 379, it is said: "The intention of the legislature should be very clearly shown to justify an interpretation of the word 'income,' which would require that, in the account for the year, the items of profit only should be included, and the losses excluded, although, but for the operations which occasioned the losses, the apparent profits could not have been made."

That case seems to have related to a matter of account showing the year's transactions, the income on the one side and the losses on the other, and I do not see the applicability of the statement in the judgment that I have quoted to the present case or point, and besides, our statute employs and repeats words that do not appear to have been in the statute in that case considered. The words "gross income" are used over and over again, and although a learned and very eminent Judge once said that the word "gross," (when used in conjunction with the word negligence), was only a vituperative epithet; still, I cannot but think it should have some signification, when used as it is in conjunction with the word "income," and repeated so often in the same connexion in the statute.

The conclusion at which I arrive is, that what was assessable at the branch or place of business at Kingston, was the "gross income" there, which I take to be the amount of premiums received year by year at that place, the statute being followed in regard to taking the income of the previous year, &c.; and if this is the correct view, the assessment could be made at Kingston and the defendants were not at liberty to elect as provided for in sub-sec. 2 of sec. 35, and assuming this to be correct I need not consider the evidence or the argument regarding such an election having in fact been made in each of these years.

If, however, counsel for the defendants was right in his contention as to the mode of arriving at the "income," I would think there was much force in the argument that the defendants would have the right to elect as

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FERGUSON, J.

provided for in that sub-section. I am not disposed to think that the bare possibility of what would be required being done, would remove a case from under the operation of the statute. The legislature contemplated the existence of some cases falling under the words "and if this cannot be done," and I apprehend that in every case there would exist the bare possibility of ascertaining and assessing the personal property of a partnership that belonged to a particular branch. I need not, however, pursue this further, as owing to the view that I have taken, the subject is out of the case.

I think it has been sufficiently shown that there was power to make the assessment: that it was made in due form: that the plaintiffs did all they were required to do to entitle themselves to payment of the taxes. As to the amount, the roll is, I think, conclusive upon the defendants. I think it appears that the taxes could not have been recovered in any special manner, provided by the Act as mentioned in sec. 131, and I think there should be judgment for the plaintiffs for the amount of the taxes, the percentages, and the interest thereon with their costs of the action.

A late case *The Clerical Medical, etc., Co.* v. *Carter Surveyor of Taxes*, 21 Q. B. D. 339 is on the subject of income tax upon interest derived from investments by the insurance company, but the statute was different from ours.

G. A. B.

[QUEEN'S BENCH DIVISION.]

RE NOBLE ET AL. V. CLINE.

Prohibition—Division Court—Territorial jurisdiction—Where cause of action arose.

The plaintiffs resided in the district of Algoma, and the defendant in the county of Wentworth.

The defendant telegraphed from Wentworth an order for a ton of fish to be sent him by the plaintiffs, and the latter shipped the fish from Algoma to Wentworth. The plaintiffs sued for the price of the fish.

Held, on motion for prohibition, that the whole cause of action arose in Algoma, and a Division Court there had jurisdiction.

Cowan v. *O'Connor*, 20 Q. B. D. 640, and *Newcombe* v. *De Roos*, 2 E. & E. 271, followed.

THIS was a motion by the defendant for prohibition to the second Division Court in the district of Algoma. Statement.

The plaintiffs resided at Serpent River in the district of Algoma, and within the limits of the second Division Court, and the defendant at the city of Hamiton, in the county of Wentworth.

On the 3rd December, 1888, the defendant telegraphed to the plaintiffs: "Send one ton most white fish, if good, dressed, at five cents. Answer." On the 6th December, 1888, the plaintiffs telegraphed to the defendant: "Fish are shipped to-day, in eight boxes." The fish arrived at Hamilton, but according to the statement of the defendant were in such a state as to be of no value.

On the 18th February, 1889, a summons was sued out by the plaintiffs from the second Division Court in the district of Algoma, claiming from the defendant the price of the fish, and was served on the defendant on the 23rd February. On the same day the solicitors of the defendant sent to the clerk of the second Division Court the following notice: "Take notice that the defendant disputes the plaintiffs' claim sued on herein; and further take notice that the defendant disputes the jurisdiction of this Court to entertain and try this case."

No person appeared at the trial for the defendant, and judgment was given for the plaintiffs, a transcript of which

Statement. was afterwards sent to the ninth Division Court in the county of Wentworth.

The defendant moved for prohibition on the ground that the defendant did not live, nor did the cause of action arise, within the jurisdiction of the second Division Court in the district of Algoma.

The motion was argued before GALT, C. J., in Chambers on the 24th September, 1889.

Aylesworth, for the defendant, contended that the whole cause of action did not arise in Algoma, citing *Watt* v. *Van Every*, 23 U. C. R. 196; *Noxon* v. *Holmes*, 24 C. P. 541; *In re Hagel* v. *Dalrymple*, 8 P. R. 183.

Shepley, for the plaintiffs, contra, referred to *Cowan* v. *O'Connor*, 20 Q. B. D. 640. He also argued that the effect of the amendment to sec. 87 of the Division Courts Act, R. S. O. ch. 51, by sec. 5 of 52 Vic. ch. 12 (O.), by which the words "by mistake or inadvertence" are struck out of sec. 87, and certain new provisions added, is that a motion for prohibition will not lie under circumstances such as those existing here; citing *Chadwick* v. *Ball*, 14 Q. B. D. 855, which overrules *Oram* v. *Breary*, 2 Ex. D. 346.

September 27, 1889. GALT, C. J.:—

Mr. Aylesworth for defendant contended that the whole cause of action did not arise in Algoma, as the defendant lived in Hamilton, and the fish were delivered there, and were there found to be in a very bad state. Mr. Shepley, contra, argued that this case was the same as *Cowan* v. *O'Connor*, 20 Q. B. D. 640. There can be no question as to this being correct. The learned County Judge before whom the case was tried has referred to a case of *Newcombe* v. *DeRoos*, 2 E. & E. 271, which appears to be in point. Cockburn, C. J., gave the following judgment, (p. 274): "Admitting that, to enable the registrar to issue a summons to a defendant residing beyond the district, the

whole cause of action must have arisen within the jurisdiction, I think that, here, the whole cause of action did arise within the district of the Stamford County Court. The cause of action is work done by the plaintiffs at the request of the defendant. The request of the defendant was made in London, by letter; but it was not such a request as created a contract until it was received and accepted by the plaintiffs; and that took place at Stamford." (In the present case the order for the fish was given by telegram at Hamilton to Serpent River, and the fish were loaded at Serpent River); "where, also, the work was done. The whole cause of action, therefore, both the work and the contract under which it was performed, arose at Stamford."

Judgment. GALT, C.J.

If in place of this suit being brought by the plaintiffs to secure the price of the fish, an action had been brought by the defendant to recover damages, as in the case of *Watt* v. *Van Every*, 23 U. C. R. 196, the suit must have been brought in Algoma.

Application refused with costs.

[COMMON PLEAS DIVISION.]

McConnell v. McConnell.

Domicile—Evidence of.

Held, upon the facts set out in the judgment *infra*, that although a testator's original domicile was in Ontario, he had changed it to the United States, which was his domicile at the time of his death, and his will therefore must be construed according to the laws of Minnesota, U.S., so far as regards all his personal estate, and his real estate there; according to the laws of Manitoba as regards his lands there; and as to the Ontario lands they devolved on his executors.

Statement. THIS was an action tried at the Chancery Spring Sittings 1889, at Stratford, before ROBERTSON, J.

The action was for the construction of a will.

Idington, Q.C., for plaintiff.
Cassels, Q.C., for the defendant.

The facts are fully set out in the judgments.

May 10th, 1889. ROBERTSON, J:—

The first question to be disposed of is, as to the domicile of the testator.

The evidence establishes that he was born in the township of Hibbert, county of Perth, Ontario, and when he died was 29 years of age. Seven years ago he left this country and went to Chicago in the United States, and remained in the United States about six years, and was married at the end of about five years, in Detroit, to a young woman, who had also been born in Canada, whose parents were British subjects but had gone to Detroit to reside. In February, 1888, testator returned to his father's home, the place of his own nativity, with his wife and child, in very bad health. While in the United States he had obtained a situation in Minneapolis as travelling passenger agent for a railway company. He took his wife to Minneapolis, and there rented a house for a term of years,

Judgment.
ROBERTSON, J.

was taken ill, and was obliged to go to California for a change of climate, and then got indefinite leave of absence, which I understand to mean that the position will be kept for the party until further action or notice, but the salary ceases. In California he was able to attend to some business, but his health not improving he made up his mind to return to his original home, as above stated, which was against his medical attendant's advice. The Doctor said to him, "If you go back to cold Canada, you will die." The testator replied, "Well if I do, thank God, I will die among my friends." Having returned to Canada, his health for a time seemed to improve, and a Mr. Boyd, having written him, while at his father's, offered the testator a position as agent of the Duluth and South Shore Railway in Toronto, which he made up his mind to accept, and his contemplated move to Toronto was talked about and concluded upon; but, in the meantime, the railway matters took a change and there was no agent required for the Duluth and South Shore Railway Company at Toronto, that road having been acquired by the Canadian Pacific Railway Company. Before this, however, he returned to Minneapolis, and stored his household furniture, &c., which had been rented, and gave up the residue of the term then to run in the lease of the house, etc., and then came back to his father's, where he had left his wife and child during his absence. His intention at this time (in May, 1888) was to go to Toronto on 1st of August to reside; and it was in contemplation that a younger brother should be sent to school at Toronto, and while there should board with him, but the testator died in July.

During the years that he was absent from Canada he regularly came back once each year, to see his parents and friends. When he returned in February, 1888, he repeatedly said, "Thank God, I am home." During the time he was at his father's he purchased a piece of land from his brother Michael Dennis McConnell, who was at the time a resident of Tacoma, in Washington Territory, United States, and the deed was written in Seaforth, county of

Judgment.

ROBERTSON, J.

Huron, under his instructions, to be sent out to Tacoma to be there executed, and in that deed the testator is described as of the "township of Hibbert, in the county of Perth, passenger agent." This was drawn by a law student in the office of Mr. F. Holmested, barrister; and the student, who was a witness at the trial, swore that when he first wrote the deed, he had described the party of the second part (the testator) as a "laborer," but in reading over this deed to him, while he did not make any remarks as to being described as of the "township of Hibbert" he did object to the designation "laborer" and had "passenger agent" written instead.

The will of the testator, begins with these words: "This is the last will and testament of J. A. McConnell, of the township of Hibbert, in the county of Perth, and Province of Ontario, formerly travelling passsenger agent of the Minneapolis and St. Louis Railway Company, United States," but the writer of the will, in his evidence at the trial, said he got no instructions to so describe the testator, but he did so describe him, merely because he found him in that township, &c.

The testator also died seized of lands in the Province of Manitoba, as well as in Dakota and Minnesota, United States; and was possessed of 500 shares in the Bed Rock Mining Company of Minneapolis and Minnesota United States; and there were found among his papers after his death, at his father's residence two certificates of his life being insured in the "Bankers' Life Association" of Minneapolis for $2,026 and $2,000, respectively, payable "to the family of the deceased."

The evidence did not show, nor was it pretended at the trial, that the testator had, while residing in the United States, become a citizen of that country, or had ever exercised the rights and privileges of a citizen duly naturalized. There was a circumstance, however, which appeared in evidence, which would go to show what the intention of the testator was on the occasion of his visit to Minneapolis, in April or May, 1888, with reference to his household furni-

ture, which up to that time had been rented with the house of which he held a lease, for a term then unexpired, and that was that he stored the furniture in Minneapolis and insured it against loss by fire for a year from 19th May, 1888, which is not consistent with the statement by plaintiff, or one of his witnesses, that after the testator returned to his father's home he had stored it preparatory to shipping it to Toronto, in the month of August, just three months after, contingent upon obtaining the position of railway agent. Judgment. ROBERTSON, J.

Then the evidence of the witnesses taken under commission shows very conclusively, that while the testator was in Minneapolis in May, 1888, he fully intended returning to that city there to assume his position as travelling passenger agent of the Minneapolis and St. Louis Railway Company, so soon as his health would permit.

On the whole the conclusion that I have come to is, that although the domicile of origin of the testator was Ontario, he being a natural born subject, of British subjects, and born in Ontario, he nevertheless changed that domicile, and became domiciled in the State of Minnesota in the United States; and I do not think that anything sufficient took place before his death to lead to the conclusion that he abandoned that acquired domicile or lost it, so as to enable me to say that during the visit to his father's home, which was for the benefit of his health only, that his domicile of origin was regained.

During his residence in the United States he married a wife, who although herself a British subject, and as I understand from the evidence, the daughter of a British subject, then living in the city of Detroit, in the United States, yet he clearly intended to remain there: he had rented a house for a couple of years in Minneapolis, and lived in it; and, in my judgment, there is conclusive evidence that his intention was to remain there for at least an unlimited time. He returned to Canada, on account of his health failing, and had it been restored to him, and had he procured the situation which his friend Mr. Boyd had told or written to him

Judgment.

ROBERTSON, J.

he would be able to offer to him in Toronto, I have no doubt he would have remained in Canada; and he was doubtless contemplating that change when his expectations were cut short by two most important events, viz., first, the proposed situation at Toronto fell through because of a change in railway matters connected with the railway for which it was proposed he should act as agent; and, secondly, by his own death taking place in July. So that had the latter event not come about, and had his health been restored, he doubtless would have returned to Minneapolis, to resume his position, which was kept for him until after his death.

I think, therefore, he voluntarily fixed his sole or principal residence in the United States, which was not his country of origin, and he did so with the intention of residing there for a period not limited as to time; and although the domicile thus acquired might have been abandoned had he lived and remained in Canada with the intent of remaining for a period not limited, I do not think in this case there was any such intention.

The result is, that the will of the testator must be construed according to the laws of Minnesota, so far as all his estate there, as well as his personal estate elsewhere is concerned, and, according to the laws of Manitoba and Dakota respectively, so far as his lands there, are severally and respectively affected; and as to his lands in Ontario, they will devolve upon his executors in the will named.

The costs of all parties, as between solicitor and client, should be paid out of the estate.

[COMMON PLEAS DIVISION.]

WADDELL V. THE ONTARIO CANNING COMPANY ET AL.

Company—Illegal acts done by meeting of shareholders—Right of minority to investigation—By-laws ratifying illegal acts—Invalidity of—Injunction.

In a company consisting of seven shareholders, the plaintiffs, four of the shareholders holding 25 per cent. of the stock, claimed that there had been mismangement of the company's funds in the payment out of large sums to the president and secretary, for salaries or services without any legal authority therefor, and in the failure to declare any dividends though the company had made large profits, and that no satisfactory investigation or statement of the company's affairs could be obtained though frequently applied for, and that it was impossible to ascertain the company's true financial standing. Under these circumstances an investigation of the company's affairs was directed.

At a meeting of four of the directors, constituting the majority, held after proceedings taken by the minority to disallow the illegal payments made to the president and secretary, and without proper notice to the minority of such meeting or its object, a resolution was passed ratifying the payments made to the secretary, and at an adjourned meeting, of which also the minority received no notice, by-laws were passed ratifying the payments made to the president and secretary.

Held, that the resolution and by-laws were invalid, and could not be confirmed by the shareholders, and an injunction was granted restraining the company from acting thereunder, or from holding a meeting of shareholders to ratify and confirm same.

Statement.

THIS was an action tried before ROBERTSON, J., at Hamilton, at the Chancery Spring Sittings, for 1889.

Bain, Q. C., and *F. R. Waddell*, for the plaintiffs.

E. Martin, Q. C., and *Duff*, for the defendants.

The learned Judge reserved his decision, and subsequently delivered the following judgment:

ROBERTSON, J.:—

The facts of this case, although somewhat complicated and involved, when once understood, resolve themselves into two questions, viz.:

1. Whether the plaintiffs, as shareholders holding a minority, in fact only 25 per cent. of the stock of the com-

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pany, can compel the defendants, who hold the remaining 75 per cent. to submit to an investigation of the affairs of the company?

2. Whether the shareholders, at an extraordinary meeting called for that purpose, can ratify the two by-laws, Nos. 11 and 12, set forth in the pleadings and complained of? (a)

After hearing and considering the evidence adduced pro and con. I have come to the conclusion that the contention of the plaintiffs, under the circumstances, so far as the first question is concerned, is one that ought to be granted, not only in their own interest, but in the interest of the whole of the shareholders.

I find that the plaintiffs made frequent attempts to have an investigation, but the defendants, the Ontario Canning Company and Decew, thwarted their efforts; and, therefore, unless the law is against them, it is only reasonable that their claim in that respect should be acceded to. And I am of opinion that the cases shew, independently of sec. 76 of R. S. O. (1887), ch. 157, (as to the effect of which I do not think it necessary to form an opinion), that the plaintiffs are entitled to all they contend for in that regard.

The statement of claim alleges, and it has been proved to my satisfaction, and I so find, that there never has been a satisfactory investigation of the affairs of this company; and that since the defendant Decew has been acting secretary-treasurer, there has been no statement made out which could be considered satisfactory to the plaintiffs. And it is

(a) The by-laws referred to, Nos. 11 and 12, were as follows:

"11. For services rendered by Mr. A. F. Carpenter, the president of said company, from 1st January, 1885 to 31st December, 1885, he shall be entitled to receive and shall be paid from the funds of said company the sum of $200; for the year 1886, the sum of $500, for the president, and H. E. Carpenter for the year 1887, the sum of $500 for the services of the said president; also at the rate of $500 for the year 1888.

"12. For services rendered by Mr. Egerton Decew as secretary and treasurer of said company, he shall be entitled to receive, and shall be paid from the funds of said company at the rate of $1,000 per year from his appointment to the 1st day of June, 1887, and from the 1st day of June, 1887, at the rate of $1,200 per year."

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alleged, and satisfactorily proved, that there have been considerable profits made during the years 1886 and 1887, and no dividends have been declared; and, notwithstanding frequent demands made by the plaintiffs, it is not possible to state now what the financial standing of the company is.

It has also been established, and I so find, that the president, A. E. Carpenter, and the secretary-treasurer, Decew, have, against the will of the plaintiffs, taken from the funds of the company considerable sums of money for salary for services, without any legal authority whatever. And it is clear law that any member of a corporation has a right to object to any illegal division of its funds; and in this respect those who contribute most have no greater right than those who contribute least: *Charlton* v. *Newcastle and Carlisle R. W. Co.*, 5 Jur. N. S. 1096.

In this case Sir W. P. Wood, V.C., says, at p. 1100: "It does not signify if all the other shareholders are pitted together against this holder of ten shares, the Court holds it is better for the real interest of the company that they should obey the law; and any one single shareholder who invokes the aid of the Court is entitled to its aid for that purpose."

See also *Armstrong* v. *Church Society*, 13 Gr. 552, and *Phillips* v. *Royal Niagara Hotel Co.*, 25 Gr. 358.

A by-law of a company provided that the managing director should be paid for his services such sums as the company "may from time to time determine at a general meeting." The only provision made at a general meeting was on January 27th, 1883, as follows: "The salary of the managing director was fixed until October 31st next, or at the rate of $4,000 per annum." The managing director sought to recover for services rendered as such subsequent to October 31st, 1883. *Held*, that he could not: *Re Bolt and Iron Co.*, 14 O. R. 211.

In the same case: "The position of L. as managing director rendering services for which remuneration was given, was not that of a servant hired by the company, but of a working member of the company, whose rights as to pay-

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ment were to be measured by the provisions of the charter and by-laws of the company. L. having withdrawn from the moneys of the company a certain sum on the assumption that he was entitled to it in payment of his services after October 31st, 1883. *Held*, that this was a breach of trust on L.'s part, and the amount thus withdrawn formed a debt based on a breach of trust, recoverable by the liquidator, under the special provisions of R. S. C. ch. 129, and as to which no set-off was permissible against any debt or dividend due from the company to L."

It was proved that after this action was commenced, in fact after the case was partially heard, that defendants made out a statement of the affairs of the company, which was produced before me at the argument, and shewed particulars up to 31st January, 1889; but the plaintiffs say: "This affords no satisfaction. We cannot tell by the mere examination of this account whether the affairs of the company are in a satisfactory state or not; besides this, we object to many items charged against the company in this account, and for which there is no warrant or authority."

I think this objection must prevail, and the same remarks apply to other statements previously made.

In *Clements* v. *Bowes*, 1 Drew. 692, Vice-Chancellor Kindersley, says, at p. 691: "The second objection is, that the bill is filed by a party who has had already an account rendered to him by the defendants, shewing all the receipts and payments, and shewing all the matters relating to the business of the company. Now, clearly that alone does not deprive him of his right: a party has a right to have an account taken with the aid of the machinery of this Court, and is not precluded because the defendant has given him an account."

The conclusion I have come to, therefore, is that the plaintiffs are entitled to an investigation of the affairs of the company from the time that the defendant Decew became the secretary-treasurer thereof; and, at the option of either party, from the time the company first went into operation after incorporation, the election to be made

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before the formal judgment is taken out: and that such investigation should he made by J. E. O'Reilly, Esq., the Local Master at Hamilton, be being, in my opinion, a suitable person, and well qualified to make such investigation and report thereon.

As to the second question, that, I confess, is not so easily disposed of, As a fact I find on the evidence, that there never had been any by-laws passed by the directors as a board, or by the shareholders as a body, for the management or government of the affairs of the company, or for the payment or remuneration of the services of the directors of the company, until the by-laws referred to and set out in the pleadings. That from the formation of the company and its going into operation, up to the time of the resignation of Mr. J. N. Waddell as secretary-treasurer and the appointment of Mr. Decew in his stead, certain sums were paid out to Mr. J. N. Waddell, for his services as secretary-treasurer, and also to Mr. A. E. Carpenter, a director and president, for his services, with the unanimous consent and approval of the directors and stockholders. I also find that at the meeting, held on the 16th day of July, 1886, when Mr. Decew was elected a director and secretary-treasurer, the subject of Mr. Decew's remuneration for the services which he was to perform as secretary-treasurer was broached by some person present at the board meeting; but it was by unanimous consent agreed that nothing should be concluded at that time in reference thereto, and that it should be deferred for further consideration, when from experience the directors could better deal with the subject. I also find that no note or memorandum was made in the minutes of that meeting in reference thereto, and that it was omitted for the reason that the question had not been submitted in any form for consideration. On this point, however, there was a conflict of testimony, that is, as to whether the question had been discussed. On the part of the plaintiffs, it was asserted that at the meeting at which Mr. Decew was appointed secretary-treasurer, some member of the board asked the question: "What

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salary is Mr. Decew to have?" Mr. F. M. Carpenter said: "We will discuss that at another time;" and the meeting then broke up. This was sworn to by Mr. R. R. Waddell, Mr. J. N. Waddell and Mr. F. R. Waddell, and fully corroborated by Mr. F. M. Carpenter. On the other hand, Mr. Decew gives this account of what took place: "There was something said about my wages. Mr. A. E. Carpenter said I was to have what Mr. J. N. Waddell had, and he wanted for himself, more than he had been receiving; and something was said about a resolution, but Mr. R. R. Waddell said that was not necessary, as all were present, and it was satisfactory. I don't remember anything else being said."

On cross-examination he said: "Nothing appears on the minutes as to my salary; that was discussed before the meeting. Mr. J. N. Waddell was secretary at first part of the meeting, and that is how I account for it not being in the minutes. There was no memorandum kept of the salary discussion of the meeting. * * "I cannot account for the salary being omitted from the resolution appointing me. I think Mr. F. M. Carpenter and Mr. R. R. Waddell are mistaken; they have forgotten about salary. I did not suppose it would be objected to, *and therefore it was not entered.*"

Mr. A. E. Carpenter corroborates Decew's statement in regard to what he says took place, as to his, Decew's, salary, but does not speak positively as to what was said about an increased allowance to himself.

On this evidence I find that there never was any agreement or understanding come to among the stockholders, or by the directors, at the meeting of 16th July, 1886, as to what amount was to be allowed to Mr. Decew for his services as secretary-treasurer; but, on the contrary, that it was purposely left in abeyance, to be settled afterwards. And I also find that it never was afterwards settled or agreed as to what amount he should have. I also find in regard to any allowance to be made to Mr. A. E. Carpenter for his services as president or director, that no sum

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was ever agreed to, except the sums allowed to and paid to him previous to 16th July, 1886. I also find that by some understanding come to between Mr. Decew and Mr. A. E. Carpenter, the former was to be paid at the rate of $900 per year for his services. I also find that Decew drew a monthly sum, by cheques written and signed by himself as secretary-treasurer and by A. E. Carpenter, as president, equal to this sum of $900 per annum, and that at the end of the year he drew an additional sum of $100, making in all $1,000 for that year; and I find, on the evidence, that the drawing of this sum of $100 was an afterthought, and not intended, nor was it concluded upon by either A. E. Carpenter or Decew until the year had expired.

I also find that the several sums drawn out by Mr. A. E. Carpenter from and after the meeting of July, 1886, were wholly unauthorized, and that Decew, as secretary-treasurer, and A. E. Carpenter, as president, acted in concert for their mutual benefit, in relation to the appropriation by them of these several sums.

Having found these facts, the question now arises, whether the by-laws 11 and 12, can be legally ratified by a majority of the shareholders.

As before suggested, the question is not easy of solution. I presume there is no doubt, that the shareholders can unanimously dispose of the funds of the corporation in any way they may feel disposed, so long as they are not guilty of some breach of the law in so doing; and again, I presume the shareholders may unanimously condone any illegal act committed by some one or more of the directors against the body of the shareholders; but the question here is, can a majority of the shareholders, under all the circumstances of this case, do so? In discussing this question, I think we must take into account the real position of the parties. There are only seven shareholders altogether, four of these control 75 per cent. of the stock, and are pitted against three others, who hold only 25 per cent. thereof. And these four holding the 75 per cent. are the same men who, as directors, behind the backs of two of the

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three others, who are also directors, and without any notice to them, have, as far as they could, passed these objectionable by-laws.

It may, therefore, be accepted as a presumption so strong that there is no doubt about it, that at a meeting of shareholders called for that purpose, these same four men, as shareholders, will ratify and confirm these by-laws agreed to by the same four men as directors, and they being holders of 75 per cent. of the stock, their votes will, of course, carry against the 25 per cent. The power, therefore, is in the hands of this majority to ratify by-laws which will have the effect of condoning an offence, which the plaintiffs characterize as a breach of trust, and which the plaintiffs contend, if permitted, will open the door to the grossest frauds being perpetrated by the majority against the minority. This is not the case of compensating directors for past services merely. If it had been that, and that only, it is possible the cases cited might be held to go so far as to declare it within the competency of a majority of the stockholders so to do; but the case assumes the features of an act which, according to the law, as laid down by the Chancellor of Ontario, in *Re Bolt and Iron Co.*, 14 O. R. 211, is a breach of trust. Here these gentlemen, A. E. Carpenter and Decew, withdrew from the company's moneys, that to which they had no legal or equitable right. Having been proceeded against for this illegal act of theirs, they seek now, by virtue of the power which they hold in their own hands to wipe out the wrong, by passing these by-laws, as directors, which they afterwards propose as shareholders, to ratify and confirm.

It would be altogether another matter, were they now preparing to do an act, which would authorize them to apply the moneys of the company in remuneration of services rendered by them, for which they had not already misappropriated the funds of the company. The money being in hand, it is possible that the minority would have to submit; but that is not this case; they have already misappropriated the funds; they have committed the breach

of trust, and before they can be heard in justification of it, they must, I think, refund the amount or, at all events, they should not be allowed now to pass and ratify by-laws, after an action has been brought against them, to cover up the very acts complained of in that action. Judgment. ROBERTSON, J.

But there is another ground on which, I think, the contention of the defendants is untenable; and it is this: All the by-laws set out in the statement of defence were proposed and passed at a meeting of the four directors, who are now defendants, without the necessary notice of such meeting, and the object of it, being given to the other two directors.

It is true a notice was sent to Messrs. J. N. and F. R. Waddell, notifying them that "A meeting of the directors of the Ontario Canning Company will be held at the office, etc., on 25th September inst., at 3 p.m., *to consider matters pertaining to the suit of Waddell* v. *Ontario Canning Company, and other business*," which notice was received, and at which meeting they did not attend, for the reason, as they swore to, that matters pertaining to this suit were to be considered, and from motives of delicacy, etc.; but nothing was done at this meeting in reference to these by-laws. A motion, however, was proposed by the president and seconded by Mr. F. M. Carpenter, and carried, that the salary of Mr. Decew, as secretary-treasurer, from the time of his appointment to 1st June, 1887, be at the rate of $1,000 per annum, and from thence until further ordered at the rate of $1,200 per annum; and that he be also allowed for his services from 1st June, 1886, until 15th July, 1886, at the rate of $1,000 per annum, and that the payments made to him, at the above rates for salary, are hereby ratified and confirmed.

On motion, Mr. W. A. H. Duff was appointed or retained to defend this suit. The meeting then adjourned, until the 26th, at 4 p.m. Nothing more was done at that meeting, nor does it appear that notice was given of an intention to introduce by-laws at the adjourned meeting. On the following day, no notices of the adjournment having been

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given to the other two directors, (which, however, may not have been necessary had the notice calling the meeting of 25th been specific as to its purpose), the same four directors met, and then and there introduced and carried the by-laws.

It is contended that the passing of the by-laws was an act in reference to the internal affairs of the company, and unless there is evidence of fraud, or harsh treatment being practiced by the majority against the minority, the Court will not interfere. I confess to feeling the force of this contention, and I am not unmindful of the long list of cases following *Mozley* v. *Alston*, 1 Ph. 790, and *Foss* v. *Harbottle*, 2 Hare 461, in which this principle has been laid down, and has been generally acted upon, by the Courts; but there is such a thing as carrying that principle too far, and while it may be impossible to prove such facts as will make out a case of actual fraud, it may be as I think there is in this case, ample to shew "harsh treatment." And admitting the importance, to all joint stock companies, that encouragement should not be given to litigious stockholders to fly to the Courts, on every pretext, which in their judgment affords an excuse for so doing, yet at the same time, I think the minority, or weaker portion of the body, should have some protection against that overbearing assumption of the majority, which amounts, in my judgment, to "harsh treatment." And particularly should that be the case, when the majority are banded together against the minority, as I find to be the fact here, for the express purpose of taking advantage of their position to obtain a personal benefit to themselves, at the expense of those who are in the minority and are in the relation of *cestuis que trustent*; and to that extent, I think their conduct has brought them to within the exception to the general principle laid down in *Mozley* v. *Ashton* and the other cases referred to.

It must be observed that the object expressed in the notice of meeting called for 25th September was "to consider matters appertaining to this suit and other busi-

ness." Now this was a special, or extraordinary meeting; there were no by-laws or regulations previously in force, directing how and under what circumstances meetings of the board of directors should be called or held, and therefore everything depended upon proper and explicit notice being given. Not only that, but it was in this case most essential that the chief object of the meeting should be set forth, and it should have been done in an express and explicit manner. On referring to the minutes of the meeting, the only matter considered "appertaining" to the suit, was the appointment of a solicitor to defend the action. So that the notice calling the meeting was, to all intents and purposes, misleading. It was misleading for this purpose, that the secretary-treasurer and president, who called the meeting, must be presumed to have known, from the correspondence which had passed between them and the Messrs. Waddell, that they would not think it necessary, in fact desirable, that they should attend at a meeting where all the other persons in attendance were to discuss the matters in a suit, in which they were the defendants, as against the Messrs. Waddell, who were plaintiffs.

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It was suggested, I think with some force, that the object of stating that "matters appertaining" to the suit would be considered, was to throw the plaintiffs off their guard, in fact give them a hint that it was desirable that they should not attend, etc.; and it had that effect.

Now this was to all intents and purposes a special meeting—in fact in the absence of by-laws, and the letters patent being silent as to that, all meetings of this company were of necessity of that character. They could not be called general meetings at all, because there had been no provision for holding such. Then, that being the case, a notice calling a special or extraordinary meeting, must state particularly what the purpose and object of calling the meeting is; and no business can be transacted at the meeting except in relation to the matters specified, unless the whole of the board is present, and unanimously consent. The real object of this meeting, as it turned out, was one of

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vital importance to the stockholders. It was important for the reason that by-laws for the government of the company were then and there to be proposed. It was important because it was intended to deal with the funds of the company, in which every stockholder had an express interest. It was important because the majority intended to do an act, that is, appropriate funds which the directors held in trust for the whole body of the stockholders, to the special use and purpose of two members of that majority, which that majority knew was then a subject of litigation between the minority and the majority. That being the case, it was incumbent upon the parties calling the meeting to give express notice of the purpose and object of the meeting. They might just as well have secretly met together, without any notice at all, as to have met under the circumstances proved in this case.

In *Re Bridport Old Brewery Co.*, L. R. 2 Ch. 191, Lord Justice Turner, said, at p. 194: "It is evidently of great importance to shareholders" (and I think of equal importance to directors) "that they should have proper notice what subjects are proposed to be considered at a meeting, and I do not think in the present case they had such notice. * * * It appears to me the shareholders were entitled to have a notice which would give them to understand that it was proposed to pass an extraordinary resolution to wind up the company."

That case was decided under the Companies' Act of 1862, sec. 129, which is in reference to voluntary winding up, etc.; and declares that whenever the company has passed a special resolution requiring the company to be wound up voluntarily, the company may be wound up. The notice given for calling the meeting was "for the purpose of considering, and if so determined on, of passing a resolution to wind up the company voluntarily." The meeting passed a resolution "that it had been proved to the satisfaction of the company, that the company could not, by reason of its liabilities, continue its business, and that it was advisable to wind up the same. *Held*, that this resolution was in-

valid as an extraordinary resolution, *the notice not showing that it was intended* to propose a resolution that the company was unable, by reason of its liabilities, to continue its business, nor containing anything to show that it was proposed to pass such a resolution for winding up the company as would not require confirmation by a subsequent meeting. Sir H. M. Cairns, L. J., concurred on the same ground.

And this case was followed in *Re Silkstone Fall Colliery Co.*, 1 Ch. D. 38.

The American cases are numerous, to the same effect; but there, the decisions are come to more on general principles ungoverned by Acts of Parliament, and are, therefore, more applicable to the case now before me.

In *Atlantic DeLaine Co.* v. *Mason*, 5 Rhode Island, 463, it was held, that a clause in the charter declaring that "all or any business of the corporation may be transacted, and acted on, at any legal meeting thereof," and a by-law passed in pursuance of the charter, prescribing how notice of special meetings shall be given, does not dispense with the necessity of specifying in such case the purpose, in the notice of the meeting.

Ames, C.J., in giving judgment, said, at p. 471: "The general rule is well settled, that an act of such importance cannot be done, at a special corporate meeting, unless the stockholders are duly notified of the purpose of the meeting, so that they can attend," etc. And he refers at p. 472, to the fact that *this is "the general law as to what the notice shall contain."*

There are numerous other cases which sustain this view, referred to in Morawetz, on Private Corporations, secs. 479 to 482, inclusive; and the case of *Cannon* v. *Trask*, L. R. 20 Eq. 669, may also be referred as shewing that, although the Court will not interfere with the powers and duties of directors in their management of the internal affairs of the company, directors will be restrained from directing an act, which will have the effect of preventing shareholders from *exercising their voting powers, etc.*

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The distinction to be drawn between the case now before me and those cited as authority against the Court interfering with the acts of the directors in regard to the internal affairs of the company, and particularly when recompense to directors for services rendered is the object is this, that in all the cases which I have been able to find, the proposition is to reward the directors by the payment of money not yet by them appropriated; it is, in fact, the case of coming before the shareholders to have their services recognized and asking remuneration therefor. That is not this case; here the moneys have been appropriated, without any authority whatever, and the passing of the by-laws is to have a retroactive effect, for the purpose of covering a misapplication of the funds of the company in the hands of the directors, who are in a fiduciary relationship as regards these moneys.

In my opinion, the by-laws complained of, as well as the resolution passed by the four defendants at their meeting on the 25th September last, in reference to the salary of Mr. Decew as secretary-treasurer of the defendants company are invalid, and that the shareholders cannot ratify them, or either or any of them, these being the illegal acts complained of; and, therefore judgment should not be stayed, in terms of the order made herein on 19th day of October, 1888.

The plaintiffs are, therefore, entitled to have an account taken of all the dealings and transactions of the said company; and that in taking such accounts, all payments made, without proper authority, should be disallowed, and the defendants, A. E. Carpenter and Decew, should be ordered to repay the several sums of money improperly and illegally taken by them from the funds of the said company, except in so far as the amounts paid to them for cans purchased by the said A. E. Carpenter and the boiler and engine purchased from said Decew, are concerned, as to which, I think, the said A. E. Carpenter and Decew acted *bonâ fide*. And an injunction restraining the defendants, other than the company, from acting upon or under the

said by-laws and resolution; and from holding a meeting of shareholders to ratify and confirm such by-laws, and from ratifying and confirming the same. And I further order that the defendants, A. E. Carpenter, F. M. Carpenter and Decew, pay the costs of this action up to and inclusive of the trial, inclusive of the costs of motion, for the injunction herein and incidental thereto; and I reserve further directions and the costs of the reference until the said Mr. J. E. O'Reilly has reported thereon.

Judgment.

ROBERTSON, J.

[COMMON PLEAS DIVISION.]

MADDEN V. THE HAMILTON IRON FORGING COMPANY.

Master and servant—Workmen's Compensation for Injuries Act—Injury sustained by workman through improper instructions by superintendent—Liability of master.

The defendants, an Iron Works Company, used in their business, a pair of shears for cutting up boiler plate and scrap iron prior to its being placed in the furnace to be melted. It was the duty of the plaintiff and another workman to put the iron into the shears. While a large iron gate was, by the superintendent's orders, being put into the shears to be cut up, by reason of the improper instructions given by the superintendent to the plaintiff, the latter, in the course of his duty was injured. The plaintiff, though apprehensive of danger, was not aware of the nature and extent of the risk, and obeyed through fear of dismissal. In an action against defendants under the Workmen's Compensation for Injuries Act for the damage sustained by the plaintiff.

Held, that defendants were liable.

THIS was an action tried before FALCONBRIDGE, J., and a jury, at Hamilton, at the Winter Assizes of 1889.

Statement.

The action was brought under the Workmen's Compensation for Injuries Act.

The plaintiff had, for six months previous to the 19th of March, been employed as a workman by the defendants, at their iron works in the city of Hamilton, and, on the day mentioned, received the injury for which compensation was sought against the defendants.

Statement.

In the defendants' works were a pair of shears worked by steam, used for cutting up boiler plate and scrap iron to be melted in the furnace, and during the greater portion of the time the plaintiff was in the defendants' employment, he and another workman named John Scott were jointly engaged in cutting iron by means of these shears. On the day the defendant was injured there was brought into the shop a wrought iron gate, variously estimated as weighing from 150 to 350 pounds, the outside frame being from 3 to 4 inches in width, and from $\frac{5}{8}$ to $\frac{7}{8}$ of an inch in thickness, and having two or three iron bars parallel with the bottom, which from the evidence appeared to be the same size as the frame. Through these parallel bars and running from the bottom to the top of the gate were perpendicular bars of round iron, about one inch in diameter. This gate was (according to the evidence on behalf of the plaintiff), ordered to be brought from the yard by Whitehead, the superintendent, to be cut up by the shears. Two of the labourers carried it into the shop, where Scott and the plaintiff were working at the shears, near which Whitehead was then standing, who ordered them to lift the gate upon the table, and marked with his finger upon the frame of the gate where it was to be cut, and told them to put the frame with the edge to the shears; and, in consequence of the weight of this gate it required the assistance of the two men who brought it in from the yard, as well as of Scott and the plaintiff, to put it in the shears; and as the frame was put in edgewise, instead of being cut through, it was merely crushed; and when, (still acting under instructions from Whitehead,) the gate was turned and the other corner put into the shears in a similar manner to the first, on coming in contact with the shears, the iron frame was not cut through, a part of the shears was broken off, and the gate was thrown back by the machine with such violence that it was thrust from the hands of the workmen holding it and fell on the plaintiff's foot, crushing three of his toes, which had to be amputated.

Statement.

The plaintiff stated that when the gate was brought to the shears, and the superintendent ordered it to be put in so that the shears would be required to cut through the frame edgewise, he was afraid of an accident, because, as he said, an iron of that thickness had not been put into the shears; but he also said he did not refuse to carry out the superintendent's orders for fear of dismissal from the defendants' service.

The evidence of Whitehead and others of the defendants' witnesses was to the effect that he gave no orders as to the where, or the particular manner in which, the gate was to be cut, or how it was to be fed to the shears; and that the cutting was left to Scott and the plaintiff, who had charge of the shears and were entrusted with the work of cutting the iron, as knowing how it should be done.

The defendants also contended that Scott and the plaintiff did not push the frame of the gate far enough back into the jaw and towards the heel of the shears, and, in consequence of the frame having been caught by the shears too close to its jaw, or mouth, the shears were broken, and as a result of the plaintiff not holding up his corner of the gate, it fell, and so the accident happened to his foot. The evidence of the superintendant was also to the effect, that before the injury to the plaintiff the shears had cut iron of greater dimensions than this gate frame; and that since the accident the company had made a test, and he produced during the trial results of such tests, showing that the shears were capable of cutting heavier iron than the gate frame.

There was no satisfactory evidence showing what became of the particular gate which caused the injury to the plaintiff; but John Freeman, a witness called by the defendants, stated that five other gates of similar make to the one in question, were broken to pieces after the plaintiff's accident, before being put in the shears to be cut up—being broken up, the flat side of the frame would be put in the shears and so easily cut.

The answers of the jury in regard to the ways, works,

Statement.

machinery and plant, were in favour of the defendants—they finding that no defect existed therein.

The following were the other questions submitted by the learned trial Judge to the jury and their answers thereto:

5. Did the plaintiff suffer the injury complained of by reason of the negligence of any person in the service of the defendants who had any superintendence entrusted to him, whilst in the exercise of such superintendence? Yes.

6. If so, who was such person and what was the negligence? Mr. Whitehead. The negligence was in his not giving proper instructions in putting the said gate in the shears.

7. Did the plaintiff suffer the injury complained of by reason of the negligence of any person in the service of the defendants to whose orders the plaintiff was then bound to conform and did conform? Yes.

8. If so, did such neglect result from the plaintiff having so conformed? Yes.

9. If so, who was the person guilty of negligence, and what was the negligence? Answer same as number 6.

10. Was the plaintiff guilty of any contributory negligence? No.

11. Was the accident caused by the negligence of the plaintiff or of his fellow workmen? No.

12. If so, wherein did such negligence consist? Not.

13. Did the plaintiff freely and voluntarily, with a full knowledge of the nature and extent of the risk he ran, impliedly agree to incur it? No, he did not realize any to the full extent.

14. Was Whitehead a person in the service of the defendants in a condition of superiority to the plaintiff? Yes.

15. If the plaintiff is entitled to recover at all, what is a fair sum to allow by way of compensation? $260 over and above the amount paid by the defendants' for doctor's bill and wages paid, $30.

The learned Judge entered judgment for the plaintiff for $260, and costs.

Notice of motion was given by the defendants to set aside the judgment entered for the plaintiff, and to enter judgment for the defendants.

In Easter sittings, May 28, 1889, *Bain*, Q. C., and *Waddell*, supported the motion. There was no negligence proved. No defect in the machine was shewn. According to the statute the accident must result by reason of an order given by defendant to do the particular act. Here the accident occurred not through giving an order, but rather

through the not giving one, and there is no duty cast on defendants to give instructions. No order or direction however, was deemed necessary, as the plaintiff was one of the men who had the doing of this particular work, and was thoroughly skilled in it, and there was nothing that he could be told that he did not know: *Thomas* v. *Quartermaine*, 18 Q. B. D. 685; *Yarmouth* v. *France*, 19 Q. B. D. 647-659-660; Roberts & Wallace on Employers, 3rd ed., pp. 3, 22, 166, 206-7; *Rudd* v. *Bell*, 13 O. R. 47; Shearman & Redfield on Negligence, 4th ed., p. 8; *Daniel* v. *Metropolitan R. W. Co.*, L. R. 5 H. L. 45, 56, 61; *Cox* v. *Burbidge*, 13 C. B. N. S. 430, 436; *Heaven* v. *Pender*, 11 Q. B. D., 503, 507; *Northern Counties &c., Fire Ins. Co.* v. *Whipp*, 26 Ch. D 482, 493; *Collis* v. *Selden*, L. R. 3 C. P. 495; Smith on Master and Servant, Black. ed., p. 763; *Vicary* v. *Keith*, 34 U. C. R. 212; *Miller* v. *Reid*, 10 O. R. 419. Argument.

Carscallen, contra. The evidence shews, and the jury have found, that the accident occurred in consequence of the negligence of the superintendent, to whose orders the plaintiff was bound to conform, in not giving proper instructions to the plaintiff when the gate was put into the shears. The evidence shews that this was the first time work of this heavy character was attempted to be done. The superintendent, under whose orders the plaintiff was acting, was bound to properly instruct the plaintiff how the work should be done. The evidence also shewed that after the accident similar gates were broken up into pieces before being put into the shears: *Thomas* v. *Quartermaine*, 18 Q. B. D. 685; *Osborne* v. *London and North-Western R. W. Co.*, 21 Q. B. D. 220; *Yarmouth* v. *France*, 19 Q. B. D. 647; *Weblin* v. *Ballard*, 17 Q. B. D. 122; *Cox* v. *Great Western R. W. Co.*, 9 Q. B. D. 106; *Millward* v. *Midland R. W. Co.*, 14 Q. B. D. 68; *Dolan* v. *Anderson*, 22 Sc. Law Reporter, 529; *Thrussell* v. *Handyside*, 20 Q. B. D. 359; *Baddeley* v. *Earl Granville*, 19 Q. B. D. 423; *Cox* v. *Hamilton Sewer Pipe Co.*, 14 O. R. 300; Shearman & Redfield on Negligence, 4th ed., pp.

Argument. 1-6; Wharton on Negligence, 2nd ed., pp. 1-6, 73, 79; *Kellard* v. *Rooke*, 21 Q. B. D. 367; *Shaffers* v. *General Steam Navigation Co.*, 10 Q.B.D. 356; *Brown* v. *Butterley Coal Co.*, 53 L. J. N. S. 964.

June 29, 1889. MacMahon, J.:—

One Whitehead was the superintendent of the defendants' works; and, in view of the evidence, and the way in which the case was regarded by counsel on either side, the only questions upon which the jury were called upon to pass were those arising under sec. 3, subsecs. 1, 2 and 3, of R. S. O. ch. 141.

The argument of counsel dealt with the answer of the jury to the sixth question, as if it was a finding that no instructions or directions had been given by Whitehead to Madden. And the question argued before us was, as to whether the defendants could be made liable by reason of the non-direction of the superintendent to the workmen as to the manner in which the frame should be put into the shears.

Upon the evidence as it went to the jury, as to whether instructions or orders had or had not been given to the plaintiff by any one having superintendence, and in what the negligence consisted, I think the answer to the sixth question, taken in conjunction with the answers to questions seven and eight, can only mean that Whitehead gave instructions as to putting the gate in the shears, and that such instructions were not proper, and in consequence of such improper instructions, the injury was caused to the plaintiff.

The plaintiff was closely cross-examined for the purpose of shewing that having been employed about the machine for some time, and knowing the nature of its working, and understanding the character of the work he was doing, he was aware of the risks connected with the service, and agreed to assume them. And it was also urged that the plaintiff, being apprehensive that an acci-

dent was likely to result from the manner in which the gate was put into the shears under instructions from Whitehead, the plaintiff should have objected to its being put in that way, and, if insisted upon by Whitehead, have refused to run any risk.

In regard to the assumption by a workman of the risks of what may be deemed hazardous employments, speaking of the construction to be put upon the English Employers' Liability Act, 43 & 44 Vic. ch. 42, Lindley, L. J., in *Yarmouth* v. *France*, 19 Q. B. D. 647, at p. 659, says: "It must be taken as settled by *Thomas* v. *Quartermaine*, 18 Q. B. D. 685, at p. 692, (1) that the words at the end of section 1 do no more than 'remove such fetters on a workman's right to sue as had been previously held to arise out of the relation of master and servant; (2) that sec. 2, sub-sec. 3, does not extend the master's liability beyond that imposed by sec. 1 and sec. 2, sub-sec. 1; (3) that in each of the cases specified in section 1, the maxim *Volenti non fit injuria* is applicable, and that, if a workman, knowing and appreciating the danger and the risk, elects voluntarily to encounter them, he can no more maintain an action founded upon the statute than he can in cases where the statute has no application. Those principles are, in my opinion perfectly sound: but the proper application of them is by no means always easy. The question whether in any particular case a plaintiff was *volens* or *nolens*, is a question of fact, and not of law." Bowen, L. J., was careful to point out that the mere fact that the plaintiff knew of the danger, and yet incurred it is not conclusive. He says: "The maxim, be it observed, is not *Scienti non fit injuria*, but *Volenti non fit injuria*."

The jury in the case in hand have found as a fact that the plaintiff did not, with a full knowledge of the nature and extent of the risk, agree to incur it.

In regard to the point insisted upon by the defendants that when the plaintiff became apprehensive of danger resulting from the mode of inserting the frame into the shears and his not objecting and refusing to run the risk, that he must be taken to have assumed it. The answer to

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MacMahon, J.

that contention, I think is, that no matter what his opinion might have been, the instructions, if given, were given by the superintendent of the company, whom the plaintiff might reasonably suppose was fully conversant with the nature of the work he was ordering should be done, and that the plaintiff had a right to act upon, and was bound to conform to the orders given by such superintendent, or else be subject to immediate dismissal.

The point was considered in *Yarmouth* v. *France*, by Lindley, L. J., at p. 661, who says: "In the cases mentioned in the Act, a workman who never, in fact, engaged to incur a particular danger, but who finds himself exposed to it and complains of it, cannot in my opinion be held as a matter of law, to have impliedly agreed to incur that danger, or to have voluntarily incurred it because he does not refuse to face it: nor can it in my opinion be held that there is no case to submit to a jury on the question, whether he has agreed to incur it or has voluntarily incurred it or not, simply because, though he protested, he went on as before. The facts of each particular case must be ascertained and considered. If nothing more is proved than that the workman saw danger, reported it, but, on being told to go on, went on as before in order to avoid dismissal, a jury may in my opinion properly find that he had not agreed to take the risk, and had not acted voluntarily in the sense of having taken the risk upon himself. Fear of dismissal, rather than voluntary action, might properly be inferred."

What was being done in this case required to be done immediately, and there was no opportunity for the plaintiff's showing why he considered the work dangerous; and upon the finding he did not undertake to assume the risk of the employment which resulted in the injury incurred by reason of such employment.

We think the motion must be dismissed with costs.

GALT, C. J., concurred.

ROSE, J., was not present at the argument, and took no part in the judgment.

[QUEEN'S BENCH DIVISION.]

RE WHITAKER AND MASON.

Municipal corporations—Warrants for salary of officer—Refusal of mayor to sign—Application by officer for mandamus—Remedy by action.

An officer of a municipal corporation applied for a mandamus to compel the mayor to sign warrants for the applicant's salary, which the mayor had been called upon to do by a resolution of the municipal council. *Held*, that the applicant could maintain an action against the corporation for his salary, and, as he had that remedy, a mandamus would not be granted at his instance.

Statement

THIS was an application by Thomas Whitaker for a mandamus or order in the nature of a mandamus commanding D. Willis Mason, the mayor of the town of Sandwich, forthwith to sign warrants for payment to the applicant of his salary as chief constable of the town since the 12th April, 1889.

The affidavit of the applicant shewed that he was appointed chief constable by the town council on the 6th February, 1889, and had ever since then, with the exception of nine days, been employed in the duties of his office; that on 13th April, 1889, the mayor suspended him from his office for one month; that he thereupon resigned his position as chief constable, and that his resignation was accepted on the 17th April, 1889; that he was again appointed to the office by the council on the 22nd April, 1889, and had continued to act in it ever since; that he had received no portion of his salary since the 13th April, 1889, in consequence of the refusal of the mayor to sign the warrants for his salary; and that he had always faithfully performed his duties as chief constable.

The affidavit of the applicant's solicitor shewed that on the 9th September, 1889, he called upon the mayor, and presenting to him five certain orders or warrants, requested him to sign the same, but that he refused to sign any or all of them

Statement. It was also shewn that a majority of the council had voted for a resolution calling on the mayor to sign warrants for the salary of the applicant.

Affidavits filed on behalf of the mayor disputed the right of the applicant to salary as chief constable, and shewed that payments had been made, and that if he was entitled to any sum at all, it was less than the amount called for by the warrants presented for the mayor's signature.

October 4, 1889. *W. H. P. Clement*, for the applicant, supported the application before GALT, C. J., in Chambers.

Aylesworth, for the mayor, shewed cause. The duty must be of a public character to be enforceable by mandamus: Shortt on Informations, &c., p. 231. Here it is only the applicant's private pocket which is affected. The writ of mandamus will never be ordered where any other effective remedy exists. The applicant can have a remedy at once by obtaining judgment against the municipal corporation of the town of Sandwich, and issuing a writ of *fi. fa.* If he has a *fi. fa.*, he needs no warrant from the mayor; he can enforce it without a warrant. This is merely a money demand, and action is the appropriate remedy: *Re Nathan*, 12 Q.B.D. 461. *In re Moulton and Haldimand*, 12 A. R. 503, shews that a mandamus will not lie where indictment can be applied.

Also, there must be a preliminary demand for the exact duty required by the application for the mandamus.

Clement, in reply. *Re Davidson and Miller*, 24 U. C. R. 66, shews there is no necessity for a demand. Where another remedy exists, the adequacy of it is the question to be considered; *Re Stratford, &c., R. W. Co., and Perth*, 38 U. C. R. at pp. 156 *et seq.*; *Re Hamilton and North-Western R. W. Co. and Halton*, 39 U.C.R. 93. I also refer to Tapping on Mandamus, at pp. 142, 139, 291; *Regina* v. *Board of Police of Niagara*, 4 U. C. R. 141; *In re Fergus and Cooley*, 18 U. C. R. 341; *Re Harbottle and Wilson*, 30 U. C. R. 314. The applicant seeks to compel the mayor

to perform a ministerial duty. His legal right to payment of his salary is established; it is not necessary for him to sue the municipality; an action would not enforce what is sought by this application. Argument.

October 7, 1889. GALT, C. J.:—

The applicant claims to be entitled to wages as chief constable of the town of Sandwich. The respondent disputes his right on the ground that he is not chief constable, and consequently is not entitled to receive the wages. If the applicant has a claim for services against the town, his proper remedy is by suit, and he might maintain an action, and as was stated by Brett, M. R., in *Re Nathan*, 12 Q. B. D. at p. 471: "If an action will lie, then a mandamus cannot issue." Bowen, L. J., in the same case states the law to be that, "from time immemorial the Courts have never granted a writ of mandamus when there was another more convenient, or feasible remedy within the reach of the subject."

It was urged by Mr. Clement that, as a majority of the council had passed a resolution calling on the respondent to sign the necessary warrants, it was his duty to do so; but this is not an application on behalf of the council, but on behalf of a person who claims to be entitled to wages, not from the respondent, but from the town of Sandwich, and whose proper remedy is by action.

Motion refused with costs.

[See *The Queen* v. *Lambourn Valley R. W. Co.*, 22 Q. B. D. 463.]

[CHANCERY DIVISION.]

JOHNSTON v. DENMAN ET AL.

Will—Devise—Legacies charged on real estate.

A testator after devising certain pecuniary legacies and a home to two of his children until they came of age, provided as follows: "And I will and bequeath unto my daughter C. J., all my real estate and the remainder of my personal estate after the above legacies are paid."

Held, [affirming ROBERTSON, J.], that the legacies were charged upon the real estate.

Statement. THIS was an appeal from the judgment of Robertson, J., who held that the legacies in the will hereinafter set out were charged upon the real estate of the testator John Johnston.

The material parts of the will in question were as follows:

"I direct them (the executors) to pay my son James Johnston on his attaining the age of twenty-one, one thousand dollars ($1,000) and a home, until he becomes of age (21). I direct my said executors and trustees to pay to my daughter, Jane Johnston, on her attaining the age of twenty-one (21), the sum of two hundred dollars ($200) and common schooling until she becomes of age (21), and a home until she becomes of age (21) * * *

And I will and bequeath unto my daughter Catharine Johnston, all my real estate, and the remainder of my personal estate after the above legacies are paid."

The appeal came on to be argued before the Divisional Court on September 5th, 1889, before BOYD, C., and PROUDFOOT, J.

Shepley, for an infant defendant who appealed. The judgment appealed from is wrong in holding that the legacies are a charge on the testator's land. The learned Judge followed *Greville* v. *Brown*, 7 H. L. C. 689, but this is a different case as there is a distinction drawn between the real and personal estate. The legacies should be paid

out of the personal estate until it is exhausted, and if they are not paid in full they must abate as to the balance, as the devise of the real estate is specific, and is not encumbered by the legacies. The general rule is laid down in *Greville* v. *Brown*, 7 H. L. 689; Theobald on Wills, 2nd edition, 633; but that does not apply here. This rule does not apply when the gift is not of the "residue" of the real and personal estate: Theobald, 3rd ed., 585. Nor does it apply when the gift is of all the realty and the residue of the personalty: *ib.* I also rely on *Wells* v. *Rowe*, 48 L. J. Ch. 476; *James* v. *Jones*, 9 Ir. R. Ch. D. 489, at pp. 496, 497; and refer to 2 Jarman on Wills, 4th ed., 607. Argument.

Idington, Q. C., contra. The will must be construed to give effect to the intention which is manifest here, as the testator knew he had only about $700 worth of personalty when he devised the legacies of $1,000 and $200, and a home to two of his children. The home is a charge on the land, and even if there were no debts the personalty was exceeded by the amount of the legacies. I refer to *Withers* v. *Kennedy*, 2 M. & K. 607; 3 Jarman on Wills, 5th Am. ed., 420.

Shepley, in reply. There is no evidence of what the personalty was except the balance now after six years' time from the death of the testator. No circumstance of that kind can be considered. *Withers* v. *Kennedy*, *supra*, is plainly distinguishable from this case. It is cited in *Theobald*, 2nd ed., at p. 633, before *Greville* v. *Brown*, and is there fully considered. [BOYD, C.—Where is the home mentioned in the will to be?] On the land, but the legatees take no interest in the land.

September 6, 1889. BOYD, C.:—

The sentence to be construed reads thus: "And I will and bequeath unto my daughter all my real estate, and the remainder of my personal estate after the above legacies are paid." *Withers* v. *Kennedy*, 2 M. & K. 607, is an

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BOYD, C.

authority that the payment of legacies is not referable to the last antecedent only, but to the whole sentence. It is as if the testator had written "After the above legacies are paid, I bequeath all my real estate and the remainder of my personal estate to my daughter."

Among the legacies provision is made for a home for two of the testator's children who were infants, till they attained majority. This can only be referable to the farm (the homestead) which he possessed, and it shews that he contemplated the legacies affecting the land.

Thus not only the proper construction but the necessary implication of the language used, justifies the conclusion of Robertson, J., that the land was charged with the satisfaction or payment of the legacies. The judgment should be affirmed with costs out of the estate to the successful party.

PROUDFOOT, J.:—

I think the legacies were charged on the real estate. The testator after bequeathing some legacies proceeded to "will and bequeath unto my daughter, Catharine Johnston, all my real estate and the remainder of my personal estate after the above legacies are paid."

The question is not, whether this devise exonerated the personal estate from its primary liability to pay the legacies, —that was not its effect.

The cases principally relied on by Mr. Shepley were *Wells* v. *Rowe*, 48 L. J. Ch. 476, and *James* v. *Jones*, 9 Ir. R. Ch. D. 489, at p. 496. In *Wells* v. *Rowe*, the testator, subject to the payment of his debts and certain legacies, devised all his real estate, and bequeathed all the residue of his personal estate in trust for a devisee; and Fry, J., said it was not in dispute that these words were sufficient to create a charge on the real estate in favour of the legatees but the question for his decision was, whether the debts and legacies were charged on the real and personal estate *pari passu*, p. 477.

That case seems to me to shew that the legacies in the present case are charged on the real estate. The devise of the real estate, there as in this case, and the residue or remainder of the personal estate, was *after the above legacies are paid*. Language of this kind suffices to charge the legacies on the real estate. Judgment. PROUDFOOT, J.

In *James* v. *Jones*, the testator gave a number of legacies, which were held not to be charged on the real estates, and then devised certain land, subject to a term of 100 years, and all his other lands and all his real estates, and all the residue (if any) of his personal estate to his son. There is no clause subjecting the estates to the payment of legacies as here. And the learned Judge held that it came within the principle of *Wells* v. *Rowe*, *i.e.*, not whether there was a charge on the realty, but whether the personal estate was exonerated.

In re Ovey, Broadbent v. *Barrow*, 31 Ch. D. 113, is another instance where lands are charged, but the personal estate is not exonerated.

The phrase in the present case *after the above legacies are paid* seems to me to apply to the real, as well as the remainder of the personal estate, and is governed by the case of *Withers* v. *Kennedy*, 2 M. & K. 607. There the testator after bequeathing to his wife certain effects devised and bequeathed all freehold, copyhold, and leasehold estates and all the residue of his personal estate, after payment of his just debts and funeral expenses, &c., &c. Sir John Leach determined that in plain construction the words in question were to be referred to the freehold, &c., as well as to the personal estate. And legacies may be charged on real estate by expressions of a character scarcely more decisive, than those which have this operation in regard to debts: 2 Jarman on Wills, 4th ed., 602.

I think the judgment should be affirmed.

G. A. B.

[CHANCERY DIVISION.]

SPAHR v. BEAN.

Husband and Wife—Action of libel—Right of married woman to sue alone—Married Woman's Property Act, 1884—R. S. O. c. 132 sec. 3 (2)—Demurrer.

A married woman may bring an action of libel in her own name without joining her husband as plaintiff.

The omission of the words "either in contract, or in tort or otherwise," found in sec. 2 (2) of the Married Woman's Property Act, 1884 from sec. 3 (2), R. S. O. c. 132 does not limit the legal effect and operation of that section.

Statement. THIS was a demurrer to the statement of claim in an action of libel brought by Sybilla Spahr, a married woman, against one David Bean, on the ground that the plaintiff could not sue without joining her husband as a co-plaintiff.

The demurrer was argued on October 2, 1889, before BOYD, C.

Hoyles, for the demurrer. The plaintiff is a married woman, and cannot sue alone. [BOYD, C.—Is not this case covered by sec. 3 (2) of R. S. O. ch. 132?] I think not, as the foundation of the right of a married woman to bring an action of tort is 47 Vic. ch. 19 (O.) She had no such right previous to that statute: *Amer* v. *Rogers*, 31 C. P. per OSLER, J., at p. 199. That statute sec. 2 (2) gave her the right of suing and being sued without joining her husband "either in contract or in tort, or otherwise." This was consolidated in the revision of 1887, and the words "either in contract, or in tort, or otherwise," were omitted in R.S.O. ch. 132, sec. 3 (2), which leaves the law as it was before 47 Vic. ch. 19 (O.) was passed. [BOYD, C.—But does not the last section (24) of the statute R. S. O. ch. 132 keep the old law in force?]. That does not help the plaintiff here because she had not the right when the statute was passed, and would not have had it if the statute had not been passed. Her right of action is therefore confined to con-

nection with her separate property: R. S. O. 1877, ch. 125. The bringing in of the words "separate property" limits the right: *Scott* v. *Morley*, 20 Q. B. D. 120. A married woman cannot be perfectly free in respect to actions as the statute would imply, for Consolidated Rule 314 provides that she may sue by a next friend, which manifestly indicates there are some cases where a next friend is necessary. Odgers on Libel and Slander says the husband is generally joined even under the recent legislation, 2nd ed., p. 397. Argument.

J. D. King, contra, was not called upon.

October 3, 1889. BOYD, C.:—

The omission of the words "either in contract or in tort, or otherwise," found in sec. 2 (2), in the late revision of the Married Woman's Property Act, 1884, as it now appears in R. S. O. ch. 132, sec. 3 (2) does not limit the legal effect and operation of that section. In an action of libel by a married woman, her husband needs not now join her as co-plaintiff. Though the Act has not, as expressed by Chitty, J., made her a *feme sole* for all purposes, it has rendered her capable of suing and being sued in matters relating to herself personally: *Thynne* v. *Maur*, 34 Ch. D. 466.

In *Weldon* v. *Winslow*, 13 Q. B. D. 784, speaking of libel upon a married woman Brett, M. R., at p. 786, said: "She is suing for a personal injury to herself. * * It seems to me that according to the law of England, the action was always the action of the wife, subject to the right on the part of the defendant of insisting on having the husband joined." But our statute following the English, now says that she can sue "in all respects as if she were a *feme sole*, and her husband need not be joined with her as a plaintiff."

This last case also shews that the proper mode of raising this objection is not by demurrer. This demurrer is overruled, but the defendant may plead on payment of costs.

C. A. B.

[QUEEN'S BENCH DIVISION.]

RE COOKE AND THE VILLAGE OF NORWICH.

Municipal corporations—By-law for contracting debt—Bonus to manufactory—Debentures not payable within twenty years—Municipal Act, R. S. O. ch. 184, secs. 340, 334, 351, 352—Time for moving to quash.

A by-law to raise a sum of money by way of bonus to aid an industry in a village, after being voted on by the electors, was finally passed on 3rd June, 1889, was promulgated on 20th June, and registered on 14th August following.

It stated on its face that it was to come into force on 2nd July, 1889, and provided that the debentures to be issued thereunder should be payable in twenty years from the date of their issue, the 1st of October following.

Held, that, as the period of payment exceeded twenty years from the taking effect of the by-law, it was in contravention of sec. 340, sub-sec. 2, of the Municipal Act, R. S. O. ch. 184, and should be quashed.

Held, also, that the by-law was not one by which a rate was imposed under sec. 334, requiring an application to quash within three months from promulgation, but was a by-law for contracting a debt under secs. 351 and 352, and that an application to quash within three months of its registration was in time.

Statement. ON the 29th of April, 1889, a by-law of the municipal council of the village of Norwich, to raise the sum of $1,700 by way of bonus, to aid in carrying on a general pickling and preserving business and erecting a building for that purpose, was read a first and second time. The first publication was made in the Norwich *Gazette* on the 2nd of May, 1889, and the votes of the electors of the municipality were taken on the 27th of May, 1889; and the by-law, having been then assented to by the electors, was read a third time and passed by the council on the 3rd June, 1889, and numbered 168. The by-law was promulgated by publication thereof in the Norwich *Gazette*, with a notice to the effect that anyone desirous of applying to have it quashed must make his application within three months next after the publication of the notice, the last publication being on the 20th of June, 1889.

The by-law was registered on the 14th of August, 1889.

The by-law provided as follows:

Statement.

1. That it shall be lawful for the municipality of the village of Norwich to grant aid by way of bonus, etc.

2. That it shall be lawful for the reeve or other head of the corporation to cause to be made three debentures of the corporation, two for $600 each, and one for $500, and which debentures shall be payable twenty years after the date of issue, which shall be the 1st of October, 1889, etc.

3. And the debentures shall bear interest at the rate of five per cent. per annum from the date of issue, which interest shall be payable yearly from the date of issue in each succeeding year, the coupons to bear date the 1st of October, 1889.

4. That, for the purpose of providing for the payment of the debentures, a special rate shall be levied, etc.

5. That this by-law shall come into force and take effect on and after the 2nd of July, 1889.

On the 20th of September, 1889, *C. J. Holman*, for Ephraim C. Cooke, a ratepayer of the village of Norwich, obtained from GALT, C. J., an order *nisi* calling on the municipal council of the corporation of the village of Norwich to attend on the first day that the Court should sit after the lapse of four days from the service of the order, and shew cause why the by-law and all proceedings thereunder should not be quashed for illegality, upon the ground that the said by-law did not comply with the statute, and was not authorized by the statute, and was beyond the power in that respect conferred by the statute on the municipality, and created a debt and a liability which was not within the power of the municipality, and that the said by-law purported to create a debt which was payable at a period extending more than twenty years from the day on which such by-law took effect.

The order *nisi* was served upon the clerk of the corporation of the village, at his office, on the evening of the 20th of September, 1889, after six o'clock.

Argument.

October 11, 1889. *C. J. Holman* supported the order *nisi*. The by-law is bad on its face. It is to take effect on the 2nd of July, 1889, and the debentures are not to be payable till twenty years after the 1st of October, 1889. That is more than twenty years, and the by-law is directly contrary to the provisions of sec. 340, sub-sec. 2, of the Municipal Act, R. S. O. ch. 184. The by-law should, therefore, be quashed. I refer particularly to *Canada Atlantic R. W. Co.* v. *City of Ottawa*, 8 O. R. at p. 192; *Vandecar* v. *East Oxford*, 3 A. R. 131; *Harding* v. *Cardiff*, 2 O. R. 329; *In re Barclay and Darlington*, 11 U. C. R. 470; *In re Secord and Lincoln*, 24 U. C. R. 142; *Re Peck and Ameliasburg*, 17 O. R. 54; *Re Armstrong and Toronto*, *ib.* 764; *Re Fenton and Simcoe*, 10 O. R. 27; *In re Revell and Oxford*, 42 U. C. R. 337; *Canada Atlantic R. W. Co.* v. *Cambridge*, 11 O. R. at p. 397.

Another objection to the by-law is that, as shewn by affidavits filed, the granting of the bonus will, for its payment, together with the payment of similar bonuses already granted, require an annual levy for principal and interest exceeding ten per cent. of the total annual municipal taxation, contrary to sec. 320 (*a.*), sub-sec. (4), of the Act, as amended by 51 Vic. ch. 28, sec. 16 (Q).

Aylesworth, for the municipal council of the village, shewed cause. The Court has a discretion, and the facts shew that it ought to be exercised against the application, the by-law having been acted upon and the money paid over. Substantially, the period is not more than twenty years. The date formally named by the by-law as that upon which it was to take effect was the 2nd of July, but the debentures were to be issued upon the 1st of October, and that is the true date. The money was raised before that date upon a note and paid over, but the debentures did not issue till the 1st of October. The Act gives a discretion; see the language of sec. 332, "may quash," which is permissive and not obligatory. It is distinctly laid down that it is discretionary with the Court to quash or not to quash: *Re Grierson and Ontario*, 9 U. C. R. at

p. 632; *Sutherland* v. *East Nissouri*, 10 U. C. R. 626; *In re Hodgson and York*, 13 U. C. R. 628; *In re Lloyd and Elderslie*, 44 U. C. R. 235; *Begg* v. *Southwold*, 6 O. R. 184. That this particular objection is technical and that it is not obligatory upon the Court to act upon it has been held in *In re Gilchrist and Sullivan*, 44 U. C. R. 588. Argument.

I urge as a preliminary objection that the procedure should have been by notice of motion instead of order *nisi*: *Re Peck and Ameliasburg*, 12 P. R. 664. If service of the order *nisi* can be treated as service of a notice of motion, then it was served too late. The by-law was promulgated on the 20th of June, and the order was not served till the 20th September, after four in the afternoon. That service counts as of the next day: Con. Rule 480; *Senn* v. *Hewitt*, 8 P. R. 70. The service was then more than three months from the promulgation, and no motion to quash it should be entertained: Municipal Act, sec. 334. Even if service could be treated as made on the 20th of September, it was too late. The three months should be reckoned exclusive of the first or last day; there could not be four twentieth days of the month in three months.

A technical objection is cured by promulgation. See *Canada Atlantic R. W. Co.* v. *Cambridge*, 11 O. R. at p. 392.

As to the objection that the bonus debt of the village is more than it should be, that is not taken by the order *nisi*, and is first brought before the Court to-day, long after the expiry of the three months; but, as a matter of fact, the objection is answered, for the taxation for 1888 was more than ten times the amount of the annual obligation for payment of bonuses.

Finally, the applicant has not shewn diligence, even if he is within the statutory period, and the rule as to laches is the same as in another case: *Re McAlpine and Euphemia*, 45 U. C. R. 199.

Holman, in reply. The applicant was in time. He obtained and served an order *nisi* on the last day of the three months. Con. Rule 480, with regard to service of

Argument.

papers, does not apply to such a service as this—the initiatory step in the proceeding. See *Murray* v. *Stephenson*, 19 Q. B. D. 60. As to procedure by order *nisi*, see *Hewison* v. *Pembroke*, 6 O. R. 170.

October 18, 1889. GALT, C. J.:—

This is a motion to quash by-law 168 of the village of Norwich, upon the ground that the said by-law does not comply with the statute, and was and is beyond the power in that respect conferred by the statute on the said municipality, and creates a debt and liability which was not within the power of the municipality, and that the said by-law purports to create a debt which is payable at a period extending more than twenty years from the day on which such by-law took effect.

This case was very fully and ably discussed by Mr. Holman, for the applicant, and Mr. Aylesworth, for the corporation, and my attention was directed to a number of authorities. It is, however, in the view I take of the case, unnecessary to refer to them, as my opinion is based on the statute alone. By the 5th section of the by-law, it is declared "that this by-law shall come into force and take effect on and after the 2nd of July, 1889." By the 2nd sec. it is provided "that, for the purposes aforesaid, it shall be lawful for the reeve to cause to be made three debentures, etc., etc., which debentures shall be payable twenty years after the date of issue, which date shall be the 1st day of October next ensuing." It is therefore manifest that the date of payment is more than twenty years from the date when the by-law was to take effect. By sec. 340 of "The Municipal Act," it is enacted: "Every municipal council may, under the formalities required by law, pass by-laws for contracting debts, by borrowing money or otherwise, and for levying rates for payment of such debts on the ratable property of the municipality, for any purpose within the jurisdiction of the council, but no such by-law shall be

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GALT, C.J

valid which is not in accordance with the following restrictions and provisions * * *." By sub-sec. 2, "If not contracted for gas or water-works, or for the purchase of public works, according to the statutes relating thereto, the whole of the debt and the obligations to be issued therefor shall be made payable in twenty years at furthest, from the day on which such by-law takes effect." Again, by sec. 342, the time within which the principal of the debt shall be repayable is fixed at a period not exceeding twenty years. In the present case the period of payment exceeded twenty years, and therefore was in contravention of the statute.

This could not be disputed; but Mr. Aylesworth contended that, owing to the delay of the applicant in applying to quash this by-law, he was now concluded by the provisions of the 334th sec., which enacts, "In case a by-law, by which a rate is imposed, has been promulgated in the manner hereinbefore specified," (that has been done in the present case), "no application to quash the by-law shall be entertained after the expiration of three months from the promulgation." The last day of promulgation was on the 20th of June; and on the 20th of September this notice was served on the clerk of the municipality. There was a good deal of discussion on this point, but, in my opinion, this case does not come within sec. 334, and it is therefore unnecessary to consider it. Upon referring to the Act, it will be seen that sec. 334 comes under the heading, "Quashing By-laws;" and it will be found that no reference has been made in the Act to "creating debts," but numerous provisions have been made respecting what may be termed "ordinary by-laws." It is true the section refers to "a by-law by which a rate is imposed," but the imposition of a rate is not the creation of a debt, and therefore sec. 334 is applicable to sec. 360, which especially refers to by-laws for raising money by rates, but not to by-laws under sec. 340. The sections bearing on this subject are sections 351 and 352, "Registration of By-laws." Section 351 requires that by-laws like the present shall be

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GALT, C.J.

registered, and sec. 352 enacts, "Every such by-law so registered and the debentures issued thereunder, shall be absolutely valid and binding upon the municipality, according to the terms thereof, and shall not be quashed or set aside on any ground whatever, unless an application or action to quash or set aside the same be made to some Court of competent jurisdiction, within three months from the registry thereof." The present by-law was registered on the 14th of August; consequently the plaintiff is within the time limited. The terms of this section also cover Mr. Aylesworth's objection that this application should have been by notice of motion and not by rule *nisi*, for nothing whatever is said except that an application or an action to quash the by-law shall be within the limited time.

Order absolute to quash by-law with costs.

[CHANCERY DIVISION.]

McINTYRE v. THE EAST WILLIAMS MUTUAL FIRE INSURANCE COMPANY.

Fire insurance—Further insurance—Notification in writing—R. S. O. (1877), ch. 161, sec. 40—Payment of subsequent assessment—Estoppel—Damages.

The plaintiff who was insured against fire with the defendants for $1,000 effected a change of mortgages on the insured property. The new mortgagees refused to accept the defendants' policy and insured the property for the same amount with another company, notifying the plaintiff of the fact, by letter. The plaintiff shewed the letter to the defendants secretary-treasurer asking him to bring the matter before the board, and was then informed by him that it would be all right and that there was nothing further to do. Subsequently the plaintiff paid an assessment on defendants' policy, which accrued after the notification of the double insurance, and which was received by defendants and entered in their books. It did not appear that this payment was on account of losses incurred by defendants previous to the double insurance. The plaintiff's property was destroyed by fire the day the "Ontario Insurance Act 1887" came into force.

Held, that the R. S. O. (1877), ch. 161, in force at the time insurance was effected, applied to the policy.

Held, also that the showing of the letter to the secretary-treasurer was not a notification in writing as required by R. S. O. (1877) ch. 161, sec. 40, but

Held, that the policy being voidable at the defendants' option the receipt and entry in their books of the assessment after the secretary-treasurer was aware of the double insurance operated as an estoppel upon them.

By by-laws printed on the policy the defendants' liability was limited to two thirds of the actual loss sustained, and the amount to be taken on one risk was restricted to $2,000. The plaintiff's loss was $2,200 and the other insurance company paid the full amount of their liability, $1,000.

Held, (affirming the judgment of FALCONBRIDGE, J.,) that the plaintiff was entitled to recover as damages, two thirds of the balance of his loss after deducting the amount of the other insurance.

Statement.

THIS was a motion by the defendants, and a cross motion by the plaintiff, against a judgment, which had been recovered by the plaintiff for $800, on a fire insurance policy.

The action was tried at London, on September 11th, 1888, before FALCONBRIDGE. J., and a jury.

It appeared that the plaintiff had, on February 1st, 1886, insured with the defendants his "brick house, kitchen, and

Statement

woodshed," for $1,000; that his property was then mortgaged to a Loan Company, which mortgage was afterwards discharged, and the property mortgaged again to another company, who declined to accept his insurance with the defendants, because they were a mutual company; and they effected an insurance in his name in the London Assurance Corporation for the same amount, and notified him by letter, which he shewed, in December, 1886, to the secretary-treasurer of the defendants, as notice of another insurance, and that officer told him that it would be all right, and that there was nothing further necessary for him to do. The plaintiff paid assessments to this officer in December, 1886, and March, 1887. The first of these assessments was made prior, and the other subsequent, to the insurance in the London Assurance Corporation. The fire occurred on June 30th, 1887. The defendants by by-laws provided that they would not pay more than two-thirds of the actual loss sustained, and that not more than $2,000 would be taken in one risk. The London Assurance Corporation paid the amount insured with them, $1,000; and the defendants refused to pay on the ground of the subsequent insurance, without their consent in manner required by the Mutual Insurance Companies' Act, and without notification in writing, as therein provided for.

The Judge submitted several questions to the jury, which, with the answers, are set out in the judgment of Proudfoot, J.

The jury assessed the amount of the loss at $2,200.

On motion for judgment, upon the findings of the jury, made on December 14th, 1888, the learned trial Judge directed judgment to be entered for the plaintiff for $800 deducting the $1,000 paid by the London Assurance Corporation from the $2,200, and giving two-thirds of the balance.

Against this judgment the defendants moved to enter a judgment for the defendants, or to reduce the amount to $466; contending that two-thirds of the $2,200 was $1,466, and, as $1,000 was paid, the amount, if any, should

be $466; while the plaintiff moved to increase it to $1,000, and interest, contending that he was entitled to the $1,200 as it was less than two-thirds of the $2,200 loss, and did not exceed, with the money received from the other company, the amount of the loss, nor $2,000 on the whole risk; and that the defendants were not entitled to take any benefit from the payment by the other company of more than two-thirds of their policy; and that the plaintiff was entitled to interest. Statement.

These motions came on before the Divisional Court, and were argued on March 1st and 2nd, 1889, before PROUDFOOT, FERGUSON, and ROBERTSON, JJ.

Meredith Q. C., for the defendants. The policy sued on is void. The double insurance was never assented to by the directors, and there was no consent endorsed: R. S. O. 1877, ch. 161, sec. 39. No notice of the double insurance was ever given in writing: R. S. O., 1877, ch. 161, sec. 40; shewing a letter, written to plaintiff, to defendants' agent, is not sufficient. The plaintiff adopted the insurance with the London Assurance Corporation, and his intention was to substitute it for the policy with the defendants. The statutory provisions cannot be waived in mutual companies by acquiescence. I refer to *Merritt* v. *The Niagara District Mutual Fire Ins. Co.* 18 U. C. R. 529; *Smith* v. *The Mutual Ins. Co. of Clinton*, 27 C. P. 441, *Couch* v. *City Fire Ins. Co.*, 38 Conn. 181; *Mason* v. *The Hartford Fire Ins. Co.*, 37 U. C. R. 437. The trial Judge was wrong, in the way he arrived at the amount of the judgment; he should have made it only $466: *The Bank of British North America* v. *The Western Ass. Co.*, 7 O. R. 166.

R. M. Meredith and *W. Nesbitt*, for the plaintiff. Shewing the letter to the secretary-treasurer who, the evidence shows, was the chief executive officer, was a good notification in writing, under section 40, and an intimation that the plaintiff intended to keep both policies alive: *Osser* v.

Argument.

Provincial Ins. Co., 12 C. P. 133. Sec. 40, R.S.O. 1877, ch. 161, was passed since *Merritt* v. *The Niagara District & ., Co.*, cited *supra*, was decided. No special form of notice is required: Speh's & Younger's Law of Employers and Employed, 156; Roberts & Wallace on the Duty and Liability of Employers, 3rd ed. 317. The company did not dissent after this notice and they are bound. There is no good reason now-a-days for applying a different rule, as to waiver, to mutual insurance companies, from that applied to other companies; and this is a case of estoppel, not waiver; the plaintiff was told, "there is nothing else to be done," not, "there is, but we waive it." The company by their receipt of the assessment from the plaintiff in March, 1887, and the entry of it in their books, after their secretary-treasurer was aware of the second insurance gave an assent, and an assent in writing, to the second insurance, and such assent operates as an estoppel against them. See *Parsons* v. *The Victoria Mutual Fire Ins. Co.*, 29 C.P. 22; *McQueen* v. *The Phoenix Mutual Ins. Co.*, *ib.*, 511; and in appeal 4 A. R. 289; *Law* v. *The Hand in Hand Mutual Ins. Co.*, 29 C.P. 1; *Hopkins* v. *The Manufacturers and Merchants Mutual Fire Ins. Co.*, 43 U.C.R. 254; *Benson* v. *The Ottawa Agricultural Ins. Co.*, 42 U. C. R. 282; *Graham* v. *The Ontario Mutual Ins. Co.*, 14 O. R. 358; May on Insurance, 2nd ed., sec. 502 *et seq.*; Bunyon's Law of Fire Insurance, 2nd ed., 186-188. They also argued, that the fire having happened the day that Act came into force, the Ontario Insurance Act, 1887, applied; and that the plaintiff was entitled to recover under its conditions, which superseded and repealed The Mutual Insurance Companies Act provisions. As to amount of judgment and interest they referred to *Graham* v. *The Ontario Mutual Ins. Co. supra*; May on Insurance, 2nd ed., sec. 428; and Porter on Insurance, 2nd ed., sec. 359.

Meredith, Q. C., in reply. The plaintiff was bound to pay the assessments whether his policy was existing or not, as the new insurance did not relieve him from liability, but did release the company.

June 12, 1889. PROUDFOOT, J.:—

Judgment.

PROUDFOOT, J.

This action was tried before the Hon. Mr. Justice Falconbridge and a jury.

On the 1st February, 1886, the plaintiff insured with the defendants several buildings, but the only ones in question now are "brick house, kitchen, and woodshed, for $1,000," insured for three years.

The eighth statutory condition provides that "the company is not liable for loss if there is any prior insurance in any other company, unless the company's assent thereto appears herein or is indorsed hereon; nor if any subsequent insurance is effected in any other company, unless and until the company assents thereto by writing signed by a duly authorized agent." And a by-law No 10 indorsed on the policy provided that, "This company will not pay more than two-thirds of the actual loss sustained by fire on property insured by them in any case; consequently parties insuring will consult their own interests by not insuring their property at more than two-thirds the value." And by-law No. 11, also indorsed, "Not more than $2,000 taken in one risk."

The plaintiff applied to the Canada Life Assurance Company for a loan, and that company by letter of 23rd November, 1886, refused to take the policy with the defendants, a mutual company, as collateral to a mortgage, but required an insurance in a good stock company, and told the plaintiff of their intention to insure in the London Assurance Corporation.

On the 2nd December, 1886, the Canada Life Company insured the plaintiff with the London Assurance Corporation for an amount exactly similar upon the different buildings to the amount insured with the defendants, and on the buildings now in question $1,000. The loss, if any, payable to the Canada Life Company.

On the margin of that policy there was a memorandum, "Insurances with other offices must be declared and indorsed hereon otherwise this policy will be considered void,

Judgment.

PROUDFOOT, J.

and in cases of joint insurances this corporation shall be liable only for its rateable proportion of any loss or damage to the property herein described." No other insurance was declared and endorsed upon it.

The buildings now in question were destroyed by fire on the 30th June, 1887. The value of the property destroyed was $2,200.

In the claim the plaintiff made on the London Assurance Corporation, 28th July, 1887, under the title "Particulars of policies with other offices," the plaintiff stated there was a "Policy in East Williams Mutual for $1,000, on the house, but this is claimed to be void for want of notice of other insurance." The London Assurance Corporation paid the $1,000 insured with them.

In the claim the plaintiff made on the defendants on the same day, he says that at the time of the fire there was no other insurance except a policy in the London Assurance Corporation.

The learned Judge submitted four questions to the jury which with their answers were as follows:

1. Did the plaintiff shew to William McCollum (secretary-treasurer of the defendants) the letter of the 2nd December soon after the receipt thereof, and did the plaintiff then request that it be brought before the board, and was the plaintiff then informed that it would be all right? A. Yes. Or was the first conversation on the subject on the 27th December, and as stated by McCollum? (No answer.)

2. Was the understanding in December, between the plaintiff and McCollum that the policy should be continued in force and that it was not necessary to give any further notice, or was it that it was not to be in force although not formally cancelled? (The answer, "Yes," is put in the margin opposite question.)

3. At the meeting in plaintiff's house in March, 1887, did McCollum, or did he not, tell the plaintiff that it was necessary to put in written notice, or that it was not necessary for plaintiff to do anything else? A. Yes.

4. What do you find to have been the fair value of the premises insured at the time of the fire? A. Twenty-two hundred dollars. Judgment. PROUDFOOT, J.

Upon these answers the learned Judge has entered judgment for the plaintiff for $800.

The defendants move to enter judgment for the defendants upon these findings and admitted facts, or to reduce the damages to $466. The plaintiff moves to increase the damages to $1,000.

So far as the question of damages is concerned, the argument for the defendants is that the defendants only agreed to pay to two-thirds the value of the property, and two-thirds of $2,200, would be $1,466, and the plaintiff having got $1,000 from the other company, he should only get the difference of $466.

For the plaintiff it was said that $1,000 from the defendants would not equal the two-thirds ot the value, and that sum with the $1,000 received from the other company, would not cover the whole loss by $200.

The mode adopted by the learned Judge was this. He deducted from the whole value of $2,200, the $1,000 received from the London Assurance Corporation, and then gave judgment for the plaintiff for two-thirds of the balance of $1,200, or for $800. And I think the learned Judge took the correct view. The meaning of the agreement was, that the company was to pay two-thirds of the value of the plaintiff's interest, and after receiving $1,000 from the London Assurance Corporation, his interest was $1,200, and two-thirds of that is $800.

So far as the complaint of the findings of the jury is concerned as being against the weight of evidence, I do not think in the view of recent decisions, that we can interfere. There was evidence sufficient to justify a judgment for the plaintiff, or for the defendants, as the evidence was believed, and the jury has decided upon the weight to to be given to it: *The Metropolitan R. W. Co.* v. *Wright*, 11 App. Cas., 152. The jury having found verbal notice to the agent of the defendants, and that the plaintiff shewed

Judgment.

PROUDFOOT, J.

to him the letter of the 2nd December, the question is, whether the defendants can be affected by it or not, or if in any other manner they are liable to the plaintiff's demand.

It was contended for the plaintiff that the only law governing this case was the 50 Vic. ch. 26, included in R.S.O. 1887, ch. 167 which came into force on the 30th June, 1887, the day the property in this case was burned, but a considerable time after the policy had been signed.

It is true that the statute repeals chs. 160, 161, and 162 of the Revised Statutes of 1877, but it would require very express language indeed to vary or abrogate contracts made before it was passed; no such language is to be found in it, and it must be treated as applying to future insurances. (*a*)

The Interpretation Act, sec. 43, indeed provides that the repeal of an Act shall not affect any right of action accruing, accrued, or existing under the previous law.

It was said to have been decided to the contrary by the Privy Council in *The Citizens Ins. Co.* v. *Parsons*, 7 App. Cas. 96, but on referring to the case it will be found that the Uniform Conditions Act 39 Vic. ch. 24 (O.), came into force on July 1st, 1876, while the policy in the *Parsons'* Case was dated May 4th, 1877 (4 S. C. R. 217), so that the question could not have arisen. The argument was that in *Parsons'* Case the Uniform Conditions Act was held to apply to previous policies, and that sec. 114 of R. S. O. ch. 167, 1887, which contains those conditions, should also apply to previous policies.

It will be convenient now to ascertain the law really applicable to this case.

The 6 W. IV. ch. 18 sec. 22 was a rigid enactment that a double insurance was *void* unless existing with consent of the directors signified by indorsement on the policy signed by the president and secretary.

The case of *Merritt* v. *Niagara District Mutual Fire*

(*a*) See *Re St. Philip's Church and The Glasgow and London Ins. Co.*, 17 O. R. 95.—REP.

Ins. Co., 18 U. C. R. 529 was decided upon that statute, and it was held that notice to an agent of the defendants of another insurance so that he might indorse defendants consent or notify plaintiff of their refusal, neither of which was done, did not avail to prevent the policy being void.

In 1859, however, the 22nd Vic. ch. 46 sec. 13 enacted that if notice in writing was given to the company of the intention to effect an insurance, it was to be deemed to be assented to unless dissented from in two weeks; in case of dissent the liability on premium notes for future liabilities was to cease.

Both of these sections were included in the Consolidated Statutes of Upper Canada, ch. 52 secs. 28, 29. And in 1873, they were again repeated in the 36 Vic. ch. 44, secs. 37, 38, (O.), but to sec. 38, the equivalent of sec. 29 of the Consolidated Statutes was added, that the policy was to be void at the option of the directors of the company. Great difficulty was found in giving a harmonious construction to these sections of 36 Vic., and in *McCrea* v. *The Waterloo County Mutual Fire Ins. Co.*, 1 A. R. 218, Harrison, C. J., considered that *void at the option of the directors* in sec. 38 modified *void* in sec. 37 so as to make that also to be void at the option of the directors.

Both these sections 37 and 38 of the 36 Vic. were included as secs. 39 and 40 of the R. S. O. 1877 ch. 161.

In 1880 the Supreme Court in *The Mutual Fire Ins. Co. of the County of Wellington* v. *Frey*, 5 S. C. R. 82, decided that the Uniform Conditions Act of 1876 did not apply to mutual insurance companies. In 1881, however, the 44 Vic. ch. 20 sec. 28, (O.) enacted that it should apply to such companies.

The foregoing was the law applicable to the present case. The 8th condition of the Uniform Conditions provides that the company is not liable for loss if any subsequent insurance is effected in any other company, unless and until the company assent thereto by writing, signed by a duly authorized agent. The secs. 39 and 40 of R. S. O., 1877, ch. 161 are to be construed together, and this in effect renders sec.

Judgment.

PROUDFOOT, J.

39 of no value, which was the reason why it was dropped from the revision of 1887.

The notice to be given to the company is required to be given in writing. In the present case there was no notice in writing directed to the company, the letter from the solicitors of the Canada Life was directed to the plaintiff, and he showed it to the agent of the defendants, for I have no doubt that McCollum was such an agent as a written notice might have been given to; but that does not fulfil the requirements of the statute, which are so precise that I do not think they can be dispensed with without a more direct act of the company than the receipt of what is nothing more than a verbal notice.

This, however, does not determine the question of the liability of the defendants, for it appears that the plaintiff made two payments on his premium note to the company. The first of these was for an instalment due prior to December 2nd, and can have no bearing on this matter. But the second was on March 22nd, 1887, for an instalment that fell due after December 2nd. The payment of this was made to McCollum, the agent duly authorized to receive such payments, and he had full notice of the subsequent insurance. If the question had depended on the notice alone, I do not think it enough, as not being in writing; but an entirely different question arises when we deal with the payment of the premiums to him, and I think that his knowledge of the subsequent insurance when he received the money and carried it into the books of the company with the knowledge of which the company must be affected, operates as an estoppel upon the company.

The receipt of the premium treats the policy as existing, and the directors of the company had an option to treat the policy as valid. The receipt of this money must, I think, be treated as an exercise of this option. Had the policy been avoided by the subsequent insurance, there was no liability upon the plaintiff to continue payments on his premium note, unless on account of losses previous to the second insurance, of which there was no evidence.

McCollum proves that he received the money for this instalment of premium, and credited it up to the company, who got the benefit of it, it was entered in the public books of the company. Judgment. PROUDFOOT, J.

Both parties agree that the plaintiff intended to effect a double insurance, the plaintiff to enforce both policies; the defendants to make the first void for want of notice of the second.

I think the judgment right, and, as both parties fail in their objections to it, there will be no costs.

FERGUSON, J.:—

This action is upon a policy of insurance claiming one thousand dollars damages. The principal defences are: (1) That the policy was made subject to the statutory conditions, which were duly printed on the policy: that after the making of the policy the plaintiff effected a subsequent insurance on the property, which was subsisting by the act and with the knowledge of the plaintiff at the time of the fire: that this double insurance did not subsist with the consent of the directors of the defendants signified by indorsement of the policy signed by the secretary or other officer authorized so to do or otherwise acknowledged in writing. (2) That the policy was and is subject to a condition that if any subsequent insurance should be effected in any other company the defendants should not be liable for loss under the policy unless or until the defendants should assent thereto by writing signed by a duly authorized agent: that a subsequent insurance was effected in another company and the defendants did not assent thereto by writing signed by a duly authorized agent, and that this subsequent insurance was subsisting at the time of the fire.

The plaintiff replies to these defences that at or immediately after the time of the effecting of the subsequent insurance, the plaintiff informed the defendants of the facts and desired and required that the defendants' assent should

Judgment.

FERGUSON, J.

be given thereto in manner required by law: that the defendants then, and with full notice and knowledge of the facts informed the plaintiff that nothing further was requisite or necessary to be done to continue the policy in question in full force and virtue: that the defendants by their acts and consent prevented the plaintiff from obtaining the assent which the plaintiff would otherwise have obtained and the absence of which, the defendants now set up as a defence, and the plaintiff claims that the defendants should be and are estopped from setting up such defence.

It appears that the plaintiff before the trial gave further particulars of evidence intended to be given by him in support of his replication of estoppel, and amongst such particulars are: (3) The conversation between the plaintiff and the defendants' secretary at the plaintiff's house on the 22nd day of March, 1887. (4) The receipt by the defendants from the plaintiff of the sum of $3 on the policy in question on the 2nd day of March, 1887. (5) The carrying on of the plaintiff's insurance and the policy sued on, in every way as valid and subsisting, with full notice and knowledge of the matters alleged as vitiating them, until after the loss in question, and the making of the plaintiff's claim, and proof in respect thereof.

In these particulars there are also two other things spoken of, namely, a conversation between the plaintiff and the defendants' secretary at the Nairn school house on the 17th December, 1886, and the receipt by the defendants from the plaintiff of a sum of $3 premium on the policy on or about the 26th day of December, 1886.

The subsequent insurance was one effected with the London Assurance Corporation. The particulars of this I need not state as they are sufficiently referred to in the judgment of Mr. Justice Proudfoot.

One William McCollum was the secretary-treasurer of the defendants. He had been secretary from the year 1879, and treasurer from April, 1884, and he appears to have had and exercised very large powers as agent of the defendants.

Judgment. FERGUSON, J.

The jury found that the plaintiff shewed to McCollum a letter of the 2nd December, soon after the receipt thereof by him, and that the plaintiff then requested the matter to be brought before the board, and that the plaintiff was then informed by McCollum that it would be all right.

This was a letter received from solicitors who had acted in effecting the subsequent insurance complained of, stating that it had been effected, and advising the plaintiff to notify the defendants of the fact, &c.

The jury have also found that it was the understanding in December between the plaintiff and McCollum that the policy in question should be continued in force, and that it was not necessary to give any further notice.

The jury have found that at the meeting in the plaintiff's house in March, 1887, McCollum told the plaintiff that it was not necessary to put in a written notice, or do any thing else.

It is proved beyond all question that the premium of $3 upon the policy in question was paid and received on the 22nd day of March, 1887, and that it was by McCollum regularly entered in the books of the defendants.

The fire occurred on the 30th day of June, 1887. The Act 50 Vic. ch 26 (O.), came into force on the same day, and there was some contention at the bar as to whether this or the former statutes were the ones governing this case.

The 28th section of ch. 20 of 44 Vic. (O.) declared that the provisions of the Fire Insurance Policy Act, ch. 162 R. S. O., 77, should apply to Mutual Fire Insurance Companies, and to all policies to be thereafter issued by any Mutual Fire Insurance Company, except as is there excepted.

The policy in question was issued long after that time and does not fall under the exceptions in the section 28, and after a perusal of the statutes and considering the matter as well as I have been able I agree in the conclusion that sections 39 and 40 of ch 161 and ch. 162 R. S. O. 1877 are the provisions that are applicable here and not 50 Vic. ch. 26.

Judgment.

FERGUSON, J.

Section 39 provides for the consent of of the directors to the double insurance being indorsed upon the policy and signed by the secretary or other officer authorized to do so or otherwise acknowledged in writing. Clearly this was not done. The plaintiff might instead of taking this course avail himself of the provisions of section 40 by giving notice in writing of the double insurance: *McCrea* v. *The Waterloo County Mutual Fire Ins. Co.*, 1 A. R. at p. 221, and showing that there was no "dissent" within two weeks as mentioned in this section.

It was contended that the showing the letter of the 2nd day of December, by the plaintiff to the agent McCollum amounted to and was a written notice to defendants within the meaning of section 40, but I cannot think this contention was right. I am of the opinion that McCollum was a good agent to receive written notice, but I cannot think that the mere showing him this letter was such written notice, that is, I do not think it was a "notification in writing," within the meaning of the statute, sec. 40, but I think it clear that McCollum had at and after the time he was shown this letter full knowledge and ample verbal notice of all the material facts respecting the double insurance, yet I do not think that the plaintiff has shown a compliance with the requirements in this respect of either sections 39 or 40 of the Act; but looking at the findings of the jury and the evidence I cannot but be of the opinion that the plaintiff was lulled into inaction in regard to the subject by the conduct and representations of McCollum acting as the agent of the defendants: he at the time having full notice and knowledge of the facts respecting the double insurance, and it seems to me plain that he and the plaintiff went on pursuant to the understanding, found by the jury to have existed, and treated this policy as a good and valid policy notwithstanding the double insurance now complained of by the defence.

The effect of the plaintiff having failed to comply with the provisions of section 39 and with the requirements of condition eight referred to in the fifth statement of defence,

and of his not having availed himself of the provisions of section 40, would be, I think, to render the policy voidable only and not void: that is to say void at the option of the defendants: see the reasoning of the late Chief Justice Harrison in *McCrea* v. *The Waterloo County Mutual Fire Ins. Co.*, at 229, and the cases there referred to, as to the two sections of the Act, or rather two similar sections, and in regard to the condition of the contract there are many authorities which I think show that such is the law. Judgment. FERGUSON, J

The defendants are able to say to the plaintiff that he did effect the double insurance, and that he did not obtain the indorsement mentioned in section 39 or the assent mentioned in the 8th condition and that he did not give the "notification in writing" mentioned in section 40.

The plaintiff is in a position to say, to the defendants admitting all this to be true, the policy did not thereby become void, but it was voidable at your option and you did not avoid it, or at least raise the question as to whether the policy had been voided, or the contrary of this had taken place, and then as to this question: There was full notice to the agent, McCollum, of the double insurance complained of by the defence as early as sometime in December. Notice to this agent must, I think, be considered notice to the defendant company, if there are any cases in which notice to the agent is notice to the company, and there are such cases, no doubt.

The matter goes on without any dissent or objection from any one until after the happening of the fire that occasioned the loss which took place on the 30th June, and until after the plaintiff had furnished and proved his claim under the policy, and in the meantime the defendants had, through their agent, McCollum, received from the plaintiff a further premium, not being a premium in arrear representing a period prior to the double insurance and notice thereof to the agent, but for a period subsequent thereto, which premium, as already stated, was duly and properly entered in the books of the company by McCollum, and this long before the fire, and on the same 22nd day of March, and all this with the full notice before referred to.

Judgment.

FERGUSON, J

McCollum was the agent to receive premiums, as well as many other things. He was the chief, if not the sole executive officer of the defendants, and surely notice to him in doing an important act of his duty, such as receiving payment of a premium, must be considered as notice to the principal for whom he was acting.

I am of the opinion that this conduct of the defendants, or on their behalf, precludes them from succeeding upon the defences to which I have referred. I think they are estopped from availing themselves of such defences. I think the plaintiff succeeds upon his replication of an estoppel looked at in the light of the particulars given under it.

During the argument some question was discussed as to whether or not the plaintiff really intended that both insurances should be kept on foot. I do not see any reason to doubt that he did so intend, and it appears to me that both parties intended that this should be done.

The tenth clause under "Variations of conditions" and "By-laws of the defendants," is as follows:

"This company will not pay any more than two-thirds of the actual loss sustained by fire on property insured by them in any case," &c.

The property destroyed was valued by the plaintiff at $2,200, and there is no complaint or objection as to this. The plaintiff recovered $1,000 insurance from the other insurance company. No question as to apportionment arises under condition three of the policy. The learned Judge subtracted this $1,000 from total loss and ascertained the plaintiff's loss at $1,200, and then entered judgment for the two-thirds of this sum $800, and I do not at present perceive that he was wrong in so doing. In this I agree with the opinion of Mr. Justice Proudfoot.

ROBERTSON, J.—I concur in the judgments just delivered.

G. A. B.

[CHANCERY DIVISION.]

QUAINTANCE V. THE CORPORATION OF THE TOWNSHIP OF HOWARD.

Municipal corporation—Agreement subject to passing of a by-law not executed by corporation—Work done under it—Mandamus to raise the money.

Plaintiff entered into an agreement in writing with defendants to do certain work under a provisional by-law, and which agreement contained this clause. "Notwithstanding anything hereinbefore contained to the contrary this agreement * * is made subject to the final passing of the said by-law * * and in the event of the said by-law not being passed * * then this agreement shall be null and void * * ."

The by-law was never finally passed and the agreement was produced at the trial by defendants to prevent the plaintiff recovering as on a *quantum meruit*.

Held, [reversing FERGUSON, J., who retained his opinion,] that the defendants were bound by the contract, and that the plaintiff on shewing the approval of the engineer, as provided by the agreement, was entitled to a *mandamus* to the defendants to raise the money.

The stipulation as to the final passing of the by-law should receive a reasonable construction and could only be invoked when the work was not properly performed.

THIS was an appeal from the judgment of FERGUSON, J. Statement.

The action was brought on an agreement for work done on a township drain, and was tried at Chatham, on October 24th, 1888.

Douglas, Q. C., and *J. A. Walker*, for the plaintiff.
Matthew Wilson and *W. R. Hickey*, for the defendants.

The plaintiff had entered into an agreement in writing with the defendants to do the work, and had executed and left it with them, and when produced it appeared never to have been executed by the defendants.

The defendants' counsel however declined to make any objection on that account and admitted it as a valid agreement. It contained the clause set out in the judgment of Proudfoot, J., but the plaintiff's counsel having failed to prove the happening of any of the circumstances mentioned in the agreement, and so being unable to prove his case

Statement.

under the agreement he sought to recover as for a *quantum meruit*.

This the learned Judge refused to allow, holding that the agreement must first be got rid of, and that as long as it stood in the way, the plaintiff could not recover on a *quantum meruit*, and he dismissed the action with costs.

From this judgment the plaintiff appealed to the Divisional Court, and the appeal was argued on March 2nd, 1889, before PROUDFOOT, FERGUSON, and ROBERTSON, JJ.

Douglas, Q. C., for the plaintiff. The plaintiff did the work for the defendants and should be paid. He was paid in part. The contract produced by the defendants never was an actual contract, as it never was executed by the defendants, and it depended upon the passing of a by-law which was never passed. He worked under the instructions and orders of the defendants. The trial Judge should have allowed evidence to show the contract did not take effect, and the plaintiff should have had judgment as on a *quantum meruit*. The work was done outside of the contract: *McDougall* v. *Hall*, 13 O. R. 166; *Pym* v. *Campbell*, 6 E. & B. 370; *Wallis* v. *Littell*, 11 C. B. N. S. 369; *Lindley* v. *Lacey*, 17 C. B. N. S. 578.

Aylesworth, contra. The by-law was provisionally but not finally passed. The plaintiff launched his action on the agreement and cannot recover on anything else. He proved the agreement at the trial. Even if defendants, delay or neglect to pass the by-law was wilful, the plaintiff could not give evidence of an abandonment after this action was commenced.

Douglas, Q. C., in reply. Plaintiff claimed for work and labour and wished to prove it outside of the agreement.

June 12, 1889. PROUDFOOT, J.:—

This action is brought by the plaintiff for work done on the McGregor Creek drain, in the township of Howard.

Judgment.
PROUDFOOT, J.

The plaintiff, on examination, said he had no other agreement with the township of Howard than what appeared in a writing shown to him.

That writing is dated 24th September, 1887, and purports to be between the township of Howard, of the first part, the plaintiff, of the second part, and two sureties for the plaintiff, of the third part; it is signed by the plaintiff and his sureties, but not sealed or signed by the defendants.

It stipulated that the work was to be commenced not later than the 28th day of September next, and was to be completed not later than the 20th day of November next, *i. e.*, it was to be begun four days after the date of the paper, and prosecuted to completion within fifty-three days.

The paper recites that the council of the township had passed, or purported to pass, a by-law for the doing and making of certain works connected with McGregor Creek drain,—this was a provisional by-law—and the paper stipulates that the work was to be done and completed as required and provided for in said plans, etc., and the by-law *as finally passed* adopting the same; and the paper contained the following clause:

"Notwithstanding anything hereinafter contained to the contrary, this agreement and obligation is made subject to the final passing and confirmation of the said by-law authorizing the construction of the said works and, in the event of the said by-law not being finally passed, or of its being set aside or quashed, or declared to be invalid, then this agreement also shall be null and void, otherwise, shall be and remain in full force and virtue."

By this curious arrangement that may be called a trap for the unwary, the plaintiff was to do the work and to run the risk of the passing of a by-law, and which, if not passed, he would get nothing.

I am not prepared to say that the plaintiff might not have proved a collateral agreement, if there had been one, by officers of the corporation, by which he should at all events receive a *quantum meruit*; but the plaintiff nega-

Judgment.

PROUDFOOT, J.

tives any such agreement, and indeed, from the terms of the paper he signed, it was not likely there would be any such.

It is said the defendants are not bound by that paper, as it was not executed by them. It may be so, but in that case there is no other shown, and the plaintiff cannot make the defendants liable for doing work not authorized by them.

But I think the defendants are bound by this contract. It was not executed in duplicate. The plaintiff never had it. It was retained by the defendants in their possession. They now produce it to prevent the plaintiff from recovering upon a *quantum meruit* by showing that he had entered into a written agreement with them for the performance of the work. They must be taken to have adopted the contract, and to be bound by its terms as well as the plaintiff.

The stipulation as to the agreement being subject to the final passing of the by-law must receive a reasonable construction. The defendants cannot be allowed to say, we have stipulated with you for the immediate performance of the work, and, after having received the benefit of the work, to escape liability by their own act in refusing to pass the by-law. Their right to refuse to pass the by-law must be confined to the case where the plaintiff has not performed his work properly, under the terms of the contract. They are entitled, however, to have the report of the Engineer as to the completion of the work as provided for by the agreement.

From the course taken by the plaintiff at the trial in proceeding as for a *quantum meruit*, no evidence was given of the approval of the Engineer. And this the plaintiff should have an opportunity of supplying. The statement of claim, asks, among other things, for a mandamus to compel the defendants to raise money by assessment to pay the plaintiff, which is in effect to pass the by-law confirming the provisional by-law. And this, I think, the plaintiff has a right to ask, but he must be

prepared to shew that he has complied with the terms of the contract.

Judgment.

PROUDFOOT, J.

I doubt whether the refusal of the defendants to pass the by-law would entitle the plaintiff to sue as for a *quantum meruit*. The defendants could not be compelled to pay for the work out of the general funds of the township. The money has to be raised by assessment on the parties benefited in the manner pointed out by the statute. So it was not important to show the resolution of the defendants, passed after the the beginning of this action, to rescind the provisional by-law.

Upon the whole, I think there should be a new trial—to enable the plaintiff to supply the evidence to entitle him to a mandamus, if he can, and the costs should abide the event.

ROBERTSON, J.:—

I concur in the judgment of my brother Proudfoot just delivered.

FERGUSON, J.:—

My opinion at the trial was, that the plaintiff failed to make any case under the agreement sued on, and that he was not at liberty to seek to recover on a *quantum meruit*, as long as the agreement existed as a valid one, and after hearing the argument here I am not at all convinced that I should change it.

G. A. B.

[CHANCERY DIVISION.]

REDICK V. SKELTON.

Arbitration and award—Publication, what is—Partnership—Right of arbitrators to declare lien.

Held, that an award is published (for the purpose of regulating the time for an application to set it aside) when the parties have notice that it may be had on payment of charges. It is not needful that there should be notice of the contents of the award before it can be said to be published.

Arbitrators upon a reference to settle disputes between parties, found the balance due from the firm to one of the partners, and declared in the award that this balance was a lien upon the assets to be paid out of them specifically.

Held, that they had the power to give this direction, and the partner in question had power to sell to satisfy the lien out of the specific property applicable of which he was joint owner.

Statement. THIS was a motion to continue until the trial of this action on an injunction granted herein upon August 21st, 1889, restraining the defendant from in any wise acting under an award dated May 15th, 1889, and made in the matter of a reference to arbitration between the plaintiff and defendant, arising out of various disputes in connection with their co-partnership business of Skelton & Company, and also from selling or disposing of the assets or book debts of the said partnership.

It appeared that the award, which was in writing, after finding the respective amount of capital which the defendant had in the business declared as follows: "The said sum is to be paid to him at once by said business, and for which he shall have a lien."

The writ in this action was issued upon August 17th, 1889, and the affidavit filed in support of this motion set up various grounds on which the award should in the opinion of the deponent be set aside.

It also appeared that the defendant had advertised the partnership property for sale under the lien given by the award.

The remaining facts in the case sufficiently appear from the judgment. Statement.

This motion came on for argument on September 24th, 1889, before BOYD, C.

C. J. Holman, for the plaintiff. There was no power in the arbitrator to give a lien. Besides, the award is not a complete one. Interest, also, was allowed contrary to the terms of the submission. I refer to *Mowatt* v. *Lord Londesborough*, 3 E. & B. 307; Harr. C. L. Proc. Act, 2nd ed., p. 231, and cases cited.

Marsh, contra. Redman on Awards, p. 263, shews the provisions under which this motion has to come. The action was begun on August 17th, 1889: *Smith* v. *Whitmore*, 1 H. & M. 576, 2 DeG. J. & S. 297; *Auriol* v. *Smith*, 1 Turn. & R. 121, shew that the plaintiff must fail in this action to get relief against the award. As the award cannot be dealt with the Court will not grant any injunction. As to the right to sell, Bigelow's Story's Eq. 13th ed., vol. 2, p. 367, note (*d*) discusses the question of whether the existence of a lien creates an implied power of sale: *Ex parte Official Receiver, In re Morritt*, 18 Q. B. D. 222, contains a discussion on the same point. These authorities are in the direction of establishing that there is a power of sale. If a lien does not give a power of sale then at any rate the injunction is too wide. It restrains him from taking any step on his award.

Holman in reply. The only question it seems necessary to go into now is, that of moving against the award. The notice to constitute publication of an award, must be that of the contents of the award. This is settled: *Brooke* v. *Mitchell*, 8 Dowl. P. C. 392; *Dexter* v. *Fitzgibbon*, 4 C. L. J. O. S. 43. This being so I have till next Michaelmas Sittings in which to move against the award. The attack on the award has not been answered. We should, I submit, have this injunction continued to include next Michaelmas Sittings.

Judgment.

BOYD, C.

September 25th, 1889. BOYD, C. :—

An award is published (for the purpose of regulating the time for an application to set it aside) when the parties have notice that it may be had on payment of the charges. Then they may have if they please notice of its contents, and the time begins to run against the party dissatisfied: *Macarthur* v. *Campbell*, (1833), 5 B. & Ad. 518. Objections arising upon the face of the award may always be taken advantage of, but those arising *dehors* must be made before the last day of the term next following the publication: *S. C.* as reported in 2 A. & E. 52. That publication is not when the award is made but when the parties have actual notice of its being made: *Paxton* v. *Great Northern R. W. Co.*, (1846), 8 Q. B. 935, 946. It is not needful that there should be notice of the contents of the award, as argued, before it can be said to be published. That view is not supported by *Brodie* v. *Mitchell*, 8 Dowl. P. C. 392, as better reported in 6 M. & W. 473. Notice was given of the award being completed and ready for delivery in this case on or about the 15th May, 1889. Easter Term elapsed and no motion was made to impeach this award, and it became valid as against all extrinsic objections: *Re Corporation of Huddersfield and Jacomb*, L. R. 17 Eq. 476, and 10 Ch. 92, shewing that Common Law terms are to be regarded and not merely the sittings of the Chancery Divisional Court.

The grounds on which the injunction was granted are disclosed in the affidavit of James Redick sworn on August 14th, 1889. He says that the arbitrators wrongfully, as he claims, gave Skelton a lien on the plant of the business for $1589.96. This is based upon an alleged error in taking the accounts by which $500 or $600 too much is allowed to the defendant. He puts his ground for relief thus, that an injunction should be granted staying the lien sale pending a motion to set aside or refer back said award for correction.

But the Court cannot interfere with the award which

Judgment.
BOYD, C.

appears good on its face so far as the figures are concerned, so that the reason alleged for seeking the injunction disappears. As between the parties to this record the defendant has the right to assert his claim to be paid the amount awarded which as found "is to be paid to him at once by the said business, and for which he shall have a lien."

This is a case of partnership dealings in which the domestic forum selected by the parties has arranged the terms of winding up as between themselves. There was power to give the direction in question, viz., that the balance due from the firm to the defendant (a partner) was a lien upon the assets and to be paid out of them specifically.

As stated by Hall, V. C., in *Potter* v. *Jackson*, 13 Ch. D. 845, such a debt for the purposes of administration shall be treated just as it would be if it were a debt to anybody else, *i.e.*, as something which must be provided for before the partners can take as between themselves anything as the fruit of their joint adventure.

This being equivalent to a debt due by the partnership there is power in one partner to sell for the purpose of paying that debt and satisfying that lien out of the specific property applicable of which he is also joint-owner. That right of sale is an incident of winding-up the concern which will not be interfered with, unless upon special grounds not presented in this application: *Butchart* v. *Dresser*, 4 DeG. M. & G. 542; *Murphy* v. *Yeomans*, 29 C. P. 421.

In ordinary cases of partnership administration by the Court this lien of the partner does not arise till after creditors are provided for. It is said to exist by force of the partnership upon the surplus assets, and is usually realized by sale of the property under the supervision of the Court, when the matter is *sub judice*: *Mycock* v. *Beatson*, 13 Ch. D. 384.

But here the claims of creditors have not been investigated and I am bound to assume—the award being final—that this was assented to by both parties: *Wood* v. *Wilson*, 2 C. M. & R. 241.

Judgment.

BOYD, C.

This being so, the lien exists and is to be satisfied out of the particular property under the control of the defendant. He has as partner and joint owner the legal right to sell for the purpose of satisfying this lien, and no case is made for the interference of the Court on that head: See *Ex parte Official Receiver, In re Morritt*, 18 Q. B. D. 222, as compared with *Mulliner* v. *Florence*, 3 Q. B. D. 484, neither of which however is applicable to the case of a partner with right of lien.

Though this point was somewhat argued before me the injunction was not obtained with a view of questioning the right to sell to satisfy the lien in a proper case: it was moved for *alio intuitu*, and in the absence of any evidence that the sale is going to be conducted in a manner prejudicial to the plaintiff I do not think the interim order should be continued.

I refuse the application; the costs will be dealt with if the action proceeds.

A. H. F. L.

[CHANCERY DIVISION.]

RE CHANDLER.

Will—Construction—Life estate—Remainder to sons—Rule in Shelley's case.

A will contained the following clause: "To my son G. W. I give and bequeath during his life time, the south-east quarter of said lot 4 before mentioned, and at his death to go to and be vested in his son W. C., or in case other sons should be born to my son G. W., then to be equally divided between all the boys."

Held, that G. W. took a life estate only, and that there was a vested remainder in fee in his sons, as a class, which would let in all born before his death.

Statement.

THIS was a petition under the Vendor and Purchaser Act, wherein it appeared that the vendor, George Washington Chandler, claimed the lands contracted to be sold under the will of William Chandler, deceased, dated August 18th, 1877, by virtue of the following devise:—

"To my son George Washington I give and bequeath during his life time the south east quarter of said lot number four before mentioned, and at his death to go to and be vested in his son William Clarence; or, in case other sons should be born to my son George Washington, then to be equally divided between all of the boys."

At the time of the execution of the will the vendor had only one son, but since then two other sons had been born to him.

The question was, whether the plaintiff took only a life estate under the above devise, and the sons an estate by purchase in remainder, or whether the plaintiff took an estate in tail male, and was able to convey to the purchaser.

The matter came up for argument on September 24th, before BOYD, C.

Atkinson, Q. C., for the vendor. This case comes in one way within *Wild's Case*, 6 Rep. 17, but the question is whether the difference between the law of descent in this country and in England affects it. We contend that the sons are a class and as such are brought within *Wild's*

Argument. *Case, supra*, and *Shelley's Case*, 1 Rep. 93, 104 A. I refer to *Mellish* v. *Mellish*, 2 B. and Cr. 520; *Bifield's Case*, cited by Hale, C.J. in *King* v. *Nelling*, 1 Vent. 231; *Garrod* v. *Garrod*, 2 B. & Ad. 87; *Andrew* v. *Andrew*, 1 Ch. D. 410; *Doe dem. Candler* v. *Smith*, 7 T. R. 531; *Doe dem. Atkinson* v. *Featherstone*, 1 B. & Ad. 944. I say George Washington has an estate tail: *Roddy* v. *Fitzgerald*, 6 H. L. Cas. 823.

Holman, for the purchaser. On the face of the will there is an indication of intention that George Washington is to have it only during his lifetime. There is an absence of technical terms. Then the provision for equal division among the boys strengthens the contention that George Washington only has a life estate. I refer to *Dickson* v. *Dickson*, 6 O. R. 278; *Smith* v. *Smith*, 8 O. R. 677; *Jordan* v. *Adams*, 9 C. B. N. S. 483; *Swert* v. *Platt*, 12 O. R. 229; *McPhail* v. *McIntosh*, 14 O. R. 312; *Bradley* v. *Cartwright*, L. R. 2 C. P 511, 522; *Morgan* v. *Thomas*, 9 Q. B. D. 643; *Andrew* v. *Andrew*, 1 Ch. D. 410; *Bennett* v. *Earl of Tankerville*, 19 Ves. 170; *Jesson* v. *Wright*, 2 Bli. 1; *Re Casner*, 6 O. R. 282, may perhaps also throw light.

Atkinson, in reply. The cases referred to by the purchaser, contain in each instance some disposition of the property over after the devise of the children, bringing it within the English cases.

September 25th, 1889. BOYD, C.:—

The intention of the testator in the 3rd section of his will is plain enough, and he uses no terms of art which require a technical meaning to be given to them. The estate devised to his son George is for life only, and at his death the land is to be vested in his son William, or if George has other sons then to be equally divided among all the boys. There is a vested remainder in fee in the sons of George as a class, which will let in all born before the death of George the life tenant.

The petition fails, and should be dismissed.

A. H. F. L.

[CHANCERY DIVISION.]

RE NORTHCOTE.

Will—Construction—Devise—Restraint on alienation—Trust.

After a devise to his son C., his heirs and assigns for ever, of certain lands, a testator added that his devise to C., was subject to this express condition, that he should not sell or mortgage the land during his life, but with power to devise the same to his children as he might think fit in such way as he might desire.

Held, that the case was governed by *Re Winstanley*, 6 O. R. 315, and that the property was not clothed with a trust in favour of the children, but the devisee took it in fee simple with, however, a valid prohibition against selling and mortgaging it during his life.

Statement. THIS was a petition under the Vendor and Purchaser Act in which it appeared that the vendor, Charles Northcote, derived his title to the lands contracted to be sold under the will of his father, Richard Northcote, dated May 3rd, 1881, by virtue of the following devise:

"I give, devise, and bequeath to my said son Charles his heirs and assigns for ever all those certain other lots of land situate on the south side of Hayden street in the said city of Toronto, being composed of lots six and seven on the south side of the said street, which I purchased from one William John Hayden, and one William Hayden, respectively, under deed bearing date, respectively, the 15th day of March, and the 5th day of May, A.D., 1857, to hold to my said son Charles, his heirs and assigns and his and their use forever."

The will, however, contained also the following clauses:

"All the rest residue and remainder of my said estate real and personal, I hereby give, devise and bequeath unto my sons Henry and Charles, their heirs and assigns and their use for ever to be equally divided between them share and share alike.

"Lastly my will is and devises hereinbefore made to my sons Henry Northcote and Charles Northcote of lands in the city of Toronto and the township of Etobicoke are subject to this express condition, that they do not sell or mortgage the said lands or any part thereof during their lives, but with power to each of them to devise the same to their respective children as they may think fit in such way as they or either of them may respectively desire."

The purchaser, therefore, objected that Charles Northcote could not make a good title, while the latter contended that under the will he had full power to convey the lands in fee to the purchaser.

Argument.

The matter came on for argument on Wednesday, September 25th, 1889, before BOYD, C.

J. R. Roaf, for the purchaser. We say this case is distinguishable from *Re Winstanley*, 6 O. R. 315, and is within the case of *Re Casner*, 6 O. R. 282. A devise is forbidden outside the children. [BOYD, C.—He does not fetter the devising power. The law, not he, gives the power to devise.] I submit the words do restrain a devise outside the children. Most of the authorities are collected in *Re Winstanley, supra*. [BOYD, C., *Re Weller*, 16 O. R. 318, follows *Re Winstanley, supra*. It would require an Appellate Court to over-ride these.] This case differs by reason of the restraint on the devising power. I refer also to *Re Dugdale, Dugdale* v. *Dugdale*, 38 Ch. D. 176; *Re Rosher, Rosher* v. *Rosher*, 26 Ch. D. 801.

J. M. Clark, for the vendor. *Re Casner, supra*, contained an absolute restraint on alienation, and is clearly distinguishable. The power to devise is attached to a fee simple by law and can only be taken away by express words. [BOYD, C.—The testator here indicates a preference, that is all; they need not observe it.] The latest case in our Courts *Bank of Montreal* v. *Bower*, 17 O. R. 548, 25 C. L. J. 506, shews that no trust is created. The English authorities are not followed in our Courts, which follow *Re Macleay*, L. R. 20 Eq. 186; *Re Weller*, 16 O. R. 318; *Earls* v. *McAlpine*, 6 A. R. 145.

September 26th, 1889. BOYD, C.:—

This will is governed by the decision in *Re Winstanley* 6 O. R. 315. The devisee is prohibited from selling or mortgaging during his life; that was held a valid restriction in *Re Winstanley*. The will then proceeds: "but with power to devise the land to children as he may think fit." That indicates the mind of the testator as to the children, but it does not clothe the property with a trust in their favor, nor does it preclude the devisee from

disposing of the property by will in favor of others than the children. Judgment. BOYD, C.

This brings the case again within *Re Winstanley, supra.* The land goes in fee simple to the devisee, with valid prohibition against selling or mortgaging during his life; there is no prohibition against exercising testamentary power which is an incident of the estate given, and the mention of the devisee's children is not to be read strictly so as to impose a restriction not manifested in the words used.

The petition is dismissed, and with costs.

A. H. F. L.

[CHANCERY DIVISION.]

BLAIN V. PEAKER.

Bankruptcy and insolvency — Assignment for creditors — Personal estate only — 48 Vic. ch. 26, (O.)

An assignment for the benefit of creditors though confined in terms to the assignor's personal estate, professed to be drawn under 48 Vic. ch. 26, (O.)

Held, that it was nevertheless not within the Act; and this action, being brought by the assignee to set aside a chattel mortgage, must be dismissed.

It is clear that it was intended under the Act to bring all the estate of the assignor into the hands of the assignee for general distribution.

Held, also, that all reference to the real estate having been struck out from the form used for making the assignment, the omission was not a "mistake, defect, or imperfection" within section 10, and capable of amendment under that section.

THIS was an action brought by T. J. Blain, as assignee for the general benefit of the creditors of one Henry Rounding under an assignment purporting to be in accordance with R. S. O., 1887, ch. 124, to set aside a certain chattel mortgage theretofore made by Rounding to the defendants. Statement.

The assignment to the plaintiff comprised all the personal estate of Rounding, but did not assign any of his real estate, and the defendants pleaded amongst other

Statement.

defences, that it was void for this reason under section 4 of the above Act.

The remaining facts of the case are sufficiently set out in the judgment.

The action came on for trial at Orangeville, on April 29th, 1889, before ROSE, J.

Myers, for the plaintiff.
McFadden, for the defendant.

September 17th, 1889. ROSE, J.:—

Action by assignee for benefit of creditors to set aside a chattel mortgage given by the assignor to the defendants.

The assignment is confined in terms to the assignor's personal estate. It professes to be drawn under the provisions of 48 Vic. ch. 26, (O.)

Section 4 of that Act declares valid and sufficient every assignment under this Act for the general benefit of creditors, if it be in the words following, that is to say, "All my personal property which may be seized and sold under execution, and *all* my real estate, credits and effects; or if it is in words to the like effect. * *."

This deed does not comply with the requirements of such section. It is clear that it was intended under the Act to bring all the estate into the hands of the assignee for general distribution.

I think the deed in question is not within the Act, and must be regarded simply as an assignment of the personal estate for distribution among the creditors.

There was in fact real estate, or an interest in real estate vested in the assignor at the date of the assignment. I cannot see that the fact that such interest was small enabled the assignor to disregard the provisions of the Act.

The language of section 4 is clear, and a deed to be brought within the Act must comply strictly with the provisions of such section.

Judgment.
ROSE, J.

It is pleaded that the objection was simply a "mistake, defect, or imperfection," within section 10, and has been removed by a Judge's order under that section.

The order is not before me, but I assume it to have been made. In my opinion the striking out from the form of all reference to real estate as was done here, and confining the assignment in express terms to the personal estate, was not either a mistake, defect, or imperfection within the meaning of such section, but an intentional act by which a deed good enough to assign the property which it purported to convey, was so drawn as not to pass or affect any real estate belonging to the debtor.

It will serve no good purpose to attempt to define what may be amended under the section, but I am clear that this omission cannot be supplied. To so hold, would be to give the Judge power on the application of the assignee to turn an assignment of a portion of the estate into an assignment of the whole, thereby making a new deed—against, it may be, the will of the assignor.

Any clerical error clearly might be corrected, but in my judgment the section was not intended to apply to a case like the present.

The defendants seized and took possession under their chattel mortgage on the 14th July, 1888, six days before the assignment. I therefore do not consider any technical objections to the execution and filing of the mortgage.

[The learned Judge then gave certain findings on the facts of the case, and concluded by dismissing the action with costs.]

A. H. F. L.

[QUEEN'S BENCH DIVISION.]

LOUIS ROUTHIER v. MCLAURIN.

Malicious prosecution—Reasonable and probable cause—Information for assault—Justification of assault—Misdirection—New trial.

Where a man has been prosecuted for an assault, and brings an action for malicious prosecution, the finding that there was in fact an assault is not decisive of the question whether there was reasonable and probable cause for the prosecution; the plaintiff is entitled to have the circumstances relied on as justification for the assault submitted to the jury, and to have their finding as to whether the defendant was conscious when he laid the information that he had been in the wrong.

A new trial granted on the ground of misdirection.

Hinton v. *Heather*, 14 M. & W. 131, followed.

Sutton v. *Johnstone*, 1 T. R. 493, distinguished.

Statement.

ACTION for malicious prosecution, tried before MACMAHON, J., and a jury at the L'Orignal Spring Assizes, 1889.

One Lyman claimed title to and possession of a certain lot in the village of Vankleek Hill, and the plaintiff's father, who was actually in possession, claimed title by length of possession. The defendant was the duly authorized agent of Lyman, who had the paper title, and the defendant went on the premises for the purpose of removing some wood placed there by the plaintiff's father, so as to give possession to one Stackhouse, to whom the defendant, acting for and on behalf of Lyman, had assumed to sell the property. The defendant had been told by one Labrosse that the plaintiff's father was claiming the property. The defendant came first with horses and two men and commenced loading the wood. The plaintiff's father told him to leave the wood there, and go off the premises. The defendant went away to get assistance, and the plaintiff's father and brother and the plaintiff made the men leave the lot and put the horses in the street. The defendant came back with several men, (from fifteen to twenty-five according to the evidence of the plaintiff's witnesses; the defendant said, "a few men, to see that I would get fair play, that I would not be injured.")

There was a scuffle and the defendant was put off the premises. He laid an information for assault against the plaintiff, and the magistrate dismissed the case on the ground that the title to land came in question. Statement.

The learned Judge submitted to the jury the following question, and others:

1st. Did Louis Routhier make an assault on McLaurin on the 11th of October last?

* * * * * * *

And he told them that if they answered the first question in the affirmative, they need not go any further, for that would end the case. There was contradictory evidence as to the share which the plaintiff took in the *mêlée*, and whether he laid hands on the defendant at all or not.

Counsel for the plaintiff objected to the direction that an affirmative answer to the first question would settle the case.

To the first question the jury answered "yes," and did not answer the remaining questions.

On that answer the learned Judge ordered that judgment be entered for the defendant with full costs.

At the Easter Sittings of the Divisional Court, 1889, the plaintiff moved to set aside the verdict and judgment entered for the defendant, and to enter a verdict and judgment for the plaintiff, or for a new trial, on the grounds:—

1st. That the plaintiff's cause of action was established, and the whole case should have gone to the jury on the evidence.

2nd. The answer of the jury to the first question was contrary to law and evidence and the weight of evidence.

3rd. The learned Judge erred in directing the jury that if they answered the first question in the affirmative it was not necessary to go further.

4th. Even if the plaintiff did put his hands on or shove the defendant at the time and place referred to in the evidence, it was not an assault by him on the defendant,

Statement.

and the plaintiff, under all the circumstances, was justified in doing what he did; and, even if an assault, it was justified.

5th. The learned Judge erred in holding that, if the first question was answered in the affirmative by the jury, that was conclusive upon the plaintiff, and that thereupon there was evidence of reasonable and probable cause which should prevent the plaintiff from maintaining this action.

And on other grounds.

May 31, 1889. The motion was argued before FALCONBRIDGE and STREET, JJ.

Watson, for the plaintiff. The bare fact that there was an assault does not shew that there was reasonable and probable cause for the prosecution. The trial Judge was wrong in withdrawing from the jury all the circumstances surrounding the alleged assault. Even if an assault was committed, it was open to the plaintiff to justify it. The case is practically concluded by *Hinton* v. *Heather*, 14 M. & W. 131, referred to in Addison on Torts, 6th ed., p. 226, as still good law. I also refer to *Huntley* v. *Simson*, 27 L. J. N. S. Ex. 134; *James* v. *Phelps*, 11 A. & E. 483; Paterson on the Liberty of the Subject, vol. 1, p. 288; *Hayling* v. *Okey*, 8 Ex. 531; *Lister* v. *Perryman*, L. R. 4 H. L. 521; *Hicks* v. *Faulkner*, 8 Q. B. D. 167. The direct point has not arisen in our own Courts, but on the question of reasonable and probable cause I refer to *McGill* v. *Walton*, 15 O. R. 389; *Young* v. *Nichol*, 9 O. R. 347; *Lyden* v. *McGee*, 16 O. R. 105; *Webber* v. *McLeod*, *ib.* 609. There should be a new trial, and the objection having been made at the trial, the costs should be paid by the defendant.

Shepley, for the defendant, supported the direction of MacMahon, J., referring to *Sutton* v. *Johnstone*, 1 T. R. 493, 510, 784; Stephen on Malicious Prosecution, p. 41; *Fish* v. *Scott*, Peake 135; *Harvey* v. *Brydges*, 14 M. & W. 437; *Blades* v. *Higgs*, 10 C. B. N. S. 713; *Lows* v. *Telford*, 45 L. J. Ex. 613; *Jackson* v. *Courtenay*, 8 E & B. 8; *Roberts*

v. *Tayler*, 1 C. B. 117; *Browne* v. *Dawson*, 12 A. & E. 624; *Jones* v. *Chapman*, 2 Ex. 803. Argument.

Watson, in reply, referred to Stephen on Malicious Prosecution, p. 42, where *Hinton* v. *Heather* is approved; and to *Donnelly* v. *Bawden*, 40 U. C. R. 611.

June 22, 1889. The judgment of the Court was delivered by

FALCONBRIDGE, J. :—

The whole point involved is, whether the learned Judge was right in holding that an affirmative answer to the first question was decisive of the case against the plaintiff, and in thus practically withdrawing from the jury any consideration of circumstances which might justify the alleged assault. The bald proposition is, that the fact that the plaintiff committed an assault on the defendant afforded reasonable and probable cause to the defendant to lay an information, without reference to the circumstances or position of the parties, to any elements of justification, or to the knowledge or presumed knowledge of the defendant that he was in the wrong.

"An assault is resolvable into four elements: (1) the intention of the assailer; (2) the attempt to touch the person, or the threat to do so forthwith; (3) the non-consent of the assaulted; and (4) the want of lawful excuse:" Paterson on the Liberty of the Subject, vol. I, p. 288.

Certainly no fault could be found with the direction complained of, if the jury had been told to consider this fourth element and to answer the first question in the negative if they found the assault to be excusable or justifiable. But it is not so left to them.

In *Hinton* v. *Heather*, 14 M & W. 131, the facts proved were as follows: The defendant came to the plaintiff's house to inquire for a person who, he said, lived there; but, being informed that no such person lived there, used abusive language, and on being required by the plaintiff to go

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Falconbridge, J.

away laid hands upon him, upon which the plaintiff forced him out. There was contradictory evidence as to the degree of force used by the plaintiff in doing so. The defendant indicted the plaintiff for an assault; the bill was found, and the indictment tried, and the plaintiff was acquitted. On the trial of an action for maliciously indicting the plaintiff the learned Judge directed the jury that if the defendant preferred the indictment with a consciousness that he was wrong in the transaction, there was no reasonable or probable cause for the indictment, and this direction was held to be substantially correct.

Pollock, C. B., says at p. 133: "The mere fact of an assault having been committed by the plaintiff was not sufficient to constitute reasonable and probable cause for the indictment, without reference to the other circumstances of the case. Undoubtedly an assault may be committed under such circumstances as to afford no reasonable or probable cause whatever for an indictment." And he suggests that *Fish* v. *Scott*, Peake 135, is not very correctly reported.

See also *James* v. *Phelps*, 11 A. & E. 483; Paterson on the Liberty of the Subject, vol. 1, 303, and cases there cited respecting assaults by a person in possession of property, either as owner or representing the owner.

In the celebrated and interesting case of *Sutton* v. *Johnstone*, 1 T. R. 493, 510, 784, the principal ground of the decision was, that it appeared from the declaration that the plaintiff was prosecuted and tried by Court-martial for not having obeyed an order of his commanding officer; and that he had not in fact obeyed it. Lords Mansfield and Loughborough gave the opinion that the Commodore "had a probable cause to bring the plaintiff to a fair and impartial trial." It was immaterial that it turned out that for the plaintiff to obey was a physical impossibility which formed a justification for the plaintiff's disobedience and a defence to the prosecution.

As their Lordships say, "this case stands upon its own special ground." It was cited by counsel for the defendant in *Hinton* v. *Heather*, and is quite distinguishable.

We are of opinion that the answer to the first question was not decisive as against the plaintiff, and that he was entitled to have the circumstances relied on as justification for the assault submitted to the jury; and also to have their finding as to the defendant's consciousness when he laid the information that he had been in the wrong. Judgment, Falconbridge, J.

There will be a new trial; costs of the last trial and of this motion to be costs to the plaintiff in any event of the cause.

[COMMON PLEAS DIVISION.]

REGINA V. VERRAL.

Municipal corporations—Baggage transfer company—Employee going through trains for baggage under agreement with railway company—City by-law against soliciting baggage—Evidence—Ultra vires.

A city by-law prohibited any person licensed thereunder soliciting any person to take or use his express waggon, or employing any runner or other person to assist or act in consort with him in soliciting any passenger or baggage at any of the "stands, railroad stations, steamboat landings, or elsewhere in the said city," but persons wishing to use or engage any such express waggon or other vehicle should be left to choose without any interference or solicitation. An employee of defendants with the consent of a railway company and under instructions from his employer boarded an arriving passenger train at one of the outlying city stations on its way to the Union station, and went through the cars calling out "baggage transferred to all parts of the city," and having in his hands a number of the transfer company's checks. No baggage was taken at the time.

Held, that there was no breach of the by-law but merely the carrying out of the defendants' agreement with the railroad company; and further that the railroad train did not come within any of the places mentioned in the by-law.

Per ROSE, J.—If the by-law in terms had covered this case it would have been *ultra vires*.

THIS was an application to quash a conviction of the defendant for a violation of a by-law of the Police Commissioners of the city of Toronto.

The by-law was as follows: "That no person licensed under this by-law shall solicit any person to take or use his express waggon, or shall employ or allow any runner or other person to assist or act in consort with him in

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soliciting any passenger or baggage at any of the stands, railroad stations, steamboat landings, or elsewhere in the said city; but the person wishing to use or engage any such express waggon or other vehicle, shall be left to choose without any interference or solicitation."

The evidence on which the conviction was made, was as follows: The informant, John Eeeighton, stated: "On the 7th day of March, inst., James Ross, myself and one Carpenter, an employee of the defendant, boarded a train of the Grand Trunk Railway, at the Queen's Wharf, in the said city of Toronto. On the way from the said Queen's Wharf to the Union Station, in said city, said Carpenter did solicit baggage by going through the cars and calling out "baggage transferred to all parts of the city." At the same time he had in his hands a number of defendant's checks. The said Carpenter is constantly doing this. It appears to be his sole business. No baggage was taken at this time."

George W. Verral. "I represent the Verral Cab, Omnibus and Baggage Transfer Company. The said Carpenter is an employee. He goes on the trains to solicit baggage in pursuance of an agreement with the Grand Trunk Railway and our instructions." The agreement was produced and put in.

In Easter Sittings, June 5th, 1889, *Aylesworth*, supported the motion. There was no offence proved under the by-law. There was no solicitation of any person to take or use the defendant's express waggon; nor did Carpenter, the man who went through the train, "assist or act in concert" with defendant in soliciting any baggage within the meaning of the by-law. There was no personal solicitation of baggage. The object of the by-law is for the protection of passengers by preventing them being harrassed by express men at the places named in the by-law. What was done here was for the convenience of the passengers under an agreement made between the Verral company and the railroad company; and the solicitation was in one of the railroad company's trains which

certainly is not one of the places mentioned in the by-law. The words "elsewhere in the said city," is confined by the preceding words. Statement.

Bigelow, contra. There was clearly a solicitation here. The object of the by-law is not merely to protect passengers from being harrassed, but to guard against any unfair advantage being given to one expressman over another. It certainly never was intended that in prohibiting expressmen from soliciting passengers or baggage at any "stands, railroad stations, steamboat landings, or elsewhere in the said city," a railroad company should have the privilege of giving a preference to some particular expressmen with whom they might enter into a contract. The railroad train, though not a stand, railroad station or steamboat landing, certainly came within the words "elsewhere in the said city," for at the time the defendant boarded the train and used the solicitation, the train was within the city.

September 7, 1889. GALT, C. J.:—

There were several grounds set forth, but it is only necessary to refer to the first, which is: "The evidence discloses no offence within the by-law mentioned in the said conviction; but, on the contrary, shews that no offence within the said by-law was committed inasmuch as

"(*a*) What Carpenter did was not soliciting any person to take or use the express waggon of the defendant or any body." There is no doubt this is the case.

"(*b*) What Carpenter did was not soliciting any person to take or use any particular express waggon whatever."

This is also true.

"(*c*) What Carpenter did did not constitute assisting or acting in consort with the defendant in soliciting any baggage."

In my opinion what Carpenter did was a solicitation of "baggage," but was not such a solicitation as is contemplated by the by-law.

It is manifest from the provisions of the by-law that

Judgment.

GALT, C.J.

the object to be attained was to prevent passengers being harassed by express men and others, on their arrival, respecting their baggage; but in the present case all that was done was a solicitation to passengers that the company would undertake the delivery of their baggage at any part of the city. There was no personal application, and moreover it was done under an agreement with the Grand Trunk Railway Company made with the Verral company for the purpose of accommodating their passengers.

"(*d*) The place where Carpenter called out the offer to transfer baggage is not within the provisions of the by-law alleged to have been contravened."

I am of opinion that this objection is well founded. The place where the notice was given was on the train of the Grand Trunk Railway Company, and was in accordance with an agreement made between the Verral company and the railway company. It was not at a "stand" or "railway station" or "steamboat landing;" but it was contended by Mr. Bigelow that it was "elsewhere in the said city," and therefore within the by-law. The latter words must be read in connection with the former, and might embrace the corner of a street, but cannot be extended to a railway car which is the property of a company, and over which the Police Commissioners have no control.

The motion must be absolute to quash the conviction, with the usual order for protection. Costs to be paid by the informant.

ROSE, J.:—

I agree that the prohibition in the by-law cannot be made to apply to the facts before us, and that if the by-law had in terms covered this case, such provision would have been *ultra vires*.

If this conviction could stand, then equally one where the proprietor of any principal hotel in this city sent to the office of the defendant and requested an agent or messenger to attend at the hotel to take the baggage of

any of the guests who might wish to employ the defendant, the agent attending at the hotel and announcing the fact of readiness to carry whatever baggage might be entrusted to the defendant. Judgment. ROSE, J.

In one sense of the word, on the facts of this case, there was solicitation by the agent when he went through the train; but in another sense there was none as he was merely carrying out the wishes of the proprietors of the train and facilitating the transfer of baggage as the defendant was bound to do under his contract with the railway company.

I agree that the conviction must be quashed, and I see no reason for withholding the costs from the defendant to be paid by the informant.

MACMAHON, J., was not present at the argument and took no part in the judgment.

[COMMON PLEAS DIVISION.]

CARTY v. THE CITY OF LONDON AND THE LONDON STREET RAILWAY COMPANY.

Municipal corporations—Accident—Want of repair of street—Contract with street railway company to keep in repair—Liability of corporation—Remedy over against street railway company—Evidence of contributory negligence.

By 36 Vic. ch. 99 (O), the London Street Railway Company was incorporated, by sec. 13 of which the city of London were authorized to enter into an agreement for the construction of the railway on such of the streets as might be agreed on, and for the paving, repairing, &c. of the same By sec. 14 the city was also empowered to pass by-laws to carry such agreement into effect, and containing all necessary provisions, &c. for the conduct of all parties concerned, including the company, and for enforcing obedience thereto. A by-law was passed by the city providing for the repair of certain portions of the streets by the street railway company who were to be liable for all damage occasioned to any person by reason of the construction, repair or operation of the railway, or any part thereof, or by reason of the default in repairing the said portions of the streets, and that the city should be indemnified by the company for all liability in respect of such damage. An accident having happened to plaintiff by reason of said portions of said streets being out of repair, an action was brought by plaintiff against the city of London therefor. After action brought, and more than six months after the occurrence of the accident on the application of the city of London the street railway company were made party defendants.

Held, that notwithstanding, the said legislation, by-law, and agreement, the city was liable under sec. 531 of the Municipal Act, R. S. O. ch. 184 to the plaintiff for the damage he had sustained; but that they had a remedy over against the street railway company.

Held, also, following *Anderson* v. *Canadian Pacific R. W. Co.*, 17 O. R. 747, that the six month's limitation clause in the Railway Act did not apply, the right of the city against the street railway company being one of contract.

Statement. THIS was an action tried before STREET, J., at the Spring Assizes of 1889, at London, with a jury.

It was brought by the plaintiff against the corporation of the city of London, to recover damages for injuries sustained by the plaintiff arising from an accident that happened to him owing to the want of repair of one of the principal streets in the city of London.

It appeared that in the spring of 1888 the street railway company had removed the ice and snow from their tracks, which were laid in the centre of the street, and which had the effect of making a trench where the tracks were. The plaintiff was driving along Dundas street near the corner

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of Richmond street, one of the most public and frequented parts of the city, and on attempting to turn out for a passing vehicle the runner of his cutter got into the trench and was overturned, his horse ran away, and the plaintiff was dragged a short distance and dashed against a telegraph pole, receiving severe injuries. The occurrence covered a space of some ten seconds.

There was evidence to go to the jury that the plaintiff's feet got entangled in the cutter, and that after being thrown out he held on to the reins; and it was urged that the holding on to the reins was evidence of contributory negligence.

After the action had been commenced, and more than six months after the happening of the accident, on the application of the defendants, the corporation of the city of London, the London Street Railway Company were made parties defendants.

The defendants, the corporation of the city of London, claimed that under the statute incorporating the London Street Railway Company, 36 Vic. ch. 99, (O.), and a by-law passed by the corporation of the city of London, thereunder, and also an agreement entered into between the corporation of the city of London and the London Street Railway Company, the city of London were relieved from all liability in the premises; or, if liable to the plaintiff, that they were entitled to have a remedy over against the street railway company.

By sec. 4 of that statute the company were thereby "authorized and empowered to construct, maintain, complete and operate a double or single iron railway," &c., "for the passage of cars" &c., "upon and along such of the public streets and highways within the jurisdiction of the corporation of the city of London," &c., "as the company may be authorized to pass along," under and subject to any agreement hereafter to be made between the council of the said city and the said company, and under and subject to any by-law of said corporation respectively," &c.

By sec. 13, "The council of said city," &c., "and the

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said company" were thereby "authorized to make and enter into any agreement or covenants relating to the construction of the said railway: for the paving, macadamizing, repairing, and grading of the streets or highways, and the construction, opening up, and repairing of drains or sewers; and the laying of gas or water pipes in the streets and highways; the location of the railway, and the particular streets along which the same shall be laid" &c.

By sec. 14 the city was "authorized to pass any by-law or by-laws for the purpose or carrying into effect any agreements or covenants; and containing all necessary clauses, provisions, rules and regulations for the conduct of all parties concerned, including the company, and for enforcing obedience thereto" &c.

The material parts of the by-law passed by the corporation of the city of London, under sec. 14, and also of the agreement entered into between the city and the company are set out in the judgment of Rose, J.

In answer to questions submitted to them, the jury found that the roadway where the accident happened was not in proper repair at the time of the accident: that the want of repair consisted in not properly clearing away the ice from the street railway track: that the roadway had been out of repair for about ten days: that the cause of the upsetting of the plaintiff's cutter was turning out of the railway track. They also found that the plaintiff was not guilty of any contributory negligence which caused the accident; and also that the plaintiff could not by using ordinary care have avoided the injuries he sustained; and also that the want of repair was caused by the street railway company.

The learned Judge, at the close of the case, gave judgment as follows:

"Upon the answers of the jury to the questions submitted to them, I enter a verdict for the plaintiff against the defendants, the corporation of the city of London, for $5,000. I further direct that judgment be entered, on or

after the fifth day of the next sittings of the Divisional Court, for the plaintiff against the defendants, the corporation of the city of London, for $5,000, with full costs of the action; and that such judgment shall declare that the defendants, the corporation of the city of London, are entitled to recover the amount of the said judgment and costs, together with their own costs of defending this action, and of adding the defendants, the street railway company, as parties over and from and against the said last named defendants, and are entitled to judgment and execution therefor." Statement.

Motions were made by both the defendants against the judgment, the grounds of which are set out in the judgment of GALT, C. J.

During Easter Sittings, June 6th, 1889, the motions were argued.

Meredith, Q. C., for the defendants, the corporation of the city of London, referred to R. S. O. ch. 184. sec. 531, sub-sec. 4; 36 Vic. ch. 99, (O.); *Anderson* v. *Northern R. W. Co.*, 25 C. P. 301; *Hay* v. *Great Western R. W. Co.*, 37 U. C. R. 456; *Regina* v. *Hodge*, 9 App. Cas. 117; *Howitt* v. *Nottingham and District Tramways Co.*, 12 Q. B. D. 16; Imp. Act, 33 & 34 Vic. ch. 78, secs. 28-9; *Barham* v. *Ipswich Dock Co.*, 54 L. T. N. S. 236; *Traversy* v. *Gloucester*, 15 O. R. 214; *Eddy* v. *Ottawa City Passenger R. W. Co.*, 31 U. C. R. 569.

Robinson, Q. C., and *Flock* (of London), for the defendants, the London Street Railway Company, referred to *Watson* v. *Tripp*, 11 Rh. Id. 98; *Turner* v. *Corporation of Brantford*, 13 C. P. 109; *Conger* v. *Grand Trunk R. W. Co.*, 13 O. R. 160; *May* v. *Ontario and Quebec R. W. Co.*, 10 O. R. 70; *Arscott* v. *Lilley*, 14 A. R. 283, 294.

Osler, Q. C., and *G. W. Marsh*, for the plaintiff, referred to *Pratt* v. *Corporation of Stratford*, 16 A. R. 5; *Ridgway* v. *Corporation of Toronto*, 28 C. P. 579; *Corporation of Vespra* v. *Cook*, 26 C. P. 182; Maxwell on Statutes, 2nd ed., 96.

Judgment.

GALT, C.J.

June 29th, 1889. GALT, C. J. :—

So far as the plaintiff is concerned there were only two issues; first, that the action was not brought within three months before the commencement of the action; and, secondly, that the alleged accident was caused by the negligence of the plaintiff.

As respects the first, the accident happened on the 8th of March, 1888, and the writ was issued on the 29th May, 1888, so there is nothing in that objection; and as respects the second, the jury have found he was not guilty of any negligence which caused the accident; and also that the plaintiff could not, by using ordinary care, have avoided the injuries which he met with. They also found that the roadway where the accident happened was not in proper repair at the time of the accident. These findings are fully sustained by the evidence.

The city of London moved against the judgment entered against them, on the ground of contributory negligence of the plaintiff; and that the duty of repairing the place where it was found to be out of repair did not rest upon the defendants, but upon the defendants The London Street Railway Company.

There is nothing to be said as respects this motion. The jury have found the plaintiff not guilty of any negligence, and that the street was out of repair. The city are therefore liable to him under sec. 531 of ch. 184; and whether such want of repair arose from the negligence of the street railway company or not, is nothing to him. It was a duty which the city owed to the plaintiff, and which, so far as he is concerned, they have neglected. The motion is therefore dismissed with costs, such costs not to be charged against the co-defendants.

The street railway company also moved against the judgment on the following grounds:

1. That the said railway company cannot be made responsible for the damage claimed herein, as they were not made parties to this action until more than six months had

elapsed from the happening of such damages; and by sec. 83 of the Railway Act, which by sec. 16 of the Act incorporating the said railway company, is made applicable, the remedy against the said railway company is barred.

This action was not brought against these defendants by the plaintiff, but they were made parties at the instance of the city, which claimed that it was owing to a breach of contract on the part of these defendants the plaintiff had been injured.

I have gone through all the cases I could find on the question, in the case of *Anderson* v. *Canadian Pacific R. W. Co.** (judgment delivered to-day), and am of opinion that the limitation clause has no bearing in cases where the cause of action arises out of a breach of contract.

2. That under the statute incorporating the said company, and the by-law of the corporation of the city of London of 8th March, 1875, granting certain privileges to the said company, and the agreement of same date between the said city and company, the said city are relieved from liability for the damages claimed herein, and no verdict or judgment should have been entered against them.

This is a most extraordinary objection. It amounts to this, that because these defendants had contracted with the city to keep their street in repair, and had broken their contract, therefore, the city was discharged.

3. Even if the city is entitled to such remedy over, the learned Judge has no power to give the direction referred to.

These defendants had been made parties defendant under sub-sec. 4, of sec. 531, and although the city of London might have recovered against them for a breach of their contract, there was nothing to prevent them availing themselves of this section; and the learned Judge was fully authorized to make the order in question.

The motion must be dismissed with costs.

ROSE, J.:—

I agree to what the learned Chief Justice has said about evidence of contributory negligence.

*Now reported 17 O. R. 747.

Judgment.

ROSE, J.

The plaintiff was thrown out of the vehicle on the street, dragged a short distance, and dashed against a telegraph pole, receiving injuries of a most serious nature. The whole occurrence covered a space of a few seconds, say ten, as stated by one of the counsel.

We are asked to say that because there was evidence that the plaintiff held on to the lines, so that possibly he was thus dragged to the place where he suffered his injuries, he cannot recover in view of *Anderson* v. *Northern R. W. Co.*, 25 C. P. 301; *Hay* v. *Great Western R. W. Co.*, 37 U. C. R. 456.

There was evidence from which the jury might have inferred that his feet were entangled in the cutter, and that his body was carried along in a position almost at right angles to the cutter.

To say, as a matter of fact, that because a man thus thrown out of an upsetting cutter did not within the space of a few seconds, and within the distance of a few feet, let the lines go, is such evidence of negligence contributory to the accident as would entitle him to recover, is too startling a proposition for my judgment at least to accede to.

It may have been, had he time for any consideration, or the exercise of any judgment, that in view of the position of the cutter and his own body, he deemed it prudent for his own safety to hold on to the lines; and, if so, though such a conclusion may have been the result of an erroneous judgment, the cases all shew that an error of judgment in a moment of peril could not prevent recovery.

It may have been, and probably it was, that he had not time to consider and determine on any course of action, and instinctively held the lines.

Certainly we cannot say that he had placed before him two courses of action, and deliberately chose that attended with danger in order to save his own property, or the lives of others which would be in jeopardy unless the horse were stopped.

The dissenting Judges in *Anderson* v. *Northern R. W. Co.*, 25 C. P. 301, if I may be allowed to say so, suggest the

result that most persons would think natural and just; and I am not for one disposed to enlarge the decision in that case beyond its strictest limits. Certainly it seems to me not to afford any authority to support the contention of the defendants in this action. Judgment. ROSE, J.

I have carefully considered the argument, that the effect of the statute 36 Vic. ch. 99 (O.), and of the by-law passed in pursuance of its provisions, and the agreement between the parties, was to relieve the city from its liability to the public under sec. 531 of the Municipal Act, R. S. O. ch. 184, 1887. Counsel relied upon *Howitt* v. *Nottingham and District R. W. Co.*, 12 Q. B. D. 16; *Barham* v. *Ipswich Dock Co.*, 54 L. T. N. S. 23-6.

The Act 36 Vic. ch. 99, sec. 13, authorized the city to enter into any agreement "relating to the construction of the railway: for the paving, macadamizing, repairing, and grading of the streets or highways; and the construction, opening of, and repairing of drains or sewers; and the laying of gas and water pipes in the said streets and highways; the location of the railway," &c.

By sec. 14 the city was also empowered to pass by-laws to carry any such agreement into effect, "and containing all necessary clauses, provisions, rules, and regulations, for the conduct of all parties concerned, *including the company, and for the enforcing obedience thereto*," &c.

A by-law was passed on the 8th March, 1875, under sec. 14 of the Act. Clause 8 provides that "the roadway between the rails, and a space of two feet outside of such rails, shall be paved or macadamized by and at the expense of the said company, and kept at all times in good repair by the said company, the materials to be furnished by the said corporation."

Clause 12 provides for paving the portion between the the rails, and for two feet outside, at the expense of the company, the same to be kept in repair by the company.

Clause 14 provides for repairs by the city at the expense of the company, in cases of neglect.

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ROSE, J.

Clause 15 provides for removal of snow or ice by the company, under the direction of the city commissioner.

Clause 13, is very material. It provides as follows: "The said company shall be liable for all damages which may be occasioned to any person by reason of the construction, repair, or operation of the said railways, or any of them, or by reason of any default in repairing those parts of the said streets which it is herein provided that the said company shall keep in repair; *and the said corporation shall be indemnified by the said company from all liability in respect of any such damages.*"

By agreement under seal the city corporation and the company, on the same day as the by-law was passed, entered into mutual covenants to carry out the provisions of the by-law.

The liability of the city under sec. 531, apart from the Act 36 Vic. and the by-law and agreement, would be undoubted.

Is there anything in the Act, by-law, or agreement to relieve the city of the liability, and transfer it to the company alone.

As Mr. Marsh pointed out under secs. 1 and 3 of C. S.C., ch. 85, and sec. 491 of R. S. O. ch. 174 (1877), sec. 531 of R. S. O. ch. 184 (1887), and see schedule C. to R. S. C. the city would be liable to indictment for neglect of duty. The clearest language would be necessary to relieve it from such liability.

The Legislature empowered the city to enter into an agreement with the company, and to pass by-laws to enforce the agreement; and by the agreement, the terms and provisions of the by-law being incorporated in the agreement, the company undertook certain duties which the city was bound to perform, and agreed to indemnify the city against all liability in respect of damages occasioned by neglect to perform such duties.

Can there be any fair reading of these provisions which does not recognize a continuing of liability on the part of the city, and an understanding on the part of the company

to perform duties for the neglect of which the city might be made responsible in damages?

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ROSE, J.

Sec. 15 of the Act, as above quoted, shews that the company may contract for the paving, macadamizing, repairing, and grading of the streets or highways; the construction, operating of, and repairing of drains or sewers, and the laying of gas and water pipes in the streets or highways.

Is the argument to be that the city may hand over to the company all these works, and free itself from responsibility for their construction and repair, and shift such responsibility over on to the company? The question, as it seems to me, affords its own answer.

It would rather appear that the relation between the two corporations would be, that, so far as the city by its works interfered with the works of the company, the city could arrange with the company to construct or repair, and compel the company to carry out any agreement to that effect.

In my judgment the cases above cited do not afford any authority against this conclusion

In neither was the relation of the parties to each other the same as here, and no provision like sec. 14 of the Act, or clause 13 of the by-law existed.

During the argument it was stated that in *Howitt* v *Nottingham and District Tramways Co.*, 12 Q. B. D. 16, there was a similar indemnity clause; but an examination of the judgment of Lord Coleridge, C.J., at p. 20, will make manifest that was not so. Indeed from the language of the learned Chief Justice, I am reasonably certain that had he found a clause similar to the one in question, his decision would have been quite the other way.

I would be unable to find any case to apply the indemnity clause to, if this be not one, and indemnity implies liability against which indemnity is sought.

I also think that the right of the city against the company rests upon contract, and that the limitation clause does not apply, following our decision in *Anderson* v. *Canadian Pacific R. W. Co.*

Judgment.

ROSE, J.

I agree to the disposition of the motions stated in the judgment of the learned Chief Justice.

MACMAHON, J., was not present at the argument, and took no part in the judgment.

[COMMON PLEAS DIVISION.]

DABY v. JOHN GEHL AND WILLIAM GEHL.

Execution—Division Court judgment—Transcript to District Court—Issuing fi. fa. lands without fi. fa. goods—Sale under expired writ—Sale after return of fi. fa. lands under ordinary fi. fa. instead of alias fi. fa. —Estoppel—Payment.

Upon a transcript from a Division Court to a District Court, it is not necessary to issue a *fi. fa.* goods from such District Court before a valid sale can take place under a *fi. fa.* lands issued therefrom.

Kehoe v. *Brown*, 13 C. P. 549, observed upon.

Lands were sold under a *fi. fa.* lands after the expiry of the year, and a deed executed to the grantor of the plaintiff by the sheriff which recited that the writ had been duly renewed, but neither the sheriff's nor the district clerk's books shewed any such renewal.

Held, that no renewal was proved, and the sale was invalid.

Subsequently, an ordinary writ of *fi. fa.* lands was issued on the judgment, a sale was made and a deed to the plaintiff executed by the sheriff.

Held, that the fact of an ordinary *fi. fa.* lands being issued instead of an alias *fi. fa.*, and the advertisement being as if the proceedings were initiatory proceedings towards effecting a sale of the defendant's lands, would not of itself invalidate the sale.

In 1886, one of the defendants commenced an action against the present plaintiff and others to set aside the sheriff's first deed, which was dismissed for want of prosecution.

Held, that the said defendant was not thereby estopped from setting up the invalidity of the sheriff's sale.

Held, also, that, under the circumstances, the defendants could not set up that the proceedings under the expired writ constituted a payment of the execution debt.

Bank of Upper Canada v. *Murphy*, 7 U. C. R. 328, distinguished.

THIS was an action to recover possession of land, tried before MACMAHON, J., without a jury, at Port Arthur on the 18th of July, 1888.

The learned Judge reserved his decision and subsequently delivered the following judgment in which all the facts are stated.

Judgment.

MacMahon, J.

MacMahon, J. — The plaintiff claims title through Hannah Penfold, who was the purchaser at a sheriff's sale, on the 31st of October, 1882, of the land in question, under an execution at the suit of Thomas Penfold against the defendant John Gehl. Title is also claimed by the plaintiff as a purchaser at sheriff's sale, on the 8th day of July, 1885, under an execution in the same suit of Thomas Penfold against the defendant John Gehl.

The plaintiff also seeks to set aside, as fraudulent and void, a conveyance made by John Gehl to his brother the defendant William Gehl, dated the 25th of August, 1882.

The defendants allege that the sales by the sheriff are illegal and void.

Thomas Penfold recovered a judgment in the first Division Court of the District of Thunder Bay, against the defendant John Gehl for $100 and costs, on the 7th September, 1880; and on the 24th of September, 1880, an execution was issued against Gehl's goods and returned *nulla bona*.

On the 3rd December, 1880, a transcript of the Division Court judgment was obtained by the plaintiff in that suit, which recited: 1st. The proceedings in the cause. 2nd. The date of issuing execution against goods and chattels; and 3rd. The bailiff's return of *nulla bona*.

This transcript was to the District Court of Thunder Bay within which John Gehl then resided; and, on the 11th of said month of December, a writ of *fi. fa.* lands was issued to the sheriff of the district to make $104.30, the amount of the debt and costs.

Counsel for defendants contended that it was necessary to issue *fi. fa.* goods from the District Court on the judgment which was then a judgment of that Court before any valid sale could take place under the *fi. fa.* lands; and a note to Sinclair's Division Courts Acts (1879), p. 185, referring to the case of *Kehoe* v. *Brown*, 13 C. P. 549, was relied upon to sustain this contention.

An examination of that case however, shews that it does not bear the construction endeavored to be placed upon it.

The cases of *Farr* v. *Robins*, 12 C. P. 35, and *Burgess* v. *Tully*, 24 C. P. 549, shew that all that is required is a return of *nulla bona* to an execution from the Division Court before the transcript is issued to enable the party, plaintiff or defendant, to issue *fi. fa.* lands on the judgment created by the filing of the transcript in the County Court

The *fi. fa.* placed in the sheriff's hands would, if not

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MacMahon, J.

renewed before the 4th December, 1881, expire on the 3rd of December, so that a sale of the lands of the defendant John Gehl on the 31st October, 1882, would be invalid, and no title would pass to Hannah Penfold through whom the plaintiff claims under his first deed unless such renewal took place.

The sheriff's deed to Hannah Penfold was put in at the trial, dated the 13th November, 1882, and recites the writ of *fi. fa.* and that it was "duly renewed."

The acting sheriff of the district was called and produced the books belonging to the late sheriff, and no entry appeared in the book shewing that the *fi. fa.* was ever renewed; and it was admitted that the books of the clerk of the District Court did not shew that the *fi. fa.* had been renewed, which would have been the case had a renewal taken place.

I find that the *fi. fa.* was not renewed; and I think it was in consequence of the discovery by the plaintiff that such renewal had not taken place, and that the sale was therefore invalid, which was the cause of the lands being again advertised and sold under the same judgment.

The *fi. fa.* having expired without any proceedings having been taken or the land advertised for sale, the sheriff had no authority to sell. Hannah Penfold therefore obtained no title and could convey none to the plaintiff.

On the 19th of June, 1885, writs of *fi. fa.* goods and lands were issued on this same judgment against the defendant John Gehl, endorsed to levy $104.30, with costs of writs &c. The *fi. fa.* goods was returned *nulla bona*, and the *fi. fa.* lands was returned *fieri feci* "the sum within mentioned ($147.26) which I have ready" &c.

The sale was not under an alias *fi. fa.*, but under the ordinary writ of *fieri facias*, and was advertised in the *Ontario Gazette* as if the sheriff's then proceedings were the initiatory proceedings towards effecting a sale of the defendant's lands.

As there was not in the sheriff's hands at the time of the first sale on 31st October, 1882, any writ in force, there could be no valid sale; and therefore nothing passed by the deed from the sheriff to Hannah Penfold. As far as the result is concerned it is as if the sheriff had never attempted to sell.

The correct course for the execution creditor to have pursued upon discovering that the sheriff's proceedings were invalid was to have caused an alias *fi. fa.* lands to

have issued; but the fact that merely an ordinary writ of *fieri facias* lands issued under which the sale took place in 1886, when the plaintiff became the purchaser, would not of itself invalidate the sale.

I have reached the conclusion that the second sale, or rather the sale under the second *fi. fa.*, was a valid sale by the sheriff to the plaintiff of the land in question.

The defendant John Gehl in July, 1886, commenced an action against Thomas Penfold, John F. Clarke, (the then sheriff of the District of Thunder Bay), Hannah Penfold, and Daby, the plaintiff in the present suit, to set aside as clouds upon the title to the land, the deed from the sheriff to Hannah Penfold of the 13th November, 1882, and the deed from Hannah Penfold to the present plaintiff.

That action was dismissed for want of prosecution, by an order dated in September, 1887.

The counsel for the plaintiff at the trial argued that the dismissal of that action estopped the defendant from setting up the invalidity of the sale by the sheriff,

There was no determination of the matter and no final judgment of the Court was pronounced on the matters in issue, and the proceedings in that suit are not therefore conclusive: Taylor on Evidence, 8th ed., p. 1719.

The evidence regarding the conveyance by John Gehl to William Gehl shews that it is fraudulent and void as against John Gehl's creditors. Prior to the conveyance William Gehl obtained from the sheriff's office a certificate shewing that Penfold's execution against John Gehl's lands was then in force and unsatisfied. The money consideration paid by William Gehl to John Gehl at the time of the conveyance was only $2. William Gehl did not appear at the trial as a witness to support the deed made to him.

The examination of William Gehl, taken for the purpose of discovery, was put in, shewing that he had re-conveyed the land to John Gehl in the year 1887; and the evidence of John Gehl at the trial is to the same effect, although such re-conveyance was not put on record in the registry office, so that the title, as far as John Gehl could convey one, stands in the registry office in the name of William Gehl.

A point taken by counsel for the defendants was that the plaintiff had not proved a judgment in the suit of *Penfold* v. *John Gehl*, and that this was required before the plaintiff could succeed in his action.

Judgment.

MACMAHON, J.

The contention raised is disposed of by the case of *Ralston* v. *Hughson*, 17 C. P. 364, and the authorities therein cited.

There must be judgment for the plaintiff for the recovery of the land mentioned in the pleadings, and to set aside the conveyance made by the defendant John Gehl to the defendant William Gehl mentioned in the sixth paragraph of the statement of claim as being fraudulent and void against the plaintiff and the other creditors of John Gehl.

The plaintiff is entitled to his costs.

The defendant moved to set aside the judgment entered for plaintiff and to enter judgment for the defendant.

In Michaelmas Sittings, December 3, 1888, *Cattanach* supported the motion.

Delamere, contra.

June 29, 1889. ROSE, J.:—

The facts and findings are set out in the judgment of my learned brother MacMahon.

Mr. Cattanach urges that the proceedings taken upon the expired writ resulted in the payment of the execution debt, citing *Bank of Upper Canada* v. *Murphy*, 7 U. C. R. 328. The facts differ materially, and the decision is not in the defendant's favor.

Robinson, C. J., there said, at p. 330: "We consider that the bank, having been paid their debt in full in 1840—not by any person who purchased the judgment from them, and not, as appears, upon any understanding even between them and the person paying the debt that he was to be allowed to enforce the execution in their name for his benefit—it could not be competent to them at this distance of time to elect to consider their debt as unsatisfied, and to act upon the assumption that the person who paid it *did not make the payment in privity with their debtor.*"

In the present case, if it is to be assumed that Daby paid Penfold the execution debt in privity with John Gehl, the execution debtor, then as such payment was made as the

consideration for the conveyance of the land in question, I do not see how the execution debtor can be heard to claim the benefit of the payment and at the same deny the power of the execution creditor to convey. For this purpose I am treating Hannah Penfold and Thomas Penfold, the execution creditor, as in fact one and the same person, *i. e.* treating the execution creditor as acting in the name of Hannah, as the fact appears to have been.

Judgment.

ROSE, J.

If John Gehl is permitted to displace the presumption that the payment was made in privity with him, then it seems to me equally open to the execution creditor to shew that the debt was not in fact paid.

In either view the plaintiff is entitled to succeed against the objection to the validity of title, for if the debt was paid, the conveyance from Hannah Penfold to the plaintiff stands, and if it was not paid the deed from the sheriff is valid.

So as against John the plaintiff's title is made out.

William Gehl now seeks to amend, claiming to be mortgagee and not owner in fee.

When examined for discovery he stated: "He told me there was a mortgage against the property and I said I would buy the property from him and pay off the mortgage, and if he wanted it back at any time I would let him have the first chance of it at $1000 * * * I told him I would not pay any more for him unless I was secured, but I would let him have it back for what he owed me. The land was worth about $800, I bought it to secure myself * * He has not paid me anything yet. * * The amount mentioned in the deed from my brother to me was $800. The whole bargain was made and completed in two days. I had no idea of buying the property before I went up there."

The statement of defence claims that the defendants "have, or one of them has a good title in fee simple absolute in and to the said lands."

On the 15th of May, 1886, William made a deed to John of the lands for the expressed consideration of $1000, to

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ROSE, J.

enable him to maintain an action against all the parties referred to by my learned brother.

At the trial William did not appear, intentionally remained away being as he says convinced that he might safely do so, although the conduct of his counsel at the trial was such as to indicate to the Court that he expected William to be present.

John gave evidence, and said:

Q. What was the arrangement between you then? A. We had no special arrangement.

Q. Whose property is it now? A. My brother claims it.

Q. Is it his really; is this property yours or your brother's? A. It should be mine by rights.

Q. What do you mean by that? A. I have worked for it, and I have paid it off in work; and the labourer should be paid for what he works.

Q. Do you mean to say that your brother ought not to be paid for the horses and cattle and the mortgage to Burk? A. I worked some of it, and he wanted so much from me that I would not pay the remainder whatever the remainder is.

Q. Whose property is this; is it yours or your brother's; who has it, the property? A. My brother.

There are glaring contradictions between these statements.

It is manifest that on the evidence before my learned brother he was quite justified in concluding that the defendant John Gehl was, as between himself and William, entitled to the property, and in view of the contradictions between them, and the large amount of costs already incurred, I think it equally clear that William should not be allowed at this stage to change the nature of his defence and have a new trial. One must not lose sight of the fact that the deed from William to John was not produced at the trial, and the facts apparently warrant the charge made by the plaintiff's counsel that it was wilfully withheld. Moreover the contention that all the inconsistencies in the positions assumed by William are to be attributable to his good nature in dealing with his brother is rendered somewhat difficult by the evidence of John above stated.

If he was willing that John should appear as owner for the purpose of bringing the action against the plaintiff and

others, as set out in the judgment of my learned brother, he cannot complain if he is held to the same position when the positions on the record are reversed. Judgment. ROSE, J.

It is impossible to open up the case to let in evidence of rents received by the plaintiff. This fact was known to the parties before the trial, and as appears from the affidavit of Mr. Keefer also to the defendants' solicitors at the time of the former action to set aside the deed. It is not a discovery of fresh evidence as claimed, but a case of either neglect or withholding of evidence at the trial of this action.

The costs already incurred are very heavy, and one cannot help noting that although when William took the conveyance from John he was made aware of the plaintiff's claim as an execution creditor, both he and John have put the plaintiff to very heavy costs in joint endeavors to prevent the plaintiff realizing his claim.

If there has not been fraudulent action as against a creditor, there has been a useless waste of money in an improper endeavour to keep the plaintiff out of his just rights. If when William reconveyed to John to enable him to bring an action to set aside the conveyance from Hannah Penfold, an honest effort had been made to pay the plaintiff's claim, we would not now be presented with the fact that the property is being, or has been eaten up in costs.

It seems to me in the interest of the parties, if not of the public, that there should be an end put to the litigation.

The motion must in my opinion be dismissed with costs.

GALT, C. J., and MACMAHON, J., concurred.

[COMMON PLEAS DIVISION.]

YOUNG v. THE CORPORATION OF THE TOWN OF RIDGETOWN.

Sequestration—Municipal corporations—Invalid by-law—Injunction restraining acting under—Passing valid by-law—Breach.

A municipal corporation having been enjoined from purchasing a property for municipal purposes under a by-law which was invalid, repealed such by-law and proceeded to purchase the same property under a new by-law valid on its face.

Held, that in purchasing under the new by-law the corporation was not guilty of a breach of the injunction, and a motion for a writ of sequestration was dismissed.

Statement. THIS was a motion for a writ of sequestration against the lands of the defendants for disobedience to an injunction.

W. R. Meredith, Q. C., for the motion.
Matthew Wilson, contra.

The facts are fully stated in the judgment.

July 20, 1889. MACMAHON, J.:—

On the 28th of March last, I granted an order for an *interim* injunction, restraining the defendants, the corporation of the town of Ridgetown, and six members of the council of that municipality, who were parties defendant at the time such motion was made, "from purchasing a certain church or building for the purpose of a Town Hall, or for any other purpose, or paying over any money therefor."

On the 16th of May, this injunction was continued until the hearing at the next Sittings or Assizes at Chatham.

After obtaining the order for the continuance of the injunction, the plaintiff caused the names of the six members of the council whom he had made defendants, to be struck out of the proceedings.

Judgment.

MacMahon, J.

On the 18th day of June last the municipal corporation of the town of Ridgetown passed a by-law, reciting that the legality of by-law No. 172, under which the purchasing of the church for the purpose of a Town Hall had been restrained by the injunction, had been questioned, and it went on to provide for the levying of a rate to raise the sum of $1,500 during the year 1889, for the purpose of purchasing a suitable building and site for a Town Hall for said town, which site is described in the by-law.

Clause 5 of the by-law is as follows: "That in order to prevent further litigation in respect of the said by-law No. 172, (being a by-law of the said corporation for the purchase of a certain church or building for the purpose of a Town Hall); and to prevent further proceedings being taken in said action, and to make it impossible to do anything in breach or contempt of said interim injunction, the said by-law No. 172, be and the same is hereby repealed; and the solicitor for the said corporation is hereby authorized and directed to move the Court or Judge for a stay of all proceedings in the said action on such terms as may seem proper, or to take such other proceedings as he may deem advisable to settle said action."

The present motion asks for a writ of sequestration against the lands and tenements of the corporation for disobeying the injunction of the Court, such disobedience being that the corporation have again purchased the said Albert Street Church for a Town Hall, and have passed a by-law for that purpose, (being the by-law of the 18th of June); such by-law providing for the raising of the necessary money for the payment of the said building, which was done while the said injunction was in full force.

After the passage of this by-law, the plaintiff moved to commit the members of the council, who were originally parties defendant, for breach of the injunction in again purchasing this property for a Town Hall, and in passing the by-law therefor.

The motion was heard before my learned brother Falconbridge, who dismissed it, upon the ground, as stated by

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MacMahon, J.

counsel before me, that the names of these several councillors having been struck out, were no longer parties to the action.

It is true that by the injunction the defendants were restrained from purchasing the church for a Town Hall, or for any other purpose, or paying over any money therefor until the hearing. But the injunction was granted on the by-law then existing, which had been passed for the purpose of acquiring this property for a Town Hall without having any money on hand to pay for it, and without making provison to raise the money by the levy of a rate during the current year for this extraordinary expenditure in addition to the ordinary expenditure for the year.

The present by-law on its face is a valid by-law. But Mr. Meredith suggested that from the figures furnished as to the receipts and disbursements of the corporation at the time the injunction was granted, it was evident that the rate to be levied for this extraordinary expenditure, together with what was required for the ordinary expenditure of the corporation, would exceed the two cents in the dollar allowed by law to be levied.

The by-law recites that the rate for the present year (1889) for the ordinary general expenditure, has been struck, and it is desirable to make provision for the levying of the said $1,500 in the present year without waiting for the passage of the by-law for the whole general rate.

It is also recited that the rate required to pay the said sum of $1,500, is 2.28 mills on the dollar, which is in addition to the amount required by yearly rate to pay all the valid debts of the corporation, so long as the same shall not exceed two cents on the dollar, being the limit the corporation is allowed to impose.

In the face of this, I must assume that the council in passing this by-law, were fully aware what rate should be struck for the purpose stated in the by-law, so that that rate, together with the rate required to meet the general expenditure of the town, would not exceed the maximum rate allowed—namely, two cents on the dollar.

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An order of the Court restraining the doing of an act should be implicitely obeyed; and where it is shown that an injunction has been disregarded, there should be no hesitation in inflicting adequate punishment for the contempt.

The question in the present case, is, whether the corporation being enjoined by injunction from purchasing the property mentioned for a Town Hall under a now admittedly invalid by-law, they were guilty of disobeying the injunction by repealing such by-law and proceeding to purchase the same property under a new by-law valid on its face?

Had the plaintiff proceeded to trial with his action, and as a result of the trial, the corporation had been perpetually enjoined from purchasing under the old by-law by reason of its invalidity, that, I take it, would not prevent the corporation from passing a valid by-law for acquiring the same or other property for the purpose designed, namely, a Town Hall.

If that is a correct proposition to lay down, the corporation could at once, after the injunction granted, admit the invalidity of the by-law by repealing it; and it was not obliged to incur the great expense attendant upon litigating the question when satisfied that the proceedings under which they proposed purchasing, could not be sustained; and in so doing the corporation could not be in a less favourable position than if the question had been duly adjudicated upon after a trial, and a perpetual injunction granted under the circumstances I have already stated. That is, the corporation by repealing the old by-law and making a purchase of the same property under the new by-law which is valid, were not disobeying an injunction which prevented its purchasing or paying over money under the old by-law.

I, therefore, do not think the defendants have been guilty of a disobedience of the injunction; and the motion for a writ of sequestration must be dismissed.

The defendants should, prior to passing the new by-law,

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MACMAHON, J.

have advised the plaintiff of their intention to repeal the old by-law, and ask for a taxation of the costs of the motion for the injunction. As this was not done the motion will be dismissed without costs.

[COMMON PLEAS DIVISION.]

REGINA v. HENDERSON.

Municipal corporations—Conviction for carrying on "petty trade"—Evidence of—R. S. O. ch. 184, sec. 495, sub-sec. 3 (a) (b).

The defendant a wholesale and retail dealer in teas in the county of W., where he resided, went to the county of H., and sold teas by sample to private persons there, taking their orders therefor, which were forwarded by him to county of W., and the packages of teas subsequently delivered. All the packages were sent in one parcel to H. county, and there distributed. The defendant was convicted under a by-law passed under statutes which are now R. S. O. ch. 184, sec. 495, sub-sec. 3, par. (*a*) and (*b*), for carrying on a petty trade without the necessary license therefor.

Held, that the conviction could not be sustained, and must be quashed.

THIS was a motion to quash a conviction of the defendant made by two justices of the peace for the county of Halton.

The defendant was convicted under By-law No. 165, passed by the municipal corporation of the county of Halton, on the 1st December, 1885, which enacted:

"1st. That from and after the passing of this by-law no person shall act as a hawker or petty chapman, or carry on a petty trade or trades, or go from place to place, or to other men's houses, or on foot, or with any animal bearing or drawing any goods, wares, or merchandise for sale, or with any boat, vessel, or other craft, or otherwise carry goods, wares, or merchandise, without having first obtained a license for that purpose," &c.

"2nd. That from and after the 1st day of December, inst., no person being an agent for any person or persons, not being resident within the county of Halton, shall sell or offer for sale tea, dry goods, or jewellery, or carry or expose

samples of any such goods to be afterwards delivered within the county of Halton to any person not being a wholesale or retail dealer in such goods, wares, or merchandise, without having first obtained a license for that purpose," &c. Statement.

The by-law followed, what is now R. S. O. ch. 184, sec. 495, sub-sec. 3, and sub-paragraphs (*a*) and (*b*) of sub-sec. 3.

The conviction was: "for that the said W. E. Henderson did carry on a petty trade without first having obtained a license for that purpose under the corporate seal * * contrary to the provisions of by-law No. 165 of the corporation of the county of Halton, and contrary to the form of the statute in such case made and provided."

A fine of $5 was imposed, and costs amounting to $3.20 to be paid forthwith; and it appearing to the magistrates that the defendant had no goods or chattels in the county liable to distress, he was ordered to be imprisoned in the county gaol for fifteen days unless said fine and costs should be sooner paid.

The evidence was to the effect that the defendant was a wholesale and retail dealer in teas in the city of Hamilton, in the county of Wentworth, where he resided; that he did not sell to merchants in Halton, but sold by sample to private individuals, that is, orders were given from the samples of tea he had with him, and the orders on being forwarded by the defendant to his place of business at Hamilton, were filled, and the tea sent in packages addressed to the different persons who had given orders, but all were enclosed in one large package, and forwarded to Milton for distribution.

The conviction was for carrying on a petty trade in October, 1888, by the defendant delivering to the different persons the tea which had been ordered from him during the previous month, and obtaining payment for the same as delivered. When the orders were taken all the tea he had was samples only—he carried no tea in bulk.

Argument.

In Easter Sittings, June 4th, 1889, *McGibbon* (of Milton), supported the motion. There was no evidence to sustain the conviction. The person must have goods with him at the time, and offer them for sale. In *Regina* v. *Coutts*, 5 O. R. 644, it was held that the Act then in force, Municipal Act, 1883, 46 Vic. ch. 18, sec. 495, sub-sec. 3, (O.) did not apply to an agent going through the country taking orders for tea, and subsequently sent to deliver the same, as not being a hawker within the Act. After this decision the Act was amended by 48 Vic. ch. 40, secs. 1 and 2 (O.); but the amendment only referred to the agent of persons not resident within the county selling goods, or carrying or exposing samples or patterns of any such goods to be afterwards delivered within the county. Thus, while the Act restricts the agent from selling, &c., it does not restrict the principal himself. The by-law here is passed under the Municipal Act of 1883, sec. 495, sub-sec. 3, of which prohibits the acting as a hawker or petty chapman, or carrying on a petty trade. The defendant did not come within the terms of the by-law. He was not a hawker, and was not carrying on a "petty trade," as he was not carrying goods for sale: *Regina* v. *McNicholl*, 11 O. R. 659; *Regina* v. *Bassett*, 12 O. R. 51; *Regina* v. *Marshall*, 12 O. R. 55.

Kappelle, contra. The defendant was clearly carrying on a petty trade within the meaning of the by-law. He obtains orders, and pursuant to the orders, the goods are delivered. Certainly, this was a sale in the county of Halton.

September 7, 1889. MACMAHON, J.:—

Regina v. *Coutts*, 5 O. R. 644, and the cases there cited, shew that a person going through the country and taking orders for tea, who was subsequently sent by his master to deliver the tea in pursuance of such order, was not a "hawker" within the meaning of the Hawkers and Pedlers Act 50 Geo. III. ch. 51—or of our Act.

After the decision in *Regina* v. *Coutts*, sec. 495, sub-sec. 3 of the Municipal Act, 1883, was amended by 48 Vic. ch. 40, secs. 1 and 2, (O.) (see R. S. O. ch. 184, sec. 495, sub-sec. 3,

paragraphs *a* and *b*,) whereby the word "hawkers" in sub-sec. 3 was made to include "all persons who being agents for persons not resident within the county, sell or offer for sale tea, dry goods, or jewellery, or carry or expose samples or patterns of any of such goods to be afterwards delivered within the county to any person not being a wholesale or retail dealer in such goods, wares, or merchandise."

Judgment. MacMahon, J.

When the language of the above amendment is analyzed, it is, I think, apparent it does not include a principal who, although not a resident within the county, sells by sample any of the classes of goods mentioned therein to persons who are not dealers in such goods, without procuring a license. The Act, as amended, applies to the agent of such a person, and was evidently framed to meet such cases as that of *Regina* v. *Coutts*.

If it was intended to make the non-resident owner of goods selling the same a "hawker," the language employed in the amendment has failed in effectuating the intention.

This is the view of his Lordship the Chief Justice of this Division in *Regina* v. *Marshall*, 12 O. R. 55, in which I fully concur.

The difficulty which was suggested regarding the Act in the case last referred to was doubtless present to the mind of the counsel who represented the prosecutor when the case came before the magistrates, for the defendant was convicted of carrying on "a petty trade without having a license."

In order to a conviction under the Act for carrying on a "petty trade," the evidence must shew, as pointed out by my brother Rose in *Regina* v. *Coutts*, that the person charged was "carrying goods for sale."

What the defendant was doing was not in contravention of the Act which prohibits the carrying on of petty trades without a license. What was being done by him would have been a violation of that part of the Act which forbids the offering for sale certain goods by sample had the defendant been a person who under the Act could have been classed as "hawker."

Judgment.

MacMahon, J.

The defendant was neither carrying on a "petty trade," nor was he a "hawker" within the meaning of the Act.

The motion must be absolute quashing the conviction without costs.

There will be the usual protection to the magistrates and officers.

Galt, C. J., concurred.

Rose, J., was not present at the argument, and took no part in the judgment.

[COMMON PLEAS DIVISION.]

Regina v. Higgins.

Canada Temperance Act—Village joined to another county for municipal purposes—Jurisdiction of justices of county within which village situated—Conviction differing from minute of conviction—Validity of.

The defendant was convicted by two justices of the peace of the district of M., for a breach of the second part of the Canada Temperance Act for selling liquor at the village of B., in the district of M. The Act was in force in the village of B. only by reason of its being for municipal purposes within the county of V., within which county the Act was in force, and there was no evidence to shew that the Act was in force in the district of M. within which B. was situated.

Held, that the justices of the peace of the M. district had no jurisdiction to convict the defendant, for he could only be convicted by justices of the peace whose commission ran into V. county.

The adjudication and minute of conviction did not award distress, but provided that in default of payment forthwith of fine and costs, imprisonment, while the conviction ordered that in default of payment forthwith, distress, and in default of sufficient distress, imprisonment.

Held, following *Regina* v. *Brady*, 12 O. R. 358, 360-1, that the conviction was bad.

This was an application to quash a conviction, made under the second part of the Canada Temperance Act, for selling intoxicating liquor.

The defendant was convicted on the 11th May, 1887 and fined by William Henry Spencer, and William Haddon Taylor, two justices of the peace for the district of Muskoka, the sum of $50 and costs, for a breach of the second part of the Canada Temperance Act, for selling intoxicating liquor at the village of Bracebridge, in the said district, between the 2nd day of March and the 2nd day of May, 1887.

There were several grounds taken in the order *nisi*, but it is only necessary to refer to the first and second, which were : Statement.

1. The said justices of the peace had no jurisdiction to entertain the said complaint or to hear and determine the same, and make the said conviction, as the second part of the Canada Temperance Act is in force in the said village of Bracebridge, only in virtue of the same being submitted to the votes of the electors of the county of Victoria, and an order in council declaring the second part of the said Act in force in said county of Victoria; and that the said two justices of the peace are not, nor is either of them, nor do they profess to be justices of the peace for the said county of Victoria.

2. That the adjudication and minute of conviction did not award distress, but provided that in default of payment of the fine and costs forthwith the defendant should be imprisoned in the common gaol for two months, while the conviction orders distress, and in default of sufficient distress imprisonment.

In Easter Sittings, May 31, 1889, *Aylesworth*, supported the motion.

Delamere, contra.

The argument and cases cited sufficiently appear from the judgment.

September, 7, 1889. MACMAHON, J. :

By the R. S. O. (1877,) ch. 5, par. 36, p. 27, and also by R. S. O. (1887,) ch. 5, sec. 1, par. 37, p. 29, the village of Bracebridge is included within the territorial division of the county of Victoria for municipal purposes.

By a proclamation in the *Canada Gazette*, dated 25th September, 1885, the second part of the Canada Temperance Act was declared to be in force in the county of Victoria from and after the day on which the annual or semi-annual licenses for the sale of spirituous liquors in the said county shall expire.

Judgment.

MacMahon, J.

In *Regina* v. *Shavelear*, 11 O. R. 727, the Queen's Bench Divisional Court held that the word "county," as used in the Canada Temperance Act, 1878, means county for municipal, and not for electoral purposes. So that the Act being in force in the village of Bracebridge by reason of lying within the county of Victoria for municipal purposes, if an offence was committed against the Act within that county it could be prosecuted only before and adjudicated upon by justices of the peace whose commissions ran into the county of Victoria.

There was no evidence of the Canada Temperance Act being in force in the district of Muskoka.

The information and conviction each describe the convicting justices as being justices of the peace for the district of Muskoka; and there is no affidavit in answer to the affidavit fyled on behalf of the defendant on the motion for the *certiorari*, that they are not justices of the peace for the county of Victoria.

On this ground alone the conviction must be quashed.

The adjudication, signed by the justices, is as follows: "Judgment given for the plaintiff; defendant fined $50, and costs amounting to $11.95, payable forthwith, and in default, imprisonment for two calendar months in the common jail."

The conviction, after setting out the amount of the fine and costs, directs, "And if the said several sums be not paid forthwith, we order that the same be levied by distress and sale of the goods and chattels of the said John Higgins, in default of sufficient distress, we adjudge that the said John Higgins be imprisoned," &c.

On this objection also the conviction cannot be sustained: *Regina* v. *Brady*, 12 O. R. 358, at pp. 360-1.

The conviction must be quashed. The order will be without costs, and with the usual protection to the magistrates and officers.

Galt, C. J., concurred.

Rose, J., was not present at the argument, and took no part in the judgment.

[CHANCERY DIVISION.]

CUMBERLAND ET AL V. KEARNS.

Covenants for title—Covenant against incumbrances and for quiet enjoyment —Municipal corporations—Local improvement rates.

Action on covenants in a deed of land whereby the defendant covenanted that he had done no act * * whereby or by means whereof the lands * * were, or should, or might be in anywise impeached, charged, or affected, or encumbered in title, estate, or otherwise however, and that the grantees should enjoy them free from all incumbrances.

It appeared that a scheme of local improvement which resulted in the imposition of a fixed rate for ten years, as a charge upon the lands conveyed, to defray the expense of the improvement, was undertaken at the instance and upon the petition of the defendant and other property holders interested, under R. S. O. 1887, ch. 184, sec. 612, sub-s. 9.

The by-law creating the charge was passed before the conveyance to the plaintiff, although the precise sum to be paid by each parcel was not ascertained by apportionment till after the conveyance.

The by-law also contained a provision for commutation at the option of the owner.

Held, (affirming the decision of ROBERTSON, J.,) that the action of the defendant in joining in the petition, was the means by which an incumbrance was created on the property, and was a breach of the covenants for which the plaintiffs were entitled to recover.

Held, also that the plaintiffs were entitled as damages in this action to a sum sufficient to remove the charge.

Per BOYD, C.—Different would be the conclusion if the taxes had been imposed by municipal authority without the intervention of the defendant; *Moore* v. *Hynes*, 22 U. C. R. 107, distinguished.

Statement.

THIS was an action for breach of covenants contained in a deed of land, brought under the circumstances which are set out in the judgment of ROBERTSON, J., before whom the action was tried at Toronto.

J. H. Ferguson and *O'Brian*, for the plaintiffs.
Haverson, for the defendant.

May 31st, 1889. ROBERTSON, J.:—

This action was tried before me at the last Toronto sittings, and is to recover damages for the breach of a covenant contained in a deed made by the defendant to the plaintiffs, bearing date the 14th day of April, 1887, conveying to the plaintiffs certain lands on Margueretta street, in the city of Toronto, and which deed is made in pursu-

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ROBERTSON, J.

ance of the Act respecting short forms of conveyances, and contains *inter alia* the following covenants: 1st, that he, the defendant, has the right to convey the said lands, notwithstanding any act of his; 2nd, and that the plaintiffs should have quiet possession of the said lands, free from all incumbrances; and 3rd, that the defendant had done no act to incumber the said lands. In the statement of claim these covenants are set out in the form of words contained in column two of the Act referred to. The complaint is, that the defendant, prior to the execution of the said deed, on or about the 2nd of February, 1885, with others, joined in a petition to the council of the city of Toronto, setting forth that he, the defendant, and the other petitioners, were owners of real property situate and abutting upon Dundas and Bloor streets, and between St. Clarens avenue and Brockton road, and that they were desirous of having a street opened midway between St. Clarens avenue and Brockton road, beginning at Bloor street and running south to Dundas street; that they desired such work to be carried out as early as possible and as a local improvement, by special assessment according to the conditions, etc., adopted by the committee of works, and under the provisions of the municipal Acts, etc; that such proceedings were thereupon had that a by-law at the instance of the defendant was, on the 9th of July, 1885, duly passed by the said corporation, directing the said street to be opened at the expense of the property benefited; and that sixty-six feet of land be taken and expropriated from Dundas street northerly to Bloor street; and that the same be established and confirmed as a public highway or street, to be known as Margueretta street; that the defendant and other owners of property on this Margueretta street, on the 16th of October, 1885, signed an agreement in writing, whereby they agreed to dedicate and give so much of their said properties as form part of said street, being strips off said properties measuring thirty-three feet on each side of the middle line of said proposed street, by the length of their frontages; and to take and receive therefor at the rate of $2.50 a foot for each foot of said strip of thirty-three feet; and to allow M. S. Wood $25 a foot frontage for his Dundas street frontage, by one hundred feet deep, and for the rest of his lot to be allowed $2.50 a foot as above, and the value of the buildings on the said sixty-six feet to be taken at the valuation of W. Maughan, assessment commissioner. This agreement was reported upon to the

council, and it appeared in evidence before the council that the defendant was then a property owner on the line of the said new street, and was entitled to receive compensation for the expropriation of so much of the same as was required for the said street, the sum of $2,076.46, and that the cost of opening up and expropriating of the land for the said street should be assessed against the property fronting on the line of the said new street; and in pursuance of this agreement and the action of the council thereupon, the defendant was, on or about the 18th of December, 1885, paid and received the said sum of $2,076.46, being the amount settled as compensation to defendant. The defendant, at the date of the firstly mentioned petition, and continuously until the date of the deed first referred to by which the defendant conveyed the said lands to the plaintiffs, was the owner of the said lands, together with the portion thereof expropriated, and it was as such owner that he acted and signed the said petition and agreement, and in promoting, suggesting, and procuring the several acts of the corporation before mentioned to be done, and by means whereof the council did, on the 29th of August, 1887, pass a by-law charging the property fronting on Margueretta street, including the property granted and conveyed by the defendant to the plaintiffs, with the cost of opening up the said street, and to pay the same imposed and charged upon the said lands a frontage tax payable for ten consecutive years, commencing from 1st of January, 1887. The plaintiffs thereupon charge that by means of the said acts, matters, and things, made, done, and committed, executed or wilfully or knowingly suffered by the defendant, the said lands have become and are now charged, affected and incumbered with the payment of the said tax; and such charges, trouble, and incumbrance, the plaintiffs allege, were occasioned or suffered by the defendant as aforesaid, in breach of his said covenants in that behalf, and the plaintiffs and their said lands have become charged and are liable to pay, and will, by reason of the defendant's said breaches of covenants, be compelled to pay a large sum to extinguish, get rid of, and free and discharge these said lands from the said charge, trouble, or incumbrance.

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The defendant admits the signing of the petition, etc., and the execution of the deed and covenants, and he says that the tax complained of as a breach of the covenants contained in the deed was imposed after the date of the

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said deed by the council of the corporation of the city of Toronto, acting under the authority of the Municipal Act and the by-laws passed by the council, numbered 1,522, respecting local improvements and special assessments therefor, passed in December, 1884; also, by-law No. 1,583, which by-law was duly signed on the 27th of July, 1885; and by-law 1,631, respecting the opening up of the said Margueretta street, etc., etc.

The facts are clear, and I find them to be as alleged by plaintiffs; there is no dispute as to them.

The opening up of the street has cost $21,921.44, of which amount the city has disbursed $452.28, being the cost of that portion of the improvement chargeable in respect of exempt property, and which is not specifically charged upon the lands in question; and the remaining $21,469.16 is the amount of the debt created by by-law No. 1,898, and is charged, together with the interest thereon, on the several properties on the street, which have together a frontage of 6,256 feet, and upon which an annual special rate per foot sufficient to pay the interest and create a sinking fund for paying the principal debt within ten years is assessed, which debt is created on the security of the special rate settled by the last mentioned by-law, and on that security only; and which sum has been raised by debentures of the city to defray that part of the expense of said work payable by local special rates.

Provision is made in the by-law to enable any of the owners of the said real property to commute the assessment imposed by the payment of his or her proportionate share of the cost as a principal sum in lieu thereof; and for the first year at the rate of three dollars and forty-three cents, one and eight-tenth mills per foot frontage; or in any subsequent year by the payment of a similar sum reduced by one-tenth thereof for each year during which the said annual special rate shall have been paid; and the plaintiffs claim that they should recover a sum sufficient to enable them to commute, which amounts to $1,536.47.

There was no evidence of the fact, but I think it may fairly be presumed, as a consequence of the opening up of the street in question, that the lands of the defendant, afterwards sold and conveyed by him to the plaintiffs, were materially increased in value, and that the plaintiffs paid for that improvement in the price which they paid the defendant for the same; and to the extent of $2,076.46 the defendant received from the city compensation for the

lands expropriated belonging to him, which sum was charged back on the lands of the defendant, including that conveyed by him to the plaintiffs. It would seem inequitable, therefore, that the plaintiffs should not only pay the defendant for the enhanced value of the property caused by this improvement, but also be required to pay to the city a charge placed by the corporation on the lands for the purpose of recouping the city the amount paid by it to the defendant for creating the improvement.

What is called the local improvement by-law, No. 1,522 (already referred to), was passed on the 8th of December, 1884, and the preamble expresses that "it is desirable to make further provision respecting local improvements and special assessments"—and by sec. 2 declares that "No work or improvement for which it is proposed to assess the real property, immediately benefited as for a local improvement, shall be undertaken by the council, unless and until the provisions of this by-law shall have first been complied with." Then follows what is required to be done by way of petition, referring the same to the committee on works, and that it shall be examined by the city clerk to ascertain if it has been signed by the requisite number of owners, representing at least one-half in value exclusive of the value of the improvements of the lands benefited, and liable to special assessment for the proposed improvements, etc.; and requiring the said committee on works to forthwith refer the same to the city engineer, etc., who shall, as soon as possible, report on the advisability of the proposed improvements, and *inter alia*, "An estimate of the probable cost, etc., and the amount thereof which will be assessed against the property which will be immediately benefited;" and in the event of the adoption of the report of the engineer, etc., the committee on works shall report; and it was afterwards ascertained that the total cost of opening up the said street amounted to $21,921.44 whereupon afterwards, on the 29th of August, 1887, the council passed another by-law, No. 1,898, "To provide for borrowing money by the issue of debentures secured by local special rates on the property fronting on Margueretta street, etc., for the opening up of Margueretta street." This by-law describes the property comprised as being "immediately, directly, equally and specially benefited by the improvement and work, and that the petitioners are two-thirds in numbers and represent one-half in value of the owners of the real property to be directly benefited

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ROBERTSON, J.

thereby," etc. This by-law then provides that $1,073.45 shall be raised annually for the payment of interest on said debentures, and also $1,717.53 annually for the payment of the debt, in all, $2,790.98 to be raised annually, "and that a special rate of forty-four cents, six and thirteen one-hundredths mills per foot is hereby imposed on the real property above described," etc., "over and above all other rates and taxes * * for the next succeeding ten years, and shall be payable to and collected, etc., in the same way as other rates," etc. In pursuance of this last mentioned by-law, the plaintiffs have been required to pay, for the year 1888, on 314 feet frontage of the land purchased from the defendant, $160.08, which annual sum has been charged upon the said lands for ten years.

It was stoutly contended on the part of the defendant that this annual rate is not a tax or charge upon the land within the covenant, for the alleged breach of which this action is brought, but is a rate or tax charged upon the owner or occupant of the land in respect of the land; and therefore on the authority of *Moore* v. *Hynes et al.* 22 U. C. R. 107; *In re McCutcheon and the Corporation of the City of Toronto*, *ib.*, 613, and other cases referred to, the plaintiffs cannot recover. I have found myself obliged to come to a different conclusion. No case in our own courts, nor in the courts of Great Britain, has been cited exactly in point. Here it is clear that the Municipal Act, and the several by-laws passed by the municipal corporation of the city of Toronto, expressly declare that the amount required for carrying out a local improvement, such as the opening up of Margueretta street, is to be secured by a charge on the lands to be benefited by the local improvement. Every act done by the defendant, and the others with whom he acted, expressly declared that the cost and expense of carrying out the improvements for which they petitioned the council was to be done as a local improvement, by special assessment, according to the conditions and regulations adopted by the committee on works and under the provisions of the Municipal Act in reference thereto, and the by-law authorizing the issue of debentures on which the money was raised expressly declares that the sum to be raised annually to meet the interest on the debentures and to create a sinking fund for the payment of the principal, "shall be imposed on the real property" affected by the improvement. The question was argued in *Moore* v. *Hynes*, *supra*, and it was there con-

tended for the plaintiff that the charge was on the land, and Hagarty, J., in his judgment says, "if that is the case he is clearly entitled to recover," but the Court then held, and it was clear under the by-law authorizing the rent for the use of the sewer, etc., that it was not a tax or charge upon the land but upon the owner or occupier in respect of the land, so that this case is really an authority in favour of the plaintiffs' contention. There are also numerous American cases, quite in point, which support the plaintiffs' contention, and in this connection I refer to *Blackie* v. *Hudson*, 117 Mass. 181; *Jones* v. *Aldermen of Boston*, 104 Mass. 461, at p. 464; *Banes* v. *Caldwell*, 143 Mass. 299; *Cadmus* v. *Fagan*, 47 N. J. Law Rep. 549; and also see Devlin on Deeds, vol. 2, sec. 907, where it is stated on the authority of a number of cases there cited, in note 3, that taxes levied subsequently to the date of the covenant have, by operation of law, relation back to the date of the deed, which is the case here.

Judgment.

ROBERTSON, J.

The only difficulty I have is in estimating the damages. The plaintiffs claim that they were entitled to recover a sum which will enable them to remove the charge. I think that is a reasonable proposition, and it appears by the by-law charging the land that the owner may commute, but, in *Moore* v. *Hynes*, *supra*, it was held that the act of commutation was wholly optional with the plaintiff, and the judgment goes on to state, "the existence of any right, legislative or municipal, by which any tax could be, as it were, capitalized and paid off by one sum forever is, we take it, a mere privilege to an owner, and the commutation sum in gross cannot, we think, be looked upon as an existing encumbrance on such covenants as we see before us." But then the plaintiffs are in this position—they must either pay the annual charge and bring a separate action each year, in case the defendant does not pay the same, or they may commute and wait to the end of each year to recover from the defendant the amount which he should pay each year in order to keep the lands freed from the charge. It appears to me on the whole that this would not be equitable, and the plaintiffs should have the right to recover whatever sum it may be necessary to enable them to free their property from the cloud upon its title, imposed by reason of the acts of the defendant. I therefore give judgment in favour of the plaintiffs for whatever amount may be ascertained on a reference to the Master, which will enable them to wipe out the charge. I think the plaintiffs are entitled to the full costs of suit.

Argument.

The defendant moved before the Divisional Court of the Chancery Division by way of appeal from this judgment, and the motion came on for argument on June 17th and 18th, 1889, before BOYD, C., and FERGUSON, J.

Haverson, for the defendant. The question is, can the vendee, under the covenants in the short form deed, compel the vendor to commute the local improvement taxes? *Bank of Montreal* v. *Fox*, 6 P. R. 219, follows *Moore* v. *Hynes*, 22 U. C. R. 107. [BOYD, C.—It is a charge on the land, there's no doubt; the question is, whether it is one for which you are liable under the covenant.] That's the point. Then the defendant and others agreed on the amount to be received for compensation on the expropriation of the lot for the street, in October, 1885. The plaintiff says the defendant signed this and also the petition. [BOYD, C.—The signing the agreement for compensation does not seem material. It seems more so, that he signed the petition for the foundation of this charge.] R. S. O. 1887, c. 184, s. 612, provides for a by-law for local improvement. The Act shews there are two methods for the charge being imposed: (1) by council taking action; (2) by initiation by the ratepayers on petition. It is clear that prior to this Act for assessing particular parts of the city with the charge of opening a street, the charge would have been borne by the city as a whole. *Moore* v. *Hynes*, *supra*, decided that the charge was merely a personal charge, but it also decided that, if it had been a charge on the land, the vendee could not compel the vendor to commute the charge. [BOYD, C. —You say it only becomes a lien when it becomes due, and it is not an incumbrance within the meaning of the covenant at the time the covenant is made?] Yes. Under the Torrens Act, the Legislature clearly views this as an ordinary tax, not as an incumbrance on the land: R. S. O. 1887, ch. 116, sec. 24, sub-sec. 2. The deed was in April, 1887, and the by-law was not till August, 1887. There is no by-law charging this land with

any sum till August, 1887. This land might, at a subsequent time and before the end of the term, become exempt, and the charge cease. A school might be built on it. [BOYD, C.—You may, for that reason, not be obliged to commute, but you may still be required to pay from year to year. You put the council in motion by petitioning.] But there must be the act of the city council. They are not obliged to pass the by-law. *Moore* v. *Hynes*, 22 U. C. R. 107, goes to shew the future tax is not an incumbrance by any means, and cannot be sued for as it arises from year to year. *Re Armstrong*, 12 O. R. 457, shews that the old sewer rates were not charged on the land. *Bank of Montreal* v. *Fox*, 6 P. R. 219, is in the same line as *Moore* v. *Hynes*, 22 U. C. R. 107, that these future charges are simply taxes and not incumbrances. The Legislature certainly regards these local rates as being ordinary taxes: *Haynes* v. *Copeland*, 18 C. P. 150; R. S. O. 1887, ch. 193, sec. 7. In cases between landlord and tenant, these rates are also looked on as ordinary taxes: *Boulton* v. *Blake*, 12 O. R. 532. In *Moore* v. *Hynes*, 22 U. C. R. 107, the covenant was very much stronger than the covenant is here. As to the American cases referred to in the judgment, the deeds under which they are decided contain the strictest warranties: Rawle on Covenants, 5th ed., p. 93. Moreover, we have different local legislation. Argument.

J. H. Ferguson, for the plaintiffs. In *Moore* v. *Hynes*, 22 U.C. R. 107, the covenant sued on was different in many respects to the one here. The only liability there was for arrears of taxes. The case proceeded on an express contract. The taxes complained of there were of a different kind to those here. We had not the local improvement system then. The taxes were practically imposed by Parliament; the taxes here are taxes practically imposed for the purchase of the road bed. In the case of a sewer rate, as in *Moore* v. *Hynes*, 22 U. C. R. 107, it may well be said that the man who is enjoying the sewer and wearing it out should pay for it. Here the tax imposed went for the expropriation of the land alone. There are separate taxes with which we are

Argument.

not dealing, for the sewers and the block-paving. Moreover, the defendant had done acts by means whereof the land has subsequently become charged, viz.: (1) signing the petition for the local improvement; (2) the promoting of it. [FERGUSON, J.—The covenant here has the words, "whereby the lands be or shall become charged?"] Yes. In this case, moreover, the engineer reported $8,200 as the proper compensation money. The landowners then met together and agreed that the compensation money should be $22,000. This they did to avoid an arbitration. Thus this sum came to be fixed as the amount to be charged upon the land. October 16th, 1885, is the date of this agreement; and we contend the act of the defendant in signing this document and afterwards helping to procure the assent of the city council to it, constitutes an act whereby this land came to be charged. The defendant further received the amount of his share of the compensation. He was an active promoter of the whole thing. Now, it is not necessary to show that the actual incumbrance has been imposed by the covenantor: *Butler* v. *Swinnerton*, Cro. Jac. 656. This case is referred to by the text-writers as still a standard authority. *Hobson* v. *Middleton*, 6 B. & C. 303, shews the defendant should not concur in any act over which he has any control. Here all the trouble has been brought about by the signing of the petition, which was a necessary preliminary to action by the council. The rule as to damages is to find out how much does it require to clear off the incumbrance. If this is a charge, this is the rule to be applied: Mayne on Damages, 3rd ed., p. 185; Devlin on Deeds, vol. 2., p. 107, and the cases there cited; *ib.* sec. 913. *Platt* v. *Grand Trunk Railway*, 12 O. R. 119, completely disposes of any question of notice to us. Practitioners here appear to have gone along supposing *Moore* v. *Hynes*, *supra*, and those cases applied to all taxes. In America many cases have been decided which are referred to by ROBERTSON, J., which support the principle for which we contend. I submit the judgment should be affirmed.

Haverson, in reply. The covenant in *Moore* v. *Hynes*, *supra*, is more extensive, not less extensive than others. There is an absolute covenant there as to all charges and incumbrances whatsoever. The money which the defendant got was for that for which he gave value. The money which he got from the city has nothing to do with the case. The money, moreover, for the road included not only the roadbed but also the fencing and grading. If the vendee should pay for a sewer or a pavement because they will wear out, much more should he pay for what will last forever. It is not the case that the city could not have acted without a petition: R. S. O. 1887, ch. 184, sec. 612. [BOYD, C.—You need not argue that. It was done here on a petition.] R. S. O. 1887, ch. 184, sec. 612, sub-sec. 9, is the section under which the act was done here. Besides, the sanction of the council is always necessary, and the engineer must be satisfied. The act is the legislative act of the city council, not the mere act of the petitioner. The agreement to waive an arbitration only deals with the roadbed. It had nothing to do with the charging the land. *Bank of Montreal* v. *Fox*, 6 P. R. 217, deals with both the methods, the local improvement method as well as the other. Argument.

September 12th, 1889. BOYD, C.:—

The material fact in this case appears to be this, that the scheme of local improvement which resulted in the imposition of a fixed rate for ten years to defray the expense of the improvement, was undertaken at the instance and upon the petition of the defendant and other property holders interested, under the Municipal Act, sec. 612, sub-sec. 9. By this action of the defendant and others, a charge was created upon this property by virtue of a by-law passed before the conveyance to the plaintiff, although the precise sum to be paid by each parcel was not ascertained by apportionment till after the conveyance. But for the action of the defendant, whereby the municipality was set in motion, there would not have been the

Judgment.

BOYD, C.

imposition of the tax upon the land of which the plaintiff now complains. An incumbrance has thus been created through the instrumentality of the defendant, which appears to me to be within the meaning of the covenants in his deed; those, namely, that he has done no act to incumber the lands, and that the grantee shall enjoy it free from all incumbrances. Both are prospective in character and extend to consequences traceable to acts originating within the covenantor. Different would be the conclusion if the taxes were imposed by municipal authority without the intervention of the defendant, in which case *Moore* v. *Hynes*, 22 U. C. R. 107, would be the governing decision. In such case, the private owner is in no wise responsible for the imposition of the tax. Here it arises upon his express invitation, and formed a charge upon the land prior to his covenant, for the subsequent tax was based upon the by-law of July, 1885, which directed the street to be opened at the expense of this and other property benefited.

I think the decision should be affirmed.

FERGUSON, J.:—

The facts of the case are, I think, sufficiently stated in the judgment of my brother Robertson.

I am of the opinion that the learned Judge was right in holding that the annual rate in question is not a rate or tax charged against the owner or occupant of the land in respect of the land, but is a charge upon the land itself; and in this respect the case seems to me quite different from the case, *Moore* v. *Hynes*, *supra*, mentioned in the judgment and upon the argument.

The covenant, for alleged breach of which the action is brought, is set forth in full in the statement of claim, and is very comprehensive in its terms in respect of the acts of the defendant, etc., covenanted against.

It is not disputed that the defendant signed and promoted the petition for what is called the local improve-

ment, or that he signed and had the benefits of the agreement of the 16th day of October, 1885, regarding the distribution of the money to be obtained for the lands then to be dedicated or taken for the new street. Judgment. FERGUSON, J.

It is not and cannot be denied that he was one of those whose acts and conduct brought about what occurred, namely, the charging the lands referred to in this agreement with the moneys in question, which, as was asserted on the argument and not disputed or denied, were solely for the purpose of liquidating or paying the moneys called the "expropriation moneys," according to the prices mentioned in that agreement, there being another and different rate for pavement, and still another for a sewer.

This conduct of the defendant was all prior to the execution of the deed containing the covenant, dated the 14th day of April, 1887. The final by-law providing for the borrowing of the money by the issue of debentures secured by local special rates on the property, was not apparently passed until August, 1887, and it was contended that this was fatal to the plaintiffs' contention. But, even apart from the manner in which this is met by the learned Judge in his judgment, it is plain, I think, that the final consummation flowed from the acts that were done prior to the date of the deed, and besides the defendant covenanted that he had done no act "* * whereby or by means whereof the lands * * were or should or might be in any wise impeached, charged, or affected or encumbered in title, estate or otherwise howsoever."

It was contended that the defendant was not liable because the municipal corporation may in such cases take the initial step and proceed without a petition, etc. The answer, I think, is, that the corporation did not do this, and what they did do was brought about by the acts and conduct of the defendant in conjunction with others; and it cannot, I think, be properly or successfully contended that the fact that the acts, etc., were not the sole acts of the defendant makes any difference. I am of the opinion that the plaintiff is entitled to recover for breach of the

Judgment.
FERGUSON, J.

covenants. Then, as to the amount of the damages; in the 4th edition of Mayne on Damages at pages 204 and 205, it is stated that there is no difference in principle between a covenant against incumbrances and a covenant to pay them off. Reference is then made to the case in 2 B. & Ad. 772 (*Lethbridge* v. *Mytton*), shewing that the plaintiff in an action upon such a covenant can recover the whole amount of the incumbrance, and the author points out that the rule in America is different unless the plaintiff has paid something or extinguished some incumbrance. In the case, *Connell* v. *Boulton*, 25 U. C. R. 444, the covenant was much like the one in the present case. For the purposes of the question of the measure of damages, I think it may be considered precisely the same, and the conclusion arrived at supports the view taken by my brother Robertson, I think, to the full extent.

I am of the opinion that the judgment should be affirmed.

A. H. F. L.

NOTE.—This case has been carried to the Court of Appeal.—REP.

[COMMON PLEAS DIVISION.]

THE CORPORATION OF THE TOWN OF COBOURG V. VICTORIA UNIVERSITY.

Victoria University—Place of Meeting of Senate—Seat of University—38 Vict. ch. 79, (O.)—47 Vict. ch. 93 (O.)

Held, that under the Acts incorporating Victoria University, and the statutes thereof, set out in the judgment, the Chancellor has no power to call a meeting of the Senate elsewhere than at Cobourg the present seat of the University.

Statement.

THIS was a motion by the defendants to strike out the name of the Senate of Victoria University as a party plaintiff, and to set aside the injunction in this case so far as the Senate of the University were concerned, on the ground that on the 30th May last, the Senate of the said University passed a resolution concurring with the defendants in giving notice to federate with Toronto University, and desiring to have the injunction dissolved so far as the same was granted or continued on behalf of said Senate.

The injunction granted restrained the defendants from removing Victoria University from the town of Cobourg, or from expending any money or letting any contracts for buildings to be erected elsewhere than at Cobourg, or from taking any steps towards federating Victoria University with the University of Toronto.

This motion was argued by *Moss*, Q. C., and *Britton*, Q. C., for the defendants.

Robinson, Q. C., and *Holman*, for the plaintiffs.

September 7, 1889. GALT, C. J.:—

After I had given judgment on a motion made before me to continue an interim injunction granted by my brother MacMahon, on 2nd May and on the 17th May, Dr. Burwash, the Chancellor of the University, on 20th May gave the following notice:

Judgment.

GALT, C.J.

VICTORIA UNIVERSITY.

Meeting of Senate.

The Senate of Victoria University is hereby called to meet in the Parlor of the Metropolitan Church, in the city of Toronto, on Thursday, May 30th, at 3 p. m., to consider and take any action which the present relations of the University to the question of federation may render necessary.

On the 23rd May, MR. WILSON, Registrar of Victoria University, sent out the following notice to members of the Senate:

VICTORIA UNIVERSITY.

Cobourg, May 23rd, 1889.

SIR—Please take notice that a special Session of the Senate of Victoria University is called by the authority of the Chancellor to meet in the Parlor of the Metropolitan Church, Toronto, May 30th, at 3 p. m., for consideration of University federation.

On the 30th May, a number of gentlemen, members of the Senate, met at Toronto, some of them were in favour of the meeting and others were opposed to it, alleging as a reason, among others, "that a meeting of the Senate cannot legally be held at Toronto, and that any business transacted at such meeting would be absolutely without legal effect. We are advised that under the charter and statutes of the University you have no authority to summon a meeting elsewhere than at the seat of the University."

This protest was disregarded and the members present (the opponents had left) passed the following resolution:

"That having heard the request of the joint meeting of the Board and the Advisory Committee, and in view of the peril of further delay, both to the harmony of the church at large and to the financial and educational interests of the College, this Senate do now comply with the request of the Board of Regents presented at our meeting in November, 1888, and the Senate are willing to concur and do hereby concur with the Board of Regents in giving the necessary notice to federate with Toronto University, and pray the Court to relieve the Board of Regents from the injunction, in so far as it is granted on our behalf."

This was carried by a vote of twenty-six against three.

Upon this resolution the present motion is made to dissolve the injunction, so far as the Senate is concerned.

The case was very fully and ably argued by the learned counsel on both sides; but as my judgment is based on the

objection taken as to the place of meeting of the Senate, it is unnecessary to refer to any other.

Judgment.

GALT, C.J.

The statutes relating to Victoria University now in force are 38 Vic. ch. 79 (O.), and 47 Vic. ch. 93 (O.)

At the date of passing of 38 Vic. ch. 79, the law relating to the Senate, was contained in 4 & 5 Vic. ch. 37, incorporating Victoria College (*a*), which enacted by sec. 3: "That the principal and professors together with the members of the Board, shall constitute the College Senate, which may be assembled as occasion may require by the principal, by giving one months notice in the *Official Gazette* in this province, and which whenever there shall be a principal and four professors employed in said College, shall have power and authority to confer the degrees of Bachelor, Master, and Doctor in the several Arts and Faculties."

By sec. 16 of 38 Vic. ch. 79, the powers of the Senate were enlarged, otherwise no change was made.

In 1884, an Act to amend the Acts incorporating Victoria College and Albert College was passed by which these Colleges were placed under the charge and control of the General Conference of the Methodist Church, under the name of Victoria University.

Section 9 amends sec. 16 of 38 Vic. by increasing the number of members and enlarging the powers of the Senate.

Section 10 enacts that the President of the University shall be Chancellor of the University, and that the Chancellor shall call all meetings of the Senate, and shall preside thereat.

Up to the time of the passing of this Act, there was no Victoria University, there was a Victoria College and Albert College. After this Act came into force certain statutes of Victoria University were passed, among others, which ordain,

"SESSIONS OF SENATE.

1. The Senate shall meet on the first Monday after the opening of the College Session in October, and continue

(*a*) The College was incorporated as "Victoria College, at Cobourg."

Judgment.

GALT, C.J.

in session by adjournment for period of eight weeks; seven members to constitute a quorum.

2. A second annual session shall be held, commencing on the first Wednesday in March, and continue by adjournment until the close of the Academic year."

In my opinion these meetings were unquestionably to be held at the site of the University, which at present is in the town of Cobourg.

Then it is enacted by the third section that,

"3. Special sessions of the Senate may be called at any other date by the Registrar on the authority of the Chancellor, the quorum of such sessions to be the same as the regular sessions of the Senate."

By the last section, power is conferred on the Chancellor to call special sessions of the Senate at any time when he may think it necessary, but in my judgment he has no authority to change the place of meeting. Had such been the intention it can hardly be supposed that at a meeting called to pass these statutes so obvious an omission would have passed without notice.

In my opinion, therefore, the resolution adopted at the meeting held in Toronto on 30th May, cannot be held to have been a resolution of the Senate; and therefore this motion must be dismissed,

Reference is made in the affidavit of Dr. Burwash to the fact that many years before the passing of 38 Vic., and so late as the year 1863, special meetings of the Senate had been held in the city of Toronto. Nothing is stated as to the manner in which these meetings had been convened, but as the law respecting the Senate then stood, one month's notice must have been given in the *Official Gazette* of the Province. No such notice was given in the present case; and, in my judgment, this case must be decided under the existing statutes of the Victoria University which confer power on the Chancellor to call special sessions of the Senate at any date he may deem necessary, but do not authorize him to change the locality.

Motion dismissed, costs to be costs in the cause to the plaintiffs in any event.

[COMMON PLEAS DIVISION.]

REGINA V. GRANT.

By-law authorizing imprisonment for six months—Validity of—Conviction, Costs of conveying to jail included in—Invalidity of—Evidence of defendant—Admissibility.

A by-law of the city of Brantford enacted that any person found drunk on any of the public streets, &c., thereof, should be subject to the penalty thereby imposed, namely to a fine not exceeding $50, inclusive of costs, and in default of payment forthwith of the fine and costs, distress, and in default of sufficient distress, imprisonment in the common jail for a term not exceeding six months, &c., unless the fine and costs were sooner paid :—

Held, that under sub-sec. 19 of sec. 479, R. S. O. ch. 184, there was power to authorize imprisonment for the period mentioned.

A conviction under the by-law directed in default of payment forthwith of the fine and costs and of sufficient distress, imprisonment for ten days in the common jail unless the costs and charges, including the costs of conveying to jail, were sooner paid :—

Held, that the conviction was bad as there was no power to include the costs of conveying to jail.

On a trial of an offence under the by-law, the magistrate cannot refuse to receive the defendant's evidence.

THIS was a motion by way of appeal from the judgment of the Chief Justice of this Division, refusing an order for a *certiorari*. Statement.

The defendant was convicted for a breach of one of the provisions of a by-law of the city of Brantford in that he was "unlawfully found drunk on the public street," of the city of Brantford, contrary to the provisions of said by-law, and fined $1.00 for the said offence and $2.85 for costs, and in default of payment of the fine and costs forthwith; distress; and in default of sufficient distress imprisonment in the common jail for the period of ten days, unless the fine and costs, including costs of conveying to jail, were sooner paid.

The by-law was passed under the Municipal Act of 1883, 36 Vict. ch. 48 (O.), which enacted amongst other things that any person found drunk or disorderly in any street, highway, or public place within the city, should be subject to the penalty imposed by the by-law, namely, a fine not exceeding $50, exclusive of costs, and, in default of pay-

Statement. ment forthwith of the fine imposed and costs, distress; and in default of sufficient distress, imprisonment in the common jail for a period not exceeding six months, unless the fine and costs were sooner paid.

In Easter Sittings, May 21, 1889, *Mackenzie*, Q.C., supported the motion. The by-law is invalid. Under sec. 454, sub-sec. 14, of R. S. O. ch. 174, (1877), the section in force when the by-law was passed, the power was conferred on cities to authorize imprisonment for a term not exceeding twenty-one days, but only with reference to by-laws aimed at the keeping of houses of ill-fame: Harrison's Mun. Man., 4th ed., 364. The conviction is also bad for including the costs of conveying to jail. Sec. 479, sub-sec. 19, R. S. O., 1887, ch. 184, plainly intends that imprisonment should be only for non-payment of the fine and costs of the conviction: *Regina* v. *Wright*, 14 O. R. 668. The word "inflicted," used in the section shews this, although the general form given by the statute of a conviction under a by-law would seem to authorize the imposition of these costs. The form cannot govern the section or read anything into it which has the effect of varying it: *Regina* v. *Lake*, 7 P. R. 215; *Regina* v. *Walker*, 13 O. R. 83; *Arnott* v. *Bradly*, 23 C. P. 1. Sec. 420 R. S. O., (1887), ch. 184, does not apply here but only to a conviction had under the statute. It limits the term of imprisonment to thirty days, whereas under the by-law six months may be imposed, and there is no provision for distress. This probably explains the powers given to impose costs of committal by sec. 420: *McLellan* v. *McKinnon*, 1 O. R. 219, 231, 2: *Regina* v. *Hamilton*, 9 C. L. J. Occ. N. 36.

Aylesworth, contra. The by-law is good. The section commented on in Harrison's Mun. Man., 4th ed. 364, has since been materially altered. Under sec. 479, sub-sec. 19 of the R. S. O. ch. 184, the power to imprison for six months applies to all by-laws in cities, and in other municipalities to by-laws directed only to houses of ill-fame. [GALT, C.J.—We think this objection fails, as we are of opinion

that under sec. 479 sub-sec. 19 there was power to authorize imprisonment for the period mentioned in the by-law.] The costs of commitment and conveying to jail were properly imposed. Sub-sec. 19 of sec. 479 must be read in connection with sec. 420, which especially provides for costs of committal. Argument.

September 7, 1889. ROSE, J.:—

On the argument three grounds were taken by the applicant.

1. That the police magistrate refused to receive the evidence of the defendant.

2. That the by-law was invalid.

3. That the conviction was bad in that it directed imprisonment for ten days unless the costs and charges of conveying the defendant to jail were sooner paid.

The last ground was not taken before the learned Chief Justice.

The second ground was held untenable upon the argument before us.

The first ground, on the material before us, appears well taken: R. S. O. (1887), ch. 184, sec. 424, but owing to some irregularity in practice, the affidavits made in answer to the application, are not before us.

The conviction was under a by-law providing for punishing persons found drunk or disorderly on any street, and the sections of the Act applicable are 479, 421-4, R. S. O. (1887,) ch. 184.

The parties agreed that the motion might be treated as for an order absolute to quash the conviction.

We would not feel justified in making the order to quash on that ground without receiving the affidavits referred to before us on the argument; and, therefore, if that were the only ground appearing, would direct the *certiorari* to issue so as to have before us all the material, it having been stated on the argument that the fact was that the evidence was not refused.

Judgment.

Rose, J.

But if the *certiorari* were directed to issue, on its return and on motion for an order *nisi*, the defendant would be in a position to urge the validity of the third ground which appears upon the face of the conviction.

We, therefore, think it best to consider that objection at this stage.

Section 479 of R. S. O. ch. 184, does not make any provision for imposing or collecting costs or charges of conveying to jail.

Section 420 applies only where the fine and penalty are imposed "*by or under the authority of this Act*," which is not this case; that section provides for "costs of the committal."

Section 421 applies to "an offence against a municipal by-law," which is this case; but in it no reference is made to such costs.

Section 422 empowers a justice to commit, "in case of there being no distress found out of which the *penalty* can be levied."

The by-law does not in terms provide for costs of conveying to jail.

Having regard to the language of these sections and the by-law, and to our decision in *Regina* v. *Wright*, 14 O. R. 668, we think the conviction cannot stand; but as it is quashed on a technical ground, not involving the merits, there will be no costs, and the usual order for protection may go.

See *McLellan* v. *McKinnon*, 1 O. R., at pp. 231-2, as to construction of the section above referred to, and *Regina* v. *Hamilton*, 9 C. L. T., 361, as to costs of conveying to jail.

GALT, C J., and MACMAHON, concurred.

[COMMON PLEAS DIVISION.]

PRITCHARD V. PRITCHARD.

Contempt of Court—Order—Solicitor to repay money into Court—Disobedience of—Order for committal—Con. order 867.

A solicitor in an action had obtained an order for the payment out to him of certain moneys in Court, and upon such order obtained the moneys. Subsequently an order was obtained rescinding the above order and directing the solicitor to forthwith repay the said moneys into Court, and to pay the costs of the application. On his non-compliance therewith a motion was made for his committal :—

Held, that the order for committal should go, for what was sought by the motion was the punishment of the solicitor for his contempt in disobeying the order of the Court ; and that Con. Rule 867 had no application.

Statement.

THIS was a motion to commit John Macgregor, a solicitor of the Supreme Court of Ontario for disobedience of an order of Mr. Justice Street, in not forthwith repaying into Court, in a cause, the sum of $661.42, and also in not forthwith repaying to the plaintiff in the cause the sum of $27.35 for costs, &c.

F. C. Moffatt, for the motion.

C. J. Holman, contra.

August 12, 1889. MACMAHON, J. :—

On the 28th May last, John Macgregor, the plaintiff's solicitor, obtained from my brother Rose, sitting in Court, an order directing "that the moneys paid into Court, together with the accrued interest, be forthwith paid out to the plaintiff's solicitor." And on the order so obtained, Macgregor received out of Court, as plaintiff's solicitor, the sum of $661.42.

Upon the application of the plaintiff, Mr. Justice Street on the 21st of June, made an order rescinding the above mentioned order, so far as it directed payment out of Court of the moneys to the credit of the action to the plaintiff's solicitor on the record ; and ordered that John Macgregor, the plaintiff's solicitor on the record, should forthwith repay into Court to the credit of the cause the

Judgment.

MacMahon, J.

sum of $661.42, being the sum received by him out of Court; and, also, that the said John Macgregor, the solicitor for the plaintiff on the record, should forthwith pay to the plaintiff the sum of $27.35, being the costs of that application. It was further ordered that upon payment into Court, Macgregor should have liberty to have his bills of costs delivered to the plaintiff, forthwith taxed, and the amount found due to him by the plaintiff upon taxation, should forthwith be paid out to Macgregor out of the moneys in Court.

This order was personally served on Macgregor on the 29th of June; and on the 5th July, a search was made in the office of the accountant of the Supreme Court, but the money had not been repaid into Court to the credit of the cause as required by the order.

A motion was made before me, on the 22nd day of July, to commit John Macgregor for non-compliance with the order.

The objections raised to the motion were, that since the Consolidated Rules, there can be no commitment for contempt in such a case as the present, as the order is only an order for the payment of money by which a mere civil liability is created, and Consolidated Rule 867 was referred to.

As I pointed out during the argument, the order, for the disobedience of which the committal of the solicitor is sought, required the solicitor, as an officer of the Court, to repay or refund to the Court a sum of money of which he had improperly obtained possession, and that Consolidated Rule 867 had no application, as what was sought by the motion was the punishment of the solicitor for contempt in disobeying the order of the Court.

The opinion I entertained at the argument is confirmed by the case of *In re Freston*, 11 Q. B. D. 545, where an order had been made by a Master, and confirmed by a Judge, that Freston, who was a solicitor, should deliver to persons named in the order certain documents therein mentioned; and also the sum of £10 which the solicitor had received, and also pay the costs of the application.

Judgment.

MacMahon, J.

A writ of execution was issued for the £10 and the costs of the order and the execution, and a levy was made at Freston's offices, but the sheriff was compelled to withdraw, as the goods seized were claimed under a bill of sale.

The substantial part of the order, *i. e.*, the delivering up of the documents, had been complied with prior to the attachment against Freston having issued. And while his counsel during the argument admitted on the authority of Hawkins, P. C., 8th ed., vol. 2, ch. 22, p. 206, that "it is very clear law that a solicitor may be punished by imprisonment for refusing or neglecting to do an act which he has been ordered to do by the High Court," they urged that writs of execution having been issued against Freston by Messrs. Benn, who were prosecuting the attachment, there was nothing but the owing of the money, and that created merely a civil liability for which he could not be imprisoned, citing *Re Ball*, L. R. 8 C. P. 104.

It was urged in *Freston's Case* that he was privileged from arrest under the attachment issued against him, because at the time of his arrest he was returning to his offices from the Bow Street Police Court, where he had been acting as an advocate on behalf of certain persons charged with treason-felony.

Brett, M. R., in his judgment, at pp. 552-3, says: "But then the question arises, whether the privilege extends to arrests or attachments for contempts of Court. It has been said in the Queen's Bench Division, that all attachments for contempts of Court are the same, and have the same incidents. I cannot assent to this. I think that the incidents are different, because the nature of contempts is different. The question depends upon the kind of contempt. In the Court of Chancery attachment for contempt might be merely a means of enforcing obedience to a decree, which was a judgment upon a dispute as to a civil right between the parties to the suit; * * and I think that as to contempts of this nature, privilege would apply. There were,

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MacMahon, J.

however, other kinds of contempt in which attachments were granted for the purpose of preventing a breach of the law, and of maintaining the discipline of the Courts; and in these cases the question is, whether the attachment is more like criminal or civil process, whether it is more like arrest for a crime, or more like the enforcement of a decree in a suit between parties. In *McWilliams's Case*, 1 Sch.& Lef. 169, at p. 174, Lord Redesdale, L. C., said: 'There can be no doubt that the thing to be considered is, not the form of the process but the cause of issuing it; if the ground of the proceeding be a debt, it is a process of debt; if the ground be a contempt, as for instance, disobedience to some order of the Court, where the object was not to recover a debt by means of the process, the consequences of such a process are in some degree of a criminal nature."

The learned Master of the Rolls, at p. 554, says: "The question, therefore, is, whether if a solicitor disobeys an order made on him in his character as a solicitor, he commits an offence and becomes subject to criminal process, or whether he is merely subject to civil process." He then discusses that question. He then asks in view of the Debtor's Act, 1869, (32 & 33 Vic. ch. 62) as to whether by virtue of that Act, Freston, being a solicitor, was entitled to freedom from arrest under the process by attachment issued against him, and points out that the power of arrest was retained against solicitors in the Debtor's Act. He then proceeds: "The rights of those employing solicitors were not merely of a civil nature; and the Courts dealt with defaulting solicitors on the ground, that they had been guilty of breaches of duty and breaches of the law." He then states that the solicitor is not entitled to his release *ex debito justitiæ*, on doing the act commanded, but must apply to the Court to be released. He concludes that "the contempt of Freston was in the nature of an offence, and no privilege can be claimed on his behalf; for attachment is a mode of curing or punishing an offence."

Judgment.

MacMahon, J.

Motions for attachments against solicitors, have not, I am happy to say, been frequent in this country; and as the case of *In re Freston*, which is almost the latest authority on the question, contains a full and clear exposition by the Court of Appeal in England, of what it regards as the duty and obligation of a solicitor to his client, and to the Court of which he is an officer; and, also, in concise and clear language, treats of the law relating to the different processes by attachment for contempt and the incidents connected therewith, I deemed it proper in the particular case I am dealing with, to refer fully to the principal judgment delivered therein.

In re Freston was followed by the Court of Appeal in the case of *In re Dudley*, 12 Q. B. D. 44.

Mr. Holman urged that as no demand had been made upon Macgregor requiring him to pay the money, no attachment should issue against him; citing *Swinfen* v. *Swinfen*, 18 C. B. 485; *Dodington* v. *Hudson*, 1 Bing. 410; *Dalling* v. *Matchett*, Willes 218. To which may be added *Brewster* v. *McEwan*, E. T. 3 Vic., Rob. & Jos. 306; in all of which cases something was required to be done for or money paid to the party by whom the order was obtained by the person against whom the order issued, and an affidavit of non-compliance, is under the practice in such cases deemed necessary. But in the present case nothing is to be done for or payment made to any person (except payment of the costs, for which demand would require to be made before an attachment could issue in respect thereof) as the order requires the sum named therein, $661.42, to be repaid into Court. There is no person to receive it, the Court being the custodian of the money before Macgregor's receipt of it, and it is to that custody he was required by the order served upon him to return it. The cases cited have, therefore, no applicability to the present case.

The order will go for the issue of a writ of attachment against John Macgregor, a solicitor of the Supreme Court of Ontario, for disobedience of the order of Mr. Justice Street, of the 21st day of June, 1889, in not paying into

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Court to the credit of this cause the sum of $661.42, as required by the said order.

And I direct the said John Macgregor, as such solicitor, to pay to the plaintiff the costs of this motion. (*a*)

[COMMON PLEAS DIVISION.]

PAXTON v. SMITH.

Statute of Limitations—Defendant maker of note and sole executor of co-maker—Payment by defendant on his own account.

After the death of one maker of a joint and several promissory note signed by two, the deceased being a surety only, a payment upon it out of his own moneys and on his own account was made by the surviving maker who was also the sole executor of his deceased co-maker.

Held, that such payment did not take the debt out of the Statute of Limitations as regards the estate of the latter.

THIS was an action tried before STREET, J., on 13th and 15th April, without a jury, at Chatham at the Spring Assizes of 1889.

At the conclusion of the evidence and argument the learned Judge delivered the following judgment, orally, in which all the facts are stated.

STREET, J.:—

In March, 1876, the defendant R.O. Smith borrowed from Richard Paxton $1,000, and as security for the repayment, he made a note payable to his father Robert Smith, and Robert Smith endorsed it to Richard Paxton. That note bore interest at eight per cent, and the interest was regularly paid until March, 1878, when a new note was made,

(*a*) Subsequently the solicitor, John Macgregor, paid the money into court, as directed by the order of Street, J., and then applied to Galt, C. J., in Chambers, who, after conferring with MacMahon, J., rescinded the order for committal.

In Michaelmas Sittings, John Macgregor moved, by way of appeal to the Divisional Court, to set aside the three orders, but the Court, under the circumstances, dismissed the motion with costs.

Judgment.

Street, J.

which is the note sued on, dated 25th March, 1878, made jointly and severally by R. O. Smith and his father Robert Smith, payable to the order of Richard Paxton for $1,000, two years after date, with interest at eight per cent per annum, payable half yearly.

The interest was paid on that note until it became due, and after it became due all the payments that have ever been made upon the note have been made by R. O. Smith, who was the principal debtor, out of his own moneys; Robert Smith, his father, was only a surety for him, and that fact was known to Richard Paxton when he advanced the money, and always afterwards.

On the 26th March, 1881, the interest up to that date having been paid at the rate of eight per cent, Richard Paxton went to Mr. R. O. Smith's banking office. Mr. R. O. Smith said he could not pay interest any longer at the rate of eight per cent, and Mr. Paxton did not wish to accept a lower rate than eight per cent for any particular time; but he signed a memorandum on the back of the note in these words: "Chatham, March 26th, 1881; I hereby agree to accept 6 per cent per annum for the next six months; sgd. Richard Paxton; witnessed by George D. Smith", a son of R. O. Smith.

It appears to have been the arrangement between Mr. R. O. Smith and Mr. Paxton at that time, that Mr. Paxton should be at liberty to call at any time for payment of his principal; and Mr. R. O. Smith gave to his clerk instructions to that effect—that the note was to be paid at any time that it was presented; but, as long as the money was not demanded, Mr. R. O. Smith agreed to pay interest upon it at the rate of six per cent.

Mr. Paxton, (*the payee*) appears, very soon afterwards, or perhaps the same day, to have endeavoured to obtain another investment for the money; he did not succeed in doing so; and R. O. Smith, went on paying the interest half yearly after that at the rate of six per cent down to the year 1886 or 1887, paying it regularly half yearly. At the end of that time he failed. His father Robert Smith died on the 9th June, 1883; and the defendant R. O. Smith was almost immediately appointed his executor, and he remains his executor now.

Mr. Paxton the payee of the note, is also dead. He died on the 14th April, 1886, and the plaintiff is his executrix.

I have already stated that all the payments of interest that were made from the beginning to the end were made

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Street, J.

by R. O. Smith, and not out of the money of his father's estate at all.

Two defences are raised, one being that Mr. Paxton extended the time for payment of the principal to Mr. R. O. Smith, without the consent of Robert Smith, the surety. If any extension was made, it was evidently made without any reference to or consent of Mr. Robert Smith the surety; but I cannot find, upon the evidence, that any binding agreement was ever made by Paxton by which he deprived himself of the right, for a moment, to require payment to be made of the principal.

The memorandum endorsed on the note does not contain in itself any statement of any consideration; and there does not appear as a fact to have been any agreement ever between Paxton and R. O. Smith that Paxton should not be at liberty to call for the payment of the note at any time: in fact, the agreement seems to have been rather the other way, that he should be at liberty to call for payment of the note at any time; and so it was understood by R. O. Smith. So that, I think, that on that ground that that defence is not sustained, there having been no binding agreement by which Paxton was prevented from suing Smith at any time.

The other defence arises under the statute of limitations. It is contended on behalf of the defendant R. O. Smith, as executor of his father's estate, that the payments made by him were made by him on his own account only, and not as executor of his father's estate.

By the law as it originally stood, an acknowledgment or payment by one of two joint contractors had the effect of keeping the note alive as against both joint contractors.

By the law now in force, sec. 2 of ch. 123, R. S. O., one of two joint contractors is not affected by payments made or acknowledgments given by the other joint contractor.

The difficulty here arises from the fact that the defendant R. O. Smith, the original principal debtor, now unites in himself the capacity of executor of the surety; and no authority has been cited to me, showing the effect of a payment made by a person holding that dual capacity, and I must determine the matter I think upon principle. The reason why an acknowledgment, and the reason why a payment to a debtor, takes a case out of the Statute of Limitations is, because it does away with the presumption which the law raises at the expiration of six years, that a debt has been paid.

Judgment.

Street, J.

The defendant R. O. Smith was the only person who could make such a payment, or give such an acknowledgment; and the payment made by him, although made out of his own moneys, must, I think, have the effect of taking the note out of the statute, both as regards the estate and as regards himself.

The statute, to which I have referred, does not apply in terms to the case at all; so that the case must be taken and be decided under the law as it would stand without any statute of this kind at all.

The result of that would be, I think, that the payment made by R. O. Smith would be available as taking the case out of the statute, both as regards himself and as regards the estate, although made out of his own moneys and not out of the moneys of the estate.

As payments have been made within six years, and after the death of Robert Smith, I think that the defence of the Statute of Limitations goes also.

There will be judgment for the plaintiff for the amount of the note, with interest, against both defendants; that is to say, against the defendant R. O. Smith as executor of the estate of Robert Smith, and as against him in his private capacity also.

I will stay the entry of judgment, until the fifth day of the Divisional Court.

Notice of motion was given to the Divisional Court to set aside the judgment entered for the plaintiff and to enter judgment for the defendant.

In Easter sittings, May 29th, 1889, *Pegley* supported the motion. The time given to the principal without the surety's consent discharged the surety: *Austin* v. *Gibson*, 4 A. R. 316. Then as to the Statute of Limitations: the statute clearly creates a bar to the action against the surety. The payments made by Smith were not made by him as executor, but in his personal capacity: Byles on Bills, 13th ed., 370; *Slater* v. *Lawson*, 1 B. & Ad. 396; *Scholey* v. *Walton*, 12 M. & W. 510; R.S. O. ch. 123, p. 1195; *Grant* v. *Macdonald*, 8 Gr. 469.

Scane, contra. As to the extension of time there was no binding contract to give time. There is not one essential ingredient here to make it binding upon the parties, and

Argument. therefore the surety is in no way discharged. As to the Statute of Limitations. Prior to the statute R. S. O. ch. 123, payment by one of several executors took the case out of the statute, and it was to remedy this the statute was passed. This is not a case of several executors and one making a payment, but here the person making the payment is the only executor of the surety, and he also combines in himself the position of the principal debtor. The principal and surety merged in the same person, the defendant, and he cannot now claim that in making the payments he was acting in his individual and not in his capacity as executor: Addison on Contracts, 8th ed. p. 1266; Angell on Limitations, 5th ed., p. 264.

September 7th, 1889. MacMahon, J.:—

The facts are fully stated in the judgment of my learned brother Street, who tried the case, and I fully agree in the conclusion reached by him, that there was no binding agreement between the creditor Richard Paxton and the principal debtor R. O. Smith, by which time was given to the principal for payment of the note sued on, so as to discharge Robert Smith, the surety, who was a joint maker of the note.

I have not, however, been able to follow the learned Judge in the reasoning by which he arrived at the conclusion that the Statute of Limitations was not a bar to a recovery against the estate of the late Robert Smith.

The note matured on the 28th day of March, 1880, and Robert Smith who was a joint maker thereon, died in April, 1883.

It has been found as a fact that the payments of interest were made by R. O. Smith, the principal debtor, out of his own moneys. But as he was the executor of Robert Smith's estate, the learned trial Judge was of opinion that the payments of interest made while the principal debtor was clothed with the office of executor, had the effect of taking the note out of the statute as regards the estate of which he was the executor.

Judgment.
MacMahon, J.

My brother Street considered that R. S. O. ch. 123, sec. 2 did not apply to this case, and that it must be decided under the law as it existed prior to the statute.

The second section of the Act is as follows: "Where there are two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, executor or administrator shall lose the benefit of the said Act so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them, or by reason of any payment of any principal or interest made by any other or others of them."

The Imperial Act, 19 & 20 Vic. ch. 97, sec. 14, is in effect the same as the second section of our Act.

These Acts—as will be seen by a reference to the cases decided prior to their passage—very much narrow the effect of a payment of any principal or interest by one of two or more joint contractors, or by the executors or administrators of one joint contractor, as to the others of them. But the point raised in this case was decided in the year 1823—long prior to the passing of the Act in England or in this country—in the case of *Atkins* v. *Tredgold*, 2 B. & C. 23, where the payee of the notes sued on lent the money which formed the consideration therefor to the son Robert Tredgold, the father John Tredgold becoming a party to the notes as surety. After the death of John Tredgold, the surety, the principal debtor Robert Tredgold (who with three others had been appointed executors of John Tredgold's estate) paid the interest out of his private estate on the notes for several years, and eleven years after John Tredgold's death, but within six years from the last payment of interest by Robert Tredgold on the notes; the action was brought against the executors of John Tredgold's estate.

The questions which were left to the jury were: whether there was any promise by the executors within six years; and they were told that if they thought that the payments made by Robert Tredgold were made by him in his

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MacMahon, J.

character of executor they should find for the plaintiffs. If, however, they thought the payments were made by him on his own account as the joint maker of the notes then they were to find for the defendants.

During the delivery of judgment on the plaintiff's motion for a new trial, Abbott, C. J., said, at p. 28: "Now the evidence given was, that Robert Tredgold paid interest in 1816. The jury have found that he paid it in his own right, and not in the character of an executor. There was not, therefore, anything done by the executors, in that character; and that being so, I should feel a difficulty in saying that a case was made out on those counts, independently of the statute."

Best, J., at p. 31, said: "It is sufficient to say, that the implied promise not having been made by Robert Tredgold in the character of executor, it does not prove the issue."

In the case of *Slater* v. *Lawson*, 1 B. & Ad. 396, the headnote is: "After the death of one maker of a joint and several promissory note signed by two, a payment upon it by the executor of the deceased party will not take the debt out of the Statute of Limitations, &c."

There was a nonsuit; and, in moving against it, F. Pollock (afterwards Chief Baron Pollock) admitted that *Atkins* v. *Tredgold* "was decisive on the other side, it that case were taken as establishing that, after the death of one party to a joint and several note, his executor could not by a payment made in that character, keep up the responsibility of a joint contractor. But he submitted that in that case it was expressly found that the survivor paid, not as executor, but in his individual capacity."

In giving judgment Lord Tenterden said, at p. 397: "It appears to us that this case is not essentially different from *Atkins* v. *Tredgold*. * * The same principle appears to us applicable in both cases; and we think, that where a joint contract is severed by the death of one of the contractors, nothing can be done by the personal representative of the other to take the debt out of the statute, as against the survivor."

Judgment MacMahon, J.

The case of *Atkins* v. *Tredgold* is almost identical in its facts with the present case. The only appreciable difference being that the surety in *Atkins* v. *Tredgold* by his will appointed, in addition to the principal debtor, three others as executors to his estate; and this difference in the facts was urged by Mr. Scane, for the plaintiff, as constituting a reason why a different principle should be evoked in deciding this case, because, as he urges, the payment made in the *Atkins* Case in order to bind the testator's estate, would require to have been made with the assent of all the executors, while here the person who made the payment being himself the sole executor of the testator's estate it was made with his assent.

But the answer to that is given in *Scholey* v. *Walton*, 12 M. & W. 510, where Parke, B., pointed out, at p. 514, (although he did not agree with the conclusion), that the Court in *Atkins* v. *Tredgold* and also in *McCulloch* v. *Dawes*, 9 Dow. & Ry. 40, decided, "that if an express promise be made by one executor in his representative character, it binds the others in their representative character."

And Lord Abinger in *Scholey* v. *Walton*, without expressly assenting to *Atkins* v. *Tredgold* and *McCulloch* v. *Dawes*, says, at p. 513: "Probably one executor may by his acts bind another; but in order to shew that liability, you must establish that he does the act *as an executor*."

Although R. O. Smith occupied the dual position of principal debtor and as the sole executor of the estate of the surety the other joint contractor, yet the authorities clearly indicate that what was done by him as R. O. Smith, the principal debtor, affects him only personally; and that in order to affect the estate of the surety he would require to do what was done in his representative capacity. See *Scholey* v. *Walton*, 12 M. & W. 510, the judgment of Lord Abinger at p. 513. See also the judgment of Gwynne, J., in the Court below in *Austin* v. *Gibson*, 4 A. R., reported at p. 317, where that learned Judge points out that in that case the dealings between the plaintiff and Scott (who was the principal debtor and was also one of the executors of

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the surety's estate) were with him as the principal debtor, and not with him as executor of the surety's estate. See also *Brown* v. *Gordon*, 16 Beav. 302, at pp. 308 and 309.

The case of *Jackson* v. *Woolley*, 8 E. & B. 778, was decided since the Act 19 & 20 Vic. ch. 97, in which case it was held that where payment of principal and interest had been made by one co-contractor, even with the knowledge and consent of the other co-contractor, the claim was barred as against such other co-contractor. And Crompton, J., stated that proof of express verbal consent by a defendant to a payment by a co-contractor would not take the case out of the 14th section.

That case was reversed in Ex. Chamb., 8 E. & B. 784 but on another ground.

A part payment in order to defeat the Statute of Limitations must be made under circumstances from which a jury may fairly infer a promise in fact to pay the remainder: *Tanner* v. *Smart*, 6 B. & C. 603; *Foster* v. *Dawber*, 6 Ex. 839; *Morgan* v. *Rowlands*, L. R. 7 Q. B. 493.

Thus a part payment by R. O. Smith, the principal debtor, from his own moneys, might create an inference that he had in fact promised to pay the remainder; but as he paid with his own moneys, the only fair inference which could be drawn would be that the remainder would be paid by him personally. But I should pause and require the clearest authority before holding that from such a payment by the principal debtor an inference could be drawn that the executor of the other joint contractor's estate had in fact promised to pay the remainder of the plaintiff's claim thereout.

There is a recent decision of *In re Frisby*, *Allison* v. *Frisby*, reported in W. N. June 8, 1889, p. 114, and also in Law Times, Vol. 87, p. 114, and at p. 145. In that case the defendant's testator joined in a mortgage as surety for payment of the mortgage debt by the mortgagor. Kay, J., held that payments made by the mortgagor, the principal debtor, kept the debt alive against the surety, who was

not a co-contractor or co-debtor, and therefore the benefit of the Act 19 & 20 Vic. ch. 97 was lost, as there was no similar provision saving the benefit of the Act 37 & 38 Vic. ch. 57 under which that action was brought. That case does not in any way affect the point to be decided in this case. Judgment. MacMahon, J.

In our opinion there must be judgment in favour of R. O. Smith as executor of the estate of Robert Smith, dismissing the action with costs.

There was no motion against the judgment directed to be entered against R. O. Smith individually.

GALT, C. J., concurred.

ROSE, J., was not present at the argument, and took no part in the judgment.

[CHANCERY DIVISION.]

OLDFIELD v. DICKSON.

Sale of land—Time the essence of a contract—Offer to sell land—Acceptance—Net price—Reasonable time to pay money.

Time may be of the essence of a contract even without any express stipulation if it appears that such was the intention.

Defendant wrote his agent on March 25th: "If O. (plaintiff) still wants that farm * * he can have it for $350 net, provided it can be arranged at once. Kindly advise me * * if he accepts, and when he will pay the money over." On 6th April, the agent telegraphed defendant "O. will take the farm, will pay the money in two weeks," and on April 11th the defendant telegraphed "your offer of 6th comes too late:"—

Held, that an arrangement between defendant and his agent as to the latter's commission would not affect the net price as between plaintiff and defendant:—

Held, also, that the enquiry "when he will pay over the money" shewed an intention to give a reasonable time for such purpose, and that under the circumstances two weeks was not an unreasonable time. But

Held, also, that the acceptance of defendant's offer was not in time.

Statement.

THIS was an action brought by Samuel E. Oldfield against Richard Osborne Dickson for damages for breach of a contract for the sale of land.

The following facts are taken from the judgment:

Previous to the negotiations in question the plaintiff had declined to purchase the land at a price exceeding $350.

On the 25th of March, 1889, the defendant wrote to one Geo. Wilkinson* at Parry Sound, as follows:

"DEAR SIR,—If Mr. Oldfield still wants that farm of mine he can have it for the $350, net, provided it can be arranged at once. Kindly advise me by telegraph at my expense if he accepts, and when he will pay over the money and I can execute the papers. We have an agent in Parry Sound through whom I can have papers sent.

Yours truly,

R. O. DICKSON."

No reply was made until the 6th of April, some ten days after the probable receipt of the letter, when Mr. Wilkinson telegraphed as follows:

"Mr. Oldfield will take the farm. Will pay the money in two weeks. I will write."

* Agent of defendant.—REP.

Statement.

On the same day Wilkinson wrote to Dickson:

"DEAR SIR,—Mr. Oldfield was away from home in Ottawa at the time that I received your letter. I saw him immediately that I heard that he was at home, to-day. He will take the place and wants two weeks to make up the money, so if it is not too late you may instruct your agent to make out the papers at once."

On the 11th the defendant answered by telegram:

"GEO. WILKINSON,

Parry Sound,

Your offer of 6th comes too late."

To which Wilkinson replied on the 13th by telegram:

"Oldfield holds you to your offer. He was to a considerable expense. Who is your agent here?"

On the same day the plaintiff's solicitor wrote threatening action, and the defendant answered inviting proceedings.

On the 10th the defendant offered the land to one John McLelland, Parry Sound, for $450, and by deed bearing date the 15th, he conveyed to the Parry Sound Lumber Company, for whom McLelland was acting.

The action was tried at Parry Sound on July 10, 1889, before ROSE, J.

Pepler and *J. H. Bowes*, for the plaintiff.
Hewson, for the defendant.

September 21, 1889. ROSE, J.:—

It was objected that there was no binding contract within the Statute of Frauds.

1. That the offer was $350, net, and the previous correspondence shewed that Dickson had agreed to give Wilkinson $15, as commission for selling, and therefore that the acceptance was really $350, less the $15.

I do not think that this is so. If the offer to sell for $350, net, excluded the commission, and Wilkinson chose to close with the plaintiff for such sum without providing for his commission, then he would be precluded from

Judgment.

Rose, J.

demanding it from the defendant. I do not see how the acceptance by the plaintiff of the defendant's offer could be affected by an understanding between the defendant and Wilkinson as to the commission.

If Wilkinson chose to submit to the plaintiff the defendant's offer in terms and to convey to the defendant the plaintiff's acceptance in terms, he either could or could not claim his commission from the defendant according to his agreement with him, but in my opinion the validity of the contract would not depend upon the validity of the claim for commission.

2. The second objection was, that the plaintiff in asking for two weeks time "to make up the money" added a term. I am against this objection also. It seems to me that when the defendant wrote "provided it can be arranged at once" he referred to the acceptance of the offer, for by asking to be advised "when he will pay over the money, and I can execute the papers," he evidently intended to give a reasonable time for such purpose, and I think two weeks under the circumstance a not unreasonable time.

3. The third objection was, that the acceptance was not in time.

Referring to the law as laid down in *Crossfield* v. *Gould*, 9 A. R. 218, it is clear that time may be of the essence of the contract even without any express stipulation if it appear that such was the intention.

Here I have no doubt that the defendants intention was to require the plaintiff to either accept or reject the offer "at once." There had been previous negotiations which had not resulted in a sale and having made up his mind to sell at that figure, thus accepting a sum much less than he had been told the property was worth, he desired to have the matter closed without delay. At all events he said so and was so understood as is apparent from the letter of the 6th of April, where Wilkinson said: "so if it is not too late you may instruct your agent," &c.

The answer to the letter of the 25th of March could have been received by telegram, on the 27th or 28th at the

latest. The fact that the plaintiff was away from home did not extend the time. The only offer made by the defendant was as he had stated in his letter. Judgment. Rose, J.

The defendant could of course have accepted the offer, but he chose not to do so. That he was influenced in his choice by the fact of another purchaser appearing can make no difference. He was either bound or he was not.

I think this objection fatal, and that the action must be dismissed with costs.

G. A. B.

[CHANCERY DIVISION.]

AUGUSTINE V. SCHRIER.

Will—Construction—Specific bequests—Home—Maintenance.

A testator bequeathed to his daughter "a home as long as she may remain single" in his dwelling house.

Held, that though in the case of an infant "home" would probably include maintenance, yet that the legatee in this case being of age, and there being no express words giving her maintenance after minority, she was not entitled to maintenance under the above bequest.

The testator also bequeathed to his wife "the full control of all my real and personal estate, stock, and implements, during her lifetime," and willed that at his wife's decease "all the stock, of whatever kind, with the farming implements on the farm at my wife's decease shall be equally divided between my sons."

Held, that the bequest to the widow of the stock and farm implements was specific, and therefore exempt from the payment of the pecuniary legacies.

Statement. THIS was an action brought by the executors of the will of Jacob Schrier, deceased, for the construction of the said will, the defendants being the beneficiaries under it.

The will was dated April 21st, 1886, and by it after directing that all his just debts, funeral and testamentary expenses be paid by his executors, the testator proceeded as follows:

"I give, devise, and bequeath all my real and personal estate of which I may die possessed of or interested in in the manner following, that is to say: that my just debts, and funeral expenses, with the expenses attending the administration of my estate be first paid by my executors hereinafter named, the *residue* of my estate to be divided as follows:"

The testator then went on to make certain pecuniary bequests, and a devise of certain lands in fee to his son Gilbert Schrier in fee to come into possession after the decease of the testator's wife, and then proceeded:

"6. I give and bequeath to my daughter Annie Schrier $400 with the use of the organ and sewing machine at present in the dwelling house, also a home as long as she may remain single with the full and sole use of the two

bedrooms and large front room in the north upstairs part of the dwelling." Statement.

He then devised some lands to his son Simon Schrier in fee to come into possession when he attained twenty-three years of age; and made a pecuniary bequest to another son, after which he proceeded:

"9. I give and bequeath to my beloved wife Mary Schrier the full control of all my real and personal estate, stock, and implements, during her life time except my son Simon's share, which he shall come into possession of when he attains the age of twenty-three years, the residue of which she shall retain and enjoy so long as she remains my widow * *."

Then followed various bequests, and the disposing part of the will concluded with the following clause:

"14. I further will and devise that at my wife's decease all the stock of whatever kind with the farming implements on the farm at my wife's decease shall be equally and fairly divided between my sons Gilbert and Simon Schrier; in the event of either of my sons Gilbert and Simon dying without heirs the property herein bequeathed to them shall go to my son George, and the money herein bequeathed him shall be equally divided between the surviving children who are living at home at the date of this my last will and testament."

The testator died on October 6th, 1888. Annie Schrier mentioned in the 6th paragraph was of age.

A question was raised as to the meaning and effect of the 6th, 9th, and 14th paragraphs of the above will.

The matter came up on motion for judgment on September 11th, 1889, before BOYD, C.

Hoyles, for the plaintiffs.

C. Moss, Q.C., *J. Hoskin*, Q.C., *J. M. Clark*, and *W. D. McPherson*, for various defendants.

The following authorities were referred to in the argu-

Argument.

ment: *Robertson* v. *Robertson*, 8 App. Cas. 812; Theobald on Wills, 3rd ed., p. 581.

As to the 6th paragraph the learned Chancellor decided that though in the case of an infant "home" would probably include maintenance, yet that the legatee in this instance being of age, and there being no express words giving to her maintenance after minority, she was not entitled to maintenance.

As to the question of the other two paragraphs the learned Chancellor reserved judgment, but on the same day gave judgment as follows:

September 11th, 1889. BOYD, C.:—

The bequest to the widow of the stock and farm implements mentioned in secs. 9 and 14 of the will is specific, and is therefore exempt from the payment of the pecuniary legacies: *Stephenson* v. *Downson*, 3 Beav. 342; *Mills* v. *Brown*, 21 Beav. 1. So far as the will gives her "personal estate," generally that is subject to the rule in *Robertson* v. *Robertson*, 8 App. Cas. 812, and must be applied to the payment of the pecuniary legacies. But these legacies are not a charge on the land or the rents or the personal estate specifically bestowed, and to the extent to which the moneys and general personal estate are not sufficient to satisfy them they must abate ratably.

A. H. F. L.

[CHANCERY DIVISION.]

RE HAMILTON.

Will—Construction—Vendor and Purchaser petition—Devise to one for life, then to issue in fee simple—Shelley's case.

A testator devised lands to his daughter: "to her own use for the full term of her natural life, and from and after her decease to the lawful issue of my said daughter to hold in fee simple," and in default of such issue over.

The daughter contracted to convey in fee to a purchaser; and the question whether she took a life estate or an estate tail was brought up on a vendor and purchaser petition.

The Court refrained from making any order on the petition, for the law on this head seemed to be in a state of uncertainty, if not of transition, and any experiment could better be made in a contested case when all parties interested were represented.

Semble, however, that the direction that the issue should hold the property in fee simple appeared incompatible with an estate tail in the mother, and that "issue" must be construed "children," and the mother took an estate for life only.

Statement.

THIS was a petition under the Vendor and Purchaser Act, which involved the construction of the will of Andrew Hamilton, who died on June 1st, 1869, and whose will was dated April 1st, 1869.

By the second paragraph the testator devised the lands in question to his daughter Sarah Jane Evans of the said city of Hamilton, then the wife and now the widow of Robert Evans deceased, "to her own use for the full term of her natural life, and from and after her decease to the lawful issue of my said daughter Sarah Jane, to hold in fee simple, but in default of such issue her surviving, then to my son James, for the term of his natural life, and upon the death of my said son James, then to the lawful issue of my said son James, to hold in fee simple, but in default of such issue of my said son James, then to my brothers and sisters and their heirs in equal shares."

The testator next proceeded to devise another lot of land in Hamilton "to my son James for the full term of his natural life, and from and after his decease to the lawful issue of my said son James, to hold in fee simple, but in default of such issue him surviving then to my daughter

Statement.

said Sarah Jane for the term of her natural life, and upon the death of my daughter Sarah Jane, then to the lawful issue of my said daughter Sarah Jane, to hold in fee simple, but in default of such issue of said daughter Sarah Jane, then to my brothers and sisters and their heirs in equal shares."

Lastly, in the 6th paragraph the testator stated: "It is my intention that upon the decease of either of my children without issue if my other child be then dead the issue of such latter child (if any) shall at once take the fee simple of the devises mentioned in the second and third clauses of this said will."

The testator's son, James Hamilton, died before the date of this petition, and there was no issue of the marriage of Sarah Jane Evans.

The petition stated that Sarah Jane Evans contended that under the terms of the said will she took a fee tail in the lands in question which she could bar by deed, and that she had contracted and agreed to sell the fee simple of the said lands to the petitioners who contended that she had only a life estate in the said lands, and that the remainder was vested in the issue (if any) of James Hamilton, deceased, or in the testator's brothers and sisters.

The petition came on for argument on September 25th, 1889, before BOYD, C.

Shepley, for the vendor. We submit that the vendor takes an estate tail which we can bar under the statute. The devise may be divided into three parts. The first part would give an estate in tail: Jarman on Wills, 4th Eng. ed. p. 416. Then the question is, whether what follows alters that. In Jarman on Wills, 4th Eng. ed, pp. 416-439, the whole matter is considered. Theobald on Wills, 3rd ed. pp. 318-320, also deals with it. See also, *Doe d. Cannon* v. *Rucastle*, 8 C. B. 876; *University of Oxford* v. *Clifton*, 1 Eden. 473. The holding in fee simple will not make the issue purchasers: Jarman *ib.* p. 418; or prevent the word

"issue" giving an estate tail. Where it has been held that a life estate only is given, that is by virtue of another rule, for which see Theobald *ib.* p. 420. Words of limitation in fee or in tail, *and* of distribution, make the word "issue" a word of purchase. Argument.

M. Malone, for the purchaser. Jarman on Wills, 3rd ed., p. 220, shews that only a life estate is given: *Doe d. Burnsall* v. *Davey*, 6 T. R. 34.

September 26th, 1889. BOYD, C.:—

The opinion of Crompton, J., in *Roddy* v. *Fitzgerald*, 6 H. L. Cas. 855, and the reasoning in *Morgan* v. *Thomas*, 8 Q. B. D. 575, are such as to make me refrain from declaring that a title can be made by the vendor. I quote the words of Crompton, J.: "It seems to me that, whether the fee is given directly to the issue as purchasers by apt words of limitation to their heirs, or whether it is given by words implying according to the rules of law the intention that they should have the fee the effect will be the same, as it is the vesting of the fee in the issue, and not the words by which it is vested that prevents the necessity of implying the estate tail in the parent for the purpose of carrying out the intention that the estate should not go over till the exhaustion of the particular line. Accordingly I am quite satisfied with the proposition that in such cases no estate tail is to be implied in the parent, but the fee is to be considered as vesting in the issue, whether the words giving the fee are direct words of limitation as 'to the issue and their heirs," or whether the fee can be held to be vested in them from the use of such expressions as estate, &c., or by implication from a power to appoint the fee to them." See *Bradley* v. *Cartwright*, L. R. 2 C. P. 511; *Richardson* v. *Harrison*, 16 Q. B. D. 85; *Brown* v. *Lewis*, 9 App. Cas. 890, and *Morgan* v. *Thomas*, 8 Q. B. D. 576.

The general question came up lately before Chitty, J., in *Williams* v. *Williams*, 51 L. T. N. S. 779 (1885), where the devise was to six nephews "to be equally divided

Judgment.

Boyd, C.

between them, and their issue after them to and for their heirs, executors, and assigns." The learned Judge (quoting Jarman) held it was an estate tail in the nephews, saying in a not very satisfactory manner, I think, that "on the true construction of this will the word 'issue' is a word of limitation, and that treating the disposition as a whole I must reject the words 'heirs, executors, and assigns,' and hold that there is an estate tail in the six nephews. I am compelled to say whether there is an estate tail or an estate in fee simple, and I think the words 'their issue after them' must have some effect given to them."

Now the rejection of words in a will is never to be adopted unless leading to some impossible or nonsensical result. I do not see how to reject the words in this will by which the testator signifies his desire that after the natural life of Mrs. Evans the property shall go to the issue of his daughter "to hold in fee simple." These words "to hold in fee simple" are very emphatic words used by him twice in the second clause of the will, and again in the sixth section of the will with reference to these issue and this land. A very good meaning consistent with all the language used, and with the plain intention of the testator can be given by reading issue as "children." In which case the mother would take only a life estate, and there would be a contingent remainder to the testator's brothers and sisters. The direction that the issue should hold the property in fee simple appears to me incompatible with an estate tail in the mother. To get rid of this incompatibility something has to give way in order to introduce the doctrine of *Shelley's Case*.

It seems to me a more benignant method of construction to vary the meaning of an ambiguous term than to strike out an emphatic clause. The law on this head as far as I can investigate at present, seems to be in a state of uncertainty if not of transition, and any experiment had better be made in a contested case where all parties interested are represented. I make no order on the petition.

A. H. F. L.

[CHANCERY DIVISION.]

THE CORPORATION OF THE TOWNSHIP OF BARTON.

V.

THE CORPORATION OF THE CITY OF HAMILTON.

Municipal Corporations—Drainage through private lands in adjacent municipality—Arbitration—"Territory"—R. S. O., ch. 184, sec. 492, sub-sec. 2.

One municipality cannot construct a sewer through an adjacent municipality against the will of the latter without first settling the terms by arbitration, even although a purchase has been made from the private owners of the land through which the sewer is to be constructed.

The word "territory" in sec. 492, sub-sec. 2, R. S. O., ch. 184, is not used to signify land belonging to the corporation as owners, but land within their territorial ambit in which they have municipal jurisdiction.

THIS was an appeal from the judgment of PROUDFOOT, J. Statement.

The action was tried at Hamilton on May 20th, 1889.

Martin, Q.C., and *Wm. Bell*, for the plaintiffs.
Moss, Q.C., and *J. M. Gibson*, for the defendants.

It appeared that the defendants had purchased certain lands in the township of Barton from the private owners thereof and were constructing a sewer through the same to Burlington Bay, as an outlet to one of the sewers of the city of Hamilton, without the consent and against the wish of the plaintiffs, and sought to justify their action by the following amongst other clauses in their statement of defence.

"4. Before entering upon said work the defendants passed a by-law for making said new sewer under the authority of sub-section 15 of section 479 of the Municipal Amendment Act, 1888,* and under and in pursuance of said by-law are now making said sewer upon certain lands in the township of Barton with the consent of the

* *Quære.* Sec. 20 of the Municipal Amendment Act of 1888.—REP.

Statement.

owners or occupiers, thereof, paying compensation to such owners or occupiers, as provided for by the Municipal Act.

5. The defendants do not intend to unite or connect the said sewer with any existing sewer of the plaintiffs, or to extend the same through any property or territory belonging to the plaintiffs."

At the close of the case the learned Judge gave the following judgment.

PROUDFOOT, J.—Though ordinarily I would be inclined to reserve judgment on the question of the statute, still in this case I do not feel any doubt upon the conclusion that is to be arrived at: and that is that the plaintiffs have no *locus standi* to bring this action. I think that the clause, section 492 (R. S. O. ch. 184), applies where the municipality of Hamilton is desirous of entering into the territory of Barton, that is of the property of Barton. If Barton has made a sewer and paid compensation to the owners of the land through which it runs and Hamilton wants to get the benefit of that sewer it must arbitrate. If Hamilton wants to go along the roads of Barton which are the property of the township, it must arbitrate.

But it is entirely a different question where, under the amended Act,* when the municipality of Hamilton is authorized not only to go into the adjacent township into township property, but to go into the adjacent municipality into private property.

The amendment authorizes the city of Hamilton to go outside its limits and take private property for the purposes of its city, making compensation. Hamilton has done that: they have taken private property of Lawry and others and made compensation. What right has the township of Barton to step in and interfere? How can they prevent Lawry and the other owners from receiving compensation for their property?

And the township of Barton cannot be said to have any interest in these properties. The "territory" of Barton cannot refer to the lands of others within the limits of the township. It must refer to the territory of the corporation, that is, property that *bonâ fide* belongs to the corporation, that they have the oversight and control of.

I cannot understand section 492 as being intended to

* 51 Vic. ch. 28 sec. 20 (O).—REP.

confer upon the municipality a right to protect the health of the inhabitants such as the Attorney-General would have: and in fact to put the municipality in place of the Attorney-General in such matters would be an extraordinary extension of the municipal powers conferred by this statute; so that it seems me that upon that ground alone the case must fail, and upon that ground also, if the municipality of Barton had appointed an arbitrator and the question had come up for discussion on a motion for injunction, they would have failed also on the same ground: that there was not a matter on which the arbitrators could act. But the shortest way for them to have done would have been to have given notice of arbitration and allowed the city of Hamilton to object to that as not being a matter upon which the arbitrators had jurisdiction.

Judgment. Proudfoot, J.

However, the plaintiffs have chosen to take this mode and I must act on it in the way I find it before me, and I do not see on what principle I can interfere to prevent the city of Hamilton carrying out their purpose in regard to the drain, and therefore dismiss the action, with costs.

From this judgment the plaintiffs appealed to the Divisional Court, and the appeal came on for argument on September 10th, 1889, before BOYD, C., and ROBERTSON, J.

S. H. Blake, Q.C., and *Wm. Bell*, for the plaintiffs. The action is to restrain the defendants from entering the plaintiffs' territory to construct a sewer. The defendants' contention that because they purchased certain lands from the private owners they can use them for sewerage purposes is no answer to an action. The defendants have no right to go beyond their own municipal territory. "Territory" means part of the municipal limits; Municipal Act R. S. O. ch. 184, secs. 13, 14, 16, sub-secs. 1, 2, and 5; sec. 24, sub-sec. 2; secs. 27, 35, 56. The defendants may have the right to purchase the lands but they have no right to enter the boundaries of the plaintiffs without arbitration. The defendants cannot put the sewage within the plaintiffs' territorial limits without plaintiffs' consent: *The Corporation of Elizabethtown* v. *The Corporation of Brockville*, 10 O. R. 372; Municipal Act, sec. 492,

Argument. sub-secs. 1 and 2. The sewers must be within the jurisdiction of each corporation's own council: Municipal Act sec. 479, sub-secs. 1, 5. The consent of the municipality in which the lands taken are situate must be obtained: sec. 496, sub-secs. 34, 35. It should be determined by arbitration whether any connection of sewers should be allowed as well as the terms and conditions: sec. 492, sub-secs. 1 and 2. That condition not being complied with the plaintiffs come to this Court. *The Mayor, &c., of Devonport* v. *Plymouth, &c., Co.*, 52 L. T. N. S. 161.

Moss, Q.C., and *J. M. Gibson*, for the defendants. If the defendants have the right any damage to the plaintiffs is of no consequence. If the defendants are a nuisance the Attorney-General should bring the action on behalf of the public, or any private individual who is specially damaged could do so. "Territory" does not mean municipal limits, but the actual lands or property of the municipality. The defendants could go upon the roads of an adjacent municipality. Even if arbitration was the proper or necessary course the plaintiffs have not appointed any arbitrator. But see *Harding* v. *Corporation of Cardiff*, 29 Gr. 308.

S. H. Blake, Q. C. in reply.

October 8, 1889. BOYD, C.:—

The cardinal principle of municipal government is, that each municipality should be as far as possible self-governing in matters of police and municipal jurisdiction, and that one municipality should not invade the territory or interfere with the concerns of another municipality without the consent of the latter, or the adjustment of points of difference by the means of arbitration or other appropriate tribunal.

This principle is plainly manifested in various parts of our municipal system as organized by law *e. g.*, R. S. O. ch. 184, secs. 528, 282 and 496, sub-sec. 35, and R. S. O. ch. 205, sec. 95.

Judgment.

Boyd, C.

If the matter is doubtful as to whether one municipal corporation has or has not the right, of its own motion, to enter upon the boundaries of another in the pursuance of public undertakings, that doubt should be resolved adversely to any *ex parte* exercise of power.

In the present case it does not appear to me that the import of the statute is dubious or obscure, but that its proper meaning is to require the joint action of both plaintiffs and defendants before Hamilton can exercise the right of draining sewage through a portion of Barton into Burlington Bay.

Section 492 of the Municipal Act provides for the extension of sewers from one into an adjoining municipality, *i.e.*, through or into the *territory* of such municipality, as it is therein expressed "in order to procure an outlet therefor."

Section 479 sub-section 15 provides for entering upon &c., any land in or adjacent to the municipality, (*i.e.*, in another municipality) for the purpose of providing an outlet for any sewer, but subject always to the restrictions in the Municipal Act contained. These sections are upon their face *in pari materiâ*, and their provisions should not be divorced. The two together form a complete provision to secure proper drainage from one municipality into and through another and for acquiring all land of private proprietors necessary for the work to be done.

The restrictions contemplated were that pertaining to the expropriation of private lands and those prescribed by section 482, which are intended to safeguard the interests of the adjacent municipality. The right so to extend the sewer is not absolute but is expressed to be subject to mutual agreement, or in case of difference or opposition subject to arbitration. In the latter case the arbitrators have power to refuse the making of any such extension. This being so, it appears to follow as an obvious conclusion that before entering upon the objecting municipality the sanction of the arbitrators should first be obtained by the corporation seeking relief. This has not been done by Hamilton, and the action is to restrain that city from constructing and from using the said extended sewer.

Hamilton seeks to justify by pleading the purchase

Judgment.

Boyd, C.

of private land in Barton through which the sewer is conducted. That may satisfy the individuals whose land is interfered with, but it does not satisfy the requirements of the township of Barton within whose territory the work is extended. I cannot accept the meaning put upon that word "territory" by the learned trial Judge, as it appears in section 492 sub-section 2. It is not used to signify land belonging to the corporation as owners, but land within their territorial ambit, over which they have municipal jurisdiction. This is the primary and proper meaning of the word as used in the statutes: See *passim* in the Act relating to the Territorial Divisions of Ontario, R. S. O. ch. 5, and in the Municipal Statute secs. 14, 16, 24, 27, 35, 56. See also R.S.O. 1877, ch. 7, secs. 1, 2, 3, 27, and 28.

Land, being the property of the corporation, is usually so expressed in contradistinction to the special term "territory." See R. S. O. ch. 184, secs. 452, 455, 479, sub-sec. 1.

The result then is, that the defendants have invaded the territory of the plaintiffs without any statutory or other sanction, and one remedy of the township so prejudiced is to apply for an injunction to this Court. The frame of action is justified by *Fenelon Falls* v. *Victoria R. W. Co.*, 29 Gr. at p. 10, and *The Mayor, &c. of Devonport* v. *Plymouth, &c. Co.*, 52 L. T. N. S. 161.

In view of the sewer being completed and the near approach of cold weather it is not asked that the work should be demolished or its use interfered with for the present. This will give an opportunity for the city to proceed to arbitrate under the Act. The formal judgment of the Court need not be pronounced till the award is made, if that be on or before the 1st of February next, but the defendants should forthwith pay to the plaintiffs the costs of action up to the present time on condition that the proceedings and evidence in the action be utilized as far as possible before the board of arbitration.

If no award by the 1st of February either party may apply to the Court, *i.e.*, one Judge sitting in Court.

ROBERTSON, J., concurred.

G.A.B.

[COMMON PLEAS DIVISION.]

SMITH V. SMITH.

Will—Life estate—Annuity—Costs—Consolidation of mortgagees.

The testator by his will made a provision for his wife as follows: "I give and devise to my beloved wife, &c., 'all household goods,' &c., 'for the term of her natural life;' and I give and devise to her one bedroom, and one parlor of her own choice in the dwelling house wherein I now dwell,' &c., 'also the use of the kitchen, yard, garden; also, I give and devise to my said wife her life in the said lot heretofore mentioned; also an annuity of $20 yearly.'" He then subject to the above and to the payment of $1,000 to his eldest son D., and other legacies, devised the lot to his second son J.

After the testator's death the plaintiff, the widow, and J., lived on the lot, arranging between them as to her maintenance. In order to raise money to pay D.'s legacy, the plaintiff and J., mortgaged the lot to a loan company, and on default, proceedings were taken under the power of sale to compel payment. The plaintiff set about making arrangements to pay off the mortgage, but the company refused to accept payments unless the amount of two other mortgages made by J., alone were also paid. No tender was made by plaintiff, nor was any demand made by her for arrears of annuity or dower. An action was brought by plaintiff to establish the will, and to have the rights of the loan company declared:—

Held, that the proper construction of the will was, that the widow was to have a life estate in the bed-room and parlor she should select, and also in the kitchen, yard, garden, and also the annuity of $20; and that the loan company could not claim to have the mortgages consolidated, and that as the plaintiff had not made any tender to the loan company she could not claim her costs, but it was directed in lieu of her paying costs the arrears of annuity and dower should be wiped out.

Statement.

THIS was an action tried at London, before BOYD, C., at the Chancery Spring Sittings of 1889. The following statement of facts is taken from the judgment of ROSE, J.:

In May, 1875, John Smith made his will providing for his wife as follows:

"I give and devise to my beloved wife, Flora Smith, all household goods and furniture, plate, linen, and china, for the term of her natural life; and I give and devise to her one bedroom and one parlor of her own choice in the dwelling house wherein I now dwell, situate and being on lot No. 27 in the 2nd Con. of Adelaide; also the use of the kitchen, yard, garden; also I give and devise to my said wife her life in the said lot heretofore mentioned; also an annuity of $20 yearly."

The lot he devised to his second son John, subject to the payment of $1,000 to his eldest son Donald, and subject to the payment of other legacies.

Statement

The testator died about July, 1873, and the widow, John and the youngest daughter Flora lived together on the whole lot until the institution of this suit.

The widow and her son made such arrangements as suited them about her maintenance; and as between them no trouble arose nor indeed did any one else raise any question as to her rights under the will or as to the construction to be put upon it, until questions were raised in this action. But on the 25th of October, 1875, the widow and her son John joined in a mortgage of the lot to the Ontario Loan and Debenture Company to raise money to pay Donald his legacy; and, shortly before the institution of this action, proceedings had been taken under the power of sale to compel payment. Thereupon the plaintiff went to her solicitor to raise money to pay the Loan Company, and to obtain an assignment, when the company set up a right to hold the mortgage until certain other mortgages upon the same land given by John—the plaintiff not joining—were paid. This apparently was the stand the company took from the evidence and pleadings though it did not appear quite certain, as the letter written by the company—assuming whatever position that was assumed—had not been put in as an exhibit although used at the trial.

John, it appeared, had become insolvent, and had made an assignment.

The plaintiff's solicitor did not tender the mortgage money due on the mortgage in which the plaintiff joined, nor was an assignment tendered.

He apparently felt or feared a difficulty in obtaining the money owing to the peculiar wording of the clause of the will above set out, and the fact that the will had been lost, and the production only of a copy registered without the necessary affidavit required by the statute.

Accordingly he advised this suit to have the will established and construed, and to have the rights of the Loan Company declared under the mortgages referred to.

To this suit were also made parties one Zavitz, a credi-

tor of John, who had obtained a mortgage as security after John's insolvency, John's assignee, and the other children of the testator. The children appeared by a separate solicitor, and disputed the will as set up on the pleadings; but they no doubt were acting with the plaintiff. Statement.

No demand of arrears of annuity or dower had been made upon any one prior to this action, nor were such arrears claimed in the action.

The learned Chancellor after argument, disposed of the matter as follows:

He decided against the contention of the Loan Company to consolidate the mortgage made by John and the widow with the other mortgages made by John alone.

He further said:

"I think the will, although there is some doubt about the meaning of it,—I think the fair meaning is, that the testator specifies what he intends to give this woman by saying she is to have one bed-room and one parlor and the kitchen, yard, garden; and then, as he does not say for how long she is to have this, he says as to the part in dispute: 'I give and devise to my said wife her life in the lot heretofore mentioned; also an annuity of twenty dollars yearly.' That is to say, she is to have her right to live in this place mentioned during her life, and in the fore part of the will he gives her the building to live in for the term of her natural life, and without this being certain as his intention, it seems to me what is expressed in the will that she is to have, viz., 'One bed room and one parlor of her own choice in the dwelling house wherein I now dwell situate and being on lot No. 27 in the second concession of Adelaide; also the use of the kitchen, yard, garden; also . . . her life in the lot heretofore mentioned,' and that I cannot give any larger meaning to the will than that; and also an annuity of $20 yearly charged upon the land; and, in that event, to have her dower. So that I declare the plaintiff is entitled to the use for her life of one bed room, one parlor in the dwelling house and the kitchen, yard, garden, under

Statement

the will, and of the other privileges declared by the will, and to the annuity of $20 per annum charged upon the land by the testator; all arrears of annuity and dower to be wiped out in lieu of costs, and, by consent of counsel, the plaintiff to be allowed two weeks from this date without other further costs of power of sale to pay off the mortgages of $900."

The plaintiff moved to set aside this judgment.

In Easter sittings, June 5th, the motion was argued.

Osler, Q.C., and *Follinsbee*, for the plaintiffs. The widow was entitled to her costs out of the estate, as this was an action for the construction of a will. The words "her life in the said lot" meant "her living in said lot." The meaning of the will was, that the widow was to have a life estate in the land. The widow was also entitled to claim her dower in the land. The Loan Company are not entitled to have the mortgages consolidated: Coote on Mortgages, 5th ed., 902-5; *Imperial Loan Co.* v. *O'Sullivan*, 8 P. R. 162; *Johnston* v. *Reid*, 29 Gr. 293.

Meredith, Q.C., contra. The widow is not entitled to costs: Morgan on Costs, 2nd ed., 345; Daniels Ch. Prac., 6th ed., 1223-4. The will does not give the widow a life estate in the land. It is limited to the devise formerly mentioned: *Fulton* v. *Cummings*, 34 U. C. R. 331; *Bartels* v. *Bartels*, 42 U. C. R. 22, 4 Geo. II. ch. 28; *Buttery* v. *Robinson*, 3 Bing. 392; *Habergham* v. *Ridghalgh*, L. R. 9 Eq. 395, 400. There can be no recovery for dower. The widow was in possession, and no demand was made as to arrears: Cameron on Dower, 513.

June 29, 1889. ROSE J.:—

[The learned Judge, after setting out the facts as above, proceeded]:

It was argued before us that the words "her life in the said lot" meant her "living on the said lot." This construction would give her a claim upon the whole lot. I

think this contention not consistent with the devise of the whole lot to John and the directions to him to pay $1,000 to Donald—$150 in March, 1885, and $150 yearly thereafter until the whole should be paid, (it was apparently not noted that the last payment would be only $100), and also the annuity of $20 to the plaintiff. While possibly any construction must fail to be quite satisfactory in view of the peculiar language used, I cannot suggest any one more likely to be the true one than that placed upon the will by the learned Chancellor. Judgment. Rose, J.

The will was declared established early in the course of the trial.

The learned Chancellor, as will be seen, declared against the contention of the Loan Company to consolidate the mortgages made by John alone with that one made by John and the plaintiff; and if the plaintiff had put herself in a proper position by tender of money and deed to demand an assignment, the Loan Company should have been ordered to pay costs; but she did not do so.

The plaintiff complains of the order as to costs, and contends that she should have them out of the estate. "Out of the estate" is an easy, good-natured term sometimes used when one shrinks from making an unsuccessful litigant pay the costs because of the great hardship which will be caused, but after all it means that some one interested in the estate must pay them, and who in this case ought to be made to bear the costs of establishing the will and having it construed? Perhaps John might not have had reason to complain of such an order as possibly the action became necessary by reason of his mother joining in the mortgage which he has become unable to pay. But John is worthless, and I do not see how his assignee can be ordered to pay. No one else has an interest in the estate save the mortgagees unless the annuitants have not been paid off, and they probably have been assisting or endeavoring to assist the plaintiff in the action, for so far as the evidence discloses they made no claim prior to the suit.

Judgment.

Rose, J.

The Loan Company possibly should neither pay nor receive costs—should not pay because no tender was made —should not receive because the claim to consolidate was set up in the pleadings—but there is no sufficient reason for our interfering with the discretion of the trial judge.

I see no reason why Zavitz should be ordered to pay costs. He is a creditor of John looking to the equity of redemption to pay his claim and in no wise interfering with the plaintiff.

The plaintiff has been living off the land content to take what John gave her, and although possibly having a claim for arrears of dower and annuity, I would judge that she had no intention of asserting it against John, if he had remained solvent.

I think the learned Chancellor made a most merciful order, and as no one is complaining of it, save the plaintiff, it must be affirmed.

We cannot protect the plaintiff as she was protected at the trial, but must discharge the motion with costs.

The Loan Company should give her the same time after this judgment as she was allowed at the trial within which to pay off her mortgage without further costs, except the costs of this motion.

GALT, C. J., and MACMAHON, J., concurred.

[CHANCERY DIVISION.]

SCOTT V. STUART.

Assessment and taxes—Tax sale—Patented lands advertised and sold as unpatented—Deed—Interest of locatee—R.S.O. ch. 193, secs. 188, 189.

Certain patented lands, which were sold for taxes, were described in the advertisement as unpatented, and in the treasurer's deed as "all that," etc., "being composed of all the right, title, and interest of the lessee locatee, licensee, or purchaser from the Crown, in and to lot," etc.

Held, that the treasurer by his deed having purported to sell the interest only of a locatee or purchaser from the Crown, the power he exercised was directed to that particular estate only, which, being non-existent, there was nothing that the power could operate upon, and that the deed was invalid.

Semble, the sale was not "fairly conducted," as the advertisement describing the lands as unpatented was of such a character as to damp the sale.

Decision of BOYD, C., affirmed.

Statement.

THIS was an action brought by Peter Anderson Scott against F. W. Stuart to set aside a tax sale of lands.

The action was tried at Walkerton on April 12th, 1889, before BOYD, C.

Thos. Dixon and *H. P. O'Connor*, appeared for the plaintiff.

Creasor, Q.C., for the defendant.

It appeared by the evidence that among some other irregularities previous to the sale the property, which was Indian land and situate in what was called the Indian Peninsula, had been advertised and sold as unpatented, when as a matter of fact it was patented; the description in the deed from the treasurer being "All that certain parcel or tract of land and premises containing thirty-nine acres be the same more or less, being composed of all the right, title, and interest of the original lessee, licensee, locatee, or purchaser from the Crown in and to lot number," &c. There was also evidence that the effect of describing lands as unpatented was, that they always sold at

Statement

a low or merely nominal price, because the Indian department had theretofore refused to recognize such sales and so gave trouble to the purchasers.

At the close of the case.

Mr. Creasor contended that this error did not invalidate the sale, especially as two years had elapsed. He referred to and commented on secs. 171, 183, 188, and 189 of R. S. O. ch. 193, and cited *Haisley* v. *Somers*, 13 O. R. 600.

BOYD, C.—There is really no case on this point as far as I know. The lines of decision lately have been giving much more liberal rights to the original owner than I should be disposed to give under sections 188 and 189 of R.S.O. ch. 193; I think those sections should be read differently but I was overruled by the Divisional Court recently, following a decision in the Court of Appeal. They have given a very large construction to the statute so as to protect the rights of these owners.

What we have to look at is this; we have to look at the transaction as it took place. I have no doubt if this sale had been attacked within the two years that it would not have been saved by the provision of section 188, because I think the Judges have now laid down such a principle of construction that it could not have been said that this sale was openly and fairly conducted.

It was openly conducted but it was not fairly conducted, by the evidence I have before me, because the advertisement was of such a character as to damp the sale.

We have the evidence of two or three witnesses who have spoken to the fact of advertising land in the reserves as unpatented is to prevent people bidding on account of the then uncertainty of the Indian department recognizing these titles. There was that in the wording which had the effect of damping the sale, so that without saying that there was anything improper in the officials, there was nevertheless inherently in that sale such a representation as to the title of the property as affected prejudicially those who attended with a view of purchasing.

But I am not sure that that limitation clause about being fairly conducted can be carried into section 188. Though the opinion of some of the Judges would seem so to indicate, I am not prepared to do that.

Well then, the next thing to be considered is, the two years having elapsed, what was the condition of affairs?

Judgment.

Boyd, C.

We look at the tax deed. That does not purport to be a deed in fee simple. It is registered so that all the world has notice of it. This tax deed is registered which on the face of it shews that the municipal officers were assuming to sell only the rights in the property of the locatee from the Crown. Now he had larger rights and they did not attempt to sell them; they did not purport to sell them; and on the construction given to this statute by the earlier cases they were only exercising a power, which because this man had no rights as locatee under the Crown had nothing to operate upon.

There are reported cases shewing that where the municipal authorities are exercising powers, you cannot attribute or add anything to the conveyance from the officer as you can from private persons. You have simply to look at the four corners of the instrument, and within the four corners of this deed the treasurer purports to sell only the interest as locatee; the power he exercises is directed to that particular estate, and there being no such estate at all in question, but a larger estate, there is nothing upon which that power operates; and the conveyance upon that other ground I think is invalid.

I do not think any of the other grounds would prevail, but the particular point I mention seems fatal, and the result must be, that I will have to set aside the tax deed, giving the purchaser, that is, giving the defendant a lien for his improvements and wire fence, for the taxes which were paid and the interest thereon. He will have to account for the moneys he received.

From this judgment the defendant appealed to the Divisional Court and the appeal was argued on September 14th, 1889, before PROUDFOOT and FERGUSON, JJ.

Creasor, Q.C., for the appeal. If the land was not described at all the sale might be bad: *Haisley* v. *Somers* 13 O. R. 600 and 15 O. R. 275, but it was described in this case. The deed cannot be questioned: R.S.O. ch. 193 sec. 189. [PROUDFOOT, J.—But the representation was made that it was unpatented. Is not this case something similar to *Dalziel* v. *Mallory*. 17 O. R. 80?] If the two years had not expired the sale might possibly be held bad

Argument. on the ground that it was not openly and *fairly* conducted; but the two years have expired and it cannot now be questioned: sec. 189. The main question is, what effect is to be given to sec. 183? Under that section no such error as describing the land as "patented" or "unpatented" shall invalidate the deed.

J. C. Hamilton and *Thos. Dixon*, contra. The sale was not openly and fairly conducted, and plaintiff had no notice: *Deveril* v. *Coe*, 11 O. R. at p. 235; *Donovan* v. *Hogan*, 15 A. R. at p. 445; *Hall* v. *Farquharson*, 15 A. R. at p. 467. The deed conveyed no interest in the land as it only purported to convey the interest of a locatee of the Crown. The deed should be strictly construed. Section 189 does not apply to this case.

Creasor, Q.C., in reply.*

October 19, 1889. PROUDFOOT, J.:—

I think the judgment of the Chancellor should be affirmed upon the ground upon which he placed it, that the lands being patented, and the treasurer by his deed purporting to sell only the interest as locatee, the power he exercises is directed to that particular estate, and there being no such estate at all in question, there is nothing upon which that power operates.

The deed purports to convey the interest of Scott as locatee or purchaser from the Crown, and it was argued that this word purchaser was wide enough to cover the interest of Scott as grantee of the Crown.

But by referring to the Public Lands Act, R. S. O. 1887, ch. 24, sec. 15, a purchaser from the Crown and a locatee of the Crown appear to be employed as synonymous terms, and entitled to a license of occupation. When the treasurer sold the interest of a purchaser he was ostensibly selling the interest of a locatee, and the interest of locatee

* Counsel also argued on other points as to the regularity of the proceedings previous to the sale, but as the judgments turned on the description it is not necessary to note them.—REP.

having ceased to exist, if it ever existed, by the issuing of the patent, the interest of the grantee is unaffected by the sale. Judgment. Proudfoot, J.

While placing my decision upon this ground, I do not mean it to be implied that I think the other grounds of objection to the sale are untenable.

The Assessment Act, (R. S. O. 1887), ch. 193, sec. 164 requires the treasurer to advertise the lands, and to distinguish the lands as patented, unpatented, or under lease or license of occupation from the Crown. By section 183 the deed is not to be invalid for any error in describing the land as patented or unpatented, but this does not apply to the advertisement. The decisions in *Hall* v. *Hill*, 2 E. & A. 569, and in *McAdie* v. *Corby*, 30 U. C. R. 349, that the omission so to state would invalidate the sale might perhaps be held even now as a valid objection under section 189. But the present is worse than the mere omission, as there was a positive mistatement by alleging the lands to be unpatented while in reality they were patented. And there was evidence given that the effect of such a statement was to damp the sale.

This is at all events a fairly arguable question, and my present impression is, that if a sale is not fairly conducted, as the Court finds this to have been, it is not protected by section 189.

FERGUSON, J.:—

The judgment of the Chancellor from which the appeal is, sets aside the tax sale. The learned Judge seems to have been of the opinion that the sale was not openly and fairly conducted, giving his reasons for such opinion, and that if the two years had not elapsed after the making of the deed without proceedings having been taken as mentioned in the statute, it (the sale) should have been held bad on this ground, and in this view I fully agree and for the same reasons.

On the argument before us, counsel for the tax-purchaser

Judgment.

Ferguson, J.

admitted with fairness and candor that, but for the deed and the lapse of time thereafter without proceedings taken, the sale would have been at least very questionable. He did use the word "bad," but seemed not to desire to bind his client by making the admission out and out.

The lands were patented lands, the patent thereof to the plaintiff being dated in October, 1876. They were advertised and sold as unpatented lands. The tax deed, that is the deed executed by the warden and treasurer described the lands as "All that certain parcel or tract of land and premises, containing thirty-nine acres be the same more or less, being composed of all the right, title, and interest, of the original lessee, licensee, locatee, or purchaser from the Crown in and to lot number," &c. The learned Judge was of the opinion that this description is a description of an interest of a locatee only: that the making of the deed by the officers was the execution of a power vested in them: that one can look only at the instrument and not attribute anything to the conveyance, as might probably be done, if it had been from a private person, and that as the estate really was a larger estate than the one that is described in the deed, there was nothing upon which the power operated and the deed was therefore invalid.

It was contended before us, that inasmuch as the description in the deed embraces the right, title, and interest of the "purchaser" from the Crown, it comprehends, as a description, the title in fee, the fact being that there was a patentee from the Crown who had a title in fee.

If one looks at the grammatical meaning only of words that may be selected from amongst those employed in this description, it may, I think, be said that there is some, but rather faint ground, for this contention; but when one looks at the whole description and the position of the word "purchaser" in it, I think the reason or ground for the contention fails, or rather vanishes.

The lands were advertised and sold as unpatented lands, and the effort of the conveyancer in drafting this description seems to me to have been to draft a

description sufficiently comprehensive to embrace all kinds of interests known to him, to have existed, or were held by individuals in lands prior to the issue of the patent of such lands, and the description so produced appears to me to forbid the idea that there was the intention to embrace in it an interest or estate in fee, such as exists in an individual after the issue of the patent; and, apart from any matter of intention, I am of the opinion that this description does not embrace or comprehend a description of lands for an estate in fee. Judgment. Ferguson, J.

It will be observed that in perusing this deed should the reader stop immediately before the words in the description "being composed of," he will have had no complete description of any land, so that sole reliance must be placed upon the particular description.

The interest or estate described in this deed is not, I think, such an interest or estate as can, by possibility be carved out of the estate in fee that the plaintiff had, such as an estate for life, a term of years, or the like; and if I am right in the view that I take of the description I fail to see how the thing described had any existence, or could under the circumstances, have been called into existence by any conveyancing, and for these reasons I agree in the view of the learned Judge in thinking that there was nothing, that is, no interest or estate upon or in respect of which this deed could have any operation; and this being so I do not see that the limitation of two years mentioned in section 189 of the Act can affect this case, and, agreeing, as I do, that but for this supposed limitation the sale was bad under the provisions of section 188, (these sections being the same as corresponding sections existing at the time of the sale) I think the judgment should be affirmed.

It appears that the plaintiff gave notice to the defendants that he would, upon the argument, amongst other things, contend that the lands having been returned to the County Treasurer as being "occupied" under the provisions of section 143 of the Act, the treasurer should not have sold the same because the arrears therefor had not been

Judgment.

Ferguson, J.

placed on the collector's roll of the preceding year, and again returned unpaid, and still in arrear in consequence of insufficient distress being found upon the lands. This subject was accordingly argued before us. And I have been at some trouble with the evidence and exhibits with the view of ascertaining whether or not sufficient was proved to bring the case within the provisions of section 163 which forbids a sale in certain cases, and in this I have found difficulty, and I am led to question if all the papers and exhibits used at the trial are here; but as my opinion is in favor of the plaintiff on the other ground, it is I think not needful or necessary that I should further pursue this.

There appear to have been some matters as to small portions of the land in question mentioned at the trial. These were not argued before us, and I do not feel called upon to say anything concerning them.

The judgment should I think be affirmed with costs.

Judgment affirmed, with costs.

G. A. B.

[CHANCERY DIVISION.]

ROBLIN V. MCMAHON.

Statute of Limitations—Acknowledgment—Depositions in another action—21 Jac. 1, c. 16—R. S. O., c. 123, s. 1.

In an action for a debt, to which the defendant pleaded the Statute of Limitations, the plaintiff gave in evidence, as constituting acknowledgments, (1) a letter from the defendant in which he said: "I am of the opinion that it will be impossible for me to pay you anything until my son's estate is wound up;" (2) portions of the examination of the defendant, signed by him and taken in a certain other action brought for the administration of the son's estate, having reference to a claim set up by the defendant against the estate, in which he admitted the receipt of the money for which the present action was brought, and stated that he was responsible to the testator of the present plaintiff, who was an executor, for it. There was evidence, also, that the son's estate was wound up, and that the defendant received more than sufficient to pay the plaintiff's claim:—

Held, affirming the decision of FALCONBRIDGE, J., that the letter was a sufficient acknowledgment under the statute, and meant that on the son's estate being wound up, the defendant would pay, and the estate having been wound up, anything conditional in the letter had been ascertained:—

Held, also, that the statute was satisfied by an acknowledgment made and signed as in the testimony of the defendant in the administration action.

Smith v. *Poole*, 12 Sim. 17, followed.

Statement.

THIS was an action brought by Edward Roblin, sole executor under the will of W. H. Cotter, deceased, against Michael McMahon, claiming payment of an alleged loan of $900, made by his testator to the defendant, and of interest thereon from June 4th, 1884.

The defendant pleaded, amongst other defences, the Statute of Limitations, R. S. O. 1887, ch. 60, to which the plaintiff replied that though it was true that the moneys were advanced to the defendant more than six years before the commencement of the action, yet the interest thereon had been paid by the defendant annually to Cotter up to June 4th, 1884, at which time the defendant acknowledged the amount due Cotter, and promised to pay the same.

The action came on for trial on May 2nd, 1889, at the Belleville Spring Assizes, before FALCONBRIDGE, J., without a jury, who on May 31st, 1889, gave judgment as follows:

Statement.

"I find that there has been within six years an acknowledgment in writing and a promise to pay the debt. I direct judgment to be entered for the plaintiff with full costs. Reference to Master at Belleville to take accounts."

The evidence given to prove an acknowledgment was (1) an extract from the examination of the defendant, taken before the Master at Belleville, upon a reference to him in a certain action of *Re McMahon, Johnston* v. *McMahon*, in which the estate of Eugene McMahon, deceased, a son of the defendant, was being administered, and in which the defendant had endeavoured to prove a claim against the said estate. The examination took place on June 4th, 1884, and the portion referred to was as follows: "Eugene wanted me to get some money for him. I wrote to W. H. Cotter at Northport, and he sent me $900 as near as I can recollect. It was received in two amounts. Eugene has been paying the interest on it, and I think some of the principal. I am responsible to Cotter for it, not Eugene."

(2) A letter from the defendant to Cotter dated Belleville, January 27th, 1885, as follows: "Dear Sir,—I am of the opinion that it will be impossible for me to pay you anything until my son's estate is wound up, which will not be before the last of March or the beginning of April."

The defendant now moved before the Divisional Court to set aside the judgment for the plaintiff, and to enter judgment for himself or for a new trial, upon the following grounds, among others:

(1) For the reception by the learned Judge of improper evidence in admitting evidence given by the defendant in another action not between the same parties as original evidence to prove the defendant's liability, the defendant having given no evidence on the trial herein; and the evidence admitted could only be used on a question of credibility of the defendant.

(2) The defendant when under examination cannot be forced to make a contract or acknowledgment to bar the statute, as such acknowledgment must be the free voluntary act of the defendant.

(3) That any acknowledgment to bar the statute must be in writing, and must contain an unqualified admission of a certain liability and a promise to pay on request, and unconditionally, or if conditional the condition must be shewn to have been performed, and the letter relied upon

by the plaintiff as an acknowledgment does not admit any certain liability nor does the evidence establish that there was only one liability, and that it must of necessity apply to that one. It does not contain a promise to pay on request, and if it does contain a promise it is upon a condition, and the condition was not shewn to have been performed, and there is not such an acknowledgment of a certain liability as that a promise to pay on request can be inferred from it. Statement.

The motion came on for argument on June 14th, 1889, before BOYD, C., and FERGUSON and ROBERTSON, JJ.

C. J. Holman, for the defendant. As to the examination in *Re McMahon, Johnston* v. *McMahon*, the plaintiff cannot rely on this. It was not a voluntary acknowledgment. In Banning on Limitations, pp. 48 and 49, it is laid down that the acknowledgment must be given to the plaintiff or his agent. The plaintiff had nothing to do with that. Cotter, whose executor Roblin was, was alive but not a party to the suit. From R. S. O. 1887, ch. 123, sec. 1, it appears the acknowledgment must be signed by writing. This examination was not such a writing, though signed. It was simply a statement made to an officer of the Court. Banning on Limitation of Actions, p. 63, shews it must be an acknowledgment made to the plaintiff, not to a stranger. Reed on the Statute of Frauds, vol. 3, par. 1090, is to the same effect. See also Banning on Limitation of Actions, p. 38. Lastly, as to the letter of January 27th, 1885, there is no evidence to shew to whom it is written, or by whom, and the letter does not appear to have been proved.

[ROBERTSON, J.—It was put in as a letter of the defendant. Counsel for the plaintiff should have objected to its going in till proved.]

At all events there is no promise to pay in the letter. There is no evidence moreover that this was the only debt owed. There is no admission of any particular debt; there is no debt mentioned. Therefore, it is not an acknowledgment in writing of *this* debt. [BOYD, C.—The examination in *Re McMahon*, appears to have been a voluntary performance, proving the defendant's claim in the winding-up.] We had no opportunity of cross-examining at all events.

Argument.

In the letter there is no acknowledgment, no promise, and no forbearance asked for. It is not clear from the letter itself that the writer is speaking of his own debt. Banning, *ib.*, p. 43, shews that if there are any limitations in the promise, the limitations must be shewn to have been removed; *Gemmell* v. *Colton*, 6 C. P. 57, discusses the law; *Young* v. *Moore*, 23 U. C. R. 151, was a stronger case than this. They were bound to shew the condition has been performed, whereas there is nothing to shew that the estate has been wound up, or that we have received any thing from it.

Masten for the plaintiff. As to the evidence in *Re McMahon, Johnston* v. *McMahon*, it was voluntary and given by the defendant for the purpose of proving a claim in the administration action; the evidence was signed by the defendant, and its words are clear and express. There is nothing in the Act or the decisions to shew that the acknowledgment must be in one writing; and we say this examination must be read in conjunction with the subsequent letter.

[BOYD, C.—They are not connected by anything on their face, and there is no evidence given to connect them.]

The examination appears from the style of cause to have been taken in the winding up of the son's estate, and the letter refers to the winding up. As to the examination not being a paper addressed to the plaintiff or his predecessor, the letter is addressed to the testator, and connected with that is the examination. A written acknowledgment may be aided by verbal evidence: Banning, *ib.*, p. 45. But an acknowledgment need not be to the party or his agent: Banning, *ib.*, p. 63. A general acknowledgment is sufficient according to cases which are chiefly before Lord Tenterden's Act: *Mountstephen* v. *Brooke*, 3 B. & Ald. 141; *Beard* v. *Ketchum*. 5 U. C. R. at p. 117; *Firth* v. *Slingsby*, 58 L. T. N. S. 481; *Frost* v. *Bengough*, 1 Bing. 266. There was sufficient evidence identifying the debt. In *Young* v. *Moore*, 23 U. C. R. 121, the debtor promised to pay *only* out of a particular fund.

That distinguishes it. Here we are not confined to the fund which he should realize out of his father's estate; that is only a limitation of time before which he cannot pay us. Argument.

Holman, in reply, cited *Roode* v. *Job*, 5 Jur. N. S. 145; *Godwin* v. *Culley*, 4 H. & N. 376; *Grenfell* v. *Girdlestone*, 2 Y. & C. Ex. 662.

September 12th, 1889. BOYD, C.:—

The writing to satisfy the statute must be such that "on a fair construction of the language, there must be an acknowledgment of the claim, as one which is to be paid by the writer:" Per Cotton, L. J., in *Green* v. *Humphreys*, 26 Ch. D. at p. 478. Fry, L. J., says, in the same case: "In order to take the case out of the statute, there must, upon the fair construction of the letter, read by the light of the surrounding circumstances, be an admission that the writer owes the debt:" p. 481.

The words in this letter of January 27th, 1885: "It will be impossible for me to pay you anything until my son's estate is wound up," import that there was a debt due to the testator, which was to be paid by the writer.

Then there is a controlling context by which the ability to pay is postponed till the winding-up of the son's estate, "which," says the writer, "will not be before the last of March or the beginning of April." There is evidence that there was an administration matter pending in which the son's estate was being dealt with; that the writer of this letter was seeking to prove a claim on that estate in June, 1884; that in the course of his evidence to establish this claim, he stated under oath and under his signature, that he had borrowed $900 in two sums from the testator, and that he was at that date responsible to Cotter (the testator) for it.

There is also evidence that the defendant's claim in that administration matter was compromised at $5,000, which would, of course, afford ample means of satisfying the plaintiff.

Judgment.

Boyd, C.

Anything conditional in the letter of January 27th, 1885, is thus ascertained by the winding-up of the estate, so far as the defendant is concerned, and the fixing of his claim at $5,000. It is to be assumed, I think, that the defendant received this sum from this source in the absence of any denial or explanation on his part at the trial.

I refer to *Chasemore* v. *Turner*, L. R. 10 Q. B. 500, in which the words were: "The old account between us which has been standing so long, has not escaped our memory, and as soon as we can get our affairs arranged we will see you are paid." The majority of the Court thought that these words "did not in any reasonable sense express an intention of the defendant that the plaintiff should not be paid unless the affairs were arranged. They considered that the non-happening of such an event as the arrangement of the affairs was not contemplated, but the happening of that event was assumed, and then a convenient time pointed out for the payment." See *Skeet* v. *Lindsay*, 2 Ex.D. at p. 317. We must look, as Cleasby, B., says in that case, not to the form so much as to the substantial meaning of the language. The letter of the defendant means substantially: "I am not able to pay you anything till my son's estate is wound up:" innuendo, "I will then pay." See *Edmonds* v. *Goater*, 15 Beav. 415; *Collis* v. *Stack*, 1 H. & N. 605; *Bourdin* v. *Greenwood*, L. R. 13 Eq. 281.

The language used in the letter indicates that something was due and owing by the defendant to the testator. It is an admission of an existing debt, although the time for making any payment is postponed on account of the alleged impossibility of the defendant to meet the obligation.

In addition to this, I am disposed to hold that the fair meaning of the statute is satisfied by an acknowledgment made and signed as in the testimony of the defendant before the Master in June, 1884. The weight of opinion is not against it, and it was so expressly decided by Shadwell, V. C., in *Smith* v. *Poole*, (1841), 12 Sim. 17, which is not cited in the text books. See also *Mountstephen* v.

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Brooke, 3 B. & Ald. 141; *Forsyth* v. *Bristowe*, 8 Ex. 716; *Edward* v. *Janes*, 1 K. & J. 534; *McCulloch* v. *Daws*, 9 D. & R. 40; *Peters* v. *Brown*, 4 Esp. 46; *Eicke* v. *Nokes*, 1 M. & Rob. 359. In the last edition of Banning on Limitations, the question is treated as still open, but he does not refer to the case of *Smith* v. *Poole*, 12 Sim. 17. See also *Clark* v. *Hougham*, 2 B. & C. 149, 154, per Bayley, B., and Best, J., p. 157; *Spollan* v. *Magan*, (1851) 1 Ir. C. L. R. 691.

There is also a well-reasoned Virginia decision very much in its circumstances like the present, as to the reason and manner of making the acknowledgment in judicial proceedings: *Duiguid* v. *Schoolfield*, 32 Gratt, (Va.) 803.

The point was left undetermined in *Francis* v. *Hawkesby*, 1 El. & El. 1052, though in a little earlier case, *Godwin* v. *Culley*, 4 H. & N. 376, some of the Judges uttered *dicta* that the acknowledgment must be to the person who claimed the benefit of it. See *Beard* v. *Ketchum*, 5 U. C. R. at p. 116-7.

The defendant complains of the form of judgment, *i. e.*, referring it to the Master to take account of what is due. This was in ease of him, but if he prefers it, the judgment may be for the $900 claimed with interest from June 4th, 1884, till judgment. Costs will go to the plaintiff, and the judgment below will be affirmed so far as the plaintiff's right to recover is concerned.

FERGUSON, J., concurred.

A. H. F. L.

[CHANCERY DIVISION.]

BANK OF MONTREAL v. BOWER ET AL.

Will—Devise—"Wish and desire"—Precatory trust—Estate in fee.

A testator, by his will, made an absolute gift of all his property to his wife, subject to the payment of debts, legacies, funeral and testamentary expenses, and by a subsequent clause provided as follows: "And it is my wish and desire, after my decease, that my said wife shall make a will dividing the real and personal estate and effects hereby devised and bequeathed to her among my said children in such manner as she shall deem just and equitable":—

Held, affirming the decision of FERGUSON, J., reported 17 O. R. 548, (ROBERTSON, J., *dubitante*), that this did not create a precatory trust, and that the wife took the property absolutely.

Per BOYD, C.—If the entire interest in the subject of the gift is given with superadded words expressing the motive of the gift, or a confident expectation that the subject will be applied for the benefit of particular persons, but without in terms cutting down the interest before given, it will not now be held, without more, that a trust has been thereby created.

In re Adams and the Kensington Vestry, 27 Ch. D. 394, and *In re Diggles, Gregory* v. *Edmondson*, 39 Ch. D. 253, specially referred to and followed.

Statement. THIS was a motion by way of appeal to the Divisional Court from the decision of FERGUSON, J., reported 17 O. R. 548, where the facts and the contents of the will in question are set out.

The motion came on for argument on June 12th, 1889, before BOYD, C., FERGUSON and ROBERTSON, JJ.

Moss, Q. C., for the defendants. The short question is, as to the effect of the final clause of the will. The Judge held it was an absolute estate free from any trust. He proceeded upon two recent cases, *Re Adams and Kensington Vestry*, 27 Ch. D. 394, and *Re Diggles*, 39 Ch. D. 253, at p. 257. The law now seems to be that the question is, whether an obligation is imposed as distinguished from a mere expression of confidence of a testator; and Judges are now indisposed to impose a trust upon a mere desire. They say the current of authority has somewhat changed. That is, however, only as to words importing confidence or belief, not where

words so peremptory as here are used. If this will had been offered to the Court for construction about the time of the testator's death, 1864, there would have been little difficulty in maintaining a trust; any difficulty there is seems to arise under the subsequent decisions. In *Lambe* v. *Eames*, L. R. 6 Ch. 597, one of the Judges says he thinks the Court of Chancery has gone too far. Here the subsequent words cut down the prior absolute gift, and are as imperative as could be desired. The words are "*shall* make a will." [BOYD, C.—A trust would be declared if she did not make a will, I suppose.] We have here all the elements necessary to create this kind of trust, (1) certainty of subject matter; (2) certainty of the object of the trust; (3) the imperative words. The rule is stated and authorities collected in *Harding* v. *Glyn*, 2 W. & T. L. C. 6th ed., p. 1077, and in the notes. So in Brett's Leading Cases on Modern Equity, at p. 13, under the case *Re Adams and the Kensington Vestry*, 27 Ch. D. 394. *Re Diggles, Gregory* v. *Edmondson*, 39 Ch. D. 253, appears to be the most recent case of all. It is evident the testator did not intend to cut the children down to a sum of ten shillings. The words, "wish and desire," were construed as imperative, and sufficient to create a trust, in *Liddard* v. *Liddard*, 28 Bea. 266; Lewin on Trusts, 7th ed., pp. 118 and 119, referring to a number of cases; *Finlay* v. *Fellows*, 14 Gr. 66, where the trust seems to have been conceded. *Lambe* v. *Eames*, L. R. 6 Ch. 597, is not altogether like this case. What they said there was, that there was a mere expression of confidence. But this case is stronger than many where a trust has been found to exist. The same Judge, Malins, V. C., who decided *Lambe* v. *Eames*, *supra*, in *Le Marchant* v. *Le Marchant*, 18 Eq. 414, said *Lambe* v. *Eames* was not to be extended to a case like that. He held then that there was a good trust. When you can say there is an obligation imposed, as distinguished from a mere expression of confidence or belief, then the rule still stands that there is a trust. If the testator intended to

Argument.

Argument.

leave absolutely to his wife, why did he add the words, "It is my wish and desire that she shall make a will." [FERGUSON, J.—Mr. McCarthy argued before me that if there was a trust she could not take any interest.] That is pushing matters altogether too far. The question is, what the testator intended. Could the widow have married after the testator's death and settled the property on her second husband, and cut out all the children? This would be the effect of holding that the gift was an absolute gift.

The *Adams Case*, 27 Ch. D. 394, is one in which the decision can be sustained without interfering with any of the cases, even those which came before it. And in the case of *Mussoorie Bank* v. *Raynor*, 7 App. Cas. 321, another case relied on below, the testator's direction to the wife amounted simply to this, that he gave to his children whatever was not required by her, and this they held would certainly be void for uncertainty, and therefore that it was better to hold the gift to be absolute. They do not say that a trust would not be held to exist in such a case as this. In the *Diggles Case*, 39 Ch. D. 253, it is hard to understand how the Court could arrive at any other conclusion than they did arrive at. That case does not go far enough to shew that there is no trust in our case.

Kidd, on the same side. In the *Diggles Case*, there were two executors, and only one was directed as to the alleged trust. If he had intended that there should be a trust, he would have directed both executors as to the trust. I might quote the older cases of *Gully* v. *Crego*, 24 Bea. 185; *Shovelton* v. *Shovelton*, 32 Bea. 143. In all the cases decided on the question of discretion, the discretion has always been as to the means by which the devisee should perform the trust. Here the discretion is as to the division, not as to the means; she must do it by will.

Robinson, Q. C., for the plaintiffs. There has been a new departure since *Lambe* v. *Eames*, L. R. 6 Ch. 597., When the Courts speak of the old rule being one not to be extended, practically they have ceased to apply the

old rule, and have applied a very different one. As to *Re Diggles, Gregory* v. *Edmondson*, 39 Ch. D. 253, if that is to be taken in connection with some of the old decisions it would be hard to say how the Court could have arrived at the conclusion there. It is hard to see how the words could be stronger than they were there: "I give you all my property, and I desire you to give so and so much." But the Court held no trust was imposed. You cannot do exactly what the testator wished. On one hand the testator could not have wished his widow to settle all the property on a second husband; on the other hand how can the Court execute a trust when the testator has expressly said he wishes the wife to do it. It is a choice between the Court of Chancery and the wife. Now the Judges say the Court of Chancery have gone much too far in intervening. *Lambe* v. *Eames*, L. R. 6 Ch. 597, puts this clearly. As to the construction of the will, if it had been construed at the time of the death of the testator, in *Lambe* v. *Eames, supra*, the will was made in 1851. If you take these too last cases, *Re Adams and the Kensington Vestry*, 27 Ch. D. 394, and *Re Diggles, Gregory* v. *Edmondson*, 29 Ch. D. 253, and add the article in Brett's Leading Cases on Modern Equity, p. 13 *seq.*, you really find all the authority that can be usefully discussed. You could not have a more full, absolute devise, than there is here. The subsequent expression of a wish is not connected with the devise closely. When such a wish is expressed in close connection with the devise, there is more reason to say the devise is conditional. You can hardly get a stronger case than the *Diggle's Case*, in 39 Ch. D. 253. Argument.

Code, on the same side. *Nelles* v. *Elliott*, 25 Gr. 329, may be referred to. The property here is such that from its nature much would be consumed before the trust would operate. Then *Stead* v. *Mellor*, 5 Ch. D. 225; *Morrin* v. *Morrin*, 19 L. R. Ir. 37; *Parnall* v. *Parnall*, 9 Ch. D. 96; *In re Hutchinson* v. *Tenant*, 8 Ch. D. 540, may also be referred to.

Argument.

Moss, in reply. With reference to the words in the *Diggles Case*, 39 Ch. D. 253, the Judges point out that they were there considering whether there was a charge upon the residuary estate in favour of a certain person who was a stranger. They were striving to get at the intention. To give the property to the widow absolutely, you must disregard the clause in the will as to the testator's wishes. It seems to me the separation here in the clauses is rather in favour of the trust. After devising it here, he afterwards makes an imperative direction. The fact that some of the property may be consumed before the time of executing the trust, is no argument against the trust; that is so very often with a tenant for life. In *Stead* v. *Mellor*, 5 Ch. D. 225, it was not decided that the word "desire," was not one of imperative obligation, but that the words of trust were too uncertain to be given effect to. In *Nelles* v. *Elliott*, 25 Gr. 329, the Chancellor gave no decided opinion as to whether there was a trust or not.

September 9th, 1889. BOYD, C.:—

The case mainly relied on by Mr. Moss, of *Le Marchant* v. *Le Marchant*, L. R. 18 Eq. 414, was cited by Jessel M. R., in *Re Hutchinson* v. *Tenant*, 8 Ch. D. 540, and he refused to follow it because being a decision of a lower Court, it was apparently in conflict with *Lambe* v. *Eames*, L. R. 6 Ch. 597. The same view was given effect to by Pearson, J., in *Re Adams and the Kensington Vestry*, 24 Ch. D. 209, which was affirmed on appeal in 27 *ib.*, 394, 406. In *Re Hutchinson* v. *Tenant*, *supra*, the words appear to me quite as strong as those used in this will. There the property was given to his wife "absolutely with full power for her to dispose of the same as she may think fit for the benefit of my [children], having full confidence that she will do so."

In this class of cases the difficulty arises from the manifestation of two intentions on the part of the testator,

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which are in apparent conflict. In one aspect the controlling scheme of the will is to leave the property under the absolute dominion of the wife; in the other, it is that such dominion shall be exercised for the benefit of the children of the family. It would be, an otiose undertaking to go through all the cases, for they are numerous, and cannot be reconciled. But since *Lambe* v. *Eames*, L. R. 6 Ch. 597, there has been a new departure in favour of confining language supposed to create a trust for the children within much narrower limits, than in some of the earlier cases. If the entire interest in the subject of the gift is given with superadded words expressing the nature of the gift, or the confident expectation that the subject will be applied for the benefit of particular persons, but without in terms cutting down the interest before given, it will not now be held without more, that a trust has been thereby created. I quote in substance from the language of the Vice-Chancellor of Ireland in a case decided in 1886, of *Morrin* v. *Morrin*, 19 L. R. Ir. 41. Quite in harmony with the later decisions is the case of *Webb* v. *Wools*, 2 Sim. N. S. 267, decided in 1852, by Kindersley, V. C. I may use his language (at p. 269) as very apt to give the judicial interpretation of the testator's meaning in the concluding clause of this will: "It is not introduced for the purpose of creating any trust * * which the children could enforce, but merely for the purpose of declaring that, giving all his property to his wife for her sole use and benefit, making her absolute mistress of it by the first branch of the clause, he means by the latter branch of it to indicate that he reposes in his wife full confidence that she will dispose of it for the benefit of herself and children, but without intending to impose on her any obligation which the Court could enforce." The highest Court of Appeal for the Colonies has accredited the decision of *Lambe* v. *Eames*, L. R. 6 Ch. D. 597, and *Re Hutchinson and Tenant*, 8 Ch. D. 540, in an appeal from the High Court at Allahabad; *Mussoorie Bank* v. *Raynor*, 7 App. Cas. 321 and 330.

I think the present judgment should be affirmed with costs.

Judgment. ROBERTSON, J.:—

Robertson, J.

Our own Courts appellate and otherwise, up to this day, have held that words expressing a desire and wish such as the testator made use of in this will, created a precatory trust. In *Baby* v. *Miller*, 1 E. & A. 218, Sir John Robinson discusses the question of words similar to these, and the Court held a trust was thereby created. Afterwards in *Moross* v. *McAllister*, 26 U. C. R. 368, Draper, C. J., in delivering the judgment of the Court, says, "desires" is equivalent to "wills." The first of these cases was decided forty-two years ago, and the latter twenty years thereafter; and our Court of Chancery in the same year, held in *Finlay* v. *Fellows*, 14 Gr. 66, that the words, "all the residue of my property real and personal, I devise to my wife, requesting her to will the same to our children as she shall think best;" and the widow having devised the whole of the property to one child out of a number, the Court (VanKoughnet, C.,) held that the words were directory, not precatory only; that the power reposed in the widow was not properly exercised, as she was bound to divide this property among all the children, although she might in her discretion give personalty to one and realty to another. So that at the time the will now under consideration was made (May, 1864), and for that matter, at the time of the testator's death, September, 1870, the law undoubtedly was in favour of the defendant's contention; and so far as this Province is concerned, the decision of my brother Ferguson is the first departure from the law as heretofore understood; but now we are confronted with a number of decisions in England, commencing with *Lambe* v. *Eames*, L. R. 6 Ch. 597, which have greatly restricted the sense in which precatory words are to be construed. Lord Justice James in this case says, at p. 599: "Now the question is, whether those words create any trusts affecting the property" (which he gave to his widow, "to be at her disposal in any way she may think best for the benefit of herself and family,")

and in hearing case after case cited, I could not help feeling that the *officious kindness* of the Court of Chancery in interposing trusts where in many cases the father of the family never meant to create trusts, must have been a very cruel kindness indeed." So that according to Lord Justice James, it was "the officious kindness of the Court of Chancery," which created a state of law, which he and the Lord Justices with him, concluded was not warranted by the intention of the testators, &c. This decision has been followed in England ever since with words expressing high approval by the most eminent of Judges, and feeling as I do that we are bound by these authorities, I agree with the judgment just delivered by his Lordship, the Chancellor, although I confess I would prefer that the decisions of our own Court of Appeal should be overturned by one of our own higher Courts of Appeal before this Division could decline to follow them. Judgment. Robertson, J.

In going thus far, I am not quite satisfied that a thorough investigation of all the modern decisions would warrant the conclusion thus arrived at. The Judges all make use of the expression, that the doctrine of precatory trusts should not be extended, not that it has invariably been carried too far, but that it must appear clearly on the face of the will what the testator's real intention was. When we come to this, the difficulty arises, did he or did he not intend that his widow was, while she provided for her own maintenance, to hold the estates for the benefit of, and to be by her as in *Finlay* v. *Fellows*, 14 Gr. 66, divided equitably among his children?

It appears to me there is force in the fact, that at the time this will became operative, the law was not as it is now held to be; and that the law as it was then should govern, otherwise these decisions, as is contended by the plaintiff, have an *ex post facto* effect.

A. H. F. L.

[COMMON PLEAS DIVISION.]

BANK OF COMMERCE v. BRITISH AMERICA ASSURANCE COMPANY.

Fire insurance—Statutory conditions as to terminating risk—Notice of termination—Sufficiency of—Amount of unearned premium—R. S. O. ch. 167, sec. 114.

A notice by an insurance company to terminate a fire policy under statutory condition No. 19 of the Ontario Fire Insurance Act, (R. S. O. ch. 167, sec. 114) should be wholly in writing, and should inform the assured that the policy will be terminated at the expiration of the prescribed statutory period after the service of the notice; and when on the cash plan a ratable proportion of the premium returned should be calculated from the termination of the notice.

Where therefore a company gave a notice which was in effect an immediate cancellation with a return of the unearned premium from the date of the notice:—

Held, [GALT, C. J., dissenting,] that the policy had not been cancelled.

Statement.

THIS was an action brought by the plaintiffs as assignees of a policy of fire insurance.

The action was tried before ROBERTSON, J., without a jury, at Toronto, at the Spring Chancery Sittings of 1889.

It was agreed that the defendants' defence should be confined to the question whether the policy was terminated on notice pursuant to the condition in the Ontario Fire Insurance Act as set out in the statement of defence, and which was as follows:

No. 19. "The insurance may be terminated by the company by giving notice to that effect, and, if on the cash plan, by tendering therewith a ratable proportion of the premium for the unexpired term, calculated from the termination of the notice: in the case of personal service of the notice, five days notice excluding Sunday, shall be given. Notice may be given by any company having an agency in Ontario by registered letter, addressed to the assured at his last post office address notified to the company, and where no address notified, then to the post office of the agency from which application was received, and where such notice is by letter, then seven days from the arrival at any post office in Ontario shall be deemed good service. And the policy shall cease after such tender and notice aforesaid, and the expiration of five or seven days as the case may be."

It is unnecessary for the purposes of this report to detail the circumstances under which the policy came into pos-

session of the plaintiffs. It had been in existence since 1st September, 1885, and while in possession of the plaintiffs had been renewed on 30th August, 1888 for one year to expire on 1st September, 1889. Statement.

On 5th October, 1888, Mr. Watson, agent for the defendants, called on the agent of the plaintiffs at Seaforth and handed him a letter of which the following is a copy :

"Dear Sir :—

"I regret I have to say that this company have instructed me to cancel their policy 286236 held by the Bank of Commerce ; and I therefore send you herewith $13.75 for unearned premium on same.

"Yours respectfully,

H. N. WATSON, Agent.

The following evidence of Mr. Watson at the trial was uncontradicted :

"Q. Was Mr. Aird there? A. Yes, he was there ; I was introduced to him ; I laid the letter down upon his table, and took out the money, $13.75, and counted it out and laid it down beside the letter.

Q. And what more happened? A. He refused to take the money. 'Well,' I says, 'I have no alternative but to tender it.' At that time he then asked me 'I have the right to hold the insurance till we replace it with another company.' I declined to answer him or give any information. 'You will find the conditions mentioned on the policy, Mr. Aird.' 'Yes, but,' says he 'what is your opinion of it,' and insisted on having my opinion. 'I will give my opinion without prejudicing myself ; well,' says I, 'my opinion is this ; I believe you have the option of having a limited time to replace that insurance, but I do not think you have the option of having an unlimited time as you express it, but,' says I, 'Mr. Aird, you had better refer to your policy and you will there find the terms of your insurance regarding cancellation, and I advise you to abide by these terms whatever they are,' and I think he said that he hadn't the policy or the policy was not there, and he asked me if I would look into the matter, and tell him regarding the time he was allowed. I think he asked me that question. I am speaking from memory of conversation as near as I can.

Q. Did you leave the letter with him? A. I did.

Q. Did you leave the money with him! A. He would not take it ; I tendered the money, three times, and he would not take it.

Q. What did you do about the money? A. I took the money, and says I, 'If you won't take the money I can't leave the money to the mercy of any thief, I must take charge of the money anyway.'"

The fire took place on the 13th October, 1888.

The learned Judge was of opinion that the notice was insufficient, and gave judgment in favour of the plaintiffs.

Argument. A motion was made to set aside the judgment, and to enter judgment for the defendants.

In Easter Sittings, June 1st, 1889, *Bain*, Q.C., supported the motion. The notice complied with the statute, and there was a tender of the unearned premium. The policy therefore was put an end to. It was urged at the trial that the notice must state that the policy would be cancelled after the expiration of five days. All that the condition requires is, that there should be a notice of cancellation, and so long as the five days subsequently elapse that is all that is required.

Lash, Q. C., contra. There are two requisites: (1) notice and (2) payment or tender of the unearned premium. The condition clearly provides for written notice, and the notice must state that on the expiration of the five days the policy will cease and be at an end. The letter here, if a notice at all, was notice of an immediate cancellation. The amount tendered also was not correct. The exact amount should be tendered. The amount to be tendered is the unearned premium exclusive of the five days. The amount tendered here was the amount of the unearned premium at the time the letter was delivered. He referred to *Caldwell* v. *Stadacona Fire and Life Ins. Co.*, 11 S. C. R. 212, 238; *Grant* v. *Reliance Mutual Ins. Co.*, 44 U. C. R. 229, 234; *Citizens Ins. Co.* v. *Parsons*, 7 App. Cas. 96, 121.

September 7th, 1889. GALT, C. J.:—

I requested the learned Judge to favour me with any memorandum of his judgment which did not appear on the record. He handed me his note of the argument which had taken place before him in which Mr. Lash Q.C., acted for plaintiff, and Mr. Laidlaw, Q. C., for defendants. I find from the full memorandum made by him that Mr. Lash urged precisely the same grounds, and cited the same authority as he did before us, viz., *Caldwell* v. *Stadacona Fire and Life Ins. Co.*, 11 S. C. R. 212.

There is no question that in that case the Court held

that the notice of cancellation was insufficient; but there is this essential difference between it and the present, viz., there was no tender of the unearned premium, nor, as far as I can judge, was there any statutory provision respecting notice of cancellation, consequently that case is no authority for the present contention. Judgment. Galt, C.J.

In my opinion the notice of cancellation was sufficient. We are not called on to express any opinion as to what might have been the rights of the plaintiff if the fire had taken place within the five days' limit by the statute. Mr. Lash objected to the notice as being a present cancellation, and therefore not within the statute. There is a variation of the statutory conditions printed on the policy by which "The company may terminate the insurance at any time by giving a written notice to that effect accompanied by a tender of a ratable proportion of the premium for the unexpired term, and upon such notice and tender, whether accepted or not, the policy shall cease." We are not called upon to consider this variation, because by the agreement of the parties the case was to be decided on the statutory provision.

In my judgment the notice was sufficient, and there was a tender of the unearned premium; and, therefore, this motion must be made absolute, and this action dismissed with costs.

ROSE, J.:—

The agreement was, that the defence should be confined to the question whether the policy was terminated on notice pursuant to the statute as set out in the statement of defence.

The statement of defence set out the following condition:

[The learned Judge then quoted condition No. 19, *supra*, and proceeded.]

If there was any notice in this case it was by personal service.

The condition requires written notice. This is, I think,

Judgment
Rose, J.

clear from the provision for personal service and by notification by registered letter. If any authority were required for what appears to me me so clear a proposition it may be found in *Moyle* v. *Jenkins*, 8 Q. B. D. 116.

The notice should advise the assured that he has five days within which to make other provision for insurance, thus avoiding the gross unfairness pointed out by Mr. Justice Strong in *Caldwell* v. *Stadacona Fire and Life Ins. Co.*, 11 S. C. R. 212, at p. 238, of "not providing that notice should be given a reasonable time before the cancellation should take effect, so that the assured might have the opportunity of covering himself by another insurance."

The ratable proportion of the premium for the unexpired term should be calculated from the *termination of the notice*, *i. e.*, five or seven days, as the case may be, from service.

The effect of giving such a notice, and making such a tender is, that the policy shall cease after the expiration of the five or seven days.

The strict compliance with the terms and conditions of this provision is "a condition precedent to the exercise of the rights of rescission which the company, at its own arbitrary election, is entitled to subject the assured to." Per Strong, J., at p. 238 of *Caldwell* v. *Stadacona Fire and Life Ins. Co.*; and see p. 239 for citation from May on Insurance. See as to strictness in cases of forfeiture: *Clarke* v. *Hart*, 6 H. L. 633.

The case of *Sun Fire Office* v. *Hart*, 14 App. Cas. 98, may be referred to as to the option to terminate at will.

In *Caldwell* v. *Stadacona Fire and Life Ins. Co.*, it was held that the condition had not been complied with because there was no tender of the unearned premium, the notice putting an end to the contract stating that "the unearned premium will be returned hereafter."

The letter relied upon as notice under the statute was handed to the assured, and was in the words following:

"DEAR SIR—I regret I have to say that this company have instructed me to cancel their policy 286236 held by the Bank of Commerce, and therefore send you $13.75 for unearned premium on same."

Judgment.

Rose, J.

It requires a very liberal reading of this letter to call it a notice of anything save the agent's instructions; but assuming it to be a notice of an intention to put an end to the contract it was a notice of immediate cancellation or rescission, and the agent stated in the witness box that the unearned premium was calculated from the 5th of October, the day he handed it to the assured. If his evidence of intention can in any wise be material, the agent stated that his intentions were to terminate the policy on the 5th, acting up to the instructions of the company.

But I think as the notice is required to be in writing, from the letter alone, and not from any oral statement of the agent, must be furnished the evidence of notice.

In my opinion the letter, if a notice at all, is defective in declaring the contract to be at an end forthwith instead of at the expiry of five days. And secondly, I am of the opinion that there was not a compliance with the statute as to the tender, the amount tendered having been computed from the date of the notice and service, and not from the expiration of five days from the service, or, as the condition puts it, "from the termination of the notice."

Therefore it seems to me the policy did not cease, and the judgment must be affirmed.

The motion should, in my opinion, be dismissed with costs.

MacMahon, J.:—

The section of the statute which has been referred to provides: "That the insurance may be terminated by the company" when it has conformed to the following prerequisites: (*a*) giving notice to that effect, that is, of their intention to terminate; (*b*) tendering with such notice a ratable proportion of the premium for the unexpired term calculated from the termination of the notice; (*c*) in case of personal service of the notice, five days' notice, excluding Sunday, shall be given.

The notice given was not a notice of an intention to

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terminate the insurance at a subsequent time,—that is at the expiration of five days from the service of the notice. On the contrary, it is a notice of the immediate termination of the risk. The ratable proportion of the premium was not calculated from the termination of the five days after the day of the service of the notice, but from the very day the notice was served, so that in no particular was what was done by the defendants a compliance with the statute.

In May on Insurance, 2nd ed., sec. 68, p. 75, it is said: "If the policy provide the length of the notice to be given, it does not seem to be material that the notice itself makes a mistake in the designation of the date when the policy will become cancelled, provided the required time shall have elapsed between the time when the notice is given and the loss shall have happened. Thus, where it was provided that after seven days' notice of intention to cancel, the insurance should terminate, a notice dated the 13th of February, and deposited on that day in the post-office, but not till after the office was closed for the day, which notice was received by the insured the next day in due course of mail, and informed him that his insurance would terminate on the 20th, the loss not having occurred till the 22nd, it was held that the notice was sufficient both within the letter and the spirit of the contract: *Emmott* v. *Slater Mutual Fire Ins. Co.*, 7 Rh. Id. 562. But this case is a departure from the usual strictness."

In fact, the language of Ames, C. J., in delivering judgment in *Emmott* v. *Slater Mutual Fire Ins. Co.*, is hardly consistent with the conclusion reached, for he says, at p. 565, "In other words, the cancellation of this class of policies was to take place as soon after the day named as the seven days' notice of the intent to cancel, required by the by-law, had been given." And at pp. 565-6 he says, "When the seven days had expired after his receipt of the notice, he had all the notice which by the by-law either in its letter or spirit, required; that is seven days' notice of the intent of the company to cancel his policy on a day subsequent to the giving of the notice."

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What I suppose is meant by that part of the judgment from which the last quotation I have made is extracted is, that upon its face the notice shewed that the company were giving the plaintiff the seven days' warning required by the by-law which formed part of the contract prior to the cancellation of the risk.

The notice was not "given" seven days prior to the 20th of the month because not received by the insured until the 14th, and so the seven days would only count from that date. If therefore, I have interpreted the last quotation from the judgment aright, it was not, as held by the Court, a compliance with the by-law, and is directly opposed to the language employed by the Chief Justice of Rhode Island in the quotation first above made from his judgment, and which I regard as a proper exposition of the law as applicable the circumstances of that case, and which I think should be applied to the case we are now considering.

In the present case there was nothing to shew that the cancellation was to take place subsequent to the notice. It was an immediate cancellation with a return of the unearned premium from the date of the notice, and not of the amount of unearned premium calculated from the fifth day subsequent to the date of the notice.

In *Runkle* v. *Citizens Ins. Co. of Pittsburgh*, 6 Fed. Rep. 143, where the company had an option to terminate the insurance at any time upon notice and a return of a ratable proportion of the premium, it is said, at p. 148: "The right, however, to terminate a contract of insurance which has been partly entered into and has taken effect by this method, is a right which can only be exercised by either party by a strict compliance with the terms of the policy relating to cancellation," See also May on Insurance, 2nd ed., sec. 574, and *Chase* v. *Phœnix Mutual Life Ins. Co.*, 67 Me. 85; *Hathorn* v. *Germania Ins. Co.*, 55 Barb. (N.Y.) 28, as to the strictness required in complying with the conditions a policy of insurance can be cancelled.

In *Grant* v. *Reliance Mutual Fire Ins. Co.*, 44 U. C. R.

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229, the plaintiff received an interim receipt insuring him against loss by fire which declared that the insurance thereby made was subject to all the conditions contained in and endorsed on the forms of policy then in use by the company. The 18th statutory condition provided that the insurance might be terminated by the company by giving ten days' notice to that effect, and by repaying a ratable proportion of the premium for the unexpired term, and that the policy should cease after the expiration of the ten days. It was held that the company was bound to give the ten days' notice and return a ratable proportion of the unearned premium, before they could terminate the insurance under their receipt within the thirty days.

According to my view the motion should be dismissed with costs.

[QUEEN'S BENCH DIVISION.]

IN RE MARTER AND THE COURT OF REVISION OF THE MUNICIPALITY OF THE TOWN OF GRAVENHURST.

Mandamus—Compelling Court of Revision to hear voters' lists appeals—Specific remedy by appeal to County Judge—51 Vic. ch. 4, sec. 13, sub-sec. (1) (O.)—R. S. O. ch. 193, secs. 61, 68.

By sec. 13, sub-sec. (1), of "The Manhood Suffrage Act," 51 Vic. ch. 4 (O.), it is provided that complaints of persons not having been entered on the roll as qualified to be voters who should have been so entered, may, by any person entitled to be a voter or to be entered on the voters' list, be made to the Court of Revision as in the case of assessments, or the complaints may be made to the County Judge under the Voters' Lists Act.

By sec. 61 of the Assessment Act, R. S. O. ch. 193, it is provided that the Court of Revision of each municipality shall meet and try all complaints in regard to persons wrongfully omitted from the roll; and by sec. 68, sub-sec. (1), that an appeal to the County Judge shall lie, not only against a decision of the Court of Revision on an appeal to that Court, but also against the omission, neglect, or refusal of said Court to hear or decide an appeal.

The Court of Revision of a municipality refused to hear or adjudicate upon a complaint made by M. under sec. 13 of "The Manhood Suffrage Act," that the names of certain persons had been wrongfully omitted from the assessment roll:—

Held, that it was the duty of the Court of Revision under sec. 61, to try the complaint made by M.; and that if no other complete, appropriate, and convenient remedy had existed, M. would have been entitled to a mandamus to compel the Court to perform its duty; but as the Legislature by sec. 68 had given a specific remedy for this very breach of duty, by appeal to the County Judge, M. was not entitled to a mandamus.

The right which M. was seeking to enforce was to have the names of certain persons placed on the assessment roll; not, as was contended, to have his complaint disposed of by the Court of Revision; the complaint to the Court of Revision was a means of enforcing his right, not the right itself.

Decision of MACMAHON, J., reversed.

Statement.

THIS was a motion made at the instance of George F. Marter, who, in his affidavit set forth that he was a ratepayer of the town of Gravenhurst, and a voter for the members of the Legislative Assembly of Ontario and for the electoral district in which said municipality was situate, and a municipal elector and voter in said municipality, for an order for a writ of mandamus to Isaac Cockburn, mayor of the town of Gravenhurst, or to the Court of Revision of the said town, compelling the summoning at an early date,

Statement. after due notice, the said Court of Revision, for the disposal of certain appeals now pending at the instance of the said George F. Marter.

The motion was argued before MACMAHON, J., in Chambers, on the 30th day of July, 1889.

Pepler, for the applicant.

W. Barwick, for the members of the Court of Revision.

August 5, 1889. MACMAHON, J.:—

The Court of Revision for Gravenhurst, pursuant to notice to that effect, sat on the 18th of June last to hear complaints and appeals, and the applicant Marter on the 8th June gave notice to have a number of names added to the assessment roll, and attended the Court on the day of its sittings, when he appealed, and in support of the appeals the Court of Revision adjudicated on the appeals of the tenants and owners mentioned in the list furnished by Marter, but refused to hear or adjudicate upon those on the list who appeared thereon as manhood suffrage applicants.

Marter states that he warned the Court that if they continued in their refusal to hear the appeals, he would take legal steps to compel them to do so, and would look to them for the costs thereof.

The notice contains the names of twenty six applicants under the Manhood Franchise Act, and Marter states in his affidavit that when he urged the hearing of these appeals the reason assigned by the majority of the members of the Court of Revision for not hearing them was, because they were political appeals, and must be dealt with by the County Court Judge. He also says that Mr. Isaac Cockburn, the mayor of the town of Gravenhurst, was present at the Court of Revision and urged the members of the Court not to hear the said appeals.

The applicant states that if the appeals are delayed for the County Judge's Voters List Court he fears the evidence will not be available to support them.

Mr. Pepler accounts for the delay in the present application in an affidavit wherein he states that his firm were first consulted on the 22nd of June, and that subsequently affidavits were drawn, and an appointment made by a Judge for hearing the motion on the 29th of June, which lapsed

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in consequence of the absence from town of Mr. Cockburn, the mayor, and the consequent inability to make the demand on him, and that an appointment for the 5th of July also lapsed for a similar reason, and because of unsatisfactory temporizing answers of Mr. Cockburn. The affidavits of H. C. G. Elliott and Geo. E. Clarke were filed in support of the statements contained in Marter's affidavit as to what took place at the sitting of the Court of Revision.

In answer to the motion the affidavit of Isaac Cockburn, the mayor of Gravenhurst, states that he took no part in the proceedings as a member of the Court of Revision, or as having any authority whatever to take part in such proceedings; that he was present to defend an appeal against his own assessment, and hearing Mr. Marter making some statements to the Court, contradicted him and urged that no harm would result to the appellants on the appeals as to manhood franchise applicants, by the Court refusing to entertain the appeals, as he (Marter) could go to the County Judge, who, he thought, was the proper party to deal with them; that Marter became very violent, and threatened the Court, and endeavoured to intimidate them into proceeding to hear and adjudicate upon the said appeals. Cockburn also states that he then said, that he had some days prior to the holding of the Court given it as his view that it would be much better to let the manhood suffrage appeals go to the County Judge rather than have a repetition of the wrangling over the matter in the manner they had formerly experienced, and that the majority of the Court coincided with his opinion; that it was at the time of the holding of the Court his impression that it was a permissive act on the part of the Court, and not compulsory on them to hear the appeals, and that it was so understood by a majority of the Court, and that their action was in good faith; that the Court was held on the 18th of June, and that its powers existed until the 1st of July; that no application was made by Mr. Marter during the month of June to extend the Court, but on the 3rd and 4th of July Marter said to him: "I want you to call the Court of Revision to hear these appeals," and he (Cockburn) replied that as the time limited by the statute had elapsed, he did not know whether he had authority to do so, and that he afterwards took the opinion of counsel, which was against his legal right to do so, and that he on the following day informed Marter of the advice received; that on the 8th day of July Marter again requested him to call the Court of Revision together to hear the

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appeals, and on the 11th day of July he got a letter setting forth his position and that of the members of the Court of Revision, which he submitted to the members of the Court excepting one who was absent, and that they individually were of opinion that under the circumstances he should not call the meeting; that in the majority of the appeals made by Marter under the Manhood Franchise Act, the appellants are residents of the town of Gravenhurst, and can attend the Judges Voters' List Court as conveniently as the Court of Revision. Mr. Cockburn also says: "Had I been requested by said Marter to call the Court of Revision together, prior to the 1st day of July last, I would have done so, but no such request was made until about the 4th day of July."

The affidavits of B. R. Mowry, Alexander McArthur, and James Sharpe, three of the members of the Court of Revision, corroborate Mr. Cockburn.

An affidavit of Mr Marter is filed in reply, in which he states that before going to the Court of Revision he heard that it had been determined by the Court not to hear the appeals, and inquired from Mr. Moody, a member of the Court, if it were true, and Moody said Mr. Cockburn had been with them and induced them not to hear the appeals; that he (Marter) afterwards spoke to Cockburn, and that he admitted that he had advised that course beforehand to the Court of Revision. The other matters stated in this affidavit need not be referred to.

Under the Manhood Suffrage Act, 51 Vic. ch. 4, sec. 13 (1) "Complaints of persons having been wrongfully entered on the roll as qualified to be voters or of persons not having been entered thereon as qualified to be voters, who should have been so entered, may by any person entitled to be a voter or to be entered on the voters' list in the municipality or in the electoral district in which the municipality is situate, be made to the Court of Revision as in the case of assessments, or the complaints may be made to the County Judge under the Voters' Lists Act."

Where complaint is made to the Court of Revision as in case of assessments, the 64th section of the Assessment Act (R. S. O. ch. 193), sub-sec. 19, points out the formalities required, including the giving of notice in writing to the clerk of the municipality, the length of time for giving the notice before the sittings of the Court of Revision, and what it is to contain. All these pre-requisites were complied with in the present case. Sub-section 15 of sec. 64 pre-

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scribes the mode of disposing of complaints in appeals under the Assessment Act, where the Court hears the complainant and any witnesses adduced, and if deemed desirable the party complained against—"When they (the Court), shall determine the matter."

Under the Manhood Suffrage Act, sec. 13, (1), the complaint may be made to the Court of Revision or to the Judge under the Voters' Lists Act. It rests with the person who considers himself aggrieved to select the tribunal to which he shall appeal for redress up to the period prescribed by the Act for completion of the duties of the Court of Revision, viz.: up to the first of July (R.S.O. ch. 193, sec. 64, sub-sec. 19) and if the complainant has complied with the requisite formalities entitling him to have his appeal heard, the Court of appeal cannot deprive him of this right given to him by the statute to have his appeal heard and determined, any more than the Court could deprive a complainant under the Assessment Act from having his complaint heard and determined. See *Regina* v. *Dodson*, 7 E. & B. 315.

The words of the Act are not permissive and do not give the Court of Revision discretionary power to hear or not to hear a complaint, but the complaint when "made to the Court of Revision as in the case of assessments," shall be dealt with in the same manner and under like circumstances as complaints against assessments are dealt with, that is, after hearing the complainant and any witnesses, etc., the Court shall determine the matter.

It is as imperative on the Court of Revision to hear and determine complaints under the Manhood Suffrage Act as under the Assessment Act. If it were not so, gross wrong might in many cases be perpetrated, as, for instance, where, as it is alleged in the present case, many of the complainants may be absent in the lumber camps when the County Judge holds Court in the municipality of Gravenhurst under the provisions of the Voters' Lists Act.

It was objected that under R. S. O. ch. 193, sec. 64, sub-sec. 19, the duties of the Court of Revision having been concluded, and the roll finally revised before the 1st of July, the Court after that day was *functus officio*.

It is said that so far as the public is concerned the section above referred to may be regarded as only directory. And that "where an act is required to be done for the public good, and there has been a wrongful omission to do it, and serious inconvenience will arise from its not being done, this Court has been considered to have the power of ordering

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it to be done, under the prerogative writ of mandamus:" *Regina* v. *Mayor of Rochester*, 7 E. & B. at p. 924. And Lord Campbell, C. J., in his judgment at pages 926-7 refers to the case of *Regina* v. *Mayor of Harwich*, 1 E. & B. 617, and says: "The understanding seems to have generally prevailed in Westminister Hall that, if, for any insufficient reason, the mayor and assessors have refused to revise the overseers' list, or to adjudicate upon any claim or objection to a name being on the burgess roll, they may, after the time for the regular revision, be compelled by mandamus to do so." See also *Regina* v. *The Court of Revision of Cornwall*, 25 U. C. R. 286.

There was no sufficient reason assigned by the Court of Revision in the present case for not hearing and adjudicating upon the appeals of the complainants.

The principal ground relied upon by Mr. Barwick in opposing the application for the writ, was that the Court will not grant the writ where the applicant has another remedy open to him, which, it is urged, the applicant has here, viz., going before the County Judge under the Voters' Lists Act.

The second rule as stated in Shortt on Mandamus, &c., p. 222, as entitling the applicant to the writ, is that "there must be no other effective lawful means of enforcing the right," or, as put by Lord Ellenborough, in *Rex* v. *Archbishop of Canterbury*, 8 East at p. 219: "There ought in all cases to be a specific legal right, as well as the want of a specific legal remedy, in order to found an application for a mandamus." So that if the applicant has another remedy for the wrong done, either by appeal, writ of error, *quo warranto*, petition of right, or where the omission to do an act can be prosecuted by indictment, or any other means which will be effectual for the purpose, a mandamus will not be granted.

It was urged that the applicant could apply to the County Judge under the Voters' Lists Act, which would be an effectual remedy, and *Rex* v. *Weobly*, 2 Str. 1259, was cited as authority for this. The case in Strange will be found upon examination to be a direct authority the other way. The application for the writ in that case was to direct the churchwardens to insert particular persons in the rate, upon affidavits of their sufficiency, and being left out to prevent their having votes for Parliament men. The writ was refused, the Court saying that the remedy was by appeal, and the Court never

went further than to oblige the making a rate, without meddling with the question who is to be put in or left out; of which the parish officers are the proper judges subject to an appeal. Judgment. MacMahon, J.

So in the case in hand, if the Court of Revision, having heard the complaints, refused to insert the names of the applicants on the roll, no mandamus to compel the Court to do so would have been granted, for the judicial functions of the Court of Revision having been exercised, the Superior Court will not interfere by mandamus, as the complainant would have the right of appeal to the County Judge.

But the application here is grounded not because the Court of Revision has acted, and acted erroneously, but because they have refused to act at all; that the complainants have not been given a hearing; and consequently there has been no judicial decision by the Court of Revision against which they can appeal.

The complainants say they have a right to be heard by the Court of Revision, and that right has been denied to them by that tribunal. They say they have right to "the benefit which the Legislature intended they should enjoy" by having their complaints heard by the Court of Revision. I cannot understand Mr. Cockburn's interference with the action of the Court of Revision, and his advising that the manhood suffrage appeals should not be heard by the Court, and then saying that, if Mr. Marter had applied to him prior to the 1st of July, he would have called the Court of Revision together for the purpose of hearing then.

It would have been as well to have the complaint heard when the complainant's witnesses were present, prepared to support the appeals.

The order for the writ must go to the Court of Revision, requiring the calling a meeting of the Court to hear the complaint of the complainants under the Manhood Suffrage Act, mentioned in the list furnished to the clerk of the municipality.

The applicant is entitled to his costs.

The members of the Court of Revision appealed against this decision.

The appeal was heard before the Divisional Court (FERGUSON and STREET, JJ.,) at a special sitting held on the 12th October, 1889.

Argument.

Moss, Q. C., for the appellants. The order appealed from is wrong because there was an ample remedy otherwise than by mandamus. By sec. 13 of "The Manhood Suffrage Act," 51 Vic. ch. 4 (O.), complaints of persons not having been entered on the roll as qualified to be voters may be made to the Court of Revision as in the case of assessments, or the complaints may be made to the County Judge under "The Voters' Lists Act." See 52 Vic. ch. 3 (O.), especially sub-secs. 7 and 14 of sec. 3. Under that sec. 13 the complaints might have been made to the County Judge. But by sec. 68 of the Assessment Act R. S. O. ch. 193, an appeal to the County Judge in a case of this kind is expressly given: "An appeal to the County Judge shall lie, not only against a decision of the Court of Revision on an appeal to said Court, but also against the omission, neglect, or refusal of said Court to hear or decide an appeal." This sec. 68 was first enacted in 1874: 37 Vic. ch. 19, sec. 16 (O). The applicant had from the 18th June to the 5th July to give notice of an appeal under sec. 68. Mandamus will not lie where there is another appropriate remedy: *Regina* v. *Registrar of Joint Stock Companies*, 21 Q. B. D. 131; *Re Nathan*, 12 Q. B. D. 461; *Regina* v. *Smith*, L. R. 8 Q. B. 146; *Re Moulton and Haldimand*, supra; *Re Judge of County Court of Perth and Robinson*, 12 C.P. 252.

It is suggested that it would not be convenient to go before the County Judge because of the absence of witnesses in the lumber camps at the time the Judge sits, but there is no evidence of this; and that is, at any rate, not the kind of inconvenience that is referred to in the cases where it is said that the remedy must be convenient.

The applicant has two remedies besides mandamus: one under sec. 68 of the Assessment Act, and the other under the Voters' Lists Act. It matters not under the latter Act whether the Court of Revision has been applied to or not; the remedy is still open.

If the right to mandamus is affirmed, it will lead to trouble, because the question arises, who is to call the Court of Revision together now; the Court is *functus officio*; it has dealt with these complaints, rightly or wrongly.

McCarthy, Q. C., for Mr. Marter. The period during which the County Judge hears appeals from the Court of Revision is now gone by, and this Court will not assist the Court of Revision to avoid all remedy, and escape from the performance of its duty. See Shortt on Informations, &c. p. 324; *Regina* v. *Mayor, &c., of Monmouth*, L. R. 5 Q. B. 251; *Mayor, &c., of Rochester* v. *Reginam*, 27 L. J. N. S. 434 (Q. B.). It would be monstrous if the Court of Revision by refusing to do their duty could escape altogether the performance of it. The above cases shew that they will be compelled to perform their duty after the time for doing so has elapsed. There is no physical difficulty about the matter, for the roll is still in the possession of the clerk of the municipality, who is the clerk of the Court of Revision. Argument.

I concede that we had the right to apply to the County Judge under the Voters' Lists Act; we had also the right of appeal to the County Judge under the Assessment Act. I differ with my learned friend as to the law. The appeal to the Court of Revision was for the purpose of correcting the mistakes of the assessor, and that could only be done upon hearing evidence. These persons had a right to have their names on the Assessment Roll, and it was important that they should be on that as well as on the voters' list, for the assessment roll is *primâ facie* evidence for the revising officer under the Dominion Act. Up to a certain point we have our election; but we elect to go to the Court of Revision, and should get a hearing there. Then what is our remedy by appeal? The usual kind of appeal is upon the same evidence as that before the tribunal appealed from; not so here, because there were no facts before the Court of Revision, and the appeal would be in effect the trial before the Court of first instance. Instead of having a trial and an appeal, we are left to a trial only. If the Court of Revision had heard and determined the facts, mandamus would not lie; but if they go wrong in law mandamus will lie.

To make the cases cited by my learned friend parallel to this, he should shew that there was some other means

Argument.] of making the Court of Revision do its duty. Having the appeals heard is the substantial thing which Mr. Marter requires to be done. All the cases cited turn upon this, that for the very thing sought there is another remedy. It was the duty of the members of the Court of Revision to hear these appeals, and they did not. The County Judge, if appealed to, will not make the Court of Revision hear these appeals. The remedy is different.

The cases cited shew that the alternative remedy must be as convenient; and here it is not.

Pepler, on the same side. As to the remedy by mandamus I refer to *Nickle* v. *Douglas*, 35 U. C. R. 126; 37 U. C. R. 51; *Re Ronald and Brussels*, 9 P. R. 232; Dillon on Municipal Corporations, secs. 838, 839, 858; Tapping on Mandamus, pp. 71, 80, 81, 107; *Regina* v. *Eye*, 9 A. & E. 670; Addison on Torts, 5th ed., secs. 853-6; *Re Simmons and Dalton*, 12 O. R. 505; *Re Allan*, 10 O. R. 110; High on Extraordinary Remedies p. 23; *Regina* v. *Lords Commissioners of Treasury*, 16 Q. B. 357; *Regina* v. *Lords Commissioners of Treasury*, L. R. 7 Q. B. 387; *Re Brighton Sewers Act*, 9 Q. B. D. 723.

The other remedy must be more effective and suitable: Addison on Torts, p. 584; *Rex* v. *Severn and Wye R.W. Co.*, 2 B. & Ald. 646; *Regina* v. *Victoria Park Co.*, 1 Q. B. 288. Here the other remedy proposed is not so effective. The witnesses would have to be summoned again, and taken to another place before the County Judge, and there would be great expense. The question whether a remedy is effective is not one of law, but of fact, and is a matter of discretion. That discretion has already been exercised in our favour, and should not be interfered with: *Neill* v. *Travellers' Ins. Co.*, 9 A. R. 54; *Regina* v. *Richardson*, 8 O. R. 651; *Kennedy* v. *Braithwaite*, 1 Elec. Cas. 182; *The South Victoria Case*, *ib.* 195.

Moss, in reply. The amendment made in 1874, now sec. 68 of the Assessment Act, was for the very purpose of avoiding these motions for mandamus. The substance of what the applicant claims is to get the names on the list. In *Rex*

v. *Justices of the West Riding of York*, 1 A. & E. 606; *Regina* v. *Ingham*, 14 Q. B. 396; *Rex* v. *Bishop of Chester*, 1 T. R. 396, the parties got relief in a different way than by mandamus. There is no absolute right to have the Court of Revision decide upon the matter, especially after the time for their sitting has expired, unless it is very clear that there is no other way in which the applicant can get what he seeks. He asks to undo the assessment roll after it is complete; once the appeals from it have been disposed of, it is final and conclusive except in case of fraud: *Canadian Land and Emigration Company* v. *Municipality of Dysart*, 12 A. R. 80; *London Mutual Fire Ins. Co.* v. *City of London*, 11 O. R. 592. Argument.

It is just as convenient to go before the County Judge as the Court of Revision: the Judge sits in the municipality for the purpose of hearing appeals.

As to the discretion contended for, see *Regina* v. *All Saints, Wigan*, 1 App. Cas. at p. 620.

A recent decision shewing that a mandamus will not be granted where there is another remedy is *Re Whitaker and Mason*, 18 O. R. 63.

Counsel also argued as to whether a proper demand had been made, but as the judgments proceed on another ground, the arguments are not reported.

November 13, 1889. STREET, J.:—

This was an appeal by J. J. McNeil and others, the members of the Court of Revision for Gravenhurst, against an order made by MACMAHON, J., on 5th August, 1889, upon the application of George F. Marter, commanding them forthwith to meet for the transaction of the business of the said Court, and particularly to hear, adjudicate upon, and determine certain appeals with respect to the omission of certain persons, complainants under "The Manhood Suffrage Act," from the list of voters, and ordering them to pay the costs of the application.

Judgment.

Street, J.

The affidavits and papers filed shewed that the members of the Court of Revision met for business on the 18th June, 1889. Mr. Marter had given notice under sec. 13. of ch. 4 of 51 Vic., Ontario Statutes of 1888, of a complaint that certain persons named in the notice had been wrongfully omitted from the Assessment Roll. Of the persons named, twenty-seven were stated to be entitled to be on the roll under "The Manhood Suffrage Act," and the others as tenants or owners. Mr. Marter attended the sittings of the Court to support his complaint with his witnesses, and offered evidence in support of it: the Court adjudicated on the appeals as to the tenants or owners, but refused to hear or adjudicate upon those claiming under "The Manhood Suffrage Act," although pressed to do so, giving as a reason for their refusal that they were political appeals, and should be dealt with by the County Judge.

Mr. Marter informed the members of the Court that proceedings would be taken to compel them to hear these appeals, and it appeared that he took advice at once, and instructed his solicitors to take proceedings on the 27th June. They advised him that before proceedings were begun he should make a demand upon the mayor of Gravenhurst requiring him to call the Court together to hear the appeals. He was unable to find the mayor until the 4th July, when he met him upon a railway train, and made this demand upon him: the mayor promised an answer by the 9th July: on the 10th July Mr. Marter having received no answer renewed his demand, but without success; and notice of motion for a mandamus was given on the 16th July. The motion came up before MacMahon, J., in Chambers on the 5th August, and the order now appealed against was made.

By sub-sec. (1) of sec. 9 of ch. 4 of 51 Vic., entitled "The Manhood Suffrage Act," it is provided that the assessor shall place on the assessment roll, as qualified to be a voter, the name of every male person who delivers or causes to be delivered to him an affidavit in the form provided in the Act; by sec. 10 the assessor is required to make reasonable inquiries as to whether any persons are resident in the

municipality who are entitled to be placed on the roll as voters under the Act, and to place such persons on the roll without the affidavit. Sec. 13, sub-sec. (1), provides that "Complaints of persons having been wrongfully entered on the roll as qualified to be voters or of persons not having been entered thereon as qualified to be voters, who should have been so entered, may by any person entitled to be a voter or to be entered on the voters' list, &c., *be made to the Court of Revision as in the case of assessments*, or the complaint may be made to the County Judge under the Voters' Lists Act."

By sec. 61 of ch. 193, R. S. O., it is provided that the Court of Revision of each municipality "shall meet and try all complaints in regard to persons wrongfully placed upon or omitted from the roll, or assessed at too high or too low a sum"; and by sub-sec. (1) of sec. 68 of the same Act, "An appeal to the County Judge shall lie, not only against a decision of the Court of Revision on an appeal to said Court, but also against the omission, neglect, or refusal of said Court to hear or decide an appeal." By sec. 69 of the same Act the person having charge of the assessment roll is required to produce it before the Judge upon the hearing of an appeal from the Court of Revision, and the roll is then to be amended if the decision of the Judge requires amendment to be made.

Under sec. 61 above referred to it was plainly the duty of the Court of Revision to have tried the complaints laid before it by Mr. Marter: and upon their refusal or neglect to perform this duty it seems clear that, if no other complete, appropriate, and convenient remedy existed, the persons aggrieved by their omission to do their duty would have been entitled to the extraordinary one of a writ of mandamus.

Sec. 68, however, appears to anticipate the case which has here arisen of a refusal on the part of the Court to perform its duty, and to provide for the person aggrieved the simple remedy of an appeal to the County Judge, instead of leaving him to the technical and expensive one of an application for a mandamus.

Judgment.
Street, J.

I think we must treat this right of appeal as the appropriate remedy intended to be given by the Legislature for the breach of duty of the Court of Revision, and as excluding the person aggrieved fron the right to a mandamus.

Where an ample alternative remedy exists, the rule has long been well established that a mandamus will not be granted: *Regina* v. *Smith*, L. R. 8 Q. B. 146; *Re Nathan*, 12 Q. B. D. 461; *Regina* v. *Registrar of Joint Stock Companies*, 21 Q. B. D. 131; *Re Moulton and Haldimand*, 12 A. R. 503.

It was argued on Mr. Marter's behalf that his right here was to have his appeals disposed of by the Court of Revision, and that an appeal to the County Judge would not give him this right; that the only process by which he could enforce this right was by a mandamus ordering the Court of Revision to do its duty.

His rights, however, and the means of enforcing them, are not to be confused: if the persons named in his notice of appeal are entitled to be placed upon the assessment roll, his rights are to have them placed there, and it is immaterial whether these rights are enforced through the medium of the Court of Revision or of the County Judge.

The right of appeal to the County Judge, under the circumstances which here existed, and the cases to which I have referred, do not appear to have been called to the attention of my brother MacMahon upon the argument before him.

A number of other objections to the order were urged by counsel for the appellant, but, in the view which I have taken of that objection which I have been considering, it becomes unnecessary that I should refer to them.

In my opinion, the appeal should be allowed and the order set aside with costs of the application and appeal.

FERGUSON, J.:—

The facts of the case are briefly and, I think, sufficiently stated in the judgment of my brother Street, which has just been read.

Judgment. Ferguson, J.

The statutory provisions having an immediate bearing upon the matter to be determined are also referred to in the same judgment, and it does not seem necessary that I should repeat either of these here.

Apart from certain objections raised as to the applicant for the writ having duly performed or done all those things necessary as matters of practice or procedure to entitle him to make and sustain this application, the chief question, as put, or rather defined, by one of the learned Judges in the case *Regina* v. *The Registrar of Joint Stock Companies*, 21 Q. B. D. at p. 135, is, whether the applicant for the writ has another remedy besides mandamus, which is equally *convenient, beneficial*, and *effectual*. In the case *Re Nathan* the words used are, "another specific legal remedy;" and in the appeal of the same case the words are, another "specific remedy." In the case *Re Moulton and Haldimand*, 12 A. R. 503, as well as in *Re Nathan*, some of the learned Judges refer to the rule governing the discretion in granting or refusing to grant the writ laid down by Lord Mansfield in *Rex* v. *Bank of England*, 2 Douglas 524, where he said: "When there is no specific remedy, that Court will grant a mandamus that justice may be done." The construction of that sentence is this: "Where there is no specific remedy, and by reason of the want of that specific remedy, justice cannot be done unless a mandamus is to go, then a mandamus will go." "No specific legal remedy" are the words used by Tapping, p. 12., and on the following page, "No specific remedy." One of the rules found in Shortt on Informations, Mandamus, and Prohibition in respect of the granting of a writ of mandamus is this: "2. There must be no other effective lawful method of enforcing the right."

After having looked at a considerable number of authorities, I think my brother Street is fully justified in his use of the words "complete, appropriate, and convenient remedy."

Judgment.

Ferguson, J.

In the case *Regina* v. *The Registrar of Joint Stock Companies*, 21 Q. B. D. 131, Justice Field remarks: "The remedy by mandamus even in modern times is inconvenient, and it is a remedy which owing to the cumbrous nature of the procedure one would not feel inclined to choose if there were another remedy equally available." And further, "The question here is, whether there is any other efficient remedy."

Section 68 of the Assessment Act provides, not only for an appeal against a decision of the Court of Revision on an appeal to that Court, but also against the omission, neglect, or refusal of the Court of Revision to hear or decide an appeal, and under the 13th section of ch. 4 of 51 Vic. complaints such as the one in the present instance may be, and are made "to the Court of Revision, as in the case of assessments."

What is complained of here is the refusal of the Court of Revision to hear and determine the complaints brought before that Court by way of appeal, and such a refusal is a thing in respect of which the statutes, I think, plainly provide an appeal to the County Court Judge. And this seems to me to be, and to have been intended to be, a specific remedy for the identical thing that has happened and is the subject of complaint; and I think this remedy complete, appropriate, and convenient.

It was ingeniously contended that, because what would be accomplished by a successful appeal to the County Court Judge would not be that which would compel the Court of Revision to hear and decide upon the complaint or appeal brought before them, the remedy by such an appeal to the County Court Judge would not be a remedy for the identical thing, a remedy for which is sought by the application for the writ of mandamus. This contention, I think, confuses—as intimated by my brother Street—rights, and the means of enforcing them, which, I think, should not be done. Whatever rights any of these applicants has can be enforced, and given effect to by such an appeal, and at present it must be assumed that the determination in the appeal would be the proper one.

I do not think that we can give effect to the contention that the remedy by an appeal is not as convenient as the one by mandamus, owing to the residence or temporary residence of some of the witnesses, or a supposed difference in the expenses of the respective remedies. I do not think that there are sufficient facts before us to justify our so doing, even if there were no other reasons against it. Judgment. Ferguson, J.

I think the appeal should be allowed on the ground, or rather for the reason, that there is another complete, appropriate, and convenient remedy, which, I think, must be considered a specific remedy for the identical thing that has occurred and is complained of; and, being of this opinion, I think it not necessary to consider other matters that were urged in the argument, and I think there should be costs of the appeal and of the application.

[QUEEN'S BENCH DIVISION.]

RE MCCORMICK AND THE CORPORATION OF THE TOWNSHIP OF HOWARD.

Municipal corporations—Drainage by-law—R.S.O. ch. 184, secs. 571, 572—Motion to quash—Notice of intention to move must be given by actual applicant.

Held, that a municipal drainage by-law, whether for the construction of an original work or the improvement of an old one, and whether the proceedings are taken under sec. 583, 585, or 586 of the Municipal Act, R.S.O. ch. 184, is subject to the provisions of secs. 571 and 572 requiring notice in writing to be given within ten days by any one intending to apply to have the by-law quashed, of his intention to so apply.

And where such notice was given by a solicitor and signed by him as solicitor for two named persons, stating that the application would be made on behalf of them and "others," and an application to quash was afterwards made to the Court by persons other than those named:—

Held, that the application was not made to the Court by any person who had given the notice required by secs. 571 and 572; that another ratepayer could not take advantage of the notice by adopting it as his own; and, the application of which notice had been given not having been made, the by-law became a valid one at the expiration of six weeks from its final passing; and the motion to quash it was dismissed with costs.

Statement. THIS was a motion made on behalf of Archibald McCormick, Thomas White, and John Scarlett, ratepayers of the township of Howard, to quash a by-law of the municipal council of that township, being by-law No. 12, which was finally passed on the 7th September, 1889, entitled "A by-law to provide for draining parts of the township of Howard by the construction of the South Marsh Drain, which will also benefit part of the township of Orford, and for borrowing on the credit of the municipality, the sum of $1,527 for completing the same."

The facts appear in the judgment.

The motion was argued before STREET, J., in Court, on the 22nd November, 1889.

W. R. Meredith, Q. C., and *Charles McDonald*, for the motion.

M. Wilson, contra.

November 25, 1889. STREET, J.:—

Judgment.

Street, J.

It was contended on the part of the applicants that the works constructed under this by-law must be treated as an original drain and not as being the repair of an old drain; that a petition signed by the majority of the persons benefitted was necessary; and that such a petition had not been presented in due time. On the part of the township it was, amongst other things, urged that, even admitting that a properly signed petition had not been presented the by-law might still be supported as being one within sec. 585 of ch. 184, R. S. O.; and it was further contended that no application to the Court had been made by any person who had given the notice required by secs. 571 and 572 of the Act.

I find myself compelled to give effect to the latter objection. Whether the by-law is to be treated as one for the construction of an original work, or for the improvement of an old one, I think sections 571 and 572 must be taken to apply to it. Whether the proceedings are taken under sec. 583, or sec. 585, or sec. 586, it is provided that the council shall proceed under the provisions of secs. 569 to 582, inclusive; and secs. 571 and 572 must be taken to be necessarily incorporated as a part of the machinery for raising the amount of money required for the work.

The council in the present case proceeded under sub-sec. (1) of sec. 571, by advertising the by-law with the statutory notice that any one intending to apply to have it quashed must, not later than ten days after the final passing thereof, serve a notice upon the reeve or other head officer and upon the clerk of the municipality of his intention to make application for that purpose to the High Court of Justice, at Toronto, during the six weeks next ensuing the final passage of the by-law. The publication of this notice is not in terms proved, but the applicants have put in a copy of the by-law with this notice at the foot; the last clause in the by-law shews that the council adopt the plan of publishing it instead of the

Judgment.

Street, J.

alternative course permitted by sub-sec. (2) of sec. 571; both parties in their affidavits state that the by-law has been finally passed, and it could not have been finally passed under sub-sec. (1) unless the notice had been published along with the by-law. The applicants have relied upon a notice given by them under the notice at the end of the by-law, and have not attempted to shew or to argue that the latter notice has not been properly published, but have insisted that the notice given by them was sufficient as a compliance with the notice at the end of the by-law. Under these circumstances, I cannot but assume it to be admitted by all parties that the notice found at the end of the by-law was duly published before the by-law itself was finally passed.

The only notice served upon the reeve and clerk, and the one upon which the applicants rely, is in the following words: "To the municipal council of the township of Howard, re South Marsh Drain, take notice that, within the six weeks next ensuing the 7th day of September instant, I intend to make application to the High Court at Toronto, to have the by-law passed by you on the said 7th day of September, relative to the South Marsh Drain, quashed, (said by-law being No. 12, 1889, of the township of Howard.) *The said application will be made on behalf of John Crowder, D. McCormick, and others*, on such grounds as they may be advised. Dated September 12th, 1889. Charles McDonald, solicitor for the said Crowder and McCormick."

This notice was served on the 14th September. It is admitted that D. McCormick named in it is a different man from Archibald McCormick, the applicant in this matter, and that John Crowder is not one of the applicants in this matter. I think the notice must clearly be treated as a notice given on behalf of D. McCormick and John Crowder only, and not on behalf of any one else.

It was shewn that McDonald, the solicitor giving the notice, had been acting before the Court of Revision for the present applicants and for D. McCormick and John Crowder

and a number of other ratepayers assessed for benefits under the by-law; and that on the 3rd September he had given a notice to the council in which he says: "I beg to withdraw the appeals of McCormick and others for whom I am acting, not because they admit the correctness of the assessment, but on account of having been advised to pursue a different course."

Judgment. Street, J.

It was argued that the notice which he afterwards served of his intention to apply to quash the by-law "on behalf of John Crowder, D. McCormick, and others," might and ought to be read as if he had added the words, "for whom I am acting." I do not see on what principle these words should be added to the notice, which the statute requires to be in writing; nor do I see that they would help the applicants if they were added. The notice would then be equivalent to a notice by a solicitor that he would move to quash the by-law on behalf of certain persons for whom he is acting, whose names he does not give. These persons might or might not be the persons on whose behalf he had been acting before the Court of Revision, and the notice would still clearly be insufficient as a compliance with the section which requires that "any one intending to apply to have the by-law quashed must, not later than ten days after the final passing thereof, serve a notice in writing, &c., of *his* intention," &c. Under the statute the council are entitled to know who is the person objecting to the by-law, and a notice which does not give this information is not sufficient under the statute.

It was then argued on behalf of the applicants that, even assuming this to be a notice on behalf of John Crowder and D. McCormick only, yet that any other ratepayer might take advantage of the notice by adopting it as his own and making the application to the Court. I can find nothing in the words of the statute to justify me in placing that construction upon them. I think they can only bear the construction that the person who gives the notice must be the person who makes the application. The language used in section 572 is this: "In case no notice of

Judgment.

Street, J.

the intention to make application to quash a by-law is served within the time limited for that purpose in the preceding section, or *if the notice is served, then, in case the application is not made,*" &c., the by-law shall be valid, &c. This can only mean the application of which notice has been given by the person intending to apply to quash the by-law, and not the application of a person who may have had no such intention until the day before the service of the notice of motion. The changes to be made in sec. 572 before it could bear the other construction need not, it is true, be many, but changes must be made in some of the words before it could bear that construction; and I can find no sound reason for not reading the section as it stands in the statute book. There is nothing absurd, repugnant, or unjust in requiring that the only man who can apply to quash a by-law is the man who has given notice of his intention to do so within a limited time after it has been passed. It is true that there would be nothing unnatural in allowing a notice given by one man to enure to the benefit of every ratepayer, and perhaps the only good reason I can find for not construing this statute so as to have that effect is, that the language used does not fairly bear such a construction. See *Abel* v. *Lee*, L. R. 6 C. P. at p. 371; *Christopherson* v. *Lotinga*, 33 L. J. C. P. 123.

I am of opinion, for this reason, that this became a valid by-law at the expiration of six weeks from its final passing, and that the motion to quash it must be dismissed with costs.

[QUEEN'S BENCH DIVISION.]

THATCHER V. BOWMAN ET AL.

Landlord and tenant—Ten years' lease by owner of life estate to reversioner in fee—Action by executrix for rent—Covenant in lease—"Heirs and assigns"—Estoppel—Shewing that title of landlord has expired—Reformation of lease—Evidence—Acquiescence.

The plaintiff's testatrix, who had a life estate in certain lands, made a lease of them for ten years to one of the defendants, who was entitled to the reversion in fee. The reservation of rent in the lease was to the lessor simply, and the covenant for payment of rent was "with the lessor, her heirs and assigns," for payment to "the said lessor, her heirs and assigns."

The lessor died before the expiration of the ten years, and this action was brought by the executrix of her will to recover *(inter alia)* the instalments of rents which became payable, as it was alleged, upon the lease after her death:—

Held, that, as the interest of the lessor was a freehold interest, the plaintiff could not recover either as being entitled to the reversion of a chattel interest, or as being the person designated by the covenant:—

Held, also, that there was no estoppel to prevent the lessee from shewing that the title of the lessor had come to an end, and that he himself became the owner upon her death.

The lessee set up an agreement between himself and the lessor that the lease should expire at her death in case she should not live for the full term of ten years, and asked that the lease should be reformed accordingly. The only evidence in support of this was that of the lessee and his wife, and of a relation of theirs, whose memory was shewn to be untrustworthy:—

Held, that this evidence was not sufficient, after so many years of acquiescence and after the death of the lessor, to justify the reformation of the lease.

Statement.

THIS action was tried before STREET, J., without a jury, at the Brantford Assizes, on the 8th November, 1889.

The plaintiff was Melissa C. Thatcher, executrix of the last will and testament of Nancy Bowman, deceased; the defendants were Ephraim Bowman, Mary Elizabeth Bowman his wife, John Givens, and Alexander Gibbons. The claim was that the defendant Ephraim Bowman was indebted to the plaintiff as executrix; that being so indebted, he conveyed his farm to his wife without any consideration and for the purpose of defrauding the plaintiff; that his wife sold the property to the defendant John Givens, who gave her back a mortgage and then conveyed subject to the mortgage, to the defendant Alexander

Statement.

Gibbons; and the plaintiff asked for judgment for her debt against the defendant Ephraim Bowman, and that she might be declared entitled to a lien upon the mortgage for the amount of the claim and costs.

The defendants Ephraim Bowman and his wife denied the plaintiff's debt; all the defendants denied the charges of fraud; and the defendants the Bowmans also asked that the covenants in a lease referred to in the plaintiff's statement of claim might be reformed.

The claim of the plaintiff against Ephraim Bowman consisted of two items. The first was for board alleged to be due from the defendant Ephraim Bowman to the deceased Nancy Bowman, under a covenant in a lease from her to him; the second was for rent alleged to be due by him to her under that lease. At the close of the evidence STREET, J., decided that the claim for board had not been made out, and reserved the other questions.

The circumstances attending the claim for rent were as follows. On 20th February, 1867, John M. Bowman, the father of Ephraim Bowman, and the husband of Nancy Bowman, being seised in fee of the lands in question, conveyed them to Ephraim Bowman, taking back a lease to himself and his wife for their joint lives and the life of the survivor. John M. Bowman died before 1872, leaving his widow Nancy surviving him. She then, being tenant for her own life, and Ephraim being entitled to the reversion in fee, made a lease to Ephraim on 25th January, 1872, for ten years. The lease was not made under the Short Forms Act. The reservation of the rent in the lease was as follows: "Yielding and paying therefor yearly and every year during the said term unto the said lessor the clear yearly rent or sum of thirty dollars of lawful money of Canada on the 25th day of the month of January in each and every year during the said term," &c: The covenant for payment of the rent was as follows: "And the said lessee doth hereby for himself, his heirs, executors, administrators, and assigns, covenant, promise, and agree to and with the said lessor, *her heirs and assigns*,

in manner following, that is to say, that he the said lessee, his executors, administrators, or assigns, or some or one of them, shall and will well and truly pay or cause to be paid unto the said lessor, *her heirs or assigns*, the said yearly rent of thirty dollars," &c. Statement.

The lessor, Nancy Bowman, died in September, 1877, during the currency of this lease; she had received at the time of her death all the rent which had become due under it and $5 on account of the current year's rent.

This action was brought to recover (amongst other things), the five instalments of rent which became payable, as it was alleged, upon the lease after her death. The defendant Ephraim Bowman asked leave at the trial to set up that it was agreed between him and his mother that the lease should expire at her death, in case she should not live for the full term of ten years, and asked that, if necessary, the terms of it should be reformed according to this agreement.

Heyd, for the plaintiff.
Hardy, Q. C., and *A. J. Wilkes*, for the defendant.

November 12, 1889. STREET, J. (after stating the facts as above):—

Upon the question of the reformation, I should be decidedly against the defendant. Nancy Bowman is dead, and the only evidence in support of the case for reformation is that of Ephraim Bowman and his wife and of a relation of theirs whose memory was shewn to be untrustworthy. I could not treat the memory of Bowman and his wife as being sufficiently accurate to justify me in altering the written contract, after so many years of acquiescence in it, and after the death of the other party to the contract, even if there were no other reasons why it should not now be done.

The only question then is, whether, under the circumstances, the plaintiff is entitled to recover upon the lease

Judgment. Street, J.

as it stands; and I think she cannot do so. An executor or administrator bringing an action for rent which accrued after the death of the testator or intestate must prove that the interest of the lessor was a chattel interest, because otherwise the heir and not the personal representative would be the person entitled to recover: *Norris* v. *Elsworth*, 1 Freem. 463; *Dollen* v. *Batt*, 4 C. B. N. S. 760. Where no reversion is left in the lessor after making the lease, the rent may be reserved and made payable to the executor, even although the interest assigned may have been a freehold interest: *Jenison* v. *Lexington*, 1 P. Wms. 555. But in the present case the interest of Nancy Bowman was a freehold interest for her own life, as the evidence shews; the reservation of rent is to her only, and the covenant sued on is for payment of it to her, her heirs or assigns. The executor cannot sue, therefore, either as being entitled to the reversion of a chattel interest, or as being the person designated by the covenant. Even if it could be held that the lease is good for the whole ten years against the lessee upon the ground of estoppel, the executor could still not recover, for the estoppel cannot be taken as entitling the executor to say that a chattel interest was created by the estoppel, the presumption in such a case being that the lease was created by an owner in fee.

But I am further of opinion that there is no estoppel here to prevent the defendant Bowman from shewing that the title of Nancy Bowman had come to an end, and that he himself became the owner of the land upon her death in 1877. At the time she made the lease she was entitled for her life, and a possible reversion was left in her after the making of the lease to Bowman for ten years; an interest, therefore, passed to the lessee which might possibly extend to the whole period of the lease; when her estate in the land came to an end during the term there was nothing to prevent the lessee from shewing this fact, because where an interest passes there is no estoppel. Had Nancy been entitled to no interest in the land at the time of the lease, and had the defendant accepted from her a

lease for ten years of his own land, knowing the fact, an estoppel against him would have been created; but here the facts are otherwise. There being no estoppel, there seems nothing to prevent the application of the well settled rule that a tenant, although he may not dispute his landlord's title existing at the date of the lease, may shew that that title has come to an end. See *Doe d. Strode* v. *Seaton*, 2 C. M. & R. 728; *Brudnell* v. *Roberts*, 2 Wils. 143; Co. Litt. 47 *b*. See also *Webb* v. *Russell*, 3 T. R. 393; *Parker* v. *Manning*, 7 T. R. 537; *Blake* v. *Foster*, 8 T. R. 487; *Sacheverell* v. *Froggatt*, 2 Wms'. Saunders 751.

Judgment.

Street, J.

The plaintiff appears, however, to have a right under sec. 3 of ch. 143, R. S. O., relating to the apportionment of rents, etc., to the rent from 25th January, 1877, to 7th September, 1877, when Nancy Bowman died, less $5 paid her on account of it in her life time. This sum is, however, less than $25, and the defendant Ephraim Bowman appears to have paid a doctor's bill and the funeral expenses of the deceased, and these he could set off against the claim; the balance would be too trifling to be worth speaking of, even with the addition of interest upon it.

As the plaintiff fails upon every ground, the action must be dismissed with costs as against all the defendants.

[CHANCERY DIVISION].

RE CLARKE AND CHAMBERLAIN.

Registry Act—Numbers—Letters—Discharge of Mortgage—Synonymous names of parties—Uncertainty of grantee.

A discharge of mortgage referred to the mortgage as 5764, whereas it was registered as 5764 C. W. :—

Held, that it was nevertheless a valid discharge properly registered.

The Registry Act, though requiring every instrument to be numbered, says nothing about adding letters, which appear to be only arbitrary marks adopted by the officials for convenience of reference.

A discharge of mortgage was signed by "Eliza" Switzer, whereas the mortgage purporting to be discharged was made to "Elizabeth" Switzer :—

Held, on a vendor and purchaser application, that there was no valid objection to the discharge, for the identity of the person signing was established by affidavit to the satisfaction of the registrar, and as a matter of family usage the names are synonymous and interchangeable.

In one of the conveyances in the chain of title the grant was to the party of the third part, whereas there were only two parties to the conveyance, and the party of the second part did not execute it :—

Held, that this was a valid objection, though the instrument would be at once corrected or reformed as against the grantors ; or could be cured by another conveyance drawn with proper certainty.

Statement. THIS was a petition under the Vendor and Purchaser Act in which the objection raised by the purchaser was that in one of the conveyances and the chain of title the grant was to the party of the third part, whereas there were only two parties to the conveyance.

Upon this point an affidavit of the solicitor who drew the conveyance was put in to shew that it was a mere clerical error.

There were one or two other points raised the facts as to which are sufficiently referred to in the judgment.

The petition came on for argument on October 9th, 1889, before BOYD, C.

S. R. Clarke, vendor in person.

W. M. Clark, for the purchaser.

Grand Junction R. W. Co. v. *Midland R. W. Co.*, 7 A. R. 681, was cited in the argument.

October 9th, 1889. BOYD, C.:—

Judgment.

Boyd, C.

The mortgage registered 5674, C. W., is discharged in the registry office by virtue of an instrument which refers to it as 5674 omitting the letters. The mortgage is in the hands of the mortgagor marked discharged, and so appears in the registry office. The statute requires every instrument to be numbered, and in this case the numbers (5674) correspond. Nothing is said about adding letters and those used are explained as some arbitrary mark adopted by the officials for convenience of reference in a large office. I think the statute has been complied with and there is a valid discharge properly registered revesting the estate. So far as this point is concerned, the officers must be assumed to know their duty, and to have acted intelligently in dealing with this mortgage and its discharge. It is said that one discharge is signed by *Eliza* Switzer, whereas the mortgage she purports to discharge is made to *Elizabeth* Switzer. As a matter of family usage the names are synonomous and interchangeable as Elizabeth and Isabella were in ancient times: see *Camoys Peerage* 6 Cl. & Fin. at p. 800. The identity of the person signing is established by affidavit to the satisfaction of the registrar; he acts upon it and discharges the mortgage and registers the discharge and the maxim "*Omnia rite esse acta*" applies. The general rule applicable in all such cases of alleged misnomer is to be found in Bacon's Abr. 7th ed., vol. 5, p. 592: "if two names are in an original derivation the same and are taken promiscuously to be the same in common use, though they differ in sound, yet there is no variance." These objections I disallow.

The other objection is valid though it is readily removable: that is the conveyance of 1887 is drawn between Synenberg and wife of the first part and Croft of the second part. The grant is made to "the said party of the third part." There is nothing to shew who is meant by "the party of the third part" *on the face of the deed*, and there is no party of the third part in fact to the indenture and

Judgment.

Boyd, C.

it is not executed by Croft. It may be inferred that Croft is the purchaser and is intended by the party of the third part. The instrument would be at once corrected or reformed as against the grantors, or it can be cured by another conveyance drawn with proper certainty. But taking this deed *per se* it is uncertain as regards the grantee. A good deal of the old law on this head is collected in *James* v. *Whitbread*, 11 C. B. 406. *Newton* v. *McKay*, 29 Mich. 1, goes a long way in support of an informal instrument but not far enough to supply the omission of the grantee.

This objection I allow: there will be no costs.

A. H. F. L.

[CHANCERY DIVISION.]

DISCHER V. CANADA PERMANENT LOAN AND SAVINGS COMPANY.

Hire receipt—Lien for engine—Sale without notice—Mortgage—Surplus—Bar of dower—Second Mortgage.

Certain lands were subject to a first mortgage, a charge registered by an Engine Company in respect to the price of an engine supplied by them, and a mortgage to the plaintiff registered subsequently to the said charge; and the lands having been sold under the power of sale in the first mortgage, a contest arose in this action in respect to the surplus left after satisfaction of the first mortgage.

The Engine Company had resumed possession of the engine, and sold it, and claimed the balance of the price under the charge out of the said surplus in priority to the plaintiff:—

Held, that they were entitled to make that claim, and that having sold the engine without notice to the plaintiff, the latter was entitled to impeach that sale by shewing that a greater sum could have been realized, if it had been properly sold after proper notice. But,

Held, also, that the plaintiff was alone entitled to the value of the interest of the wife of the owner of the equity of redemption in the land as inchoate dowress; inasmuch as she had barred her dower in his favour, whereas she had not done so in connection with the charge of the Engine Company.

In the absence of arrangement, the value of this interest must be ascertained and retained in Court to be paid out to the plaintiff if the right of dower attached by the wife surviving her husband, and to the Engine Company if it did not attach.

Remarks upon the position of holders of hire receipts after resuming possession of the chattels covered thereby.

Statement.

THIS was an action brought by the plaintiff for the purpose of obtaining payment of his claim under a second mortgage out of the surplus moneys in the hands of the defendants, the Canada Permanent Loan and Savings Company, who had sold under a power of sale in a mortgage held by them.

The Waterous Engine Works Company, who were also defendants to the action, also claimed the said surplus moneys, in priority to the plaintiff by virtue of a charge on the land given by the mortgagor and registered before, the plaintiff's mortgage.

This charge of the engine company was under a certain agreement dated February 19th, 1887, between the engine company and the mortgagor, Edward D. Masury, whereby

Statement. after reciting that the latter had agreed to buy and the former to sell a certain agricultural engine for $660, payable as therein mentioned, it was agreed, in the usual form, that the property was not to pass to the purchaser until the full payment of the price, and that the company might resume possession in case of default, "or if the company or its officers or agents is or are of opinion that * * it is necessary to resume possession thereof in order to secure the said debt under this contract, or protect themthemselves from loss either of the original sum, or interest; * * and expenses incurred in making seizure, and vending said machinery in case of default, are to be considered as part of the original debt and to be collected with it, and it is agreed and understood that no cause of action is to lay against the company for any action they may take to secure themselves under the above clauses." The agreement then went on to provide that in the event of the company resuming possession of the engine and reselling, they might after sale have the right to recover the balance remaining unpaid from any other securities they might have or by process of law.

In this agreement was incorporated a statement by Masury that he owned certain lands of a certain value, registered in his own name, and that he would not sell or further incumber the same until the indebtedness to the company was paid: "and said indebtedness shall be a charge upon said lands until paid."

The plaintiff's mortgage contained a bar of dower by the wife of the mortgagor which the above charge of the Engine company did not.

Prior to the commencement of this action the engine company had recovered judgment against Masury, and had resumed possession of their engine, according to the terms of their contract, and had subsequently sold it without giving notice to anybody, and they now claimed to recover the deficiency in the price out of the surplus moneys of the mortgage sale in question.

The matter was brought up in Chambers upon affidavit

and came on to be argued upon October 21st, 1889, before Boyd, C. Statement.

Beck, for the plaintiff.

Hoyles, for the Waterous Engine Company.

A. McLean Macdonell, for the Canada Permanent Loan and Savings Company.

The following authorities were cited on the argument: Armour on Titles, p. 269; *Re James Croskery*, 16 O. R. 207; *Re Hewish*, 17 O. R. 454; R. S. O. 1887, ch. 133, sec. 7, sub-sec. 2; Coote on Mortgages, 4th ed. p., 583.

October 23rd, 1889. Boyd, C.:—

The document which passed between the Waterous Company and Masury may be regarded as a conditional sale for the purpose of disposing of the fund now in question. The provision in certain events which have arisen was that the company should have the right to resume possession of the machine sold to Masury or to re-sell it. In this case the company has elected to sell the machine and has credited the proceeds (after certain deductions) on the original price, and claim the balance out of the fund in Court.

Two points were urged, viz., that the company having once bought in the machine and having thereafter sold it have assumed so to deal with the property as to take it for the debt. I do not see that this follows. Their relation to the chattel is not that of mortgagees or even pledgees. They are the owners with property still in the machine and with special provision agreed upon that in case of breach of the agreement for sale they shall have the right to resume possession or re-sell and charge all expenses against it and recover the balance due from Masury. But they have not the right by law in the absence of stipulation to re-sell without notice to Masury. This would be allowing them to fix the measure of damages or the

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Boyd, C.

amount of the balance by their own act without warning or notice to the party interested. Having assumed to sell without notice I think it is now open for the plaintiff as second mortgagee to impeach that sale by shewing that a greater sum could have been realized if it had been properly sold after proper notice. It may be that a good price has been obtained and that it is not worth while to follow this line of inquiry, but that, it appears to me, is the only relief that could be given to Discher. See *Sands* v. *Taylor*, 5 Johns. 395, 410; *MacLean* v. *Dunn*, 4 Bing. 722.

In other respects he is in the same plight as Masury, who made a special bargain as to expenses and the like which affects the plaintiff as being registered upon the lands prior to his mortgage.

Second, that the value of Mrs. Masury's interest as inchoate dowress in the land should be paid to the second mortgagee in whose favour her dower is barred. She did not sign the agreement to the Waterous company, and to the extent of her interest I think the applicant is entitled to be protected. In the absence of any arrangement between the parties I can only direct that the value of this be ascertained and retained in Court to be paid out to Discher, if the right of dower attaches, and to the Waterous company if it does not attach. This will of course depend on her surviving her husband, for till then she cannot have it nor can any one claiming through her.

A. H. F. L.

[CHANCERY DIVISION.]

WOODHILL ET AL. V. THOMAS ET AL.

Will—Devise—Period of distribution—Duration of annuity—Death of annuitant—"To be equally divided," meaning of—Vested interest.

A testator, by his will, provided as follows: "I give and devise to my four daughters" (naming them); "an annuity of $120 per year each, to be paid one year after my decease, and to be for the period of their natural lives. Also to my two granddaughters" (children of a deceased daughter), "an annuity of $60 each, to be paid annually, * * * which annuity will expire at the death of my last daughter. In the event of the death of any of my daughters, the annuity which she received during life to be equally divided amongst her children until the decease of my last daughter, share and share alike. In the event of the death of my last surviving daughter, the annuities are immediately to cease, and the amount of real and personal estate in the hands of the executors is to be equally divided amongst my grandchildren, provided they are not lazy, spendthrifts, drunkards, worthless characters, or guilty of any act of immorality."

One of the granddaughters named married and died, leaving an infant child, and her husband was appointed administrator of her estate.

Held, that each annuity given was to continue to the death of the last surviving daughter, and that the annuity of the deceased granddaughter from the time of the last payment to her until the death of the last surviving daughter was payable to her proper personal representative for the benefit of those who were, according to law, entitled to her estate.

Held, also, that the words "to be equally divided," were equivalent to a direction to "pay and divide," and that the interest taken by the deceased granddaughter, in the property to be divided by the executors, was a vested interest subject to be divested by the clause as to lazy spendthrifts, &c., which clause was not a condition precedent but rather in the nature of a condition subsequent, and that her personal representative became entitled to her share.

Statement.

THIS was an action brought by Robert Pickering Woodhill and Isaac Wilson, the executors of one Robert Woodhill, against Mary Ann Thomas, and other defendants, who were interested in his estate, for the construction of his will.

The facts and material parts of the will are set out in the judgment.

The action came on by way of motion for judgment on October 16th, 1889, before FERGUSON, J.

Middleton, for the plaintiffs. The period of distribution mentioned in the will, viz., the death of the last surviving

Argument. daughter of the testator, has not yet arrived, but all the children and grandchildren are of age and have agreed on a distribution. One of the grandchildren who took a bequest under the will, married and died, leaving an infant child, and the question is: What interest, if any, is he entitled to? The executors wish the direction of the Court.

Moss, Q. C., for the infant. The annuities continue until the death of the last surviving daughter. The devise for the lives of the daughters is a gift, *pur autre vie: In re Ord, Dickinson* v. *Dickinson*, 12 Ch. D. 22, as put by James, L. J., at p. 25, and cases there cited, *Savery* v. *Dyer*, Dick 162; *Hill* v. *Rattey*, 2 J. & H. 634, at p. 639; *Blight* v. *Hartnoll*, 19 Ch. D. 294. The infant, who is a great grandchild, is entitled to his mother's share when the division is made between the grandchildren: *Baldwin* v. *Rogers*, 3 D. M. & G. 649; *Latta* v. *Lowry*, 11 O. R. 517; *Pew* v. *Lefferty*, 16 Gr. 408. The infant's mother fulfilled the requirements of the will at the time of her death, so her representative is entitled. I also refer to *Wynne* v. *Wynne*, 2 M. & G. 8; *Lloyd* v. *Branton*, 3 Mer. 108; *West* v. *West*, 4 Giff. 198; *Ackers* v. *Phipps*, 3 Cl. & F. 665.

McCullough, for the father of the infant, the administrator of the mother. The devise was to a certain named person for a definite time, and was vested: *Murkin* v. *Phillipson*, 3 M. & K. 257; *In re Byrne, Byrne* v. *Kenny*, 23 L. R. Ir. 260. The time to ascertain who is entitled was at the death of the testator: and the grandchildren took and their representatives: *Anderson* v. *Bell*, 29 Gr. 452; *In re Duke, Hannah* v. *Duke*, 16 Ch. D. 112; *Smith* v. *Coleman*, 22 Gr. 507.

J. H. Macdonald, Q. C., for the children and grandchildren. The whole will is to be considered, and the testator's intention is apparent. He had both real and personal property and both children and grandchildren, only personalty goes to the children. There is nothing to show that his whole income was exhausted by the legacies. When the time of distribution arrives, all the real and

personal property is to be divided among the grand-children. The question as to morality, as referred to in the will, is to be decided at the time of distribution. As to the construction of the will, I cite *Festing* v. *Allen*, 12 M. & W. 279, and the cases there cited in argument by Mr. Malins: *Newman* v. *Newman*, 10 Sim. 51; Jarman on Wills, 4th ed., pp. 818, 834, 837 and 838. There are people in existence to fill the definition in the will: *Re Smith*, 35 Ch. D. 558. When the testator said grandchildren, he meant grandchildren, and when the period of distribution arrives, the grandchildren and only those who are worthy should get the money. The grandchildren must be free from the vices mentioned in the will: *Leeming* v. *Sherratt*, 2 Ha. 14; *The Earl of Orford* v. *Churchill*, 3 V. & B. 59; *Phipps* v. *Williams*, 5 Sim. 44. The clause in the will as to the annuities to grandchildren, makes it expire at the death of the last daughter, and so is restrictive and not enlarging. *In re Ord, Dickinson* v. *Dickinson*, 12 Ch. D. 22, the words were stronger than here, and there was nothing in the will to throw light upon the devise. An annuity does not extend beyond the life without express words to show the intention. See also *Hill* v. *Rattey*, 2 J. & H. at p. 639; Fearne on Contingent Remainders, 554. Argument.

Moss, Q. C., in reply. A direction to pay vests immediately. I refer also to *Williams* v. *Clark*, 5 DeG. & S. 472; *Packham* v. *Gregory*, 4 Ha. 396; *Re Stevens, Stevens* v. *Stevens*, 14 O. R. 707; *Hussey* v. *Berkeley*, 2 Eden, 194; Hawkins on Wills, 2nd ed., 231.

October 25th, 1889. FERGUSON, J.:—

The action is by the executors for the construction of the last will of the late Robert Woodhill. The will bears date the 10th day of December, 1870, and it is said that the testator died in the year 1871.

After directing payment of the funeral expenses and the debts, the residue is disposed of. One clause is: I give and devise to my four daughters (naming them) an

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annuity of $120 per year each, to be paid one year after my decease, and to be for the term of their *natural lives*. Also to my two granddaughters, the children of my daughter Mary Lawson, an annuity of $60 each, to be paid annually, &c., which annuity will expire at the death of my last daughter. Mary Lawson had died before the making of the will.

Then follows this short clause: "In the event of the death of any of my daughters, the annuity which she received during life to be equally divided amongst her children until the decease of my last daughter, share and share alike."

The will then proceeds: "In the event of the death" (which means no doubt the same as upon the death) "of my last surviving daughter the annuities are immediately to cease, and the amount of real and personal estate in the hands of the executors is to be equally divided amongst my grandchildren, provided they are not lazy, spendthrifts, drunkards, worthless characters, or guilty of any act of immorality."

Then follows this clause: "I give and bequeath to my son Robert Pickering Woodhill, an annuity of $40 per annum, to be paid, &c., which annuity is also to cease upon the death of my last surviving daughter, and his children are to share the same as the rest of my grandchildren."

The remaining parts or clauses of the will are not material to any of the contentions.

The estate, it is said, has been fully realized, and is in the hands of the executors ready for distribution at such time as may be deemed proper.

The plaintiffs state that the defendants, the children and grandchildren of the testator, have applied to them to distribute the estate, and have agreed among themselves as to the shares which each shall receive, but that by reason of a claim set up on behalf of the defendant Lawson Cruikshank Ferrier (an infant under the age of twenty-one) a great grandchild of the testator, to a portion of the estate under the will, the plaintiffs are unable to carry out

the wishes of the defendants other than this great grandchild.

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The defendants, other than this great grandchild, claim that they are entitled to the whole estate, that being of full age, &c., and having so agreed amongst themselves as to the share that each should receive, their request for an immediate distribution according to the agreement should be complied with, and the plaintiffs are willing to comply with this request if they can rightfully do so. They therefore ask for the construction of the will, and for a declaration as to whether or not in any event the said great grandchild, the infant Lawson Cruikshank Ferrier, can have any estate, claim, or interest under the will.

The two granddaughters of the testator, children of his daughter Mary Lawson, were Frances Williams and Mary Trelissa Ferrier. In the year 1888, Mary Trelissa Ferrier died, leaving an only child who is the infant defendant Lawson Cruikshank Ferrier.

It is not contended or suggested that there is any person other than the defendants who can have any interest under the will. The contention was, as to whether or not this infant defendant is entitled to an interest; and, if so, what interest? The husband of the late Mary Trelissa Ferrier, the father of the infant defendant, is made a party defendant, he being the personal representative of his late wife and the guardian of the infant defendant. He makes no contention differing from that made on behalf of his son, the infant defendant.

The defences are of a formal character, and there appears to be no dispute as to the facts.

For the infant defendant it was contended that he is entitled to two interests under the will. One being the annuity of $60 a year, which was given to his mother. This is contended for on the ground that this annuity was one to continue until the death of the last surviving daughter of the testator, and that to this the infant became entitled through his mother. (Counsel said that any interest that the husband and father, who is also personal

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representative of the mother, may have need not be considered as distinct from the rights of the infant, there being no matter of, or in difference between them ; and that the matter to be determined upon is, whether or not this annuity continues after the death of the infant's mother ;) and the other, that is, the other interest contended for on behalf of the infant defendant, being the right to participate in the distribution under the clause of the will directing the division of the amount of the real and personal estate in the hands of the executors amongst the grandchildren of the testator upon the death of his last surviving daughter.

As to the first of these, the annuity of $60, I do not think there should be any serious doubt. This annuity is given to the infant defendant's mother. She died leaving him her only child. Daughters of the testator are still living. The question, as argued, and as it appears really to be, is, whether the gift to the infant defendant's mother was a gift of an annuity to cease in the event of her death before the death of the last surviving daughter of the testator, or a gift of an annuity to cease upon the death of such last surviving daughter and not before.

The words of the will bearing directly upon this subject and speaking of the gift to the two granddaughters of the testator, are, I think, at least reasonably plain. They are : "Which annuity will expire at the death of my last daughter."

An argument was grounded upon the fact of the will containing a provision that in case of the death of any of the testator's daughters, her annuity should be divided among her children until the death of the testator's last surviving daughter, and containing no similar provision respecting the annuities given to the granddaughters of the testator ; but I do not think that any implication that could arise by reason of this, sufficient to control the meaning of, or that should be given to the words quoted, which appear to me to be an express provision on the subject. Besides may it not fairly be said that the scheme of

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the will in this respect is that all the annuities given shall continue and be paid until the death of the testator's last surviving daughter, and one is at liberty to read the whole will on the subject: *Hill* v. *Rattey*, 2 J. & H. at p. 639. Those to his daughters are for their natural lives, with the provision that in case of the death of any of them the annuity that had been paid to her during her life should be divided amongst her children until the decease of the last surviving daughter of the testator.

The provision in regard to the duration of the annuity in question I have before set forth, and the provision respecting the duration of the annuity payable to the son of the testator is: "which annuity is also to cease upon the death of my last surviving daughter."

It seems to me a plain reading of the will to say that each annuity given is an annuity to continue till the death of the last surviving daughter of the testator, the period at which the executors are directed to divide the amount of the real and personal estate, then in their hands amongst the grandchildren of the testator, and I am of the opinion that this annuity, from the time of the last payment thereof to the mother of the infant defendant until the death of the last surviving daughter of the testator, is payable to the proper personal representative of the mother of the infant defendant for the benefit of those who are, according to law, entitled to her estate, a matter, as before stated, that I am not called upon to determine. It does not anywhere appear, I think, that the annuity was intended for maintenance or personal enjoyment only. What appears, I think, is that it is a gift of so much property in the form of an annuity, and I think the case, or the appropriate part of the case *In re Ord, Dickinson* v. *Dickinson*, 12 Ch. D. 22, is much in point.

Then as to the question whether or not the infant defendant is entitled to participate in the distribution, under the clause in the will directing a division upon the death of the last surviving daughter of the testator, of the amount of the real and personal property then in the hands

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of the executors amongst the grandchildren of the testator. The words of the provision containing this direction are quoted above. Leaving out the last clause, that is the word "provided," and all that follows it, the direction may be shortly expressed in this way: *Upon the death of my last surviving daughter the amount of the real and personal estate in the hands of my executors is to be equally divided amongst my grandchildren.* The only gift of this is contained in this direction to divide. The will contains no other gift of it.

In Hawkins on Wills, 2nd ed., at pp. 231, 232, this rule appears: "A bequest in the form of a direction to pay, or to pay and divide, at a future period, vests immediately, if the payment be postponed for the convenience of the estate, or to let in some other interest. Thus under a bequest to trustees in trust for A. during his life, and after his death to pay and divide amongst his children, the shares of children dying in the lifetime of A. are vested, and pass to their representatives;" citing *Hallifax* v. *Wilson*, 16 Ves. 171; *Leeming* v. *Sherrett*, 2 Ha. 14, and *Packham* v. *Gregory*, 4 Ha. 396. Further: "If there is a gift to a person at twenty-one, or on the happening of any event, or a direction to pay and divide when a person attains twenty-one, then the gift being to persons answering a particular description, if a party cannot bring himself within it, he is not entitled to take the benefit of the gift. There is no gift in those cases, except in the direction to pay, or in the direction to pay and divide. But if, upon the whole will, it appears that the future gift is only postponed to let in some other interest, or, as the Court has commonly expressed it, for the greater convenience of the estate, the same reasoning has never been applied to the case. The interest is vested notwithstanding, although the enjoyment is postponed": citing *Packham* v. *Gregory* again.

It will be observed that in the present case the direction is to divide "the amount" of the real and personal estate in the hands of the executors. This seems to me the equivalent of a direction "to pay and divide."

In the case of *Latta* v. *Lowry*, 11 O. R., at p. 519, the the Chancellor refers to and quotes the rule in Hawkins, at p. 72, saying that it appears to be substantiated by the authorities: "If real or personal estate be given to A. for life, and after his decease to the children of B., all the children in existence at the testator's death take vested interests, subject to be partially divested in favour of children subsequently coming into existence during the life of A.," and referring to *Hutcheson* v. *Jones*, 2 Madd. at p. 129, says, "The Court has arrived at this rule of construction impelled by the operation of two principles; *one* in favour of the early vesting of estates; and the *other* in favour of including all who come being before the period of division."

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The author says the rule applies or extends to gifts to grandchildren, issue, brothers, &c.: citing *Baldwin* v *Rogers*, 3 D. M. & G. 649.

A large number of cases were referred to by counsel on the argument, and I have examined those with as much care as the time at my command permits, and I am of the opinion that the interest taken by the mother of the infant defendant, under the direction to divide the amount of the real and personal estate amongst the grandchildren of the testator, if at present no effect be given to the word "provided" and those following it in this direction, was a vested and not a contingent interest. It does not appear what estate the testator had. It does appear that he gave the annuities before referred to, making in all a comparatively large annual sum to be paid until the period of distribution, under the direction to divide amongst the grandchildren; and looking at the whole will it seems to me that it sufficiently appears that the gift is not postponed by reason of anything personal to those to whom it is made, but in order that the annuities given might be paid, *i. e.*, to let in this interest, and for the greater convenience of the estate. I think the enjoyment only is postponed.

Then in regard to the words: "Provided they are not lazy, spendthrifts, drunkards, worthless characters, or guilty of any act of immorality."

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Ferguson, J.

I cannot accede to the argument that these constitute a condition in the nature of a condition precedent. They constitute at most, I think, a condition in the nature of a condition subsequent to be set up, if not fulfilled, against the payment of a share, a condition, the non-fulfilment of which would probably cause or operate as a divesting of the share of any grandchild so in default. There is no "gift over," and I am of the opinion that these words do not prevent the vesting of the interests, as being matter of description to be answered by the person to receive shares of the gift, as was contended. This is not, I think, such a condition as is referred to in *Monkhouse* v. *Holme*, 1 B. C. C. 298, and *Leeming* v. *Sherratt*, 2 Ha. 14.

This gift is, I think, to a class, and I think it is vested, but was capable of being divested as to one or more of the class by reason of these words employed by the testator.

Then assuming the interest to have vested in the infant defendant's mother, her representatives became entitled to it upon her death, it not appearing that there was any cause for divesting it, and in this way it belongs to the father of the infant defendant as personal representative of the mother for the benefit of those entitled to it. The infant defendant is the only child, and I need not determine any matter between him and his father.

Being of this opinion, it is not needful or necessary that I should consider the argument presented, going to show that the great grandchildren might be included in the meaning of the word "grandchildren" used by the testator.

It was said by counsel that the conclusion would or might have the effect of "tying up" the estate for a long period. The distribution, however, may, notwithstanding, be at the death of the last surviving daughter of the testator, the very period mentioned in the will, and contemplated by the testator.

The foregoing embraces all that I am asked to decide, so far as I can perceive.

The costs will be out of the estate, and the executor's costs will be "trustees' costs."

G. A. B.

[CHANCERY DIVISION.]

ALBRECHT v. BURKHOLDER.

Slander—Law of Slander—Amendment Act, 1889—52 Vic. ch. 14 (O.)—Words applicable to class of two—Right of action.

Where slanderous words were spoken under such circumstances as that the person to whom they were spoken did not know to which of a class of two persons they were intended to be applied.

Held, that either of the two members of the class was entitled to sue, but it was necessary for her to prove that the words were untrue of the other member, otherwise she could not recover.

Statement.

THIS was an action for slander, brought under the Law of Slander Amendment Act, 1889, 52 Vic. ch. 14, (O.), under the circumstances fully set out in the judgment of STREET, J., before whom the action was tried, at Hamilton, on October 3rd and 4th, 1889.

F. Mackelcan, Q. C., for the plaintiff.
B. B. Osler, Q. C., for the defendant.

October 19th, 1889. STREET, J.:—

This was an action of slander, brought under the provisions of the Law of Slander Amendment Act, 1889, and was tried before me at Hamilton on 3rd and 4th October, 1889. No special damage was laid or proved, and counsel agreed after all the evidence had been taken, that I should dispose of the questions raised without a jury.

The plaintiff is an unmarried daughter of Ferdinand Albrecht, and the statement of claim as amended states that the defendant after March 23rd, 1889, falsely and maliciously spoke and published of her the words following, that is to say: "He, the defendant, had heard that Charlie Brayley had got one of the Albrecht girls (meaning the plaintiff) in trouble," meaning thereby that he had got the plaintiff in the family way, and that the plaintiff had committed fornication with the said Brayley, "but that he (the defendant) did not know how much truth there

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Street, J. issue was joined.

The evidence shewed that the plaintiff was one of a family of four daughters of Ferdinand Albrecht, all of whom were unmarried, the plaintiff and her sister Louisa Albrecht were the only ones to whom the words could apply, as the other two were mere children.

The plaintiff had received some marked and public attentions from Charles Brayley: her sister Louisa knew him, but had never been out with him: both the plaintiff and her sister swore that upon the slander being repeated to them they both came to the conclusion that the plaintiff was the one to whom the slander was intended to apply.

The words charged, or rather words equivalent to them but used in the first person, were spoken about June 11th by defendant to Jacob Braemer when no one but he and the defendant were present. Braemer knew Albrecht and Brayley, but not any of Albrecht's daughters. He was not asked and did not state whether he knew of Charles Brayley's attentions to the plaintiff nor whether he understood the statement as applying to her. Afterwards defendant met Braemer and Brayley together: Braemer asked defendant to tell Brayley what it was that he had told Braemer on the former occasion, whereupon defendant repeated what he had said on the former occasion, and gave his authority for it, whereupon Brayley said "that he would make somebody sweat for that, and that there was nothing the matter with the girl." Brayley was not called as a witness. These two occasions were the only two upon which the words were used. A witness named Crockett had heard the rumor, and thought it must apply to the plaintiff because he had heard "that Brayley had being trying to court this girl." This witness had not heard the rumor from the defendant. This was practically the whole evidence, and upon it the defendant's counsel argued that there should be judgment in his favour upon the ground that the slander had not been shewn to have been uttered with regard to the plaintiff, and that the

innuendo was not proved: that the person slandered was not sufficiently identified and could not be identified by an innuendo. On the part of the plaintiff it was urged that the innuendo had been proved, and that whether proved or not the action might be maintained by either or both of of the elder daughters of Mr. Albrecht.

Judgment.
Street, J.

If the plaintiff's right to succeed here is to depend upon the question as to whether or not the innuendo had been proved, I think she must fail. The words used did not in themselves ascertain her as being the person intended, and in order to identify her as being the particular daughter of Albrecht referred to, evidence of extraneous circumstances became necessary. I think the evidence of her relations with Brayley was proper to be received as part of the inducement explaining the innuendo, and that a jury would have been fully justified in finding that any person hearing the slander and knowing the circumstances would naturally apply the slander to the plaintiff. But the sole person who heard the slander uttered was not acquainted with these circumstances, and was for that reason unable to apply them to the defendant's words. The rule seems to be settled that the meaning naturally conveyed to the hearers of the words uttered, and not necessarily the meaning intended by the person who utters them is the meaning which is to be attributed to them by the jury. So that if the person who hears them is not aware when he hears of them of the circumstances which give to the words used the point and application alleged by the innuendo, it is as if those circumstances did not exist: *Capital and Counties Bank* v. *Henty*, 7 App. Cas. 741.

I think, therefore, that the innuendo here has not been proved and that the words must be read for the purposes of this action as if no innuendo at all had been alleged by which the words were made specially applicable to the plaintiff. The plaintiff, however, contends that she is entitled to maintain the action without any innuendo of that nature: that when the defendant imputed unchastity

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Street, J.

to one of Mr. Albrecht's daughters, without specifying the particular one to whom he alluded, either one of them might treat the words as aimed at herself, and bring an action.

In the old case of *Harrison* v. *Thornborough*, 10 Mod. 196, to which I was referred, it is laid down that if the words were "A. or D. did" &c., either A. or D. might bring the action. In the still older case of *Falkner* v. *Cooper*, Carter's Rep. p. 55, it is said by Bridgman, C. J., that if J. S. is killed, and one saith A. or B. killed him, A. may have an action and so may B. On the other hand, in *Sir John Bourns Case* cited Cro. Eliz., 497, when a party in a cause said to three men who had just given evidence against him, "one of you three men is perjured," it was held that no action would lie: and in *James* v. *Rutlick*, 4 Rep. 17, when the defendant said to a master, "One of thy servants hath robbed me," it was held that in the absence of special circumstances no one could sue, for it is not apparent who is the person slandered.

In *Harrison* v. *Thornborough*, *supra*, and *Falkner* v. *Cooper*, *supra*, the words which I have quoted appear to have been interpreted as if the person uttering them had said "If A. did not, B. did," &c., "and if B. did not, then A. did," &c., because it was said in each case that A. in bringing his action must allege (and of course prove) that B. did not do what was charged.

I think that an action should be maintainable for such a slander, and that the law would be defective if I were compelled to hold otherwise. Suppose the defendant here had announced from a public platform or had published a printed statement to the same effect as the words he has uttered, it would be plainly wrong if his words were wholly untrue, that he should be allowed to go unpunished because he had taken care not to specify the particular young woman to whom he referred, of the two to whom his words might refer. If he were able to shew that his words were true he might in an action brought by either sister allege that as to a particular one of them his words

were true: this would come as an answer to the allegation on the part of the plaintiff stated as being necessary in *Harrison* v. *Thornborough*, *supra*, and *Falkner* v. *Cooper*, *supra*, that neither of the persons named had committed the offence charged. Judgment. Street, J.

It appears to me, therefore, as the result of the cases and as being reasonable, that where the statement complained of is, that A. or B. committed an offence adding expressions from which a jury may determine that the hearers of the words when uttered would understand them as applicable solely to either A. or B. then, the person to whom they appear so applicable may bring the action alleging himself to be the person intended: but that when nothing is added to make the expression applicable specially to either A. or B., then A. and B. may each bring an action, but each must allege in his action that the other did not commit the offence and, of course, that the words were spoken falsely as to himself. A difficulty in the way of the latter part of this principle is, to say what are its limits. Its application where one of two or three persons is referred to is easy enough. For instance, to say that one of the doctors in A., where there are only two doctors, is an abortionist, might well be an injury to both: but to say that one of the doctors in B., where there are 100 doctors, is an abortionist, would not be an appreciable injury to all. The difficulty would, however, not be a practical one, for it would be controlled by that principle laid down in the cases which requires the guilt of all the other members of the class to be negatived before the plaintiff can recover even nominal damages. The labour and expense of doing this in a case where no real damage has been inflicted or could be recovered would probably be sufficient to deter the bringing of actions by one of a large class referred to in this way when the slander is not pointed at any particular member. The old cases which say on the one hand that where the words are "A. or B. did" &c., an action may be maintained by A. and also by B.; and on the other hand that when the words are "one

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Street, J.

of thy servants hath robbed me," to a man having several servants, no action will lie, do not point out the exact line intended to be drawn between the questions which they respectively decide. The construction to be put upon slanderous words now is not governed by the same principles as at the time when these older cases were decided. Then the words were always construed most favourably to the defendant: now the question is, whether the persons who heard them might naturally apply them to the plaintiff. See the remarks upon the old cases in *LeFanu* v. *Malcolmson*, 1 H. L. C. 668.

The plaintiff in the present action has, I think, failed in shewing, as I have said, that the person who heard the words uttered could have applied them to her individually, and she has not alleged or proved what I think is essential when she sues simply as one of a class who have been slandered, that the other member of the class is not guilty, and, therefore, I am of opinion that upon the record and evidence as it stands she must fail. Had the case been tried before me from the beginning without a jury I should have given the plaintiff leave to produce further evidence upon this point, and to amend her pleadings: but the consent given to my disposing of the matter without a jury was only given after the evidence had been completed, and was that I should dispose of it upon the evidence which had been given, and I cannot go beyond this consent by taking further evidence.

I must therefore dismiss the action, but I do so without costs, because the defendant has succeeded upon a point which is highly technical, because he was wrong in talking so lightly of the character of these young women, and because he made no attempt at undoing any wrong that he had done, but on the contrary insisted when examined that he had a perfect right to make use of the words which he had used.

Action dismissed without costs.

A. H. F. L.

[QUEEN'S BENCH DIVISION.]

SMITH V. BAECHLER.

Damages—Measure of—Conversion of logs—Knowledge.

In an action for the conversion by the defendant of certain logs of the plaintiff which had been cut without permission on the plaintiff's land, and purchased by the defendant and hauled to his mill, and there cut into lumber, the measure of damages was held to be the value of the logs as they were in the defendant's yard at the time they were demanded by the plaintiff, without any deduction for cutting and hauling, it appearing that the defendant knew that he was buying logs taken from the plaintiff's land, or at least that he suspected that such was the fact, and wilfully abstained from inquiry.

Semble, had the defendant been an innocent purchaser, a different measure of damages might have been applied.

ACTION tried before STREET, J., at Stratford on 20th September, 1889, without a jury. Statement.

The plaintiff was the owner of certain timbered lands in the township of Elma, in the county of Perth. The defendant was the owner of a saw mill upon the same block of land as that in which the plaintiff's lands were situate, and within a mile of the plaintiff's lands. In the autumn of 1888 the defendant applied to the agent managing the plaintiff's lands asking to purchase the timber upon them, but the agent declined to sell and warned the defendant not to trespass or cut any timber upon them. A man named Hyles had obtained from the Merchants Bank the right to cut timber upon a lot of theirs in the same block and adjoining the plaintiff's land. Hyles contracted to sell and deliver to the defendant at his mill a large quantity of logs, and did so during the winter of 1888-9. Some of these logs came from the Merchants Bank property, but a very large number of them came from the plaintiff's land. The plaintiff's agent, learning what was being done, went to the defendant's mill, where all the logs cut upon both lots were lying, and demanded of the defendant the logs which had been cut upon the plaintiff's land. The defendant, however, insisted that he

Statement.

had bought them and was entitled to them, and proceeded to saw them into lumber. The plaintiff brought this action against the defendant for converting the logs. The defendant denied taking the plaintiff's property, and denied any demand upon him.

Mabee, for the plaintiff, cited upon the question of damages *France* v. *Gaudet*, L. R. 6 Q. B. 199.

Garrow, Q.C., for the defendant, referred to *Stimson* v. *Block*, 11 O. R. 96.

October 19, 1889. STREET, J.:—

[After stating the facts as above, and the evidence as to the quantity of logs belonging to the plaintiff.]

The plaintiff is clearly entitled to recover damages from the defendant: the only question is, as to whether the damages should be calculated upon the value of the timber standing in the bush or delivered in the mill yard.

I think the defendant must be taken to have known, under the circumstances, that he was buying logs which were being taken from the plaintiff's land, or if he did not actually know it, that he must have strongly suspected it, and wilfully abstained from inquiry.

It must be remembered that the defendant has been in saw milling business for some fifteen or sixteen years in this spot. The bulk of the logs he bought from Hyles were cut in the centre of the plaintiff's land, where there could be no question of a mistaken boundary; the men who were cutting the logs were boarding at defendant's saw mill, and came home from their work to midday dinner every day, and to supper and sleep at night; the logs were drawn along a road through the woods, hardly a mile in length, leading from the plaintiff's land into defendant's mill yard; the defendant's sons were his agents to receive and measure the logs, and one of them is shewn to have been present upon one occasion when Hyles's men were cutting logs in the very middle of one of the plaintiff's lots,

and to have returned to the saw mill with a load of these logs. The defendant says that he was never in the woods that winter; that he never asked where the logs came from; and that he did not think it was his business to make inquiries. Under these circumstances, I think it is not doing him an injustice to assume him to have either had actual knowledge of the robbery which was being daily committed, or to have wilfully shut his eyes to it. Judgment. Street, J.

I think this is a case in which the defendant should be charged the value of the logs as they were in his yard at the time the plaintiff served the demand on him, without any deduction for the cost of cutting and hauling them. If the defendant had been an innocent purchaser of them a different rule might, in my opinion, have been properly applied. See *Hilton* v. *Woods*, L. R. 4 Eq. 432, and the cases there cited.

[CHANCERY DIVISION.]

LAWLESS V. CHAMBERLAIN ET AL.

Husband and wife—Marriage of infant—Action to have same declared void—Duress—Jurisdiction of High Court—Consent of parents—26 Geo. II. ch. 33, sec. 11.

The High Court of Justice in this Province has jurisdiction, where a marriage correct in form is ascertained to be void *de jure* by reason of the absence of some essential preliminary, to declare the same null and void *ab initio*; but nothing short of the most clear and convincing testimony will justify the interposition of the Court.

Where duress is alleged, it must be manifest that force preponderated throughout, so as to disable the one interested from acting as a free agent. Although the plaintiff in this action, in which he sought to have his marriage with the defendant declared void, on the ground that he was forced into it by intimidation and threats, at first protested, by his subsequent conduct he displayed a readiness to assist in the preliminary and final details, and submitted to the proposed method of procedure, and intelligently forwarded its accomplishment:—

Held, on the evidence, that his consent to the marriage was proved:—

Held, also, that sec. 11 of 26 Geo. II. ch. 33 (Lord Hardwicke's Act), by which the marriage of a minor by license, without the consent of parent or guardian, was absolutely void, is not in force in this Province.

Statement. THIS was an action brought by Sydney Cusack Lawless, an infant, by John Patrick Lawless, his father and next friend, against Maud Chamberlain* and Richard Chamberlain, to set aside as void a marriage between the plaintiff and the defendant Maud Chamberlain, also an infant, on the ground that it was brought about by intimidation and threats, and that although a license was issued, the plaintiff was a minor and had not obtained his father's consent.

The action was tried at Ottawa, on October 20th, 1889 before BOYD, C.

The evidence is fully set out in the judgment.

Gemmill and *Chrysler*, for the plaintiff. Consent is of the essence of a valid marriage. The parties must be free

*The action was brought against her in her maiden name, but the statement of defence filed on her behalf by the Official Guardian designated her as Maud Lawless, "improperly called Maud Chamberlain in the style of cause."—REP.

agents. The evidence here shews that the plaintiff was in fear of his life: *Scott* v. *Sebright*, 12 P. D. 21; Hammick's Law of Marriage, 2nd ed., p. 48; Bishop on Marriage and Divorce, 6th ed., pars. 210-212. The plaintiff is an infant and the consent of a parent was necessary, and if not obtained, as was the fact here, the marriage is void: 26 Geo. II. ch. 33, sec. 11; *Regina* v. *Roblin*, 21 U. C. R. 352; *Hodgins* v. *McNeil*, 9 Gr. 305. Argument.

McCarthy, Q. C., and *F. W. Harcourt* for the infant defendant. The Court has no jurisdiction to entertain this action: 4 Geo. IV., ch. 76; *Warter* v. *Yorke*, 19 Ves. 451; Shelford's Law of Marriage and Divorce, 468, 469; *Templeton* v. *Tyree*, 2 P. & M. 420. The want of consent of the parent does not render the marriage even voidable. The evidence does not shew sufficient duress or threats to compel the plaintiff to go through the ceremony against his will. Fear is defined in Co. Litt. 253 *b.*, *Blake* v. *Barnard*, 9 C. & P. 626; Hammick, 48; *Roblin* v. *Roblin*, 28 Gr. 439.

Gemmill, in reply, referred to O. J. A. secs. 20 and 21.

November 27, 1889. BOYD, C.:—

The plaintiff's statement of claim discloses a case which if proved would warrant judicial interference, and is, as stated, within the jurisdiction of this Court.

To dissolve a marriage once validly solemnized is not of judicial but of legislative competence: whereas if the alleged marriage has been procured by fraud or duress in such wise that it is void *ab initio*, judgment of nullity may be given by the Court.

The present action rests on the invalidity of the proceedings because of the want of consent: the plaintiff's case being that he was not a free agent. *Consensus, non concubitus, facit nuptias* is a maxim of all law — civil, canonical, and common; recognized by all Courts on suitable occasion.

Under the English system matters pertaining to marriage,

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Boyd, C.

arising directly between the very parties, were relegated to the Ecclesiastical Courts at the time of our adoption of English law. But in litigation touching property and civil rights, when the question of marriage or no marriage arose, collaterally or indirectly, there was at that time power to deal therewith in Courts other than Ecclesiastical: *Betsworth* v. *Betsworth*, Sty. R. 10.

When a marriage correct in form, is ascertained to be void *de jure*, by reason of the absence of some preliminary essential, the action of the Court does not annul, but declares that the marriage is and was from the first null and void. There is jurisdiction to grant this measure and manner of relief now vested in the Superior Courts of Ontario. The Court is now empowered by Revised Statutes of Ontario ch. 44 sec. 52, sub-sec. 5 to make declaratory judgments, embodying binding declarations of right, whether any consequential relief is or could be claimed or not. The Court may now, therefore, do *per directum* what it could always have done *per obliquum*. The essence of the ecclesiastical jurisdiction in this class of cases was merely declaratory: *Bowzer* v. *Ricketts*, 1 Hagg. Con. R. 214; *B——n* v. *B——n*, 1 Spinks at p. 250, (*i.e.*, of course after due investigation) and this formal jurisdiction is now conferred upon the Provincial Courts.

Apart from this the inherent jurisdiction of the Court of Chancery extends to all cases of fraud, and to cases in which there was no adequate remedy at law: R. S. O. ch. 44, secs. 21 and 23. It may be said that these sections are to be measured by the jurisdiction of the English Chancery in 1837. It is true that the jurisdiction now invoked, was not then *exercised* by Courts of Equity in England, yet it would be difficult to shew that such a power was not possessed, though held in abeyance, on account of the special tribunals for matrimonial causes.

The ancient jurisdiction of Chancery was exercised in this direction: *Tothill*, Rep. 61, and particularly so during the Protectorate, when "Courts Christian," in the technical sense, ceased to be: Anon. 2 Showers R. 283, (Case 269.)

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Boyd, C.

The particular question of jurisdiction now in hand has been discussed with great wealth of learning and research by three of the early Chancellors in the State of New York, whose names are sufficient commendation of the worth of their judgments. First, by Chancellor Kent in *Wightman* v. *Wightman*, 4 Johns Ch. R. 343 (1820); next, by Chancellor Sanford in *Ferlat* v. *Gojon*, 1 Hopk. Ch. 541 (1825), (a decision re-affirmed by him after a second consideration in *Burtis* v. *Burtis*, *ib.*, 628); and again by Chancellor Walworth in *Perry* v. *Perry*, 2 Paige Ch. R. 501 (1831). This last eminent jurist held that that part of the Common Law of England which renders a marriage absolutely void, when either of the parties had not the legal capacity to contract matrimony, or where there was in fact no legal consent by one of two parties, the same having been obtained by force or fraud, and never afterwards voluntarily acquiesced in, was undoubtedly brought to this country by our ancestors, and formed part of the common law of the colony.

In such cases, he goes on to observe, for all the substantial purposes of justice, the Courts of Common Law and of Equity in England had concurrent jurisdiction with the Ecclesiastical Courts. Although the other Courts yielded to the "Courts Christian" the exclusive jurisdiction to declare the nullity of the marriage by a direct proceeding between the parties, it was rather on the ground of convenience than from a want of power in the Court of Chancery to grant similar relief to the parties, (p. 504).

To the like effect Sanford, C., in 1 Hopk. pp. 560, 561: "The jurisdiction of equity in cases of fraudulent contracts seems sufficiently comprehensive to include the contract of marriage; and though this may be a new application of the power of this Court, I do not perceive that it is an extension of its jurisdiction."

Upon the merits however, the plaintiff's case fails in the proof.

In a book of much repute the general rule is thus stated: "Matrimony contracted in consequence of menace,

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or impression of fear, is null and void *ipso jure*. * * that is, such a fear as may reasonably happen to a man or woman of good courage, constancy, and resolution, and such as involves some danger of death, or else of some bodily torment and distress:" Poynter on Marriage and Divorce, 2nd ed., 138.

In a more modern author, it is thus expressed: "The general rule is, that such amount of force as might naturally serve to overcome one's free volition and inspire terror, will render the marriage null:" Schouler's Domestic Relations, 4th ed., pars. 23, 27, p. 39.

In the last English decision on this head of law, Butt, J., reflects upon the former statement, saying: "Whenever from natural weakness of intellect or from fear—whether reasonably entertained or not—either party is actually in a state of mental incompetence to resist pressure improperly brought to bear, there is no more consent than in the case of a person of stronger intellect and more robust courage yielding to a more serious danger:" *Scott* v. *Sebright*, 12 P. D. at p. 24, (1886.)

Apart from definition, each case must be dealt with upon its own facts and circumstances.

Mr. Justice Butt also alludes to the great care and circumspection which should be exercised in dealing with questions affecting the validity of marriage. This is emphatically so as regards the character and quality of the evidence. The rule has long been recognized in cases of annulling marriage that nothing short of the most clear and convincing testimony will justify the interposition of the Court. One of the ordinances in the Ecclesiastical Constitution of 1597, is in these words: "Forasmuch as matrimonial causes have always been reputed the weightiest, and therefore require the greatest caution when they come to be handled and debated in judgment, especially in causes wherein matrimony is required to be *dissolved* or *annulled*, we strictly charge and enjoin that in all proceedings in *divorce*, and *nullities of marriage*, good circumspection and advice be used, and that the truth may,

as far as possible, be sifted out by the depositions of witnesses and other lawful proofs; and that credit be not given to the sole confessions of the parties themselves, howsoever taken upon oath, either within or without the Court": Macqueen's Law of Husband and Wife, 3rd ed. p. 159.

The father of the defendant, by whom the threats were first and chiefly alleged to be made, has died, pending the action, and no evidence from him has been obtained.

The plaintiff, being examined at the trial, said in his evidence in chief: "I received a letter from the defendant the night before the marriage. It is torn up. I got a rig and drove up from Hull to Aylmer (seven miles), and got there at 8.30 p.m. I sat down with her, and her father came in. He asked me what I was going to do. I said I was going to go home. He held out a pistol, and said, 'No, you are not.' One of the Ritchies (Samuel, uncle of the defendant), came in and quieted him, and stopped his threatening. They sat down and waited for another Ritchie to come in. The second Ritchie (Thomas), asked, 'What are you going to do?' He said: 'You must either marry the girl, or you wont leave the house alive. I'll give you three minutes to make up your mind.' The father was very angry, and seemed under the influence of liquor. And he said, 'I'll blow your brains out.' I believed he was going to shoot me. They sent for a minister, Mr. Cunningham (English Church), who lives in Aylmer. He came to the house, and took out forms of license, and was going to perform the marriage. I said I was under age, and had not my father's consent, and it was at the head of a revolver. The clergyman said it was best to go and consult another minister. After debating a while, they got another minister, Mr. Service, and he advised Chamberlain not to go on with the marriage. I said there was no love in it; it was force. The father said, if the marriage did not proceed he would have satisfaction. He gave me the impression that he meant what he said. The ministers left there pretty late.

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Mr. Cunningham said he did not like to go on with the marriage, because it would not be legal. Ritchie and the father decided to go to town (Ottawa), to get married. This was about four o'clock in the morning. I drove with one of the Ritchies to town. He drove to Miss Yielding's, to get a certificate—she grants licenses. I had no discussion with Ritchie about a marriage license. Yielding was not awake at first. We drove around for a while, and went back when she was up. She handed the license to me. Ritchie and I went out and went round and met the girl and her father. Before this we drove to Marks's, a minister and doctor, and asked him if we could hold a marriage in an hour's time. We arranged it, and then we drove to Marks's, and got married. After this I drove away and went to my office, and saw no more of the defendant till to-day. I was married between 5 and 6 a.m., probably later."

In *cross-examination*, he said: "I had connection with defendant about a month and a half after I first saw her. She told me she was in the family way, about three months before the marriage. * * After the Ritchies came into the house, they decided to send for a minister. I said I could not say anything against being married. I said I would prefer to live, and to send for one. I only had three minutes. I thought I would try and stop it when the minister came. I had my wits about me, just as much as I have them now. It was about an hour and half before the minister came, and about an hour in talk before Ritchie went for the minister. Mr. Cunningham came about half-past ten. I think I was smoking a cigarette when Mr. Cunningham came in. It may have been discussed that I had seduced her, and that she was pregnant. I don't think I said 'let it sliver.' I might have used the expression. If I said this, it would be after Mr. Cunningham said the marriage would not be legal. I meant by it to let the ceremony go on. I still had my wits about me. I thought the ceremony might be performed in the hopes that I would annul it afterwards. * * When Mr. Service

came he advised not to marry as it would not turn out happily. The father said, if it does not go on I will have satisfaction. I was seriously alarmed, though I probably did not shew it. Mr. Cunningham said it was the best thing to go to town—to go to a clergyman that did not know me. I acquiesced in this arrangement. Preparations were made to go town, and we waited for about a couple of hours till it got light enough. I lay down on a sofa, but did not sleep. One of the Ritchies stayed there all the time: we talked in an apparently friendly way together. I got in the rig I had brought up, and drove from Aylmer to Ottawa, Thomas Ritchie was with me—I was pretty sleepy, and did not talk much. It was spoken of in the room that we should get a license. Mr. Cunningham had asked for a license; he had agreed to go forward with the marriage, after the Methodist minister (Service) went away. Ritchie went off to get a license, and returned saying he could not get one—that they would not give him one. The father then said, better go to Ottawa and get one, and Cunningham agreed. Ritchie did not know the street where Miss Yielding lived, but I did—I drove there. Blinds were drawn at first when we went there; we drove back; I got out and rang the bell. We passed through Hull coming, and passed my father's house: I did not stop because I did not know but he might have a revolver. I have plenty of friends in Hull. Miss Yielding came down stairs and opened the door—both of us went in, I told her I wanted to get a license. She got the paper and said: 'Is this a run-away marriage?' She said 'are you a Wright Lawless?' I said, 'No.' First she asked my name, and I gave it as S. C. Lawless. She asked me the age and where I lived. I said 'Twenty-two.' Chamberlain suggested I should say this, if any difficulty arose as to age. Ritchie said I was to do this at Aylmer, and I agreed to do so. She asked me the name of the girl and age. I answered. I think Ritchie answered these questions. She asked who was to marry? I said the Rev. Mr. Moore or Marks. Ritchie had suggested this, too. I said the girl was about twenty

Judgment.

Boyd, C.

and Ritchie said she was twenty-one, but that it did not matter for she had her father's consent. The reason for marrying in Ottawa and not in Hull was in the affidavit, 'for convenience and not to avoid publicity.' I made the affidavit produced; that 'defendant and I were desirous of entering into marriage.' I swore this through fear [jurat is 1st August, 1889]. I did not appeal to Miss Yielding for protection. * * I got the license and put it in my pocket. * * I handed the license to Dr. Marks. He asked my age I said twenty-two, and my father's name, and where I lived. I paid little attention to what he asked."

The plaintiff's father was next called, and proved that plaintiff was born in Ontario on 20th January, 187[illegible], and that he was not consulted about his son's marriage, and did not consent to it.

Rev. Mr. Cunningham was the next witness. "Thomas Ritchie came for me at half-past ten at night. Lawless was in the house on a chair with his hat on, and smoking a cigarette. He paid no attention to me, nor I to him. Afterwards he said, 'Can you marry a minor without the consent of his parents? I have been brought to this at the point of a pistol. I don't acknowledge being father of the child.' I said to Thomas Ritchie, it is a matter for the legal authorities, instead of having him married. The father said, 'proceed with the ceremony.' I said, 'I can't.' Chamberlain said, 'If you don't, some one else will.' I said, 'I doubt it.' Thomas Ritchie and I then went for Mr. Service, and after he came down with us I asked the plaintiff about it, and he said, 'I am quite willing now; let it sliver.' He acknowledged being the father of the child. He said, 'go on with the license' [I issue marriage licenses] 'and I'll take an affidavit.' I said, 'the man who marries without the sanction of his parents, will take an action against me.' He said 'I'll take an affidavit I won't.' He said his 'father would never give his consent,' but 'you can go ahead.' I said I would not take the double responsibility of issuing a license, and also marrying. Plaintiff said

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Boyd, C.

'when Sims comes' [the person who was expected to issue the license in question] 'what will I say about my age?' I said, 'tell him the truth.' [Sims having refused to act] I said 'the only way is to go to Ottawa.'"

Cross-examined—"Thomas Ritchie said something to young Lawless about being the father of the child, and about forcing or getting him to marry, and plaintiff said, 'You'd just act the same if you were in the same position.' The father wanted the marriage to go on, and I explained it would not be legal, because he was a minor, and had not the consent of his father. I proposed to go to the Methodist minister to get light on marrying him on account of his minority. This was because Chamberlain said 'If Mr. Cunningham won't, some other minister will.' When Service came up with us, I then asked Lawless if he was willing to proceed. He said, 'Yes, I'm willing.' I wondered at the change. I asked him if he admitted being the father of the child. He said, 'Yes, I'll admit anything'; he said he was in a hurry, 'let it sliver' he wanted to get through with the ceremony, as I understood, to get home. I said he had not got any older, and that he was still a minor. I said he must know that the ceremony was illegal if I married him without the consent of the parent. He had no objections to make that the ceremony should not go on; he removed all the difficulties as far as he could. Thomas Ritchie then suggested going to town, and said, 'let the young man take it on his own responsibility.' Lawless said nothing, except that he was satisfied to do this. The young man did not appear to be afraid; he did not appear to be going into it willingly; he made a protest at first; he made no appeal afterwards."

Dr. Marks was the last material witness called for the plaintiff. He said: "I am a superannuated minister of the Dominion Methodist Church. * * I was handed a license by the plaintiff, and married them according to the ritual of the Church. When I asked the question, 'Will you have this woman?' he answered, 'I will.' And to the next question he said, 'I do.' Then they joined hands as

Judgment.
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I directed them, and with my hands on theirs I pronounced a blessing, and declared them man and wife. I had not the slightest suspicion that the man was not a voluntary and willing party."

For the defence was called, *Thomas Ritchie*. In substance he said: "I reached Chamberlain's about 9 o'clock of night of last of July. I saw the young man, and asked him if he was satisfied to get married. He said he supposed he was—he supposed he had to. Then I went for a minister. The father had something in his hand, a revolver, I suppose. When the minister came, the plaintiff said that he was not of age, that he was not the father of the child, and that he had been forced into it at the point of a pistol. I remarked openly, that the girl would be better not tied to him, and I still think so. The young man afterwards seemed to waver and be willing. When Mr. Cunningham and Mr. Service came together, he had changed his mind and wanted the marriage to go ahead, and said, 'let it sliver.' The defendant's father was about sixty-six or sixty-seven years of age, and was sickly. * * I said it would not be legal to get a license from Sims, as Sims said to me he could not issue it to a minor. I said the only way to get a legal marriage was to go to Ottawa, or to get the father's consent. I said to Chamberlain that we had better go and see Mr. Lawless. The son said it would be useless; his father would never consent, and to let us go to Ottawa. * * He drove me in the buggy to Ottawa; he said, 'I'm not the worthless fellow that you think I am. If you hush this up, I expect to get a raise of salary, and I will take up house and live with her after she comes back from Montreal.' He wanted me to keep the marriage quiet * * He talked in a friendly enough way—no hard words. I made no threat, and I had no weapon. He had settled to go for the license. Mr. Cunningham had mentioned Mr. Marks's name before we left. I never suggested his saying he was twenty-two. He claimed before that he was a minor, and then he said he was old enough. He said that the defen-

dant was twenty-one. I corrected him, and said that she was not twenty. I did not know his age. He could have escaped if he liked; he never tried to do so. I would have been too glad if he had escaped."

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In cross-examination.—"I knew that the young man was coming up, and that Mr. Chamberlain was going to make him marry his daughter if he could. I saw no threats. It was understood between the father and me that no violence was to be used. I knew he was going to force him into the marriage if he could, and I did not want him to go too far. My brother is not here to-day as a witness. Lawless said afterwards that he supposed he had the right to marry the girl. I guess Mr. Chamberlain said that if he did not marry the girl he never would leave the house alive. I do not mind saying this. Chamberlain said he was an old man, and it was better to put the two of them out of the way, rather than be disgraced. He thought if they would be married, it would take the disgrace away. He was excited and talked wildly, and did not know what he would say. He talked this way, but did not mean it. I don't think he knew what he was doing or saying. Plaintiff told me also that his people were opposed to his going with the girl; but he was going to pass the civil service examination, and would get a raise of salary, and did not care for his people at all."

Miss Yielding, was the last witness: "Lawless I think said he wanted a license. I asked him if both were over twenty-one? He said, 'yes.' I said he had to take his oath. He gave me his age at twenty-two, and said the girl was over twenty-one. He said he had the father's consent. I asked this because I was a little afraid as it was early. Lawless gave me explanation that the marriage was merely for convenience at Ottawa. I never thought he was under the influence of fear or apprehension."

When there is a variance in the details of the evidence as between that of the plaintiff and that in favour of the defendant, I think that the recollection of the plaintiff is

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at fault, and indeed he admits that he has not a very good memory. The concurrence of testimony is against him, for instance in what he says in the presence of Miss Yielding as to the age of the defendant. Altogether I prefer the version of witnesses not so much interested as the plaintiff, where there is discrepancy in the relation of events. But upon the plaintiff's own evidence, I should not be disposed to act in relieving him from a connection which he entered into, not it may be willingly, but still intelligently and deliberately.

Granting that evidence of intimidation may be found at one point of time, during the transaction, this is not enough. It must be manifest that force preponderated throughout, so as to disable the one influenced from acting as a free agent. It is true that a pistol was produced at the outset, and it was flourished about to emphasize the demand of the father that the injury done to his daughter should be, as far as possible repaired by marriage. But the frenzy of the feeble old man soon spent itself, and if the youth did at first quail, he soon recovered his equilibrium. The situation was then discussed—the paternity at first disavowed, was admitted; perhaps the better genius of the young man suggested the honorable solution; perhaps he feigned acquiescence, believing that all would be illegal for want of his father's consent. Certain it is, that to outward observers he submitted to the proposed method of procedure, and even forwarded its accomplishment. Any perturbation of mind must surely have disappeared before he is found, seated, with his hat on, smoking a cigarette, and informing the clergyman of his readiness to participate in the solemnization by saying "let it sliver."

His subsequent conduct displays readiness to assist in the preliminary and final details. He drives some seven miles, past his father's house from Aylmer to Ottawa, in order to procure the license. He allays the suspicions of Miss Yielding; he answers her questions as to age, giving his own at twenty-two years, and he confirms his answer by taking an affidavit to the same effect. He thereby also

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solemnly declares that he and the defendant were desirous of entering into marriage. He next proceeds to the minister's house, arouses him and makes the appointment for the celebration. Thereafter he attends with the marriage party, utters affirmative responses to the usual questions, and so is declared to be married to the defendant.

The protest first made to Mr. Cunningham has not been repeated, and has been surely waived by this course of action so inconsistent therewith. The opportunities for protecting himself, if acting through fear, or overpowered by force, were manifold, but he so demeans himself that no thought crosses the minds of Miss Yielding or Dr. Marks that he is other than a willing actor. It is even suggested that his father should be visited with the view of obtaining his consent, but this the plaintiff rejects. Contrary to what he alleges to be his mental condition, his choice and consent to go forward, appear in speech and conduct at three critical periods, and in a prolonged series of acts: 1. Before the clergyman at Mr. Chamberlain's house. 2. Before the issuer of marriage licenses. And 3; Before the officiating clergyman at Ottawa. My judgment is, that the necessary consent to this union is proved as to both parties, and that the religious observance was not a mere idle ceremony, but was the final step in the actual constitution of marriage.

It is needful to advert briefly to another ground on which relief is sought. That is the point which was very prominently before the mind of the plaintiff, viz., that the marriage would be illegal for want of the parents' consent. That depends upon whether the 11th sec. of Lord Hardwicke's Act, 26 Geo. II. c. 33, is in force in this Province. That section rendered such marriages by license absolutely void, without any sentence of the Court, and length of cohabitation and birth of children afforded no ground of exemption: *Johnstone* v. *Parker*, 3 Phill. 41; and consent subsequently given would not avail to validate.

This rigorous law was soon after repealed in England, and no Judge has regarded with favour the proposal to hold

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it applicable to this country. Judicial opinion as reported is all the other way.

Such a marriage was thought to be legal by Sir J. B. Robinson in *Regina* v. *Bell*, 15 U. C. R. 290. The opinion of the Court was, in *Regina* v. *Roblin*, 21 U. C. R. 356, that this section was not in force in this country, and with this reading of the law agrees Esten V. C., in *Hodgins* v. *McNeil*, 9 Gr. at pp. 307, 309.*

I need not labour the matter in order to explain why the clause of an Act, which was admitted in England to have been "productive of great evils and injustice," was thought, and is to be thought, inapplicable to the circumstances of this Province. That is adverted to at considerable length in *Regina* v. *Roblin* (*supra*).

It would be singular to hold such a law in force at the suit of an infant who has himself represented that he was over age, and so procured the license, and advanced the marriage which he now seeks to avoid.

My judgment is, that the particular sections of Lord Hardwicke's Act are not the law of this Province.

The net result of the whole is, that the action must be dismissed with costs, to be paid by the next friend.

G. A. B.

* See *O'Connor* v. *Kennedy*, 15 O. R. 20.

[CHANCERY DIVISION.]

BROWN ET AL. V. GROVE ET AL.

Bankruptcy and insolvency—Assignment for benefit of creditors—Sheriff as assignee—Death of sheriff—R. S. O. ch. 124—Action by judgment creditor—Fraudulent preference.

An assignment for the benefit of creditors made to a sheriff under R. S. O. ch. 124, is made to him as a public functionary, and on his death the care and administration of the estate assigned devolves upon his deputy, and thereafter upon his successor in office.

It is not competent to the sheriff to disclaim or decline to act as such assignee.

Where an assignment under the statute had been made to a sheriff, who died shortly after, and proceedings were subsequently taken in their own names by judgment creditors of the assignor to set aside a transfer of property as fraudulent :—

Held, that the plaintiffs, suing alone, had no *locus standi* to maintain the action.

Statement.

THIS was an appeal from the judgment of ARMOUR, C. J.

The action was brought by Brown, Balfour & Co., as judgment creditors of one Anna Uebelhoer, to set aside as fraudulent against such creditors an agreement for sale and purchase of the lands in question made between said Anna Uebelhoer and one W. D Buell, and also to set aside the proceedings had under a power of sale in a mortgage, as fraudulent against creditors, by which certain property of Anna Uebelhoer had been sold to one W. B. Buell, and was tried with an action of *Brown* v. *Buell*, which had also been brought to set aside the agreement referred to.

The two actions were tried at Hamilton, on April 27th, 1889, without a jury.

W. Nesbitt and *Lees*, for the plaintiffs.
Lash, Q. C., and *A. G. Hill*, for the defendants.

It appeared that Anna Uebelhoer had made an assignment for the benefit of creditors to the sheriff of the county of Welland, who died soon after the making of the assignment, and no further proceedings were taken with reference thereto.

Statement. The learned Chief Justice dismissed both actions with costs.

From this judgment the plaintiffs appealed to the Divisional Court, and the appeal was argued on September 6th, 1889, before BOYD, C., and PROUDFOOT, J.

W. Nesbitt and *Lees*, for the plaintiffs. The evidence shews that the sale should be set aside, as fraud is proved.

Lash, Q. C., contra. The evidence does not shew fraud, and the plaintiffs had no *locus standi*, as an assignment had been made to the sheriff, and until got rid of, the plaintiff cannot bring such an action as this.

Nesbitt, in reply.

October 8th, 1889. BOYD, C.:—

The plaintiffs' attack upon the whole series of transactions among the defendants, as in fraud of creditors, failed in the judgment of the learned Chief Justice, and no ground has been disclosed in argument or evidence which appears to me sufficient to justify our interfering with that result.

[The learned Chancellor then commented on the evidence, and continued.]

I think that the plaintiffs have no *locus standi* for another and a legal reason; because by the assignment to the sheriff in January, 1887, the individual creditors could not sue without getting rid of that. That assignment cannot be impeached collaterally, as was attempted in reply to the defendants' plea setting up this instrument.

But the sheriff of Welland, being added as a party, I think minor relief should be given by making the beneficial interest of Mrs. Uebelhoer in the property available for the creditors, under the provisions of R. S. O. ch. 124. To this the defendants agreed by their defence, provided proper parties were before the Court. They set up that the debtor had assigned to the sheriff under the Act. The plaintiff replied that this assignment was invalid for vari-

ous reasons; but they did not make the sheriff a party and hence it was impossible to discuss the question of the validity of the assignment. Judgment. Boyd, C.

Under R. S. O. ch. 124 sec. 3, sub-sec. 2, the assignment, even if open to objection, is valid for the purposes of the Act till it is superseded or avoided by a competent Court.

Their excuse was, that before action the sheriff had died, and the Act made no provision for procuring another assignee in such a case. No express direction is given as to what is to be done in this emergency, but probably because it is in effect provided for in other parts of the Revised Statutes.

By ch. 16, sec. 45, in case the sheriff dies the deputy is to continue the office until another sheriff is appointed. So by the Interpretation Act, ch. 1 sec. 8 sub-sec. 27: words directing or empowering a public officer or functionary to do any act or thing or otherwise applying to him by name of office, shall include his successors in such office and his or their lawful deputy. By ch. 124, the appointment of assignee is to be made to the sheriff as a public functionary, and on his death the administration and care of the assigned estate devolves upon his deputy, and thereafter upon his successor in office.

The present sheriff being added, the record is made complete for the purpose of dealing with the fund, and it is needless to determine whether the assignment is invalid or not. If invalid, the plaintiffs as creditors have the right to sue therefor; if valid, that right appertains solely to the sheriff; either way by paying under the order of the Court the accounting defendants are discharged, and justice is done by the distribution of the fund among the creditors *pari passu*.

Another excuse was that the sheriff to whom the assignment was made had not accepted of it, but had disclaimed. There is no evidence of this: rather is the evidence the other way: for he allowed the fact of the assignment to be advertised, and he presided and took the minutes at the

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first meeting. Apart from this I apprehend it was not competent for him as a public officer to disclaim and decline to act. He has no such option as might exist in the case of a private assignee. (See ch. 124, sec. 13.)

PROUDFOOT, J., concurred. G. A. B.

LE MAY V. THE CANADIAN PACIFIC RAILWAY COMPANY.

Railways and Railway Companies—Master and servant—Dominion Railway Act—Negligence—Unpacked frog—"Person injured thereby"—Answers of jury—Pleading—"Volenti non fit injuria."

Section 262, sub-sec. 3, of 51 Vic. ch. 29 (D.) provides that "the spaces behind and in front of every railway frog or crossing, and between the fixed rails of every switch, where such spaces are less than five inches in width, shall be filled with packing up to the under side of the head of the rail," and section 289 of the same Act provides that "every company, * * * causing or permitting to be done, any matter, act or thing contrary to the provisions of this Act or the special Act * * or omitting to do any matter, act or thing required to be done on the part of any such company, * * is liable to any person injured thereby for the full amount of damages sustained by such act or omission," etc.

The plaintiff, who had been for some months employed at the place where the accident happened, as a switch foreman, while in the course of his duty in the act of uncoupling cars, had his foot caught in an unpacked frog, where it was crushed by the wheels of the cars:—

Held, that, although a servant of the defendants, he was a "person injured" within the meaning of the statute, and entitled to maintain an action for negligence.

The jury, having found that the frog was not packed, in reply to a question whether the plaintiff had "notice or knowledge or ought he to have had notice or knowledge that the frog was not packed," answered: "We believe he did not have notice, and should have had notice," and in answer to another question they negatived contributory negligence on the plaintiff's part:—

Held, even assuming that the meaning of the answer was to impute notice of the danger to the plaintiff, it would not prevent his recovering so long as he himself was not negligent, there being no finding or evidence to sustain a finding that the plaintiff, freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it.

Quære, per FERGUSON, J., whether it is not necessary, under the present system of pleading, to set up specially a defence arising from the maxim, "*Volenti non fit injuria.*"

Statement. THIS was an action brought by John W. Le May against The Canadian Pacific Railway Company for negligence in

Statement.

not having a certain space at a frog in the railway track filled with packing, by reason of which his foot was caught in the unpacked frog, and was run over and crushed by the wheels of a railway car.

The action was tried at Port Arthur on the 17th and 18th of July, 1889, before FALCONBRIDGE, J., with a jury.

Colin McDougall, Q. C., and *Frank Keefer*, for plaintiff.
Shepley, for defendants.

The facts are fully set out in the judgment of the Divisional Court.

Five questions were submitted to the jury, four of which, with the answers are set out in the judgment of FERGUSON, J., and the fifth was as to the amount of damages, if any, which were found at $2,500.

The learned Judge reserved judgment on the findings until after the argument which took place at Osgoode Hall, on August 16th, 1889.

August 21, 1889.—FALCONBRIDGE, J.

Mr. Shepley's able and ingenious argument merits more consideration and more elaborate treatment than I am able to give it in view of the limited time at my disposal.

It is of the last importance that the parties should be able, if they so desire it, to move against this judgment at the next sittings of the Divisional Court. With much doubt and hesitation, I refuse to give effect to his contention that the effect of sec. 289 of 51 Vic. ch. 29, (D.) is merely to declare the want of packing to be an act of negligence and disregard of duty on the part of the defendants, and that a servant must otherwise bring himself within the rules of the common law before he can recover. If I am right in this, it is not necessary to decide whether the knowledge of a section foreman is notice to the company.

I enter judgment for the plaintiff with full costs.

Argument.

From this judgment the defendants appealed to the Divisional Court, and the appeal was argued on September, 12th and 13th, 1889, before BOYD, C., and FERGUSON, J.

Shepley, for the appeal. This action is brought under 51 Vic. ch. 29, sec. 289, (D.) with which must be read sec. 262. It is not brought under R. S. O. ch. 212, for that Act does not apply here, as the defendants are a Dominion railway; *Monkhouse* v. *Grand Trunk R. W. Co.*, 8 A. R. 637; *Clegg* v. *Grand Trunk R. W. Co.*, 10 O. R. 708. And it is not brought under R. S. O. ch. 141. *McLaughlin* v. *Grand Trunk R. W. Co.*, 12 O. R. 418, in which the Dominion Act was invoked, decided that the Dominion statute, as it then stood, conferred no right of action upon servants, and the question to be decided here is, whether the amendment since made makes any, and if so, what difference? In *McLaughlin* v. *Grand Trunk R. W. Co.*, Chief Justice Cameron said, at p. 424, that the Court might conjecture the object of the Act to be the protection of servants, but could not on that conjecture attach a liability to the master. The plaintiff has no remedy unless sec. 289 as amended, has made a difference. I contend it has not. This legislation is not *sui generis*. If it had been intended that servants should be included in the words "persons" used in sec. 289, parliament might and would have followed the apt wording of similar previous legislation. See R. S. O. ch. 208 and 212, and the American statutes mentioned in Patterson's Railway Accident Law, p. 383, par. 337, in which the words are "any person including employees."

The American decisions are uniform upon the meaning to be given to the word "person" in similar statutes; and in every State where there is a similar statute, "person" is held not to include "servant." In *Sullivan* v. *The Mississippi, &c. R. W. Co.*, 11 Iowa 421, at p. 428, it was held that the word did not include employees. It was held to include employees in *Schultz* v. *The Pacific R. W. Co.*, 36 Mo. 13; but that case was dissented from and

overruled in *Connor* v. *Chicago, &c. R. W. Co.*, 59 Mo. I also refer to *Higgins* v. *Hannibal, &c. R. R. Co.*, 36 Mo. 418; *Proctor* v. *Hannibal and St. Joe R. R. Co.*, 64 Mo. 112; *Rahback* v. *The Pacific R. R. Co.*, 43 Mo., 187; *Carle* v. *Bangor, &c., R. R. Co.*, 43 Me. 269. These decisions are collected and approved in Thompson on Negligence, vol. ii., 1004-5, and it is pointed out there, that any other construction would violate a well known rule of interpretation—viz., that the Legislature will not be presumed, without express words to have abrogated the common law. Even if a servant is within the statute, it does not profess to take away from the master any common law defence to the servant's action beyond the defence that the unpacked frog is not an actionable defect, but is one of the risks of the employment. The servant must still in other respects make out his action as at common law. He must still prove that he was ignorant of the defect, and that his master knew of it. All the statute does for him is to prove that an unpacked frog is a defect. Here the jury has found expressly that he ought to have known of the existence of the defect. This is equivalent to a finding of knowledge on his part. There was the grossest contributory negligence proved. Argument.

Delamere and *Frank Keefer*, contra. The evidence and findings are both in the plaintiff's favour, that he was caught in the frog. The answer to the first question is, that the plaintiff should have been told of his danger and was not. It is in his favour, but even if it was not as contended by the defendants, it would not prevent his recovering. Sec. 289 uses the word "person," and that word is defined in the interpretation clauses. [BOYD, C.—Both my brother PROUDFOOT and I agree that you need not argue the meaning of "person."] Sec. 262 imposes a duty on the company, and the negligence is, therefore, that of a master: Whittaker's Smith on Negligence, 156. Leaving the frog without packing was an illegal act: *Grote* v. *Chester and Holyhead R. W. Co.*, 2 Ex. 251. *Thomas* v. *Quartermain*, 18 Q. B. D. 685, distinguishes between breaches of stat-

Argument. utory duty and other duties: *Baddeley* v. *Earl Granville*, 19 Q. B. D. 423. In *Thomas* v. *Quartermain*, it was held that the maxim *volenti non fit injuria* was still in force, but perhaps not in cases of breach of statutory duties. The negligence is not the negligence of the man instructed to pack the frog, but of the company itself: *Grote* v. *Chester and Holyhead R. W. Co.*, 2 Ex. 251; *Grey* v. *Pullen*, 5 B. & S. 970; Smith on Negligence, Bl. ed., 158; *Clark* v. *Holmes* 7 H. & N. at 949. There was no contributory negligence, as it was shewn to be the custom to cut or disconnect cars while in motion. See also *Crispin* v. *Babbitt*, 82 N. Y. R. 516; *Flike* v. *The Boston, &c. Co.*, 53 N. Y. R. 549.

Shepley, in reply. The finding of the jury in answer to the first question can only have had one meaning, in view of the explanation given to them in the charge. It would have been absurd to ask the jury whether the company or defendants had given the plaintiff notice of the frog being unpacked. I refer further to Smith on Master and Servant 4th ed., 264; *Ferguson* v. *Central Iowa R. W. Co.*, 5 Am. & Eng. R. R. Cas., 614; *Burlington, &c.* v. *Coates*, 15 Am. & Eng. R. R. Cas., 265.

October 19, 1889.—BOYD, C.:—

Le May now aged twenty-five years, went into the service of the Canadian Pacific Railway in December, 1887, and was promoted to the position of switch foreman in July, 1888. On 22nd May, 1888, the Railway Act, 51 Vic. ch. 29 (D.) was passed, which provided for the packing of railway frogs.

On 6th August the side track was constructed near Port Arthur, on which the accident occurred on 20th October, whereby the plaintiff lost his foot by reason of the omission of the defendants to comply with the statute in this particular. Sec. 262 gives directions for packing frogs; and sec. 289 provides that the company which omits to do anything required to be done by the

company (*i. e.*, by that statute) is liable to the person injured thereby for the full amount of damages sustained by such omission. Judgment. Boyd, C.

The plaintiff's action is founded on a statutory breach of duty on the party of the defendants, by which he has been maimed for life.

It was argued that he was not, being a servant of the company, within the meaning of the statute. To that may be answered the plain meaning of the words which extend to "any person injured." Borrowing the language of Locke, "We must consider what *person* stands for, which I think is a thinking, intelligent being."

It is ordinary knowledge, which even Judges must not forget in the presence of a statute, that of all persons in the community those most exposed to danger from the fatal frog, are the track and switch men of the railway. To leave these men out of the benefit of the Act, would be to minimise its scope and violate one of the main canons of interpretation laid down by the Legislature, whereby all Acts are deemed remedial and to be liberally construed: R. S. C. ch. 1, sec. 7, subsec. 56.

It is next urged that the answer made by the jury to the first question left to them, disentitles the plaintiff to recover. This question was, "Did the plaintiff before the happening of the accident, have notice or knowledge, or ought he to have had notice or knowledge that the frog was not packed? Answer—We believe he did not have notice, and should have had notice."

The defendants' counsel says this means he is to be affected with notice of the state of the frog, because of his employment and his observation of the place. I should take the very opposite meaning out of the words —namely, that no notice was given to him of the frog being unpacked, and that notice, should have been given to him. That is also in harmony with the answer of the jury to the fourth question, that he was not guilty of contributory negligence. But assume that

Judgment. Boyd, C.

it means that notice of the danger is to be imputed to him, that would not prevent his recovering so long as he was not himself negligent. As expressed by Lord Justice Bowen, in *Thomas* v. *Quartermain*, 18 Q. B. D., at p. 697: "The plaintiff's knowledge of the danger is not conclusive. Obviously, such knowledge may have even led him to exercise extraordinary care."

The hope of the defendants based on this apparently ambiguous finding is dissipated by the holding of Wills, J., in *Osborne* v. *London and North Western R. W. Co.*, 21 Q. B. D. 220, at p. 223. He said, "Where the existence of negligence on the part of the defendants, and the absence of contributory negligence on the part of the plaintiff, are specifically found, * * if the defendants desire to succeed on the ground that the maxim *volenti non fit injuria*, is applicable, they must obtain a finding of fact that the plaintiff freely and voluntarily, with full knowlege of the nature and extent of the risk he ran, impliedly agreed to incur it."

There is here no evidence which would warrant such a finding.

The last defence urged is the standing one of contributory negligence. But this was left fully and fairly to the jury, and they have disposed of it adversely to the company, and it cannot be said that there is not sufficient evidence to support their disposition of this defence.

While under orders from the company to take charge of cars loaded with various freight so as to place them at their proper places for unloading, he had to detach or uncouple some of these loaded cars. He found the pin to be stiff and could not pull it out from the side of the car, and so stepped in with one foot between the cars to get a better pull, and while working at the pin, his foot went into the frog, and was caught. The cars were moving backwards slowly, inch by inch, as it were, and in spite of his efforts to get free, they shoved him forward, and one wheel went over his foot.

He was familiar with the manner of uncoupling cars

and acted on this occasion in the usual way. He knew there was a frog at the place in question, but did not know whether it was filled or not. The plaintiff says the company expect men to uncouple cars while they are on the move, under pain of being discharged if they do not adopt this plan. The company knew of how the work of coupling was usually and generally done, and should have been solicitous to lessen the danger as much as possible by observing the directions of the statute The plaintiff was a competent person to do this work, and as the car was moving so very slowly he felt himself evidently master of the situation, and would have been so but for the defendants' neglect to make the frog perfectly safe. This omission of duty on the defendants' part, appears to me to have given rise to the accident, and to have been its immediate cause, and I find no good reason for disturbing the verdict and judgment in the plaintiff's favour.

FERGUSON, J.:—

The plaintiff was a switchman in the employment of the defendants It is alleged that the accident which gave rise to the action occurred by reason of the negligence of the defendants in not having a certain space at a frog in their railway track filled with packing as required by the Railway Act, 51 Vic. ch. 29 (D).

It is not now asserted that this space was packed as required, or at all. The fact is undisputed that it was not packed. The plaintiff sustained the injury complained of while in the performance of his duty as such employee of the defendants, and at this place he had his foot cut off or partly cut off by a wheel of one of the defendants' cars, and the jury have awarded him $2,500 damages.

The 3rd sub-section of section 262 of the Act provides that the spaces behind and in front of every railway frog or crossing, and between the fixed rails of every switch where such spaces are less than five inches in width, shall be filled with packing up to the under side of the head of

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Ferguson, J.

the rail. The 289th section of the same Act provides that "every company * * causing or permitting to be done, any matter, act, or thing contrary to the provisions of the Act or the special Act, * * or omitting to do any matter, act, or thing required to be done on the part of any such company, * * is liable to any person injured thereby for the full amount of damages sustained by such act or omission," &c.

The plaintiff had been for some months employed at the place where the accident happened, and had had charge of a gang of men there.

Several questions were submitted to the jury, which were as follows:

1st. Did the plaintiff before the happening of the accident, have notice or knowledge, or ought he to have had notice or knowledge, that the frog was not packed? The answer of the jury is, "We believe he did not have notice, and should have had notice."

2nd. Did the accident happen to the plaintiff by reason of the frog not being packed in accordance with the statute? The answer is: "We believe that it did."

3rd. Did the plaintiff receive the injuries while in the discharge of his duties, as a servant of the defendants, and in consequence of the discharge by him of such duties? The answer is: "We believe he received the injuries in the discharge of his duties, and in consequence of them."

4th. Was the plaintiff guilty of contributory negligence? The answer is: "We do not believe that he was."

It was contended that the words, "Any person injured thereby" in the 289th section aforesaid, do not apply to or comprehend an employee or servant of the railway company; but I cannot perceive any good ground for this contention, and I agree in the reasoning and conclusion of the Chancellor in his judgment in regard to this element of the case.

There was much contention at the bar respecting the meaning of the answer to the first question, that is: whether the jury meant by the latter part of it, "and

should have had notice," that the plaintiff should have been notified by the defendants that the space in question was not packed; or that the plaintiff having been for some considerable time engaged or employed in the performance of his duties as the defendants' servant at the place, should have himself known that the space in question was not packed as required. Judgment. Ferguson, J.

I do not see that it matters so much so far as the result of the case is concerned, which of these readings is given to this answer of the jury; for, let it be assumed that the one least favourable to the plaintiff is adopted, then I apprehend notice that the space was not packed as required will be imputed to the plaintiff.

The second finding is, that the accident occurred by reason of the space not being packed; and there is no doubt that this finding is well supported by the evidence.

The fourth finding is, that the plaintiff was not guilty of contributory negligence.

As appears by the opinions of all the Judges in the case, *Thomas* v. *Quartermain*, 18 Q. B. D. 685, this notice imputed to the plaintiff (or even actual knowledge of the fact if such had been the case), is not conclusive against the plaintiff on the question of contributory negligence. In that case the learned Judges were not all of the same opinion, but upon this particular point they seem to agree.

The case was under the provisions of a statute different from the Act relied on in the present case, nevertheless the discussion and the authorities referred to upon this particular branch or subject are in point here. Several cases are referred to in the judgments, and so far as I am able to perceive from these, from the opinions of the learned Judges, and from some other cases, it is not unsafe to state the law upon the point as laid down in the case of *Clarke* v. *Holmes*, 7 H. & N. 937, namely, that knowledge is only a fact in the case to be taken into consideration by the jury, with all the other facts and circumstances, in determining the question whether the plaintiff had himself helped to bring about

Judgment. the accident, in respect of which he seeks to charge the
Ferguson, J. defendants.

The jury knew what they intended by the part of their answer—that is, the answer to the first question; and if they meant, as I have assumed, against the plaintiff, that by reason of his employment at the place, and being so long engaged there, he ought to have known what the fact really was: they must have taken this into account when they were considering what their finding should be on the issue regarding contributory negligence, and their finding upon this issue, I think, cannot be disturbed here. I agree with the Chancellor in his way of looking at the evidence relating to this issue, and I think there is certainly evidence on which a jury might reasonably find, as the jury have found upon this issue, and such being the case, we cannot, according to the latest authorities on the subject, disturb the finding.

Then there being a statutory duty resting upon the defendants to have the space in question filled or packed; the accident having occurred by reason of this duty having been neglected—See the second finding—the plaintiff being a person within the meaning of the words, "any person injured thereby" in the 289th section, and not being guilty of contributory negligence, I do not see that his case at the present time would be any better or stronger if the other reading were given to the latter part of the answer to the first question—namely, that he should have been notified by the defendants, and I do not see how we are to disturb the verdict the plaintiff has obtained.

It was contended, as I understood the argument, that the plaintiff had voluntarily undertaken the whole risk at the time and place of the accident, and that his case fell under the maxim *volenti non fit injuria*, counsel seeking to separate this means of defence from the issue raised upon the question of contributory negligence, as was apparently done in *Thomas* v. *Quartermain*, 18 Q. B. D. 685. This was not set up in the pleadings as a defence, although contributory negligence is set up.

Judgment. Ferguson, J.

Under the former law of pleading, it was not necessary that a defendant should set up contributory negligence, or perhaps the other, if he chose to rely upon it. The whole would be involved probably in the issue raised upon the plea "not guilty"; for the plaintiff, there being only that plea upon the record, would have to make out that the injury occurred to him by reason of the negligence of the defendants; or to put it otherwise, that the negligence of the defendants was the proximate cause of the injury of which he complained; and if on the evidence it appeared that he himself had partly or wholly caused the injury, he could not succeed unless in case, where, notwithstanding some neglect by the plaintiff, the defendants might, by the exercise of reasonable care have avoided the accident, as in the case of *Tuff* v. *Warman*, 21 C. B. N. S. 740 and many subsequent cases. But under the present law of pleading, the parties are to state the facts upon which they respectively rely; and it may be questioned, when the defendants seek to separate this as a defence from contributory negligence, which they have set up, whether they are at liberty to do so without a pleading on the subject.

Apart, altogether, however, from any question of pleading, it appears to me that the defendants cannot and do not make out their contention in this respect. Whether or not the plaintiff did voluntarily undertake the whole risk is a question of fact. It is to be borne in mind that the jury have found that the plaintiff did not in fact know that the space or frog in question was not packed; and the most that can be said against the plaintiff on the finding upon this immediate question is, that notice of the fact should be imputed to him.

The question as to the kind of knowledge of the danger necessary to found this defence, is referred to and discussed in the case of *Thomas* v. *Quartermain*, 18 Q. B. D. 685, the learned Judges employing various forms of words in so doing, but I see nothing in that case or in any other authority to lead to the opinion or conclusion that the risk

Judgment.

Ferguson, J.

can be voluntarily undertaken or encountered by one who does not at the time, in fact, know of the danger.

It is laid down, as I understand it, that the knowledge on the part of the plaintiff, which will prevent him from alleging negligence against a defendant, must be a knowledge under such circumstances as leads necessarily to the conclusion that the whole risk was voluntarily incurred or encountered by him; and I am wholly unable to see how this can be the case where there is only imputed knowledge, if even so much as this, and not knowledge in fact of the danger.

In addition to what I have said, I agree with the view of the evidence taken by the Chancellor bearing upon this element of this case; and I am of the opinion that it has not been shown that there is in fact ground for this defence; and besides it was not left to the jury, and there is no finding upon the subject.

I do not know that any thing was urged against the amount of damages awarded by the jury, and I am of the opinion that the verdict and the judgment entered thereon should be sustained.

G. A. B.

[CHANCERY DIVISION.]

RE J. T. SMITH'S TRUSTS, NO. 2.

Trusts and trustees—Moneys in Court—Application to pay out to trustees—Trustee company—Party entitled to income—Retention in Court—Remainderman.

On an application by a Trustee Company, and a party who was entitled for life to the income of a fund in Court, which was the proceeds of the sale of certain settled estates, for the payment out of the fund for the purpose of investment by the Company as trustees, (they having been appointed the trustees under the will which devised the settled estates), which application was opposed by the official guardian on behalf of the remainderman:—

Held, that the practice and current of authority were against what was asked by the petitioners, and that they were not entitled to it as a matter of right, and that the application must be dismissed.

Statement.

THIS was a petition by the Trusts Corporation of Ontario and Mary Hannah Holland for the payment out of Court of certain moneys, being the proceeds of the sale of certain settled estates, to the annual income of which Mrs. Holland was entitled under the will of one John Thomas Smith.

The petition set out the making of the will devising the lands in question to certain named trustees, who had resigned, and in whose place the Trusts Corporation of Ontario had been appointed; the sale of the lands; the payment of the proceeds into Court; and that Mary Hannah Holland was entitled to the interest thereof during her life, with remainder to her son John Burton Holland, who was about fourteen years of age, and failing him to the residuary devisees: and asked for the payment out of the moneys to the company as trustees for investment; alleging that Mary Hannah Holland and her son were solely dependent upon the income of the said moneys for their support, and that the said moneys if so paid out could be invested at a much higher rate of interest than three and a half per cent. which she was advised was all she could obtain from the Court.

The petition was argued on November 27th, 1889 before BOYD, C.

Argument.

Arnoldi, for the petitioner. The fund is the proceeds of the sale of certain settled estates. The income and an allowance for the child have been paid out from time to time to Mrs. Holland under an order of Court. The Trusts Corporation of Ontario are now the duly appointed trustees. The life tenant and trustees join in the application for the fund to be paid out of Court. [BOYD, C.—For what purpose?] To hold under the trusts of the will. The sale of the lands makes no difference in the trusts except that money is substituted for the land: Morgan and Chute's Chancery Acts and Orders 4th ed., p. 247 secs. 23 and 24. This company is such a trustee as the Court approves of.

J. Hoskin, Q. C., official guardian, for the remainderman. The application should be refused. It is made by the tenant for life who gets the benefit at the expense of the remainderman. If any loss happens it would fall on him, and he is not benefited by any increased rate of interest the trustees might get: *Kingsmill* v. *Miller*, 15 Gr. 171.

Arnoldi, in reply. *Kingsmill* v. *Miller*, was decided before there were any trustee companies authorized by the Government to act, and was to meet the case of individual trustees. The money is virtually impounded, when the parties entitled are competent to manage it. By being retained in Court it is being taxed to support the Accountant's office: R. S. O. ch. 44, sec. 138; and if invested on mortgage would be still further taxed under the existing arrangement with the Toronto General Trusts Company: so that the life tenant, who is a widow, and her child, and whose sole means of support is the income of this fund, are taxed the difference between three and one half per cent. interest and six or six and one half per cent. interest, which it is alleged could be obtained if the fund was paid out to the trustees, who are a company recognized by the Ontario Government by charter to act as trustees. There is no law against the payment out.

[BOYD, C.—I think the practice that has obtained is different; but if there is no law against it, the fund will be paid out.]

December 6th, 1889.—BOYD, C.:—

Judgment.

Boyd, C.

The fund in Court is held for the benefit of the applicant, Mrs. Holland, during her life, and thereafter for the infant (now 15) if he survives her. The present trustees and the life-tenant unite in this application for payment out of the *corpus* of the fund, not appealing to the discretion of the Court, but asserting the right as legal owners.

The Official Guardian, representing the remainderman, opposes the petition. The money is rightly in Court as proceeds of settled estates, and it has been administered by the Court for some years. No case was cited for the petitioners, and it seems to me that both the practice of the Court and the current of authority are against what is asked.

The Governesses' Benevolent Institute v. *Rusbridger*, 18 Beav. 467 (1854), was a case where the plaintiff entitled contingently in remainder, applied to have the trust fund brought into Court against the wish of the trustees, who had personally promised the testator to fulfil their trust, and against whom there was no imputation. Romilly, M. R., at p. 469, said: "I am sure that the Court has always acted on this principle: that the *cestui que trust* is entitled to have the trust fund secured by the decree of the Court. I think myself bound, *ex debito justitiæ*, to order the fund into Court, but I never saw a case in which there was less danger."

In *Bartlett* v. *Bartlett*, 4 Ha. 631 (1845), stock was ordered by Wigram, V. C. to be paid into Court on the application of persons contingently entitled, notwithstanding that all parties entitled to vested interests were satisfied with the conduct and custody of the trustees and opposed the application. This was cited to and followed by Kindersley, V. C., in *Marryat* v. *Marryat*, 23 L. J. Ch. 876; he read the case as holding that any person having an interest in a trust fund however remote, was at liberty to come to the Court and say what amounts to this: that the trustees shall be displaced from their duties, and the

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Boyd, C.

fund shall be taken out of their hands and paid into Court, and this without any imputation or suggestion of improper conduct on the part of the trustees.

James, V. C. approved of *Marryat* v. *Marryat*, and the Vice-Chancellor's reading of *Bartlett* v. *Bartlett*, in *Bromley* v. *Kelly*, 39 L. J. Ch. 274.

To the same effect Wood, V. C., in *Hammond* v. *Walker*, 3 Jur. N. S. 686 (1857); and in *Robertson* v *Scott*, 14 L. T. N. S. 187, Stuart, V. C., said: "As far as I know, it is the invariable practice of the Court, in suits for the administration of trust property, to order the money, upon the application of the parties beneficially interested, to be paid into Court."

These cases suffice to shew the foundation upon which rest the leading cases on the subject in our Courts, viz.: *Mitchell* v. *Richey*, 13 Gr. 445, and *Kingsmill* v. *Miller*, 15 Gr. 171, wherein the principle was laid down, which has since regulated the practice of the Court: that in consequence of the danger to which the fortunes of infants are often exposed in private hands, the Court in the administration of an estate takes charge of the share going to infants, and invests the same for their benefit, instead of the amount being left in the hands of a trustee. See also *Stileman* v. *Campbell*, 13 Gr. 354.

I observe a disposition in a reported case, decided by Hall, V. C., *In re Braithwaite* v. *Wallis*, 21 Ch. D. 121, to relax the strict rule in the case of adult *cestuis que trust* in England; but that does not argue that infants are not still to be protected to the best ability of the Court.

None of the English cases I have referred to were cited before Hall, V. C., so that, as a decision its value is greatly impaired. However, it does not touch the point I now deal with in dismissing this application.

An order has already been made in this matter in 1883, providing for the investment of the fund. That contemplates supervision being still exercised by the Court over the investments, and the making of the usual deduction from the yearly interest as a contribution towards the

Judgment.
Boyd, C.

expenses of the Accountant's office, which are charged upon the moneys in Court by the statute, R. S. O. ch. 44, sec. 138.

In making sale of this land the Court did not act in pursuance of section 23 of the Settled Estates Act of 1856, as the time had not come for the application of (and it was not deemed advisable to apply) the money as therein mentioned; but the direction was given to invest by analogy to section 25 of the same Act: *In re Thorold's Settled Estate*, L. R. 14 Eq. 31, and *In re Taddy's Settled Estate*, L. R. 16 Eq. 532; *Wall* v. *Hall*, 11 W. R. 298.

No sufficient reason appears for rescinding the order of 1883, and handing over the trust funds to the applicants: and I do not see that they are entitled to them as a matter of right. There will therefore be no order on this petition.

G. A. B.

[CHANCERY DIVISION.]

WORTS V. WORTS.

Will—Construction—Continuing business—Investment of trust funds—"Securities"—Conversion of testator's business into a joint stock company—Reserve fund of surplus profits—Capital or income—Tenant for life and remainderman—Breach of trust.

A testator, by his will, devised all his property to trustees upon trust, after providing for certain annuities, to accumulate the income of the residue for ten years, and then to hold the estate for the benefit of his sons and daughters as therein mentioned, or in the case of a son or daughter who might be dead, to hold the share of such son or daughter according to the provisions of his or her will, and in default of any such will, for any children, him or her surviving, and if no such child, then over. He also empowered his trustees to make advances to his sons and daughters, or any children of his sons and daughters, as they might deem advisable, out of the income of the share of such son or daughter or child, and authorized them to invest the moneys of the estate in such securities as they should think proper, and to continue any business he might be engaged in at the time of his decease, for one year after his death.

At the time of his decease the testator was a partner in a firm of distillers. A few months after his death, the surviving partner and the representatives of his estate turned the business into a joint stock company, the testator's share of the assets of the partnership, with the assent of all his children, being valued and put in as so much stock. According to the fundamental agreement entered into by the corporators, a large share of the profits of the company were annually accumulated as a reserve fund. After a period of seven years, the interest of the estate of the testator in the company was bought out by the surviving partner at a large advance, based upon the amount of profits so accumulated in the reserve fund, with an allowance for the prospective amount of such profits in future years:—

Held, that the above employment of the funds of the estate was technically a breach of trust, and an improper investment under the terms of the will.

"Investment" is not a proper term as to moneys in trade; and "security" means such security as binds lands or something to be answerable for it.

Held, however, that the reserve of profits derived from the user and increase of the capital, was, properly regarded, income, out of which or out of that part of the purchase money which represented the same, advances might be made by the trustees, under the will.

Distinction between this case, and one between tenants for life and remaindermen, pointed out.

Statement. THIS was an action for the construction of the will of James Gooderham Worts, and was brought by the executors and trustees of the will, the defendants, being the beneficiaries thereunder.

The testator died on June 20th, 1882, and the will and codicils thereto were dated respectively January 11th,

1878 ; September 27th, 1880 ; November 14th, 1881 ; May 4th, 1882 ; and May 22nd, 1882. Statement

By his will the testator, after making a certain specific devise, devised and bequeathed all the residue of his estate real and personal to the plaintiffs upon trust, after payment of certain legacies :

4th. To pay to each one of my sons and daughters who shall attain the age of twenty-one years, or be married $5,000 per year (payable quarterly without power of alienation or anticipation) for the period of ten years after my death. The children of any of my sons or daughters who may die in my lifetime, or under the age of twenty-one years, to stand in their parents' place with respect to the said annuity. The payment of the said annuity to date from my death.

5th. The residue of the income arising from my said estate to increase and accumulate for the said period of ten years.

6th. At the end of the said period of ten years to pay over to each of my said sons, if then alive, the seventh part or share of my estate as such share then exists, (excepting $50,000 to be retained as set out in the following clause), and if my said sons, or either of them be then dead, then to hold such part or share of the son so dead according to the provisions of the will of such son, and in default of any such will then in equal proportions for any children he may have left, if more than one, to such children, if only one, to such child, the issue of any who may be dead to take the share of the deceased parent. But if either of my said sons shall be dead as aforesaid, leaving no issue him surviving, then such his share shall be divided equally among his brothers and sisters then living and the descendants of any who may be dead, *per stirpes*.

* * * * * * *

8th. At the end of said period of ten years to pay over quarterly without power of alienation or anticipation to each of my daughters, if then alive, the income arising from the one-seventh part or share of my said estate as such share then exists for the period of the natural life of each of my daughters, and to hold the principal of such part or share of each daughter respectively subject to the provisions of the will of such daughter, and in default of such will, then (subject to the provisions of the next clause hereof) in equal shares for the children of such daughter, etc.

* * * * * * *

11th. I empower my trustees to make advances from time to time to either of my sons or daughters or the child or children of any son or daughter as they, my trustees, in their discretion may deem advisable out of the principal or increase of the share of such son or daughter, child or children.

* * * * * * *

I authorize my trustees to invest the moneys of my estate in such securities as they shall think proper, and to alter, change, and vary the same

Statement. from time to time as to them shall seem desirable, with power to retain any investments existing at my death so long as they shall see fit.

* * * * * * *

I authorize my executors to continue any business in which I may be engaged at the time of my decease for one year after my decease if they see fit.

In the third codicil of his will the testator provided as follows :

3rd. I declare that the power to make advances in the 11th clause of my will shall be limited to income only, and there shall be no power to make any such advance out of principal.

The Statement of claim set out the facts, so far as material to this report, as follows :

9th. That on or about the first day of August, 1882, the plaintiffs invested a large sum of money of the assets of the estate of the testator in the stock of the incorporated company known as "Gooderham & Worts, Limited," and have received annually large dividends from the said stock as part of the profits of the said investment, the balance of the said profits being placed to the credit of the reserve account mentioned in the agreement referred to in the succeeding paragraph, the amount so placed being greatly in excess of that called for under the terms of the said agreement.

10th. That at the time the said investment was made, an agreement was entered into between the plaintiffs and George Gooderham, surviving partner of the firm of Gooderham & Worts, a firm composed of the said testator and the said George Gooderham, which agreement bears date the first day of August, A.D. 1882, and more particularly sets forth the facts relating to the said investment and the said reserve account.

11th. That at the time the said agreement was entered into, it was the intention of the plaintiffs as well as of the sons and daughters of the testator, that all the increase or profits which should accrue in respect of the amount so invested should be treated as income and not capital, and at the time of the placing of the different amounts annually to the credit of the said reserve account it was never supposed or intended that such payments should be credited to capital.

12th. That on or about the thirteenth day of April, A.D. 1889, the plaintiffs entered into an agreement with the said George Gooderham by which in consideration of a sum largely in excess of that originally invested by the plaintiffs, they transferred and assigned to the said George Gooderham all their interest in the said business of "Gooderham & Worts, Limited," which agreement may be referred to upon the hearing, and the sum so agreed upon was arrived at by computing the accumulated surplus income carried to the credit of the reserve fund and estimating the further accumulations likely to arise during the remainder of the period covered by the agreement of the first day of August, A.D. 1882, subject to a discount at the rate of five per centum per annum and adding the sums so

ascertained to the amount of the original investment in the stock of "Gooderham & Worts, Limited."

Statement.

13th. That doubts exist as to whether the difference between the amount of capital invested in the stock of "Gooderham & Worts, Limited," in the ninth paragraph hereof referred to, and the price received from the said George Gooderham as hereinbefore mentioned should be treated by the plaintiffs as income or capital of the said estate.

14th. That doubts also exist as to whether the increase in value of such of the stocks as were held by the said testator at the time of his decease and which are now held by the plaintiffs should be credited to capital or income.

15th. That the said Thomas Frederick Worts and Alice Rebecca Cox (*a*) above referred to during and prior to the year 1888 became heavily involved to divers parties as the makers and endorsers of negotiable paper, which said paper was made largely for the accommodation of one Edward Strachan Cox, the husband of Alice Rebecca Cox, and the total amount of such indebtedness amounts to a sum exceeding $300,000.

16th. That the said Alice Rebecca Cox and Thomas Frederick Worts having made arrangements with their creditors for a compromise of their respective claims have made an application to the plaintiffs for an advance from the income of their respective shares in the testator's estate, sufficient to pay the amount of such composition and also for their solicitor's costs and charges relating to the contestation and adjustment of the different claims made against the said parties and the settlement of their affairs.

17th. That whilst the plaintiffs are of opinion that the purposes for which the said advances are required are eminently proper, and that it is in the interest of the said parties that such advances should be made, still, before making such advances, the plaintiffs are desirous of ascertaining whether they are authorized to make the same and whether the purposes to which the said advances are to be applied are such as the Court will approve of.

The plaintiffs claim :

1st. That the said will and codicils may be construed, and the position and powers of the plaintiffs and the rights of the parties respecting the matters above mentioned declared and defined.

2nd. That it be declared whether the difference between the amount originally invested by the plaintiffs in "Gooderham & Worts, Limited," and the amount received upon the sale of the interest of the estate in the said company to George Gooderham is capital or income, and also whether the increase in the value of the Bank and Building Society stocks hereinbefore mentioned should be credited to capital or income account.

3rd. That it be declared whether the plaintiffs are empowered to make the advances to the said Thomas Frederick Worts and Alice Rebecca Cox for the purposes hereinbefore stated and whether the purposes to which

(*a*) These were a son and a daughter of the testator.

Statement.

the said advances are to be applied are such that the Court would sanction and approve.

4th. That the costs of all parties may be paid out of the estate of the said testator.

5th. That the plaintiffs may have such further and other relief as the nature of the case may require.

The matter came up for argument on motion for judgment on October 10th, 1889.

Moss, Q. C., and *T. P. Galt*, for the plaintiffs.

The question is, whether the difference between the original investment and the sum paid by Mr. Gooderham, which is largely in excess of that original investment, should be treated as capital or income; in other words, are the accumulations beyond what the trustees received from time to time in the shape of dividends, to be treated as capital or income?

The children of the testator contend this sum is income, —the grandchildren of the testator contend it is capital. [BOYD, C.—The accrued profits of the business during these years is the fund in question].

Robinson, Q. C., for Mrs. Cox, and Mr. Frederick Worts so far as he desired the advance. The sole question is, is this fund consisting of the increase between what is put into the business and what George Gooderham paid, to be considered capital or income? The reserve fund consists of what had accumulated up to the purchase money, and what went to increase the purchase money. I don't know that there can be any distinction in principle between the two sums. There is much authority on this question, but *Bouch* v. *Sproule*, 12 App. Cas. 385, is probably the only case needing careful consideration here. By far the larger number of the cases decided are questions of the effect of what a company, whose shares have been taken by a testator, has done. In cases of that kind the tenant for life and the remainderman are bound by what the company chooses to do. Persons taking shares in a company are

Argument.

subject to what the company chooses to do,—they are entitled only to such dividends as the directors choose to declare. If they give it out as dividend it goes to the tenant for life. But here the question is different, namely, what the parties have agreed shall be done. We say the argument is unanswerable in favour of the money being income. The trustees made the investment, and it is part of the case that all who made the agreement intended this should be income. So here the question is not what the company have done, but what the parties intended, unless there is something to prevent this being carried out. The agreement says a reserve fund is to be formed out of the profits. Now profits are *primâ facie* income. Is there anything to make this capital? What was done cannot affect the character of the fund. In some of the cases the question has turned on whether the company had power to increase their capital. Here the company had in a certain prescribed way, power to increase their capital, but they never did increase it. If the agreement has not changed the profits into capital, what has done so? Morawetz on Private Corporations, 2nd ed. s. 465-472, discusses the whole question so far as it depends on American authority in cases where the turning point is, what has the company done. This case depends, however, on what the parties interested have themselves agreed to.

Lash, Q. C., for others in the same interest. This company had power to increase its capital not only under the Joint Stock Company Act, but also by calling in unpaid shares. The profits now in question arose after the decease of the testator; they are not the result of any accumulation of profits in his lifetime. The intention of all parties was, that the reserve fund should be something between the capital and the trustees,—which should prevent the capital being jeopardised,—not that it should be capital itself. In *Bouch* v. *Sproule*, 12 App. Cas. 385, the judgment of Lord Herschell suggests a distinction existing between this case and one where the question arises as to a bonus, the result of accumulations which may have

Argument.

been going on for years before the testator's decease. Again, another distinction turns upon the easy method this company had of increasing its capital had it wished to do so. Here, moreover, there is no evidence of the company intending to make this reserve fund into capital.

McCarthy, Q. C., for the infants. The intention of the parties to this agreement, especially where it is sought to be made out by evidence outside the agreement, ought not in a case like this, where infants are concerned to have any effect. The trustees were not authorized to carry on the business for more than a year. Lewin on Trusts, 8th ed., p. 319, seems to show that as an investment this would not have been justified. The trustees put the fund nevertheless into a trading business. They were really speculating in the business, and under the general rule profits should accrue to those who were the owners of the fund: *Re Hill*, 50 L. J. N. S. 551. Being a breach of trust, the tenants for life could not obtain an advantage. Apart from that, however, in this case regard being had to the agreement and the position of the parties, this reserve fund was, as a matter of fact, treated as capital. The reserve fund was put aside to replace the corpus, if anything impaired the corpus,—in such case it would become corpus. If it was profit this could not be so. [BOYD, C.—I understand it was to prevent capital being impeached. If the building was burnt, for instance, it would be replaced out of this fund]. Yes. How then can it be said that it should not be regarded as capital? Then, with this fund in existence, if shares had been put on the market they would have had a higher value. This is illustrated by the very case of *Bouch* v. *Sproule*, 12 App. Cas. 385. The ordinary rule seems to be, if the company have dealt with it in a certain way, that must govern the parties. The other side concede this in a way. The concern has been going on for seven years, during all which time the directors have set apart so much as profits and put the rest back. What they might have done hereafter we cannot tell. What they have done has made it part of the corpus. *Straker* v.

Wilson, L. R. 6 Ch. 503, is a stronger case than ours, and it was held that the moneys there in question went to the parties in remainder. Argument.

Creelman, for the adult grandchildren, in the same interest as the infants. There are two facts to be called attention to: In the agreement of April 30th, 1889, by which the sale to Mr. Gooderham took place—the offer of the purchaser shews that the whole was treated as capital. The purchase is for seven-eighteenths of the capital stock, —because Mr. Gooderham evidently looked at it as capital of Gooderham & Worts. [BOYD, C.—The other was an accretion]. Yes. Then the mortgage to secure it also indicates the intention of the parties to treat this as capital.

Robinson, in reply. The point as to breach of trust is a new one. The sons here, however, are not tenants for life as to half of the estate. Only the daughters are life tenants. In the will there are very unlimited powers of investment. Moreover, here no new moneys were invested in this business. The trustees here retained the investment, but did not continue the business; they retained the investment and formed a joint stock company to which they turned over the whole business. They only retained the money which was in the business, taking a certain amount of stock in the new company. Whether we should consider they retained the investment, or should be said more properly to have made the investment in the shares of the company, seems immaterial. In one sense they retained the money in the business, in another they invested the money in the business. We say both the retention and the investment were authorized. We say there is here no breach of trust. Now the argument of the other side on the other point must go to this, that wherever you make a reserve fund of profits which may some day be resorted to to make good impaired capital, there the profits were always capital. If so it would prevent one ever forming a reserve fund out of profits,— the object of which is as a rule to equalise profits, and so make a certain yearly income safe. Supposing the re-

Argument. maindermen were entire strangers, it would be out of all reason to argue that by the agreement the parties made as to a certain share of their profits, they were to lose these profits for themselves and their families forever.

October 14th, 1889. BOYD, C.:—

The testator was, at his death, a partner in the firm of Gooderham & Worts. His will authorized the executors to continue that business for one year after his death if they saw fit. It was continued for a few months and then a corporation was formed by the surviving partner and the representatives of the estate and others whereby the same partnership was continued as a joint stock company. The assets of the testator were valued and put in as so much stock. The business in this shape was prosecuted for seven years when the interest of the estate was bought out at a large advance by the surviving partner. This employment of the funds was with the assent of all the children of the testator. I have little doubt that technically there was a breach of trust, and that this user of the moneys in the business was an improper investment under the terms of the will. The will authorizes the trustees "to invest in such securities as they shall think proper . . with power to retain any investments existing at his death as long as they shall see fit." This latter clause does not mean the prosecution of the business he was engaged in, for at the longest that was to end in a year. Neither does it justify any change of form such as made here, whereby a partnership was superseded by a company of limited liability, and the "trustees acted therein instead of the executors." This was not *retaining* the moneys in the shape left by the testator; nor was it retaining any *investment* existing at the time of his death. For *investment* is not a proper term as to moneys in trade, and the testator has not used it in any popular sense, because he speaks of investing in connection with securities and does not regard his business as an investment. Coming then to

the direction to invest in such securities as the trustees shall think proper—that does not justify the putting of the estate into personal security much less into a trading concern : *Pocock* v. *Peddington*, 5 Ves. 794 ; *Wilkes* v. *Steward*, G. Coop. 6. There was no "security" at all taken in this case : that means some such security as binds lands or something to be answerable for it : *Ryder* v. *Bickerton*, 3 Swan. 80, n. ; *Harris* v. *Harris*, 29 Beav. 107. But it does not follow (because there was a breach of trust) that the capital of the testator's estate should be increased out of the reserve fund in question. That aspect of the case might arise if this property was to go between tenants for life and remaindermen. But such is not the relation of parties now contending before me. The grandchildren of the testator are not entitled in remainder unless the parents die intestate as to this estate. The owners of the whole estate practically, at present, are the parents who have all acquiesced in this employment of the assets. No one has a status to complain of what was done, and to insist that only a portion of the profits should go to the life estate and the remainder be capitalized. Therefore, I hold that the matter falls to be disposed of in the same way, breach or no breach of trust.

Judgment. Boyd, C.

Eliminating this part of the transaction, how stands the reserve fund ? The fundamental agreement between the corporators of the Gooderham & Worts company provides that a reserve fund shall be formed and kept up out of the profits of the said company in manner as specified (*a*). Mr. Beatty, in the evidence before me, said in effect that this was a fund intended to stand not as capital but as a sort of protection against capital being impeached by any contingencies (*b*). No such contingency arose—the fund has

(*a*) The words of the fundamental agreement referred to were as follows : "A reserve fund shall be formed, and kept up out of the profits of the said company ; and in order to form the same a sum shall be carried to the credit of such reserve fund in every year out of the net profits of that year, but not exceeding thirty-three per cent. of such net profits, until such funds amount to two hundred thousand dollars, and thereafter not to exceed twenty-five per cent. of the annual net profits.

(*b*) Mr. Beatty was examined orally during the course of the argument.

Judgment.

Boyd, C.

increased and forms a large part of the value of what has been purchased by Mr. Gooderham.

Regard must be had to the directions of the testator in order to determine the character of this reserve fund. After providing for certain payments and annuities out of income, the testator directs the residue of income to increase and accumulate for ten years—a period still current. When the ten years is up, the whole accumulated estate, principal and interest, or increase, will form a new blended fund, which is to be dealt with and divided as capital. That is to say, part of it will be shared so as to go absolutely to the sons, and part of it will form a new interest-bearing fund, the income of which is to go to the sons and daughters for life, remainder to be at their disposal by will, otherwise to go as the testator has directed, among the grandchildren.

The testator, however, during the ten years contemplates advances being made out of the income of the share of each child, and this can only be managed by keeping separate the share of each and the interest or income accruing from it, so that during the ten years it may appear what income is attributable to the share of each child.

The judgment already given by me, and which I cannot reverse, has affirmed that advances may be made out of the whole residue of the income accrued since the death of the testator, and need not be confined to advances out of income accrued during the year in which the advances are made (*a*).

The trustees were not required by the will to capitalize

(*a*) This was a judgment given on June 11th, 1886, in another action for construction of the same will, which declared that according to the true construction of the will: "The plaintiffs" (sc. the trustees) "have an absolute discretion to make advances from time to time under the eleventh clause of the said will, as limited by the third codicil without enquiry, and without being informed as to the purposes for which such advances may be asked. (*b*) That such advances may be made out of the whole residue of the income accrued since the testator's death, and need not be confined to advances out of the income accrued during the year in which such advances are made."

Judgment.

Boyd, C.

the yearly income nor were they obliged to do so as the result of going into trade. The parties might all have agreed to capitalize, but their intention was otherwise as to the reserve fund. If the decision of the point rested merely upon the conduct of the corporate business and not upon the provisions of the will, I should not regard what has occurred as sufficient to change the accumulation of yearly profits in the reserve from income to capital. There must be some decisive act or course of dealing to indicate that such a change has been made. The mere fact that moneys were taken from the undivided profits and carried to a reserve fund is not equivalent to their capitalization: per Lord Watson in 12 App. Cas., at p. 402, nor does it appear that the reserve was so expended in the repair and maintenance of the works and plant as to make it to all intents and purposes capital stock in the concern. This was the turning point in *Straker* v. *Wilson*, 6 Ch. Ap. 503, which led Lord Hatherley to reverse James, V. C., whose judgment is very pertinent to the circumstances of this case.

I regard it as the duty of the trustees under the will to keep the capital and income separate during the ten years for the purpose of advancement, if in their discretion advancement is in any case proper. These profits have been practically kept separate by being segregated in a reserve fund which is readily ascertainable.

I now declare this reserve, derived from the user and increase of capital, to be income out of which advances may be made by the trustees.

The costs will be borne by the estate.

I may mention that evidence was tendered as to the wishes of the testator respecting the business of Gooderham & Worts, which I considered not material (even if admissible), having regard to the opinion I have now expressed upon the whole case before me.

A. H. F. L.

[CHANCERY DIVISION.]

FRANK v. THE CORPORATION OF THE TOWNSHIP OF HARWICH.

Way—Road along lake shore—User and dedication—Evidence of—Break in road.

Uninterrupted user by the public, for seventy years, of a roadway along the edge of an unoccupied and uninclosed farm bordering on a lake, upon a sandy beach formed there by the waters of the lake, and the course of which roadway was slightly varied from time to time by the rise and fall of the waters of the lake, is sufficient evidence of dedication of a right of way, and the breaking through of a small inland lake by which the road was cut across and a navigable channel created was held not to deprive it of its character of a highway.

Statement. THIS was an appeal from the judgment of FALCONBRIDGE, J., in an action brought by Thomas Frank against the Corporation of the Township of Harwich, to restrain the defendants from tearing down fences and trespassing on a part of the plaintiff's property, being lots 1, 2, E, and F, along the shore of Lake Erie, which the defendants claimed had by user become a public highway.

The action was tried at Chatham, on September 20th and 21st, 1888.

C. R. Atkinson, Q. C., and *T. Macbeth*, for the plaintiff.
Matthew Wilson and *J. B. Rankin*, for the defendants.

February 19th, 1889. FALCONBRIDGE, J.:—

The plaintiff is the owner of a farm in Harwich, being parts of lots 1 and 2, E, and F, in the 4th concession west of the Communication Road, described in the pleadings by metes and bounds as having 110 chains frontage on the edge of the waters of Lake Erie.

The defendants have been for some time claiming that there is a public highway going across the plaintiff's farm from east to west, near the water's edge of Lake Erie, and the defendants in 1886 and 1887, threw down a portion of the plaintiff's fence and attempted to make a roadway.

Judgment.

Falconbridge, J.

The plaintiff brings his action claiming damages and an injunction.

The defendants, by their statement of defence say: (1) that a highway known as the Lake shore or sandbank road running across the southerly end of the township of Harwich, and extending into the adjoining townships, was dedicated many years ago and has since been used by the public as a common highway, etc.; (2) That the plaintiff became owner of his land with full knowledge of the existence of said highway and long after the same was established, and the plaintiff and prior owners of the land have acquiesced therein; (3) That prior to the plaintiff's ownership of the land and while said highway was being used as such by the public, etc., the defendants with the knowledge and consent of the then owner of said land, laid out and opened other public highways into said Lake Shore road: one of which was made over a portion of said land, and defendants in so doing expended a large amount of money: and plaintiff ought to be estopped from now denying the existence of the Lake Shore road; (4) The Lake Shore road seldom required repairs, but public money was expended thereon, and statute labour usually and from time to time performed thereon, and when plaintiff erected a fence and denied the existence of a highway, the defendants as caretakers, liable for repairs, threw down such fence, so as to keep the highway open for public use and travel, and this is the wrong complained of.

The lands in question together with lots C and D in the third concession were patented to David Cowan in 1804. Lots C and D lie between plaintiff's land and the Rond Eau which is known in the early surveys as "Lac à la Pointe au Pins."

The description in the patent is as follows:

"All that parcel or tract of land situate in the township of Harwich in the county of Kent in the western district in our said Province, containing by admeasurement 1100 acres with allowances for road, be the same more or less, being lots lettered C and D in the third concession, lots lettered E and F and lots numbered 1 and 2 west of the Communication road from Lake Erie to Chatham, together with all the woods and waters thereon lying and being under the reservations, limitations, and conditions hereinafter expressed; which said 1100 acres are butted and bounded or may be otherwise known as follows, that is to say: commencing in the little lake, within

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Falconbridge, J.

Pointe aux Pins, in front of the third concession, and at the S. E. angle of said lot lettered C, then along the front of the said third concession, N. 58° 5′ W. 74 ch. more or less, to the limit between the said lot C and No. 3, then S. 31° 55′ W. 124 ch. more or less to Lake Erie, then easterly along the water's edge to the outlet of the little lake, then northerly and easterly along the water's edge of the said little lake to the place of beginning."

About forty witnesses were examined *viva voce* and the evidence of many old men, taken *de bene esse*, was read.

Although there was much contradiction, I think the weight of evidence is in favour of the defendants. There has been a user by the public both for purposes of sport and business for about seventy years, with some interruptions not acquiesced in by the public and not sufficient to divest their right. Agents of owners were on the land and must have known it was used as a highway—indeed, Hall, whose father was an agent for John Frank, speaks of work done on the road by him some years ago, which work he charged as his road work, and the witness says John Frank was over the place when the work was done. There was other evidence of road work.

Piers were built at the western outlet of the Rond Eau in 1846 and rebuilt in 1871. The effect was to break the line of communication round the shore. Passengers would have to cross at the piers in boats. This made the road a *cul de sac* but did not deprive it of its character as a highway, the other end being still open.

Judgment dismissing the action with costs.

From this judgment the plaintiff appealed to the Divisional Court, and the appeal was argued on September 7th and 8th, 1889, before BOYD, C., and PROUDFOOT, J.

Moss, Q.C., and *Macbeth*, for the appeal. The evidence shews that there was no express dedication of any road along the front of the plaintiff's farm, and no dedication could be implied, because the owners (who reside in another county) had no knowledge of the alleged user by the public. User alone does not prove dedication: there must be *animus dedicandi*. The whole place was open, unfenced and unoccupied until the year 1883. This part of the township, until recently, was very marshy and wild,

Argument.

and any one crossing it would naturally go along the edge of the lake, where the sand washed by the water made a comparatively hard surface and temporary road; but even that was not permanent, as the action of the water caused this edge of sand or bar to shift its position. There is evidence that there was only one settler there in 1816, and he used to go that way to a mill in the adjoining township. Many years after other settlers came there and drove their cows that way to this unoccupied marsh, and cut and hauled hay therefrom. They merely used the beach as the easiest way to and from the marsh and the lake, without any thought of acquiring any right, and with the exception of people shooting and fishing there, no other use was made of the way to the knowledge of the owners. Under the circumstances it would have been churlish to deny people these privileges, and no dedication could be found from seventy years of such user. There was no evidence that it was used for teams or as a road proper. Even user by casual travellers crossing the township ceased entirely in the year 1846, when the Rond Eau * broke through the bar to the lake, and the government put up two piers, one at each side of the passage broken through: and the piers cut off all road communication at one end, and formed the way claimed into a *cul de sac*. When the defendants first threw down the plaintiff's fence at the entrance of the way on his farm, they claimed no dedicated right of way; but that there was a road reserved there in the patent, or as the councillors say that there was a highway along all navigable waters, and the patent has been produced granting the lots down to the water's edge and reserving no right of way, and any way implied along navigable waters is only for purposes of navigation. The claim by dedication was first put forward after action brought. We refer to Angell on Highways, 3rd. ed., § 151: *Regina* v. *Plynkett*, 21 U. C. R. at 538; *Macpherson* v. *Scottish etc. Society*, 13 App. Cas. 744; *Schwinge* v. *Doel*, 2 F. & F. 845; *Chapman* v. *Cripps*, *ib.* 864; *Trustees of*

* A small inland lake or pond.—Rep.

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the British Museum v. *Finnis*, 5 C. & P. 460; Glenn's Law of Highways, 5; *Adams and the Corporation etc. of East Whitby*, 2 O. R. 473.

Matthew Wilson, contra. No question as to the location of the road or as to its width or the purposes for which it was used is raised by the pleadings. The plaintiff denies our right to any way for any purpose over his land. The public cannot be estopped by any erroneous reason given by the council for the defendants' claim. The Lake Shore Road is a continuous one across several townships from Amherstburg eastward to Morpeth, and in treating the question of dedication we must deal with the whole road and not merely a short portion in an unsettled part of Harwich. Dedication may be implied from thirty years user prior to the construction of the piers, and making this break in 1846 did not deprive the rest of the road of its nature as a highway: "once a highway always a highway." A *cul de sac* may be a highway: *Bailey* v. *Jamieson*, 1 C. P. D. 329, and cases there cited. Moreover this is not a *cul de sac* as the obstructed end abuts on navigable water at the piers, which water is a highway. The evidence shews, and the trial Judge found that *locus in quo* was used by the public as a highway to the knowledge of the owners for the time being, or their agents. The defendants also submit that it is not necessary to trace this knowledge to the owners or shew acquiescence by them to make a *primâ facie* case; and that case is not answered. The burden is on plaintiff. *Powers* v. *Bathurst*, 49 L. J. Ch. 294, and *Regina* v. *Patrie*, therein cited, and *Mytton* v. *Duck*, 26 U. C. R. 61. The defendants thinking there was a highway along the lake shore, opened roads leading to it, one them being across part of plaintiff's land. The circumstances all shew that defendants and the public used the way in question as of right and not with permission. Plaintiff denies the user and does not pretend that permission was given. See *Moore* v. *The Corporation of Esquesing*, 21 C. P. at p. 281; Shirley's Ldg. Cas. 381; *Adams* v. *The Corporation of East Whitby*;

2 O. R. at 476; Angell on Highways, 3rd ed. §§ 142, 145, 148, and 158. The Court should be guarded in finding dedication by user over wild lands, yet it can be inferred and found and should be so found here: *Dunlop* v. *The Township of York*, 16 Gr. 216. Argument.

Macbeth, in reply, referred to *The Grand Hotel Co.* v. *Cross*, 44 U. C. R. 153.

October 8th, 1889. BOYD, C.:—

This case was argued upon the proposition of law that the *locus in quo* being a sandy beach, barren and unenclosed, evidence of dedication should not be inferred from mere length of user by the public, for this citing Angell on Highways, 3rd ed., § 151.

This does not appear to accord with English law. In *The Queen* v. *The Inhabitants of East Mark*, 11 Q. B. 877, Lord Denman said: "If a road has been used by the public between forty and fifty years without objection, am I not to use it, unless I know who has been owner of it? * * I think the public are not bound to inquire whether this or that owner would be more likely to know his rights and to assert them; and that we have gone quite wrong in entering upon such inquiries. Enjoyment for a great length of time ought to be sufficient evidence of dedication, unless the state of the property has been such as to make dedication impossible," p. 882. That was a case arising in respect of the waste lands of a manor. The principle thus laid down was declared to be sound and familiar law in *The Queen* v. *Petrie*, 4 E. & B. at p. 44, and was followed in a late case by Fry, J., decided in 1880, *Powers* v. *Bathurst*, 49 L. J. Ch. 294.

The decisions in the States are not uniform. Some very strong may be found in support of the English view. See *Worrall* v. *Rhoads*, 2 Whart (Pa.) 427, and *Reimer* v. *Stuber*, 20 Pa. St. R. 458.

But the evidence in this case is not confined to acts of user merely; it is shewn that this user was with the

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Boyd, C.

knowledge of and without objection from former owners. The *locus in quo* is part of a long stretch of commonly used roadway forming a lake shore road across several townships. It was very obvious that the early settlers would avail themselves of this firm sandy path provided by nature, made smooth and hard by the action of Lake Erie, and needing no repairs to keep it in order. As the road began by this kind of user so it was kept up in later years, though other proper township roads were afterwards opened up in the interior. It never ceased to be used by the public for purposes of business and recreation, and as a matter of evidence there was plenty from which any tribunal might infer dedication

The road thus used was travelled in the same course, any slight variation being caused only by the rise and fall of the water in the lake, and any interruption of its continuity being for an occasional short period in the spring, when the water would break through the bar; but any opening so made was speedily filled up again with material as firm and compact as ever.

Save for this temporary interruption from natural causes, the occupation and user by the travelling public was uniform and unchallenged from early in the century, until the building of the piers by the government at the Rond Eau in 1846. This cut off communication by the lake shore road between townships to the east and those to the west of this channel. But with that difference, the road in front of the plaintiff's land has been used as before down as far as the piers, to the time when the plaintiff made the interruption out of which this litigation arose.

It was suggested that the effect of this public work was to form the road into a *cul de sac*, but that is not so, inasmuch as the road now terminates at the channel made by the piers, *i.e.*, on navigable waters, which is itself a natural highway.

The evidence given for the defendant has been credited by the trial Judge and as I have said already, it is ample to justify his judgment dismissing the plaintiff's action and

I can find no satisfactory ground upon which to disturb it. It will therefore be affirmed with costs. Judgment. Boyd, C.

PROUDFOOT, J. :—

I have read over all the evidence in this case, and it appears to me to establish that for many years there was a continuous travel and traffic from about the site of Antrim, or of Hills wharf, along the shore of Pointe au Pins, the point forming the Rond Eau, and westward past the land now owned by the plaintiff, and on to Amherstburgh.

The irruption of the lake at the place where the piers and breakwater are now placed interrupted that communication for teams and horses, though it continued to be used by foot passengers. To the west of the piers there has been a continuous, but, owing to the interruption, a less frequent use of the road along the front of the plaintiff's land, not only by pleasure seekers, and hunters and fishers, but also by others. The Rond Eau is a harbour, and from there are shipped wood, and staves, and grain, and goods are imported. A custom house officer resides at Blenheim, and in the performance of his duty he has to visit the harbour, and uses the Lake Shore Road in going and returning. Passing the plaintiff's land, the road is on the sandy beach, varying sometimes in its line during storms when the part nearest the lake is washed by the waves.

It appears that some road work was done by the pathmaster many years ago on the road in front of the plaintiff's place. The plaintiff's father was well aware of this, and paid for it. He knew of the existence of the road. Part of it had been repaired by logs laid in corduroy fashion, and when logs happened to be washed out by the water of the lake they were replaced.

There is varying evidence as to the amount of user of the road, as might be expected, according as the witnesses saw it at different times. One of the witnesses says: "There is that one road to get to the west side of

Judgment. Proudfoot, J.

the piers, either on foot or with a buggy or waggon. There is that one road and that one road only. I have seen hundreds and hundreds of people travel over that road, and dozens and dozens of buggies and double carriages driving along it. People drove on it to draw wood, or logs, or anything."

There was never any interruption of the travel on this road till a fence was placed across it by the plaintiff or by his direction in 1883. The fence was put up by Bisnett, a tenant of the plaintiff, and who owns adjoining land. Before this he had asked Vester, one of the municipal councillors of Harwich to move a resolution granting him the privilege of building a fence across the road to the lake, on the condition that he might put a gate there and allow the people the privilege of passing backwards and forward. No such motion was made. Bisnett put up the fence, people petitioned against it, and the council directed him to remove it. He then petitioned for an extension of time to enable him to do so, saying that if the fence were removed his cattle would get out of his grounds. An extension was given to him. Not having removed it the fence was repeatedly thrown down by direction of the defendants.

Another councillor, Hutchison, gives evidence of Bisnett having applied to the council for leave to put up the fence, which was not granted. Cameron, another councillor, speaks of the application, and thinks he was allowed to put up the fence, if he put a gate at the road and kept a man there: that the fence was built and gate placed, but Bisnett had forbidden people to pass: that complaints were then made.

Bisnett represents the action of the council as having been friendly to him,—that the council wanted to please the persons complaining of the fence, and ordered its removal; and wanted also to please Bisnett, and extended the time for its removal for a year; and he says he was never troubled about it afterwards. Bisnett's lease expired in about a year from this action of the council.

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Proudfoot, J.

But whatever may have been the friendly intentions of the council to Bisnett, they do not seem to have had the same to the plaintiff, as, after Bisnett's lease had expired, the council ordered the fence to be thrown down. It was repeatedly thrown down, and as often replaced by plaintiff's men.

Bisnett denies having applied to the council for leave to put up the fence before he built it.

In 1859 the defendants employed a surveyor to lay out what was known as the Gore road, to connect with the Lake Shore road. The survey was made, and connected with the line between lots 2 and 3, and thence down to the lake. This recognizes the existence of the Lake Shore road by the council thirty years ago, and runs another road to connect with it. Malcolm, the surveyor who made the survey, testifies to its use as a public road from the piers westerly.

Recognizing the difficulty of establishing a right of way by user, since the user is not continuous and may vary at different times, a consideration of all the voluminous evidence in this case satisfies me that for many years (forty or more), there has been such a user of the way in question as to give a right. There is evidence of varying witnesses, but amply sufficient to sustain the judgment, if the learned Judge believed them.

The plaintiff's title is derived from his father's will, under which he took a share, and by purchases from his brothers of their shares, and I think he must be bound by his father's act as well as his own. The evidence above shews that his father was aware of this travelled way and acquiesced in it—though the plaintiff says that at one time his father forbade the council to make the road, which is not very intelligible, as the road was in use long before. The acquiescence of the father in the user of the road, his paying for labour done by the pathmaster on it,—and the plaintiff's knowledge of the user of the road without objection since the death of his father till 1883, amount, I think, to evidence of a dedication.

Judgment.

Proudfoot, J.

A good deal of the argument for the plaintiff seemed to treat the irruption of the lake, and the building of the piers, as an obstruction that put an end to the right to travel on the remainder of the road, that it was like to a *cul de sac*. But there may be a highway on a road or street closed at one end and forming a *cul de sac*. The public have a right to go upon it at their pleasure, and have exercised that right here.

The judgment should be affirmed. See *Souch* v. *East London R. W. Co.*, L. R. 16 Eq. 108.

G. A. B.

[CHANCERY DIVISION.]

ANDERSON ET AL. V. THE SAUGEEN MUTUAL FIRE INSURANCE COMPANY OF MOUNT FOREST.

Fire insurance—R.S.O. ch. 167, sec. 106—Statutory conditions, 12, 13, 22—Mortgagee clause—Time within which and person by whom proofs of loss to be made—Default of mortgagor—Subrogation—Premium note—Sec. 131.

A mortgagor insured his mill against fire with the defendants, the policy being payable on its face, to the extent of one-half, to the mortgagee.

Attached to the policy was a separate slip called a "mortgagee clause," by which it was provided that the insurance, as to the interest of the mortgagee only therein should not be invalidated by any act or neglect of the mortgagor; and, also, that whenever the company should pay the mortgagee any sum for loss under the policy, and should claim that, as to the mortgagor, no liability existed therefor, it should, to the extent of such payment, be subrogated to all the rights of the party to whom such payment should be made.

Proofs of loss were not made by the mortgagor and mortgagee until within sixty days of the end of the year after a fire had occurred; and within sixty days after the proofs were delivered, an action was commenced by the mortgagor and the representatives of the mortgagee:—

Held, (affirming the judgment of BOYD, C., at the trial), that the mortgagee was not bound as "the assured," under statutory condition 12, to make proofs of loss, and that here the person assured, the mortgagor, was the person to make them, under conditions 12 and 13:—

Held, also, that the neglect of the assured to make the proofs of loss in proper time, so that the sixty days thereafter might expire before the termination of the year after the loss, within which an action had to be brought under condition 22, was a neglect from the consequences of which the mortgagee was relieved by the mortgagee clause, and that, as far as he was concerned, the action was not brought too soon:—

Held, also, that the words, "*shall claim* that, as to the mortgagor, no liability exists," in the mortgagee clause, meant "and as to the mortgagor no liability exists," and that, as the policy was valid at the time of the fire, and nothing was shown to have taken place since to render it invalid, there was a liability to the mortgagor: that condition 22 barred the remedy and not the right, and that the defendants were not entitled to subrogation:—

Held, also, that the mortgagor was bound to make the proofs in such time, that the sixty days would elapse before the expiration of the year limited for bringing the action and his remedy as to the other half of the policy was barred.

The defendants claimed the right, under R.S.O. ch. 167, sec. 131, to retain the amount of the premium note given to the mortgagor until the time had expired for which the insurance was made to cover any assessments that might be made thereon:—

Held, that, as against the mortgagee, they were not entitled to retain the amount.

THIS was an appeal and cross-appeal from the judgment of BOYD, C., at the trial. Statement.

Statement.

The action was on a fire insurance policy for $1,000 brought by the insured, a mortgagor, and the personal representatives of a mortgagee of the insured premises: each of whom had brought separate actions which were consolidated, and tried together at Walkerton, on April 11th, 1889.

Shaw, Q. C., appeared for the executors of the mortgagee.

D. Robertson, for the insured, William Wilton.

W. Kingston, for the company.

The facts sufficiently appear in the judgment of FERGUSON, J.

At the trial the learned Chancellor gave the following judgment:

BOYD, C.:—

I think this policy must be divided, as to the $500. I do not see that there is any case precisely governing this present decision, and I formed the opinion as to how that decision should be, not being controlled by any authority on the points.

So far as the $500—one-half of this amount is concerned, which is payable by the terms of the policy to Mr. Present of Guelph, who is mortgagee, I think his representatives have the right to recover it, notwithstanding the defences that have been raised.

Under the clause in the slip which is annexed to the policy, it is recited that, "It being hereby understood and agreed, that this insurance, as to the interest of the mortgagee or trustee only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by the terms of this policy."

Now the matters which are set up as against the mortgagor are, 1st: That of misrepresentation in the valuation of the property which was said to be worth $4,700; 2nd, A false statement that the property was injured to the

extent of $3,100; and the 3rd defence is, that the action was prematurely taken.

As to the first point, the property being worth $4,700, that is, made up of $1,700 applied to the building, and $3,000 applied to the machinery:

[The Chancellor then gave a *resumé* of the evidence on the point of the valuation of the property and proceeded:]

So that I feel no manner of difficulty in saying on this evidence, as a jury would say, that there was no unfair or misleading representation by Wilton putting this property as he did. He had paid more than that some time before, and he had kept it in good repair. As to the first ground of defence, therefore, I find it fails as to the facts.

As to the second, that there was a false statement that the property was injured to the extent of $3,100, I think that is well proved, because taking the evidence of Petrie, he puts the building at $1,000, and the machinery at $1,560; but if you put the building at $1,500, which I think is a reasonable estimate, it would bring the amount up to $3,100. If you look at the other valuations of machinery putting it higher, you have a larger loss sustained: so that it seems to me to be on the same kind of evidence I have referred to, that there is fuller corroboration: and that there was loss to the extent of $3,100, and there was no false statement on that issue, so that I think that defence fails.

The other defence, that the case was brought before the sixty days had expired is correct in fact. The question to be considered on this point is the effect of that upon the position of the mortgagee.

I do not read that this condition, as Mr. Kingston argues, as applying to the mortgagee; he says the 12th and 13th conditions apply to the mortgagee, and puts the burden on him of making this proof; on the contrary, I think that the distinction exists throughout this policy between the insured who is the owner or occupant and the encumbrancer.

The 12th condition says, "proof of loss must be made by the assured, although the loss be payable to a third party." I take the insured to be Wilton and the third party to be the mortgagee.

The 13th clause says: "Any person entitled to make a claim under this policy, is to observe the following directions." That of course is larger, and I think the directions

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Boyd, C.

indicate what is meant. One of them is, that he is to state "When and how the fire originated, so far as the declarant knows or believes; 3. That the fire was not caused through his wilful act or neglect, procurement, means, or contrivance; 4. The amount of other insurances; 5. All liens and encumbrances on the subject of insurance; 6. The place where the property insured, if movable, was deposited at the time of the fire; 7. He is in support of his claims, if required and if practicable, to produce books of account, warehouse receipts and stock-lists," and so on. All that shows that "any person claiming," refers to the person in occupation as opposed to the person who has encumbrances upon the property; so that I think the inherent meaning of these two clauses is to show that the person insured is the person to make the proof.

Then the 17th condition says, "The loss shall not be payable until sixty days after completion of the proofs of loss, unless otherwise provided for by the contract of insurance. Reading that, and the 12th section together, it is clear that there must be proof of loss made by the insured.

In this case we have that proof of loss made by the insured, though not sixty days before the action, so we have the 12th paragraph satisfied by the proof of loss being made. If the insured himself were suing it seems to me the 17th clause applies, that he shall not have the right of action till sixty days after the proofs of loss. But this goes on to say, "The loss shall not be payable until sixty days after completion of the proofs of loss, unless otherwise provided for by the contract of insurance."

I think we have another provision in reference to the person who is not the insured, and that is this mortgagee clause affecting the mortgagee, which says: "It being hereby understood and agreed, that this insurance as to the interest of the mortgagee or trustee only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured." I think that is another provision in reference to the payment so far as the mortgagee is concerned, which exempts him from the limitations imposed upon him by the 17th condition.

Then the 22nd says: "Every action or proceeding against the company for the recovery of any claim under or by virtue of this policy, shall be absolutely barred, unless commenced within the term of one year next after the loss or damage occurs."

I should suppose that that pledges the mortgagee to

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Boyd, C.

begin his action within the year. It is not necessary for me to express a decided opinion on that, as the action was begun within the year. At present I should think that did apply to him as well as every other person insured. The only other condition which at all touches him is the 17th, and I think that can be dealt with as I have indicated. I am not prepared to say that the proper construction of this is that the action can be taken in order to save the time running, and the proof can be made afterwards. It may be the sound construction, but I do not at present say that I should place my decision on that ground, though it may, if the case goes further, be open to consideration whether that is not the proper reading.

The conclusion I have come to with this $500 claim, payable to the mortgagees, is, that they are absolved from the defences set out and that there is the right to recover. I think there is a right to recover absolutely without any right of subrogation on the part of the insurance company, because I think there is the liability existing in regard to this $500, so far as the mortgagor is concerned; that is to say, I read the liability in this mortgagee clause as affecting his intrinsic right to recover. He has not been guilty of any false or misleading statement in regard to the application or amount of insurance. Where he does fail is because his case was not begun in time, but that does not extinguish the liability of the company; it does not show that they are not liable to him, but that he is not in a position to enforce his claim. It is a good claim, though by the lapse of time he is not able to enforce it, but there is the absolute right to payment of the $500.

As to the other moiety of the claim of $500, I do not think that the mortgagees have the right to recover. Under the mortgagee clause of this policy, their only right would be under their mortgage, and that is not very clearly set up in their claim; but even if it were, they could only recover under their mortgage on the strength of Wilton's claim, and any defences made against Wilton would be equally strong against them. It may be open to Mr. Kingston on the evidence, but not on the pleadings, but it does appear that the covenant in the mortgage to assign the insurance has been satisfied by Wilton assigning the Wellington policy* and assigning $500 of this policy, so that in that aspect the mortgagees could never recover this $500 I am dealing with. I think, however, if

* A policy in another company.—REP.

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they can recover it they are precluded because Wilton is precluded, and I think he is precluded because he has not waited sixty days after the proofs.

It is said that it is inequitable to set that up. I do not see where there is any equity to be set up against an Act of Parliament. The parties were not in the dark as to what their rights were; in fact their attention was called to the matter of claim papers more than once. Letters were written about the claim papers, and the company is asked if they are important and they abstain from waiving it, not saying anything about it.

The 20th condition says, "No condition of the policy, either in whole or in part, shall be deemed to have been waived by the company, unless the waiver is clearly expressed in writing, signed by an agent of the company."

We have nothing in writing clearly expressed. We have correspondence backward and forward, which may be one thing from the point of view of the company, and another thing from the point of view of the person writing; but it was to get rid of that difficulty that the Legislature said that no waiver was to be allowed unless clearly expressed in writing, signed by an agent of the company. Now there is nothing of that kind here at all. In fact the action of the company in sending these blank claim papers shows that they were not going to waive that. It is unfortunate that Wilton did not perfect his claim before bringing his action. He does succeed as to these points which occupied the time of the Court, and this other, as to the time gave rise to no additional cost at all. I think the judgment should be for the mortgagee to the extent of $500, with costs of action and dismissing Wilton's action without costs.

From this judgment both the plaintiffs and defendants appealed to the Divisional Court, and the appeal and cross-appeal were argued on September 10th, 1889, before FERGUSON and ROBERTSON, JJ.

William Kingston, for the defendants. The action was brought within twenty days of the making of the proofs. The mortgagee has succeeded in getting a judgment, although the insured was in fault, and the defendants are entitled to an assignment of the mortgage to the extent of

the $500 recovered. The company were always willing to pay the mortgagee this $500 if he would make such an assignment, but he refused. If the defence, that the action was brought too soon, was good against the insured, it was also good against the mortgagee. The mortgagee has not put in any proofs and cannot avail himself of those put in by the insured. The policy with the mortgagee clause slip attached, is a new and separate contract with the mortgagee by the company; *Mitchell* v. *City of London Assurance Co.*, 15 A. R. 262; *Dick* v. *Franklin Ins. Co*, 10 Mo. App. R. 376, at p. 388. The company is also entitled to retain the amount of the premium note for the $500 now ordered to be paid by them. R. S. O. ch. 167, sec. 131. I refer to *Bull* v. *The North British Canadian Investment Co.*, 15 A. R. at p. 423; *Klein* v. *The Union Fire Ins. Co.*, 3 O. R. 234; *The National Fire Ins. Co.* v. *McLaren*, 12 O. R. 682; *Omnium Securities Co.* v. *Canada Fire, &c., Co.*, 1 O. R. 494; *The Mutual Ins. Co. of Wellington* v. *Frey*, 5 S. C. R. 82. Argument.

Lash, Q. C., contra. The judgment is right that the proofs of loss should be made by the insured, the mortgagor, in this case. If the mortgagor neglects the proofs the mortgagee is not affected. No proofs are necessary by the mortgagee, so no time need elapse after proofs before the mortgagee could bring an action. Proofs of loss must be made by the insured, even when the loss is payable to a third party. See 12th statutory condition. They may be made by the agent of the insured under the 14th condition. As to subrogation, the contract of the company is with the mortgagor, and the company contends if they pay anything to the mortgagee and they claim there was no liability to the mortgagor, then they are entitled to an assignment of the mortgage to the extent of the payment. The mortgagee never consented to any such arrangement and is not bound. Even if the mortgagee had consented, the circumstances of this case do not call for it. There was no offer of payment and demand of an assignment: *Klein* v. *The Union Fire Ins. Co.*, 3 O. R. 234. Even

Argument. if the mortgagor did not put in proofs in time or sue before the time limited, that does not show there was no liability. It may be the action would fail, but there is such a liability as would support the mortgagee's claim. There is no evidence of any premium note being in existence. It may have been paid. The sixty days limitation does not bar the action, it only postpones the payment: *Smith* v *The City of London Ins. Co.*, 11 O. R. at p. 61.

Kingston, in reply.

October 19, 1889. FERGUSON J.:—

The policy sued on bears date the 10th July, 1887. It is executed by the defendants, and purports to be an insurance in favour of William Wilton, for the sum of $600 on a frame building, then occupied as a grist mill, and the sum of $400 on machinery contained therein.

At the time of the insurance, the property was under a mortgage apparently for the sum of three thousand dollars, made by Wilton in favour of the late Mr. Present, of the city of Guelph. Other properties were embraced in this mortgage.

Wilton and the personal representatives of the late Mr. Present are the plaintiffs. Anderson is one of these representatives.

Appended to the policy is a clause known as the Mortgagee Clause.*

* MORTGAGEE CLAUSE.

Loss, if any, payable to Mortgagee or Trustee, as hereinafter provided.

1. It being hereby understood and agreed, that this insurance, as to the interest of the mortgagee or trustee, only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by the terms of this policy.

2. Provided, that in case the mortgagor or owner neglects or refuses to pay any premium or assessments due under this policy, then, on demand, the mortgagee or trustee shall pay the same.

Amongst other things this contains, the words: "Loss, if any, payable to J. C. Present, Esq., Guelph, mortgagee or trustee, as hereinafter provided." Then follow seven provisions; the first and seventh of which were the ones chiefly discussed upon the argument before us.

Judgment. Ferguson, J.

The statutory conditions are endorsed upon the policy and variations of the same are added. The fire which

3. Provided, also, that the mortgagee or trustee shall notify this company of any change of ownership or increase of hazard which shall come to his, or their knowledge, and shall have such change of ownership or increase of hazard duly indorsed on this policy, or otherwise assented to by the company.

4. And provided further, that every increase of hazard not permitted by the policy to the mortgagor or owner, shall be paid for by the mortgagee or trustee on reasonable demand, and after demand made by this company upon, and refusal by the mortgagor or owner to pay, according to the established schedule of rates.

5. It is, however, understood that this company reserves the right to cancel this policy at any time (in accordance with variations in the Conditions No — and also to cancel this agreement on giving notice by registered letter or in writing, delivered to the mortgagee or trustee herein named, and from the receipt of said letter or notice this agreement shall be null and void.

6. *It is further agreed, that in case of any other insurance upon the property hereby insured, then this company shall only be liable under this policy for such ratable proportion of any loss or damage as the actual cash value of the property insured bears to the whole amount of insurance (without reference to the dates of the different policies) issued to or held by any party or parties having an insurable interest therein.*

It is also agreed, that whenever this company shall pay the mortgagee or trustee any sum for loss under this policy, and shall claim that, as to the mortgagor or owner, no liability therefor exists, it shall at once, and to the extent of such payment, be legally subrogated to all the rights of the party to whom such payments shall be made, under any and all securities held by such party for the payment of said debt, and if required to do so by this company, the mortgagee or trustee, shall execute an assignment to the extent of such payment. Or said company may, at its option, pay the said mortgage or trustee the whole debt so secured, with all the interest which may have accrued thereon to the date of such payment, and shall thereupon receive from the party to whom such payment shall be made a full assignment and transfer of said debt, with all securities held by said parties for the payment thereof.

Attached to Policy No. of the Mutual Fire Insurance Co. of

Secretary.

Judgment.

Ferguson, J.

occasioned the loss sued for, occurred on the 10th day of October, 1887.

The proofs of loss furnished by Wilton, are dated the 23rd day of August, 1888, and are marked as having been, or said to have been, received by the defendants on the 28th September of the same year. Certain proofs of loss bearing date the 26th day of August, 1888, were also apparently furnished by the late Mr. Present, the mortgagee.

No question appears to have been raised as to the sufficiency in fact of the proofs of loss.

The 17th of the statutory conditions is: "The loss shall not be payable until sixty days after completion of the proofs of loss, unless otherwise provided by the contract of insurance."

The 22nd of the same conditions, is: "Every action or proceeding against the company for the recovery of any claim under or by virtue of this policy, shall be absolutely barred, unless commenced within the term of one year next after the loss or damage occurs."

On the face of the policy, the amount payable to the mortgagee in the event referred to, is limited to the sum of $500.

The mortgagor, the assured, and the representatives of the mortgagee join as plaintiffs in suing the defendants, each, as I understand, seeking to recover the sum of $500, the amount of the policy as before stated, being $1,000; and no such question, as to parties, as that discussed and decided in the case of *Mitchell* v. *City of London Ass. Co.*, 15 A. R. 262, was raised, and I apprehend it could not be under the circumstances with success.

According to my recollection of what passed upon the argument, the action was commenced two days before the expiration of the year from the time of the happening of the fire that occasioned the loss. But at the time of its commencement, the sixty days after the completion of the proofs of loss had not expired. I have no doubt that these statements from recollection are correct, but I have to rely upon recollection, because counsel have seen fit to

carry away the record and some other papers, and after some trouble I have failed to obtain them. I have not now any copy of the pleadings. Judgment. Ferguson, J.

The 12th of the statutory conditions is: "Proof of loss must be made by the assured, although the loss be payable to a third party."

The 13th of these conditions is: "Any person entitled to make a claim under this policy is to observe the following directions:" then follow several directions marked from *a* to *c*, inclusive, according to the statute.

The action was tried before the Chancellor, who for the reasons assigned by him, decided that there should be a recovery by or for the representatives of the mortgagee for the sum of $500; but that the mortgagor could not recover for the other $500; and from his judgment there are cross-appeals, that is, there are two appeals, one by the defendant and one by the plaintiff mortgagor.

Counsel for the defendant did object that the findings of fact were not correct, but said he could not hope to have them or any of them reversed or set aside under the circumstances; and looking at the evidence and the manner in which it was treated by the learned Judge in giving reasons for his findings, I think the opinion of the learned counsel that he could not hope to have the findings disturbed, was a well-founded one.

These findings must, I think, stand, the result being, that there was no misrepresentation, fraud, or the like at the inception of the transaction; and further, that the policy at the time of the fire that occasioned the loss, was, for anything that has been said or urged against it, a good, valid, and subsisting policy. The other chief contentions on the part of the defence were, that the action was brought too soon, by which it was meant, that it was brought before the expiration of the sixty days after the completion of the proofs of loss and a contention professedly based upon some of the provisions of the "mortgagee clause," which was called the right of *subrogation*.

As to the first of these contentions, it was argued that

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Ferguson, J.

there was a contract of insurance between the defendants and the mortgagee: that the mortgagee fell under the expression "the assured," in the 12th condition: and that for this reason he should, as "the assured make proofs of loss."

Upon this subject, I have looked at a number of cases and authorities, and I think the position of the three parties, the company, the mortgagor, and the mortgagee, so far as this contention has concern, is, with perhaps a too free use of the word "assignee," stated with reasonable accuracy in May on Insurance, at p. 459, where the author, after dealing with the case of a transfer of the property, and an assignment of the policy, says: "But there is another species of assignment, or transfer it may be called, in the nature of an assignment of a *chose in action*. It is this: 'In case of loss, pay the amount to A. B.' It is a contingent order or assignment of the money, should the event happen upon which money will become due on the contract. If the insurer assents to it, and the event happens, such assignee may maintain an action in his own name, because, upon notice of the assignment, the insurer has agreed to pay the assignee instead of the assignor. But the original contract remains; the assignment and assent to it form a new and derivative contract out of the original. But the contract remains a contract of guaranty to the original assured; he must have an insurable interest in the property, and the property must be his at the time of the loss. The assignee has no insurable interest *primâ facie*, in the property burnt, and does not recover as the party insured, but as the assignee of a party who has an insurable interest and a right to recover, which right he has transferred to the assignee, with the consent of the insurers."

If this is the position, as I think it is, the contention that the mortgagee was bound as "the insured" to make proof of loss under condition 12, must, I think, fail.

Then, in regard to condition 13, this seems intimately connected with the 12th condition, by which the proof

is to be made by the assured, although the loss is payable to a third party. The directions to be observed by the 13th condition, seem to be directions in regard to making such proof. It appears to me that the two conditions are necessarily interwoven, and that the real meaning is, as stated by the Chancellor in his judgment—namely, that the person insured is the person to make the proof of loss under these conditions. If this is not so, I cannot perceive the use and propriety of the reference to a "third party" in condition 12. The words "any person entitled to make a claim under this policy" in the beginning of condition 13, seem to me, when the two conditions are read together, to refer to the assured and his legal representatives, the policy being made in favour of him and such representatives, and in this way do not necessarily embrace the mortgagee in the present case.

Provision No. 1 of the mortgagee clause is, that the insurance as to the interest of the mortgagee shall not be invalidated by any act or neglect of the mortgagor, &c. The rights under such a provision are stated at least in part by the Chief Justice of Ontario, in the case of *Omnium Securities Co.* v. *Canada Fire, &c., Co.*, 1 O. R. at p. 496. The neglect of the assured to make the proofs of loss in proper time, so that the sixty days thereafter might expire before the termination of the year after the loss or damage, was, I think, a neglect from the consequences of which the mortgagee was relieved by this first provision in the mortgagee clause, and the case seems to be thus otherwise provided for by the contract within the meaning of the 17th condition. It was necessary to bring the action within the year, and I am of the opinion that the contention that the action was (as it was expressed) brought too soon, cannot, so far as the rights of the mortgagee are concerned, succeed.

Then as to the subrogation, the provision is, that whenever the company shall pay to the mortgagee any sum for loss under the policy, and shall claim that as to the mortgagor no liability therefor exists, it shall at once and to

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the extent of such payment, be legally subrogated to all the rights of the party to whom such payment shall be made, &c. There is a peculiarity in the words employed, "and shall claim," &c. I apprehend the meaning to be given to the expression is this: and as to the mortgagor no liability exists; not that the company shall merely make such a claim, and as the policy was a valid and subsisting policy at the time of the fire, and nothing is shown to have taken place since that time to render it invalid, the mortgagor has a right, and there is a liability to him.

The action or proceeding only to recover this is spoken of in the 22nd condition. That condition bars the remedy only, and not the right. It does not, as I understand it, extinguish the liability; and I am, for this reason, of the opinion that the Chancellor's conclusion in regard to this clause for subrogation is the right one, and that the defendants are not entitled as contended.

As to the appeal of the mortgagor, nothing that was urged, seems to me to show, and in my opinion there is nothing to show, that they can be relieved from the position assigned them by the judgment appealed from.

The mortgagor was the one to make the proofs of claim. The two conditions Nos. 17 and 22, were before him. These are conditions contained in the statute, and no complaint can be made in regard to them. He, in order to guard his own interests was bound to make the proofs in such time that the sixty days after his so doing, would elapse before the expiration of the year limited for bringing the action. No sufficient reason is shown for his not having done so, and I am of the opinion that his remedy is barred by force of the two conditions. And so far, I am of the opinion that the judgment should be affirmed.

A matter that was not at all referred to before the learned Judge at the trial, was argued before us. This arises under section 131 of the Act, ch. 167, R. S. O., the same as the 131st section of 50 Vic. ch. 26 (O), which provides that if there is a loss on property insured by the com-

pany, the board of directors may retain the amount of the premium note or undertaking given for insurance thereof until the time has expired for which the insurance has been made, and at the expiration of such time the assured shall have the right to demand and receive such part of the retained sum as has not been assessed for. The insurance, in the present case was from the 10th July, 1887, to the 10th July, 1890. We do not know what has been done in regard to assessments on the note. It was said at the bar that nothing had been paid in respect of it. The Act says the amount of the note may be retained by the directors, &c., and the question now is: Whether or not the defendants can avail themselves of the benefit of this section of the Act as against this mortgagee?

Judgment. Ferguson, J.

As before stated, by the first section or part of the mortgagee clause, it is provided that the insurance as to the interest of the mortgagee or trustee only therein, shall not be invalidated by any act or default of the mortgagor or owner of the property, &c. By this, I think, is meant that the insurance shall be good and valid and available to the full amount of the interest of the mortgagee, and to this amount only, notwithstanding any act or default of the mortgagor or owner: and as it seems to me, it would not consist with this contract to permit the defendants as against the mortgagee to retain the amount of the note. The clause was probably passed to ensure to companies the actual payment of the consideration for the risk in cases in which a loss has occurred, and such consideration has not been paid. But the mortgagor or owner is the one to pay the assessments—the one to pay this consideration.

If the consideration is paid, the company can have nothing to complain of in this respect. If it is not paid, the non-payment of it is or will be a default of the mortgagor or owner, and such a default seems to me to be a thing embraced in the contract in the mortgagee clause that has just been referred to. Besides the one mentioned in the statute to demand and receive any balance there

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Ferguson, J.

might be after satisfying the assessments, is the assured, who, if my view is correct, is not the mortgagee.

I am, for these reasons, of opinion against the defendants in this regard; and I think the judgment should be affirmed with costs.

ROBERTSON, J. :—

The only question which created a difficulty in my mind was that raised by defendants, claiming to have the right to deduct the amount of the premium note from the amount of the verdict recovered by the mortgagee's representatives. This point was not urged at the trial, although the defendants raised it on the pleadings, and there was no evidence offered of the non-payment of this note, or that any part of it was yet unpaid. But apart from that, I am now, after due consideration of the effect of the contract between the parties, of opinion that the defendants have not the right to deduct this sum from the amount which the executors of the mortgagee have been held to have the right to recover; if the amount of the note has not been or is not hereafter paid, that is or will be a default of the maker, who is the assured, and by the terms of the contract the rights of the mortgagee are not to be in any way affected by the default, &c., of the assured. I think, therefore, the judgment should be affirmed.

G. A. B

[QUEEN'S BENCH DIVISION.]

CHARD v. RAE.

Executors and administrators—Action upon a judgment—Grant of administration after action begun—Plaintiff not primarily entitled to administer—Right of widow to administer—Renunciation after action—Statute of Limitations, R. S. O. ch. 60, sec. 1—Parties—Joint judgment.

The rule in equity is, that when a person is entitled to obtain letters of administration he may begin an action as administrator before he has fully clothed himself with that character; but the same doctrine does not apply where the person immediately entitled to obtain administration is not the one who begins the action.

Trice v. *Robinson*, 16 O. R. 433, distinguished.

Where the point is specially raised on the pleadings as to the time when the letters of administration were obtained, it devolves upon the Court to ascertain whether an action was begun in time by a properly constituted plaintiff.

The father of the plaintiff obtained judgment against L. and R. in an action upon a promissory note on the 26th October, 1868, and the plaintiff began this action against L. and R. upon the judgment on the 22nd October, 1888. At that time the plaintiff's father was dead and no personal representative of his estate had been appointed. On the 4th November, 1889, letters of administration to his father's estate were granted to the plaintiff, the widow renouncing probate on the same day. Subsequently to that the statement of claim was delivered, and the action continued against R. alone. R. by his statement of defence put the plaintiff to the proof of his position and title to sue on the judgment, and set up, amongst other defences, the Statute of Limitations, R. S. O. ch. 60, sec. 1.

Held, that the widow was the person primarily entitled to administer, and as she had not renounced when the action was begun, the plaintiff had at that time no status; and as against the Statute of Limitations that no action was rightly begun within the period of twenty years fixed by the statute as that within which an action upon a bond or other specialty shall be commenced; and therefore the action failed.

Semble, also, that an objection raised at the trial that L. was not before the Court was a valid one; for an action on a joint judgment is not different in principle from an action of contract against joint contractors.

Statement.

THIS action was begun by writ of summons issued on 22nd October, 1888, the plaintiff named in the writ being Albert Chard, son of Peter Chard, deceased, and the defendants George M. Rae and T. D. Ledyard.

At the date the writ issued no personal representative to the estate of Peter Chard had been appointed, but on the 4th November, 1889, letters of administration to the estate and effects of Peter Chard deceased were issued by the Surrogate

Statement. Court of Hastings to the plaintiff, the widow of the deceased renouncing administration on the same day.

The statement of claim was against George M. Rae only, and in the style of cause the plaintiff was described as "administrator of the estate and effects of the late Peter Chard." The claim set forth that the plaintiff was the son and administrator duly appointed of the late Peter Chard; that the said Peter Chard on the 18th September, 1868, commenced an action against Rae and such proceedings were had therein that on the 26th October, 1868, Peter Chard recovered judgment against Rae for $1,010 debt and $35.94 costs; that the whole amount of this judgment was still unpaid at the time of the commencement of this action; and the plaintiff claimed to recover the amount due upon the judgment for debt, interest, costs, and subsequent costs.

By his statement of defence the defendant said that he did not admit the plaintiff's title to bring the action and recovered him to prove that he occupied the position alleged in the statement of claim, and that he was the absolute owner of the alleged judgment; that the defendant did not admit the bringing of the former action or the recovery of the judgment therein, and put the plaintiff to the strict proof thereof. The defendant also said that he never owed money to or had dealings with Peter Chard, and if any judgment was ever recovered against him, such a judgment was recovered upon a promissory note which he indorsed as accommodation indorser merely, and which was to be used for entirely different purposes, and which without notice to him or knowledge on his part had come to the hands of Peter Chard after maturity without consideration, and in fraud of the defendant; that if the alleged judgment were proved to have been regularly recovered, the defendant was not primarily liable thereon to the knowledge of Peter Chard, but the judgment was recovered against a number of other persons who prior to himself were liable to Chard, either for the debt in question, or as indorsers prior to himself, to the knowledge of Chard; that about the time of the recovery of the alleged judg-

ment Peter Chard entered into an arrangement with some or one of the defendants who were responsible to pay the judgment prior to this defendant; and in and by such arrangement Peter Chard agreed to and he did thereby release and discharge him from the alleged judgment and never enforced or tried to enforce payment thereof from him, and thereby induced him to believe and he did believe that the judgment had been satisfied and himself released and all claims against him abandoned, and the defendant by reason of the action of Peter Chard and the plaintiff did not take any proceedings to protect himself, as he otherwise would have done, and had Peter Chard so acted he would have been able to protect himself from all liability by enforcing his rights against the other parties, which he was now unable to do; that even if the defendant remained liable upon the judgment subsequent to such agreement and settlement, Peter Chard subsequently thereto so dealt with the defendants primarily liable thereon, knowing that this defendant's liability, if at all, was that of surety only, that in consequence of such dealings the defendant became and was discharged from any further liability; that in consequence of the delay and laches, the parties primarily liable had long since been discharged in insolvency, or had otherwise become unable to be made to pay the judgment, and the defendant would not have the benefit of the evidence of Peter Chard, or of the other defendants, or of his rights against them. The defendant Rae submitted that he was so prejudiced by the delay that the enforcement now of the judgment would be a fraud upon him, and he claimed the right to be protected therefrom. Lastly, he set up that any claim the plaintiff had against him was under the practice of the Court, barred by lapse of time, and he claimed the benefit of the various statutes of limitation in force since the recovery of the judgment, especially C. S. U. C. ch. 78; R. S. O. 1877 ch. 61, sec. 1; and R. S. O. 1877 ch. 108, sec. 23. Statement.

Issue was taken thereon.

Statement.

The action was tried at Belleville, before BOYD, C., on the 13th November, 1889.

An exemplification of the judgment was put in, which shewed the date to be as mentioned in the statement of claim, and also that the judgment was against G. M. Rae and T. D. Ledyard. The letters of administration issued to the plaintiff were also put in. The witnesses called by the plaintiff proved that the judgment sued upon was obtained upon a promissory note made by one D'Arcy in favour of Ledyard, and indorsed by Ledyard and Rae, and that the note got into the hands of Peter Chard in payment for certain mineral lands.

The defendant swore that he did not indorse the note in the usual way, but signed a blank indorsement to help Ledyard, supposing himself to be secured; his indorsement was not obtained to pay for the lands; he never received a farthing for this or other indorsements, and never authorized Ledyard to part with this one for any other purpose than to retire other paper indorsed by him (the defendant) to reduce his liability; the note was not signed by D'Arcy when he (the defendant) indorsed it; he appeared to the writ of summons, but did not defend further, having been assured that the matter was finally settled between Chard and D'Arcy; he would have defended but for this assurance, upon the ground of want of proper notice of dishonour; no execution was ever issued against him at Toronto, where he had lived for twenty-eight years, and he felt that the matter was closed; no claim was made against him in Peter Chard's lifetime; he first received the writ of summons in this action on the 28th January, 1889

Cross-examined, he said that he had no word from Chard or his solicitor that the claim was settled; he found out by accident some time afterwards that judgment had gone against him; he communicated with his solicitor, one Gilbert, and had an assurance that he would hear no more about it: Gilbert and D'Arcy and Chard and Fletcher (who was associated with Ledyard in buying the land from Chard) were all dead; some three or four years ago the

plaintiff wrote some letters, and afterwards a firm of soli- Statement.
citors in Toronto made a claim; he made an offer without prejudice; he did not consider that it was just that he should pay or that there was any liability.

The case was argued at the conclusion of the evidence.

Dickson, Q. C., for the plaintiff. I rely on the judgment and the letters of administration. These letters refer back, though issued pending the action: *Trice* v. *Robinson*, 16 O. R. 428. The action was begun before the expiry of the twenty years. The evidence given might have avoided a judgment in the original action, but is too late now in an action on the judgment.

Clute, for the defendant. *Trice* v. *Robinson* is distinguishable. It applies only to cases where the person is entitled to administration, and that is not the case here, as the mother only renounced after the expiry of the twenty years. The defence here is the Statute of Limitations, and this cannot be controlled by matters of procedure: *Knox* v. *Gye*, L. R. 5 H. L. 656. The onus is on the plaintiff to prove that the debt was not paid after the lapse of twenty years: *McMahon* v. *Spencer*, 13 A. R. 430, 435. The defendant here was not primarily liable and upon payment would be entitled to an assignment of the judgment in the original action, and the effect of the plaintiff not proceeding against both of the defendants was to discharge Ledyard from liability under that judgment: *Fisher* v. *Patton*, 5 O.S. 741; *Adams* v. *Ham*, 5 U.C.R. 292. A judgment against two is a joint liability, and if afterwards only one is proceeded against, that operates as a discharge of the other: *King* v. *Hoare*, 13 M. & W. 494; *Biddleson* v. *Whitel*, 1 W. Bl. 507; *Kendall* v. *Hamilton*, 4 App. Cas. at p. 543. The judgment should not be revived as against Rae because of the prejudice resulting from the discharge of Ledyard: *Rex* v. *Young*, 2 Anstr. 448. The plaintiff should not be indulged by giving him leave now to bring Ledyard before the Court, because of the lapse of time and the death of many witnesses: Maclennan's Jud. Act, 2nd ed. 153;

Argument. *Williams* v. *Andrews*, W. N. 1875, p. 237. I also refer to *Lucas* v. *Cruickshank*, 13 P. R. 31; *Meir* v. *Wilson*, *ib.* 33.

Dickson, in reply. The reason that the action was not prosecuted against Ledyard, is that he has obtained a discharge in insolvency. I ask leave to add him now as a party.

December 3, 1889. BOYD, C. :—

The rule in equity is, as I endeavoured to state it in *Trice* v. *Robinson*, 16 O. R. at p. 433, that when a person is entitled to obtain letters of administration he may begin an action as administrator before he has fully clothed himself with that character. Thus *Humphreys* v. *Humphreys*, 3 P. Wms. 348, shews that the person who is entitled to administration may, as next of kin, file a bill in respect of personal estate. But if administration has not been actually obtained, the defendant may demur or plead in abatement as the case may be. An amendment, however, will be allowed to cure the defect upon the letters being taken out. On the other hand, if it be charged in the bill that the plaintiff is the representative of the person deceased, and has taken out administration (though the latter be not the fact), yet if no objection be made or pleaded till the hearing, and then only *ore tenus*, the Court will not interfere if proof be given of administration having been obtained by the plaintiff pending suit: *Fell* v. *Lutwidge*, 2 Atk. 120; *Simons* v. *Milman*, 2 Sim. 241; *Moses* v. *Levi*, 3 Y. & C. Eq. Ex. at p. 366; *Winn* v. *Fletcher*, 1 Vern. 473. In the latest English case where the point has been considered, Kindersley, V. C., said that the plaintiff, if he is the person to take out letters of administration, need not sustain the character of administrator before he can file his bill, and in such case it is enough for the plaintiff to obtain the letters before the case comes up for hearing to give him a right of suit: *Horner* v. *Horner*, 23 L. J. Ch. 11 (1854).

I do not understand that the Courts have gone further

and held, as I am asked to hold here, that the same doctrine obtains where the person immediately entitled to obtain administration is not the one who begins the action. The person here primarily entitled to administer the estate of the deceased Peter Chard was his widow, and it was only upon her renouncing that letters issued to her son, the present plaintiff: (see Flood on Wills, p. 693; Walker on Executors, 40).

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Boyd, C.

Again, the *status* of an alleged administrator to bring an action so as to save the bar from lapse of time, where the question is raised on the pleading that his title was not obtained till after action, has not been passed upon in any of the cases cited, or that I have been able to find. It seems to me the correct practice is, that when the point is specially raised as to the time when the letters of administration were obtained, it devolves upon the Court to ascertain whether an action was begun in time by a properly constituted plaintiff. This is in conformity with the holding in *Humphreys* v. *Humphreys*, *vide supra*, and in *Humphreys* v. *Ingledon*, 1 P. Wms. 752. This last case was followed by Spragge, V.C., in *Lawrence* v. *Humphries*, 11 Gr. 210. As stated by Lord Macclesfield in *Comber's Case*, 1 P. Wms. 766, the administrator receives his right entirely from the administration, but the right of the executor is derived from the will, and not from the probate.

As against the Statute of Limitations, I am inclined to think there is no action rightly begun so as to save the statutory bar unless administration has previously or contemporaneously issued, and that the time which has begun to run will continue till the time when the plaintiff has obtained such a status. Not till the 4th of November, 1889, did the plaintiff in this case obtain administration upon the renunciation of his mother (which was made on the same day), and not till then, I think, was the plaintiff in a position to receive payment of and discharge the debt, or to sue validly for its enforcement. The plaintiff is in the same position as if he had amended on that day, stating

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Boyd, C.

the fact of having obtained such letters, and up to that day the statute will run in defendant's favour: *Dumble* v. *Larush*, 25 Gr. 552; affirmed on rehearing, 27 Gr. 187.

At law no action can be brought till administration has been obtained by the plaintiff: *McArdle* v. *Glenny*, Ir. R. 3 C. L. 628. The rule, generally speaking, is the other way in equity in cases where the person entitled to administration is concerned.

The case in hand, however, presents the new question as to what should be the rule as between the variant practice at law and in equity where the Statute of Limitations is invoked by the defendant. The doctrine of relation introduced in equity is a benevolent fiction in order to prevent a miscarriage of justice as to matters intervening between the death and the grant of administration (see Walker's Comp. of Law of Executors, pp. 130-1); but it cannot operate as against the provisions of a Statute of Limitations. It is familiar law that when time has begun to run in favour of the debtor during the intestate's life, the absence or non-existence of an administrator is no excuse for not beginning to sue within the statutory limit: *Freake* v. *Cranefeldt*, 3 M. & Cr. 499. The statute applicable here says that actions upon a bond or other specialty shall be commenced within the period of twenty years after the cause of action arose (R. S. O. 1887 ch. 60. sec. 1). In *Pratt* v. *Swaine*, 8 B. & C. at p. 287, Holroyd, J., says: "Where letters of administration have been granted, the administrator is entitled to all the rights which the testator had at the time of his death vested in him; but no right of action accrues to the administrator until he has sued out the letters of administration." See also *Holland* v. *King*, 6 C. B. 727. The early cases permitting bills to be filed before administration obtained were decided without reference to any statutes of limitations, which then applied to Courts of Equity only by analogy; but now every Court is bound equally by statutory enactments; see *Re Greaves*, 18 Ch. D. 551.

Now here, the cause of action arose on the 26th October,

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Boyd, C.

1868, by the recovery of judgment against Ledyard and Rae, and the twenty years expired on the 26th October, 1888. This action was begun by writ, dated 22nd October, 1888, and was in time if letters of administration had been issued to the plaintiff. He did not, however, obtain them till the 4th day of November, 1889, which was after the cause of action had ceased to be enforceable upon the statute being pleaded. There are many circumstances of suspicion thrown around the plaintiff's right of action, not only from lapse of time and death of persons whose testimony would be of value, but from circumstances already in evidence which, though they might not be pleadable in bar of the judgment, would deprive one of any feeling of reluctance in dismissing the action with costs: see *Boatwright* v. *Boatwright*, L. R. 17 Eq. at p. 75.

It is not worth while to consider at much length the other question of law raised; that is, the effect of bringing the action against Ledyard but not proceeding against him in the statement of claim. The plaintiff was obliged to prove his judgment, and that on the face appears to be against Ledyard and Rae. No matter what the previous relations were between these defendants, these became merged in the new obligation created by law by virtue of the judgment: *Duff* v. *Barrett*, 15 Gr. 632; affirmed on rehearing, 17 Gr. 187. That is to say, this action on the joint judgment is not different in principle from an action of contract against joint contractors, and the omission of any one is matter of abatement: *Cocks* v. *Brewer*, 11 M. & W. 51. Now it is open for the plaintiff to proceed against one of two defendants named in the writ, and if the other defendant objects in such a case as this, of joint obligation, the remedy was formerly to plead in abatement: *Teal* v. *Jones*, 2 P. R. 63. This is discussed in *Kendall* v. *Hamilton*, 4 App. Cas. 504. The Lord Chancellor says that though the form of objecting by means of a plea in abatement to the non-joinder of a defendant who ought to be included in the action is abolished, yet he conceives that the application to have the person so omitted included as

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Boyd, C.

a defendant, ought to be granted or refused on the same principles on which a plea in abatement would have succeeded or failed: p. 516. See also pp. 530, 531, 534, 535, 543; see also *Re Hodgson*, 31 Ch. D. 177, 188.

The objection raised at the hearing as to the absence of Ledyard is a valid one, and it would involve the consideration of whether he can now effectively be added as a party, or whether any amendment should be allowed, had I been disposed to agree with the plaintiff as to his right of action against the present defendant. But taking the view I do, it is not useful to prosecute the matter further.

[QUEEN'S BENCH DIVISION.]

BLACKLEY v. DOOLEY ET AL.

Sale of goods—Payment by instalments—Property remaining in vendor—Transfer by vendor of his interest—Removal of goods by third party—Conversion—Trover—Detinue—Parties.

One of the defendants was the purchaser of a piano, which she had partly paid for, under a conditional sale by which until fully paid for it was to remain the property of the vendor, but, before paying the balance due on it, she allowed the other defendant, who had acted as the vendor's agent in the sale to her, secretly to remove and take possession of it, he paying her the cash payment she had made.

After this transaction between the defendants the plaintiff purchased from the vendor the notes given for the purchase money of the instrument, and took an assignment under seal of the property in it.

In an action against the defendants for the recovery of the piano, in which no demand was proved upon the defendant in possession of the instrument, it was objected by him that neither detinue nor trover would lie:—

Held, that the plaintiff was entitled to recover damages against him for the conversion of the piano; for it was not necessary to impute the conversion to any particular period of time, and the said defendant's denial after action of the plaintiff's right to the piano could be treated under the circumstances as evidence of a conversion before action by the said defendant of the plaintiff's interest in it; and as against technical objections raised by a wrong doer the benefit of all possible presumptions should be allowed.

Held, also, that it was not necessary that the vendor should be added as a party in order to entitle the plaintiff to succeed.

Statement.

IN the year 1887 one Baine, a dealer in musical instruments, delivered to the defendant M. H. McDougall a piano, for which she agreed to pay $275, $50 down and the balance by instalments. It was part of the agreement between them that the piano should remain the property of Baine until the payments were completed, and that upon any default in the payments Baine should have the right to remove the piano. Default was made in these payments: the plaintiff purchased the notes representing them and took from Baine a transfer under seal of his property in the piano. Before the plaintiff became the owner of the piano under this transfer, the defendant Dooley, who as agent for Baine had made the agreement with the defendant McDougall for the sale of the piano to her, and who was fully aware of Baine's rights, persuaded her to allow him secretly to take the piano away from her possession

Statement. upon his returning to her the $50 which she had paid. Dooley had left Baine's employment before he removed the piano, and was acting in what he did adversely to Baine. No evidence was given of any demand having been made by any person upon Dooley for the return of the piano. This action was brought (in the Common Pleas Division) for the recovery of the piano, or its value, with damages for its detention. The defendant Mrs. M. H. McDougall did not appear. The defendant Dooley put the plaintiff to the proof of his case.

The action was tried before ARMOUR, C. J., at Hamilton, on 27th April, 1889, without a jury, and judgment was given for the plaintiff for $275 damages, with full costs. In giving judgment the learned Chief Justice said:

"I think the plaintiff is entitled to succeed. No doubt this agreement was entered into. Mrs. McDougall bought from Dooley, as the servant of Baine, and Dooley gave her this document as a copy of the agreement, and he is bound by that. That agreement stipulates that the title shall remain in Baine.

"I have no doubt that Dooley took the piano or that it was taken by his order and consent. The plaintiff is entitled to add Baine's name, if necessary for the purpose of getting the piano. I do not think it is necessary that he should be added or that he should consent. I think the evidence is, that the piano went into the possession of Dooley, and it is to be presumed that he has it still and is still detaining it."

The defendant Dooley moved against this judgment during the Easter sittings of the Divisional Court, and the motion was transferred to the Queen's Bench Division by order of the Chief Justice of the Common Pleas Division, and was argued on 3rd June, 1889, before FALCONBRIDGE and STREET, JJ.

F. Fitzgerald, for the defendant Dooley. The action cannot be sustained as an action of detinue, as no demand was proved: *Clements* v. *Flight*, 16 M. & W. at p. 50; and trover

will not lie, as the conversion, if any, was before the plaintiff became entitled. I refer to *Crossfield* v. *Such*, 8 Ex. 825; *Gardner* v. *Adams*, 12 Wend. 297. A right of action for damages is not assignable even in equity: 1 Spence's Eq. Jur. 181; 2 *ib.* 849, 867, 869, 873; *Ryall* v. *Rowles*, 2 W. & T. L. C. 898; *Thurman* v. *Wells*, 18 Barb. (N.Y.) 500; *Brush* v. *Sweet*, 38 Mich. 574; *Dickinson* v. *Seaver*, 44 Mich. 624. Argument.

Furlong, for the plaintiff. The action should be regarded as one for a continuing trespass; there is a daily conversion while the defendant keeps the plaintiff's goods. I refer to *McCombie* v. *Davies*, 6 East 538; *Fenn* v. *Bittleston*, 7 Ex. 152.

December 3, 1889. The judgment of the Court was delivered by

STREET, J.:—

The counsel for Dooley relied in his argument upon grounds which we must look upon as being more technical than substantial. He argued that if this is to be treated as an action of detinue there is no evidence of any demand and refusal, and therefore no wrongful detention of the piano as against the present plaintiff, citing *Clements* v. *Flight*, 16 M. & W. at p. 50, as his authority for this proposition; and that if it is to be treated as an action of trover, the conversion, if any, must be held to have taken place at the time when Dooley removed the piano from Mrs. McDougall's possession, which was before the plaintiff acquired his rights: that the right which Baine had at that time was, therefore, a right, not to the piano, but to damages for its conversion, and that this right was not assignable.

We are of opinion that these objections should not be allowed to prevail. Dooley's conduct in the matter appears to have been clearly dishonest. He knew well that Baine was the owner of the piano and that Mrs. McDougall's duty, if she were unable to keep up her payments, was to hand it back to its owner. It is clear that under these

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Street, J.

circumstances Baine was entitled at any time up to the date when he assigned his interest in it to the plaintiff, to bring an action to recover it from Dooley, assuming, as the Chief Justice assumed, and as we have a right to assume, that it still remained in Dooley's possession or under his control. The plaintiff by the transfer from Baine became the owner of the piano, and was entitled to recover it from Dooley. It is true he made no demand upon Dooley before bringing the action, but the conduct of the defendant after action may be treated in an action of trover as evidence of a conversion before action: *Morris* v. *Pugh*, 3 Burr. 1242; *Wilton* v. *Girdlestone*, 5 B. & Ald. 847. We are not bound to impute the conversion to any particular period of time, and are at liberty to treat the defendant's denial after action of the plaintiff's right to the piano, under the circumstances, as evidence of a conversion before action by the defendant of the plaintiff's interest in it, and to give to the plaintiff, as against objections such as are here raised by a wrongdoer, the benefit of all possible presumptions. We agree that it is not necessary that Baine should be added as a party to the action in order to entitle the plaintiff to succeed, and the motion must, therefore, be dismissed with costs.

[QUEEN'S BENCH DIVISION.]

REGINA V. SPAIN.

Justice of the Peace—Summary conviction—Malicious Injuries to Property Act, R. S. C. ch. 168, sec. 59—Uncertainty—Nature of offence and property not particularly described.

A summary conviction under R. S. C. ch. 168, sec. 59, alleged, in the words of the statute, that the defendant unlawfully and maliciously committed damage, injury, and spoil to and upon the real and personal property of the Long Point Company:—

Held, that this was not sufficient without its being alleged what the particular act was which was done by the defendant which constituted such damage, &c., and what the particular nature and quality of the property, real and personal, was in and upon which such damage, &c., was committed; and the conviction was quashed for uncertainty.

Statement.

THE defendant was convicted by Matthew C. Brown, the police magistrate for the county of Norfolk, on the 8th November, 1889, for that he, (the defendant), on Friday the 25th day of October, 1889, at Long Point, in the township of South Walsingham, in the county of Norfolk, did unlawfully and maliciously commit damage, injury, and spoil to and upon the real and personal property of the Long Point Company, and was adjudged for his said offence to forfeit and pay the sum of $10 fine, and $1 damage, to be paid and applied according to law.

The conviction having been brought before the Court by *certiorari*, on the 26th November, 1889, *C. E. Barber*, for the defendant, obtained a rule *nisi* to quash the same, on the grounds: (1) That the magistrate had no jurisdiction to make the conviction, as the evidence taken before him did not disclose an offence under the Malicious Injuries to Property Act, under which the conviction was made; (2) That the conviction and the information upon which it was founded were for a double offence, contrary to the provisions of the statute; (3) That the conviction did not set out and describe the property to which damage had been committed; and on other grounds.

Argument. On the 3rd December, 1889, *Barber* supported the rule, referring upon the third ground to *Charter* v. *Graeme*, 18 L. J. M. C. 79.

Robb shewed cause.

December 4, 1889. The judgment of the Court (ARMOUR, C.J., and STREET, J.,) was delivered by

ARMOUR, C. J.:—

We think the conviction cannot be upheld, because it does not describe the offence which the defendant was charged with committing with sufficient certainty.

It is true that it is alleged in the conviction, in the very words of the statute R. S. C. ch. 168, sec. 59, under which the defendant was convicted, that the defendant unlawfully and maliciously committed damage, injury, and spoil to and upon the real and personal property of the Long Point Company, but this is not sufficient without its being alleged what the particular act was which was done by the defendant which constituted such damage, injury, and spoil, and what the particular nature and quality of the property real and personal was in and upon which such damage, injury, and spoil was committed.

I refer to *In re Donelly*, 20 C. P. 165; Paley on Convictions, 6th ed., 184 and 208.

The conviction must be quashed without costs, and with the usual order for protection.

[QUEEN'S BENCH DIVISION.]

ROBINSON ET AL. V. BOGLE.

Trade-name—"Belleville Business College"—Action to restrain use of designation—Non-appropriation of name by plaintiffs—User by public in relation to plaintiffs—Requisite that name should be specific, and not merely descriptive—Costs.

The plaintiffs, proprietors for about twenty years of a commercial school, sought to restrain the defendant, also a proprietor of a similar institution, lately established in the same place, from using the name "Belleville Business College," which, although generally used by the public in describing the plaintiffs' establishment, was not its registered name, and had never been adopted or appropriated by the plaintiffs themselves, who had carried on their business under different names, one of which was registered. After the defendant's advent some confusion arose in the post office as to letters addressed "Belleville Business College," but it did not appear that any students were lost to the plaintiffs by reason of the defendant's conduct:—

Held, that, as there had been no actual user by the plaintiffs of the name claimed, user by the public was not sufficient to attach the designation to the business so as to make it equivalent to the plaintiffs' personal user thereof:—

Held, also, that the name in controversy being merely descriptive of the nature of the business and the locality of its operations, in the absence of evidence of user of the name by the plaintiffs, or that the name of the locality was so inseparably connected with their establishment that a secondary meaning was attributable to it, there was no ground for protecting the name.

Thompson v. *Montgomery*, 41 Ch. D. 35, distinguished.

No costs were given to the defendant, as he had sought by the use of the name to advantage himself in an unmeritorious way.

Statement.

THIS was an action to restrain the defendant from using the name "Belleville Business College," as the name of a commercial school or college conducted by him in the city of Belleville, to the prejudice of the plaintiffs' rights, the plaintiffs being the proprietors of another commercial college in the same place, which had been in existence since 1868, and the name "Belleville Business College" having been used by the public to describe the plaintiffs' establishment, though that was not its registered name, and was not the name used by the plaintiffs themselves.

The action was tried at Belleville on the 12th November, 1889, before BOYD, C.

The facts given in evidence are sufficiently stated in the judgment.

Argument.

The case was argued at the close of the evidence.

McCarthy, Q.C., and *Burdett* (*W. N. Ponton* with them) for the plaintiffs. The plaintiffs have had a business reputation for nineteen years under the name of the "Ontario Business or Commercial College," and they seek that no one shall by using the same or a similar name mislead the public, and deprive them of their income and profits. The establishment was popularly known as "Belleville Business College." Would not the unwary public be misled by the adoption of the like name by the defendant? If so, that is sufficient; a fraudulent intention is not essential. Reference was made to *Davis* v. *Kennedy*, 13 Gr. 523; *Gage* v. *Canada Publishing Co.*, 11 A. R. 402, 408; 11 S. C. R. 306; *Levy* v. *Walker*, 10 Ch. D. at p. 447; *Thompson* v. *Montgomery*, 41 Ch. D. 35; *Re Dunn's Trade-Marks*, *ib.* 439; *Lee* v. *Haley*, L. R. 5 Ch. 155; High on Injunctions, 2nd ed., sec. 1085; *Brooklyn* v. *Masury*, 25 Barb. N. Y. S. C. R. 416; *Walker* v. *Alley*, 13 Gr. 366; *Carey* v. *Goss*, 11 O. R. 719; *Barsalou* v. *Darling*, 9 S. C. R. 677; *Partlo* v. *Todd*, 12 O. R. 171; *Davis* v. *Reid*, 17 Gr. 69; *Smith* v. *Fair*, 14 O. R. 729; *Re Australian Wine Importers*, 41 Ch. D. 278.

Clute and *J. J. B. Flint*, for the defendant. The case is not within the Trade-Mark Act, R. S. C. ch. 63, secs. 3 and 4; and all the cases cited relate to trade-names. The name in question here is simply descriptive of the business established. There is no fraud alleged or proved. The defendant does not infringe the plaintiffs' rights; the public give the plaintiffs a colloquial name; they say they have adopted this, and we have used it to their detriment. "Business College" is no peculiar or distinctive name which the plaintiffs can appropriate to themselves; the name is simply descriptive of the kind of education given. The plaintiffs certainly cannot appropriate the name "Belleville," which merely shews the place where the business is carried on. Reference was made to Kerr on Injunctions, 2nd. Am. ed., pp. 360-2; *London Assurance* v. *London and Westminster Assurance Corporation*, 32 L. J. Ch. 664;

Street v. *Union Bank*, 30 Ch. D. 156; *Watson* v. *Westlake*, 12 O. R. 449; *McCall* v. *Sheal*, 28 Gr. 48; *Raggett* v. *Findlater*, L. R. 17 Eq. 29; *Cheavin* v. *Walker*, 5 Ch. D. 850; *Singer* v. *Loog*, 8 App. Cas. 15; *Merchants Banking Co. of London* v. *Merchants Joint Stock Bank*, 9 Ch. D. 560; *Levy* v. *Walker*, 10 Ch. D. 436. Argument.

McCarthy, Q. C., in reply. Although the Trade-Mark Act does not apply, yet the use of the name can and ought to be prohibited: *Croft* v. *Day*, 7 Beav. 84.

December 7, 1889. BOYD, C.:—

The plaintiffs' business college was begun at Belleville in 1868, under the name of the "Ontario Commercial College, Belleville." Of late years the word "Business," has been substituted for "Commercial" in the title. In 1884 the plaintiffs registered the name as "Ontario Business College (Robinson & Johnson) Belleville." This in their circulars and annuals and other publications is shortened to "Ontario Business College, Belleville," and as frequently to "Ontario Business College;" which last is the name inscribed on the front of their building. These and these alone are the plaintiffs' own designations of their institution. Some people, however, or it may be many people, have fallen into the way of speaking and writing of it as the "Belleville Business College"—doubtless because that was aptly descriptive of the fact that it was a business college, and for some time the only business college at that place. Lately the defendant has started a rival institution under the name of "Belleville Business College," which he has inscribed on his building. The action is to restrain the defendant from using the name "Belleville Business College." Confusion has arisen in the post-office from the fact that that some letters intended for the plaintiffs were addressed simply "Belleville Business College," without any adjunct to show for which of the schools they are intended; but it is not proved or claimed that any student has been lost to the plaintiffs or withdrawn

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Boyd, C.

from them by reason of the defendant's conduct. Before the defendant came, there was of course no difficulty about letters, for, there being but one business college at Belleville, everything addressed generally went there. Until the defendant adopted this name, I see no proof that the name "Belleville Business College" was ever adopted or appropriated by the plaintiffs. In the annual circular of 1888-9, consisting of 56 pages, issued by the plaintiffs, while at the head of all the pages and over the face of nearly every page the name "Ontario Business College" appears, only on one page (p. 44) in a letter of commendation from James White, do I notice the name "Belleville Business College." As a fact, I must find that this last name was never appropriated by the plaintiffs, and as used by other people, it was merely indicative of the work done and of the place at which that work was done by the plaintiffs. Public user of a name of this kind and in this way, (however widely diffused) has never been held to attach the designation to the business, so as to be equivalent to the proprietor's personal use of it.

I find two difficulties in the way to the plaintiffs' success: first, in their title to claim any right or interest in the name used by the defendant; second, (assuming an interest) is the name such an one as should be protected at the plaintiffs' instance?

As to the first: the plaintiffs must bring themselves within the principles which are applicable to trade-mark and trade-name cases. Now one of the essentials is, that there should be actual user of the name by the claimant. The right in truth is based on priority of appropriation by him. Thus it has been held that a man who has never carried on business under a particular name cannot, even though he has some right to use that name, interfere with its being used by another: *Beazley* v. *Soares*, 22 Ch. D. 660.

So it is said in *London and Provincial Law Assurance Society* v. *London and Provincial Joint-Stock Life Ins. Co.*, 11 Jur. 938, that the Court will always have regard to the fact whether there has been such a length of exclusive

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Boyd, C.

user of the name under which the plaintiff carries on his business as to justify the Court in interfering. And in a still more pointed way, James, L. J., speaks in *Levy* v. *Walker*, 10 Ch. D. at p. 447: "The sole right to restrain anybody from using any name that he likes in the course of any business he chooses to carry on is a right in the nature of a trade-mark. * * The Court interferes solely for the purpose of prohibiting the owner of a trade or business from a fraudulent invasion of that business by somebody else. It does not interfere to prevent the world outside from being misled into anything. * * An individual plaintiff can only proceed on the ground that, having established a business reputation under a particular name, he has a right to restrain any one else from injuring his business by using that name." That is to say, the name and the business must be linked together and visibly connected by the plaintiffs themselves, and out of this union the reputation must grow in order to give an actionable right. See also *Wheeler* v. *Johnston*, L. R. 3 Ir. 293-4.

As to the second: What is special or peculiar about the name in controversy, "Belleville Business College," that there should be a monopoly vested in the plaintiffs by its popular use in reference to them? "Belleville" is the name of a city, and "Business College" is the name of a school for commercial training, which has long been in common use. The defendant himself founded the "Guelph Business College" before coming to Belleville. There are and have been also such places at all the other considerable centres of population in Ontario: "Montreal Business College," "Ottawa Business College," "Brantford Business College," and so on, at Brockville, St. Catharines, Galt, Peterborough, &c. Is the first comer to take the name of the place and exclude all others who may be equally and truthfully proprietors of business colleges at the same place? The case in hand is not one where a fictitious or fancy or symbolical name is used; the combination is, as language is used, baldly and literally true.

Judgment.

Boyd, C.

Now another essential in cases analogous to trade-mark cases is, that the name or epithet should be something more than merely generic or descriptive; it should be specific or distinctive. The difference in treatment between the use of a fancy name and one which embodies merely a statement of facts is well illustrated by a comparison of the two cases *Hendriks* v. *Montagu*, 17 Ch. D. 638, and *Turton* v. *Turton*, 42 Ch. D. 128, and specially pp. 145, 146. In *Cheavin* v. *Walker*, 5 Ch. D. at p. 863, James, L. J., said: "Whatever is mere description is open to all the world." In *The Colonial Life Ass. Co.* v. *The Home and Colonial Ass. Co.*, 33 Beav. at p. 550, the Master of the Rolls thus dealt with the matter: "If a company which does colonial business cannot call itself 'Colonial,' it is obvious that, under a species of assertion that the word colonial is symbolical, the plaintiffs might prevent every other person using it as descriptive of his trade. * * Such a claim cannot be maintained." Again, in words which are remarkably pertinent to the present case, Lord Justice James said in an appeal which is noted as *Australian Mortgage Land and Finance Co.* v. *Australian and New Zealand Mortgage Co.*, W. N. 1880, p. 6: "While the business name of another could not be appropriated, a man could not, on the other hand, give himself any monopoly in a name which merely described the nature of the business or the locality of its operations."

There is a class of cases, no doubt, in which the name of a place has been treated as entitled to protection in its particular use in connection with business. One much relied on by the plaintiffs, and a typical example, is *Thompson* v. *Montgomery*, 41 Ch. D. 35. The judgment of Chitty, J., proceeds upon this, that by length of user in connection with the plaintiff's business, the name "Stone" was accepted in the market, not in its geographical and primary sense, but with a secondary meaning, *i. e.*, not as referring to ale brewed at Stone, but ale of the plaintiff's brewing. That is, as I understand the decision, the term had ceased in its connection with the plaintiff's business

to be descriptive, (though it was so at first) and had became distinctive by the length and manner of the plaintiff's user of it. But the plaintiffs gave no evidence in this case of their user of the name "Belleville Business College," or that a secondary meaning was to be attributed to the name of the locality. *Lee* v. *Haley*, L. R. 5 Ch. 155, was the case of a name, rather of the fancy sort, used for ten years by the plaintiff. The distinction between that case and this is plain by the ground of decision as expressed by Giffard, L. J., at p. 161: "The principle is * * that it is a fraud on a person who has established a trade, and carries it on under a given name, that some other person should assume the same name, or the same name with a slight alteration, in such a way as to induce persons to deal with him in the belief that they are dealing with the person who has given a reputation to the name."

Judgment.

Boyd, C.

More akin to this second aspect of the case I now deal with is the decision of the Supreme Court of the United States, in *Canal Co.* v. *Clark*, 13 Wallace 311, and from which I cite a passage at p. 327: "It must then be considered as sound doctrine that no one can apply the name of a district of country to a well-known article of commerce, and obtain thereby such an exclusive right to the application as to prevent others inhabiting the district or dealing in similar articles coming from the district, from truthfully using the same designation. It is only when the adoption or imitation of what is claimed to be a trademark amounts to a false representation, express or implied, designed or incidental, that there is any title to relief against it. True it may be that the use by a second producer, in describing truthfully his product, of a name or a combination of words already in use by another, may have the effect of causing the public to mistake as to the origin or owner ship of the product, but if it is just as true in its application to his goods as it is to those of another who first applied it, and who therefore claims an exclusive right to use it, there is no legal or moral wrong done. Purchasers may be mistaken, but they are not deceived

Judgment.

Boyd, C.

by false representations, and equity will not enjoin against telling the truth."

The defendant has correctly described his establishment as a business college at Belleville in holding it forth as "Belleville Business College"; he uses a name which the plaintiffs have never used as the designation of their college; he has, no doubt, puzzled the public interested in such matters for the time being, until it is disclosed that Belleville is to have two distinct colleges instead of the old one split into two parts; he has made confusion in the post-office, occasioned by the careless or inaccurate writers of letters who do not take pains to write to the plaintiffs by the name which they have extensively circulated and advertised as their proper address; he has adopted a vague name which will help to continue, it may be, for a while, this annoyance to the plaintiffs. But it does not appear that the defendant has made any unfair use of letters addressed ambiguously, and probably the steps taken by the post-office authorities have practically remedied the matter. Nor does it appear to me that the plaintiffs can lose students who seek them because of their history and reputation in the past. Students who are aiming at the plaintiffs' college can readily find it, and others will go where there is the best training. This much is to be said on the legal aspects of the case as a question of right to be litigated.

But I cannot say that the defendant has not sought in some way to advantage himself in a manner not meritorious. He was aware that when Albert College began a commercial department in 1884, under the name "Belleville Business College," it called forth the protest of the plaintiffs, to which that college yielded; he must have known from his long residence in Belleville, and his connection with the plaintiffs' institution, that it was sometimes or frequently known and corresponded with as "Belleville Business College," and he must have guessed that embarrassment would arise in the delivery of letters, as has happened. His course in choosing this vague name—

that might have been sufficiently distinguishing had there been but one such "College" at Belleville—is suggestive of the keen business man, but does not otherwise recommend him as seeking to do what was perfectly fair. Much better had he added to the name some "garnishment," which would have relieved him from blame, even though correspondents had been careless and inexact in their mode of address. Judgment. Boyd, C.

These considerations apply to the question of costs, which has ever been used as an instrument of correction in the hands of the Court. What I have said will indicate why, in dismissing the action, I do so without costs.

[QUEEN'S BENCH DIVISION.]

RE FERRIS AND EYRE ET AL.

Arbitration and award—Misconduct of arbitrators—Receiving ex parte statements.

Upon a motion to set aside an award on the ground that the arbitrators improperly received statements from one of the parties in the absence of the other :—

Held, that it is not necessary in such a case to impute any intentional impropriety of conduct to the arbitrators, nor to shew that their decision has been in any way influenced by what has occurred ; it is only necessary to shew that their minds may possibly have been influenced against the applicant by the communications that have taken place.

And where it appeared that after the close of the evidence and while the arbitrators were considering it, some explanations in regard to an account were given to them by one party to the arbitration in the absence of the other on a certain evening, and that when the arbitrators and the parties all met the next morning, one of the arbitrators said that they had had an explanation about the account, and wanted to know what the other party had to say about it :—

Held, that the award was bad, and must be set aside.

THIS was a motion by W. J. Eyre and Calista A. Phillips, executors under the will of John Eyre, to set aside an award made by George S. Miller, Milton K. Lockwood, Statement.

Statement.

and Lewis A. Purdy, on the 12th September, 1889, ordering the applicants to pay Matthew Ferris the sum of $680, and to release and discharge a mortgage made by Ferris to the late John Eyre.

The motion was made on the ground that the arbitrators had improperly received statements from Matthew Ferris and his brother, J. M. Ferris, in the absence of the applicants, (the other parties to the arbitration,) and without notice to them.

The facts appear in the judgment.

The motion was argued before STREET, J., in Court on the 10th December, 1889.

Moss, Q. C., for the applicants. The arbitrators were in a position by possibility to be biassed, and that is enough. They listened to what was said by one party behind the back of the other. They say they were not influenced; but even if not, the following cases shew the award is bad: *Race* v. *Anderson*, 14 A. R. 213; *Re Cruickshank and Corby*, 30 C. P. 466; 5 A. R. 415; *Dobson* v. *Groves*, 6 Q. B. 637; *McEdward* v. *Gordon*, 12 Gr. 333; *Conmee* v. *Canadian Pacific R. W. Co.*, 16 O. R. 639, and cases there collected.

W. R. Meredith, Q. C., for Matthew Ferris. There is nothing in point of fact to support the argument just addressed to this Court. There must be affirmative evidence that some communication of the kind took place behind the back of the other party. The law is, that if the parties are called together afterwards, and the matter is explained, the defect, if any, is cured. That is the principle of *Race* v. *Anderson*.

Moss, in reply, referred to *Whitely* v. *MacMahon*, 32 C. P. 453.

There was also a question raised as to the reception of certain affidavits upon the motion. This question is dealt with in the judgment.

December 12, 1889. STREET, J.:—

Judgment.

Street, J.

Application by W. J. Eyre and Calista A. Phillips to set aside an award made by George S. Miller, Milton K. Lockwood, and Lewis A. Purdy, in favour of Matthew Ferris, the other party to the reference, upon the ground that the arbitrators had improperly received statements from Matthew Ferris and J. M. Ferris, in the absence of Eyre and Phillips, and without notice to them. In the notice of motion the applicants gave notice of their intention to read, *inter alia*, the affidavit of W. J. Eyre and the examinations of the arbitrators to be taken upon the motion. In the course of these examinations the arbitrators made the statements which are relied upon as shewing that the alleged improper communications had taken place between them and Ferris. Affidavits in reply were filed by the respondent Ferris and his brother. There I think the evidence that is before me should properly have closed.

Mr. Moss, counsel for the applicant, asked leave to read a further affidavit of his client; and Mr. Meredith, for the respondent, then asked that in that case he should be allowed to read a reply to it, sworn by his client on the morning of the motion. I have looked at the affidavit tendered by Mr. Moss, and it appears to me to contain only matter which supports the case made out by the original affidavits and depositions filed in support of the motion. I, therefore, reject both that and the affidavit offered in reply to it.

It appears that after the evidence was closed, and while the arbitrators were considering it, an account, in the handwriting of J. M. Ferris, was found amongst the papers, which the arbitrators thought required explanation on the part of Matthew Ferris. J. M. Ferris was sent for by his brother for the purpose of giving the explanation. He reached Brighton, where the arbitrators were assembled, and being anxious to leave early in the morning, went with his brother to see the arbitrators in order to endeavour to get them to take his evidence that night. At this inter-

Judgment.

Street, J.

view it seems from the evidence that some statements must have been made by Matthew Ferris with regard to the account, because Mr. Purdy in his evidence, at page five of the depositions, says that when the arbitrators and the parties all met the next morning, he told Mr. Eyre that he had an explanation from Mr. Ferris about it, and wanted to know what Mr. Eyre had to say about it. His statement as to when this explanation had been received although by no means clear, leads me to the conclusion that the arbitrators had listened to the statement the night before. It is admitted that Mr. J. M. Ferris was anxious to make his statement and get away. It is admitted by Mr. Purdy that Mr. Matthew Ferris said to the arbitrators that night, with reference to the account, "We can easily explain that thing away," and when we find Mr. Purdy apparently opening the proceedings next morning by telling Mr. Eyre that he had had an explanation of the account from Mr. Ferris, and wanted to hear his story, it is much more easy to come to the conclusion that he referred to some explanation received in the absence of Mr. Eyre than in his presence, as the respondent contends. The cases draw an exceedingly clear and stringent line as to the course to be pursued by the Courts when it has been shewn that any communications have passed between the arbitrators and one of the parties behind the back of the other. It is not necessary to impute any intentional impropriety of conduct to the arbitrators, nor to shew that their decision has been in any way influenced by what has occurred. It is only necessary to show that their minds may possibly have been influenced against the applicant by the communications which have taken place, and the consequence then follows, as a matter of course, that the award must be set aside.

Having come to the conclusion, from the evidence of the arbitrators here, that Matthew Ferris did on the night of his brother's arrival give to the arbitrators some explanations as to the account then in question, in the absence of the opposite parties, it becomes quite unnecessary to consider

exactly how far the explanations may have gone; they appear to have gone far enough, at all events, to require an answer from Mr. Eyre, in the opinion of the arbitrators; and I, therefore, am bound by the authorities to hold the award to be bad in consequence, and to order it to be set aside with costs. Judgment. Street, J.

See *Race* v. *Anderson*, 14 A. R. 213, and the cases there cited; also, *Harvey* v. *Shelton*, 7 Beav. 455; *In re Hick*, 8 Taunt. 694.

[QUEEN'S BENCH DIVISION.]

RE HIBBITT V. SCHILBROTH: WOODS ET AL., GARNISHEES.

Prohibition—Division Court—Substitutional service of summons—Defendant out of Ontario—R. S. O. ch. 51, sec. 100.

At the time of the issue of the summons in a Division Court plaint the defendant was in Ontario, but she left without its having been served upon her, and an order was made after she had left for substitutional service.

In the material upon which she supported a motion for prohibition she did not negative the existence of such facts as would give jurisdiction to make an order for substitutional service, and from her own affidavit it was to be inferred that the summons had come to her knowledge:—

Held, that, as the Judge in the Division Court had jurisdiction under sec. 100 of R. S. O. ch. 51, as amended by 51 Vic. ch. 10, sec. 1, to order substitutional service if certain facts were made to appear, and as the defendant was subject to the summons at the time it was issued, it was for the Judge to determine whether the facts necessary to give jurisdiction appeared, and his determination could not be reviewed by the High Court.

THIS was an appeal by the primary creditor from an order made by ROSE, J., in Chambers, upon the application of the primary debtor, prohibiting the junior Judge of the County Court of York and the primary creditor from further proceeding with a plaint in the 1st Division Court of the county of York. Statement.

The Judge of the County Court had made an order allowing the primary creditor to serve the primary debtor

Statement.

with the summons by serving it substitutionally, the primary debtor being at the time such order was made out of Ontario.

The order prohibiting was made upon the ground that the Division Court had no jurisdiction to order substitutional service upon a person out of Ontario.

The appeal was argued before the Divisional Court (ARMOUR, C. J., and STREET, J.,) on the 26th November, 1889.

Schoff, for the primary creditor. The Judge in the Court below had jurisdiction to make the order under sec. 100 of the Division Courts Act, R. S. O. ch. 51.

John Greer, for the primary debtor. The Division Court has no jurisdiction at all where the defendant is out of Ontario: *Ontario Glass Co* v. *Swartz*, 9 P. R. 252; *Re Guy* v. *Grand Trunk R. W. Co.*, 10 P. R. 372.

December 21, 1889. The judgment of the Court was delivered by

ARMOUR, C.J. :—

The plaintiff on the 22nd day of January, 1889, caused to be issued out of the first Division Court of the county of York, a writ of summons directed to the primary debtor and to the garnishees. The primary debtor had been prior to that time, and then was and thence until the month of March, 1889, continued to be, a resident of the city of Toronto, and in the said month of March left the city of Toronto and went to reside in the city of Detroit. The primary debtor had prior to 22nd day of January, 1889, arranged for the sale of her property to the garnishee Woods, for whom the garnishee Forster was acting as solicitor; and to attach the money coming to the primary debtor from the sale of her property, as well as to obtain judgment against her for the plaintiff's claim, the said summons was issued. The summons was served upon the

garnishees on the 22nd of January, 1889, and an order for substitutional service was obtained from the junior Judge of the County Court of the county of York on the 1st day of April, 1889, on the primary debtor, by the delivery of the summons to one John Greer. Judgment. Armour, C. J.

Application was thereupon made to a Judge for a prohibition prohibiting the plaintiff and the said Judge from further proceeding in the said suit, on an affidavit made by the primary debtor in which she stated, among other things, that prior to the 22nd day of January, 1889, she was the owner of certain property in the city of Toronto, and having decided to leave the province of Ontario to take up her abode with her husband in the state of Michigan, she arranged for the sale of her said property, executed the deeds therefor to the purchaser, and made other arrangements to complete the same; that on applying for her money to go to the United States, where she had arranged to go, and had made the sale of her property for that purpose, she was informed by the purchaser and his solicitor, the above named garnishees, that proceedings had been taken in this action, and that in consequence thereof she could not get the whole money coming to her from the said sale.

The learned Judge granted prohibition, and from his order this appeal is made.

Under the Division Courts Act, R. S. O. ch. 51, sec. 100, as amended by 51 Vic. ch. 10, sec. 1, where it is made to appear to the Judge upon affidavit that reasonable efforts have been made to effect personal service of the summons upon the primary debtor, and either that the summons has come to the knowledge of the primary debtor, or that he wilfully evades service of the same, or has absconded either before or after the issue of the summons, the Judge may order substitutional service.

The Judge is invested with jurisdiction to make this order if it has been made to appear to him upon affidavit that reasonable efforts have been made to effect personal service, and if either (1) the summons has come to the

Judgment.

Armour, C. J.

knowledge of the primary debtor; or (2) if he wilfully evades service of the same; or (3) if he has absconded either before or after the issue of the same; and we cannot interfere with the exercise by the Judge of such his jurisdiction; it is only when he acts without jurisdiction that he can be prohibited.

The primary debtor was subject to the writ of summons at the time it was issued, and it was for the Judge to determine whether reasonable efforts had been made to effect service of it, and whether it had come to her knowledge, or whether she wilfully evaded service; and his determination cannot be reviewed by this Court.

The material upon which the motion for prohibition was made did not negative the existence of such facts as would give the Judge jurisdiction to make the order; and it is fairly to be inferred, from the affidavit of the primary debtor quoted above, that the writ of summons had come to her knowledge.

We think that the appeal must be allowed with costs here and in Chambers.

[CHANCERY DIVISION.]

TOWNSLEY V. BALDWIN.

Lien—Mechanic's lien—Action by sub-contractor—Necessity of averring that something is due to the contractor.

Held, upon demurrer to a statement of claim in an action to enforce a mechanic's lien brought by a sub-contractor against the owner of the lands, and the contractor, that it was necessary for the plaintiff to aver that there was something due from the owner to the contractor.

THIS was a demurrer to a statement of claim in an action brought by a sub-contractor against the owner of certain lands, and the contractor who had contracted to build some stores upon the property, to enforce a mechanic's lien. Statement.

The demurrer was by the land-owner, and was on the ground that there was no averment in the statement of claim that anything was due from the owner to the contractor.

The demurrer came on for argument upon December 4th, 1889.

J. F. Edgar, for the land-owner. The material fact is not alleged as required by Con. Rule 399. The principle is the same as in garnishment. The sub-contractor's lien is only to the extent of the fund due from the owner to the contractor. [BOYD, C.—The question is, who should allege that there is something due or nothing due.]

Dr. Snelling, for the plaintiff. The pleading here is identical with the form in Mr. Holmested's book on the Mechanics Lien Act, R. S. O. (1887), ch. 126. The owner knows what is due by him to the contractor, and when he puts in his defence he may say he owes the contractor nothing. I ask a reference to take the account between the contractor and the owner. The quantum of the lien depends upon this, but not the right to the lien. [BOYD, C.—You are not entitled to a lien, unless the owner has

Argument.

not paid the contractor in full. Should you not come shewing a cause of action, as a matter of pleading. You may not know how much is due, but you should allege that something is due.] I take a reference at my risk as to costs. If nothing is due I shall be mulcted in costs. [BOYD, C.—Your client does not know now that he has a lien, unless he knows that something is due.]

Edgar, in reply, referred to *Bailey* v. *Johnson*, 1 Daly's (N.Y.) 61; *Jensen* v. *Brown*, 2 Colorado 694; *Thomas* v. *Trustees of the Illinois Industrial University*, 71 Ill. 310.

December 5th, 1889. BOYD, C.:—

The plaintiff as sub-contractor is entitled by the statute to a lien upon the property of the owner, not absolutely but conditionally, to the extent to which the owner is indebted to the contractor in respect of the contract price. If no amount is owing from the owner to the contractor there is no lien to the sub-contractor. The plaintiff as sub-contractor, to have a cause of action, must prove something due from the defendant who demurs to the co-defendant Baldwin who took the contract to build the stores. What has to be proved has, as a general rule, to be alleged, though it may be that the exact state of the account can only be known at first to the owner and contractor. In these circumstances particularity is not required, but there should be some such statement as may be found in the form of pleading (appropriate to this case) given in Mr. Holmested's book on the Mechanics' Lien Act, 2nd ed., p. 121, Form 12, par. 6. The plaintiff's claim is defective in this regard, and the demurrer should be allowed, but with leave to amend on the usual terms, and within the usual time.

A. H. F. L.

[CHANCERY DIVISION.]

ROUTLEY V. HARRIS.

Defamation—Slander—Charging criminal offence—Charging offence punishable by fine only—Malicious injuries to property—R. S. C., chap. 168, secs. 26, 27, 58, 59.

Held, on demurrer to a statement of claim in an action of slander, that any defamatory charge referable to wrongdoing under sec. 26, or sec. 58, of the Act relating to malicious injuries to property, R. S. C., ch. 168, is actionable, without proof of special damage; for the punishment of imprisonment, and not merely the infliction of a fine is imposed in the case of such offences; but it is otherwise in the case of a defamatory charge referable to sec. 27, or sec. 59 of that Act, for such offences are punishable by fine only.

THIS was a demurrer to the statement of claim in an action for slander. Statement.

The material parts of the pleading demurred to were as follows:

2. In the month of August last past the said defendant having had the bands of a certain quantity of sheaves of oats on his premises cut, and certain of his fences enclosing growing crops let down as he alleged, falsely and maliciously charged the plaintiff in a public manner with having maliciously committed the offences, and maliciously injuring the defendant's crops, the subject of imprisonment and contrary to the Act respecting Malicious Injuries to Property.

3. The said defendant also at different times and places in the township of Warwick, and elsewhere in the vicinity of the plaintiff's residence, in the presence of other persons, falsely and maliciously uttered the following words after having referred to the offences mentioned in the preceding paragraph. "You did, and I can prove it," "more than that you let down my fence, and let horses and cattle into my crops," meaning thereby to charge the plaintiff with having maliciously injured the defendant's property by cutting the bands of oats as alleged, and of having let down the said fences for the purpose and with the effect of injuring and destroying the defendant's said crops.

4. The said defendant, in the said month of August, at different places in the township of Warwick, and in the neighbourhood of the plaintiff's residence, in the presence of other persons, after conversations upon the subject of the offences mentioned and referred to in paragraph two hereof, falsely and maliciously uttered the following slanderous words against the good name of the plaintiff, "he cut the bands," "I can prove it," "he did it," "he cut them bands of mine," meaning thereby to charge the plaintiff with having committed the said offences hereinbefore referred to, and using the said expressions with reference to the said plaintiff.

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5. The said defendant in a conversation with one Bernard McKenny on defendant's farm, on a day in August last, after the alleged offences hereinbefore referred to, and on or before the 19th day of August last, in a conversation about the circumstances and persons who committed the said offences, remarked, "the two first letters of his name are 'A.' 'R.'" "It would be easy for them when they are coming from the second line to come angling across my place and cut them," meaning thereby falsely and maliciously to refer to the plaintiff, and to charge him with the commission of the offences as hereinbefore alleged.

The words of the demurrer were as follows:

3. The defendant demurs to the plaintiff's statement of claim, and says that the same is bad in law, on the ground that it does not disclose any cause of action which is actionable without proof of special damage, no one of the offences charged in the alleged slanders being indictable offences, and on other grounds sufficient in law to sustain this demurrer.

The demurrer came on for argument on December 18th, 1889, before BOYD, C.

Aylesworth, for the defendant. The statement of claim must charge something which is the subject of imprisonment, and not merely of a fine. Here what is charged is at most a malicious trespass to fences and crops, or a petty trespass. This is not the subject of imprisonment without the option of a fine. I rely on Odger's, Law of Slander, 2nd ed., pp. 53-7; *Webb* v. *Beavan*, 11 Q. B. D. 609; *Ogden* v. *Turner*, 6 Mod. 104; *Palmer* v. *Solmes*, 30 C. P. 481; R.S.C. ch. 168, secs. 27, 58, 59; R.S.O. 1887, ch. 101.

Folingsbee, for the plaintiff. It is not necessary to set out the specific crime charged, if it was alleged by the defendant that the plaintiff has done something which subjects him to imprisonment: Odger's Law of Slander 2nd ed., p. 54; *Huber* v. *Crookall*, 10 O. R. 475; R. S. C. ch. 168, sec. 26. Any imputation of any criminal offence is ground for an action of slander: Harris's Criminal Law, 4th ed., pp. 1, 2, 4.

December 19th, 1889. BOYD, C.:—

By the Act relating to Malicious Injuries to Property, R. S. C. ch. 168, sec. 27, every one who unlawfully and

maliciously throws down or in anywise destroys any fence shall, on summary conviction, be liable to a penalty not exceeding $5, over and above the amount of injury done. Sec. 59 of the same Act provides that any one who unlawfully and maliciously commits any damage to real or personal property for which no punishment is otherwise provided, shall be liable to a penalty not exceeding $20. Sec. 58 provides for a case of such damage where the injury done exceeds $20, and makes it a misdemeanor punishable by imprisonment. Sec. 26 provides for the like damage to cultivated roots or plants growing in any land, open or enclosed, and declares the penalty to be a money payment *or* imprisonment. Any defamatory charge referrable to wrong-doing under either the 26th or 58th sections would be actionable without special damage; but if such defamation imports wrong-doing under the 27th or 59th sections then I take it special damage must be alleged according to the principles recognized in *Webb* v. *Beavan*, 11 Q. B. D. 609. Pollock, B., there says, "the distinction seems a natural one, that words imputing that the plaintiff has rendered himself liable to the mere infliction of a fine are not slanderous; but that it is slanderous to say that he has done something for which he can be made to suffer corporally": p. 610.

In the 2nd paragraph of the claim it is alleged that the defendant having had the bands of a certain quantity of sheaves of oats on his premises cut, and certain of his fences enclosing growing crops let down as he alleged, falsely and maliciously charged the plaintiff in a public manner with having maliciously committed the offences, and maliciously injuring the defendant's crops, the subject of imprisonment and contrary to the Act respecting Malicious Injuries to Property, and in the 3rd paragraph it is alleged that the words uttered after having referred to the said offences were "you did it, and I can prove it," "more than that you let down my fence and let horses and cattle into my crops," meaning to charge the plaintiff with having maliciously injured the plaintiff's property by cutting the bands of

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Boyd, C.

oats as alleged, and of having let down the said fences for the purpose and with the effect of injuring and destroying the defendant's said crops." Though the pleading is somewhat vague, yet I think the gist of the complaint is, that the defendant has publicly charged the plaintiff with maliciously injuring the defendant's growing crops (as in the 2nd paragraph of the claim) and with throwing down the defendant's fences "for the purpose and with the effect" of letting horses and cattle in to destroy the growing crops (as in the 3rd paragraph of the claim). This manner of pleading points to an offence under the 26th section of the statute exposing the guilty person to incarceration.

The other charge, as to cutting the bands of oat sheaves, is not so pleaded as to indicate that the offence imputed is under the 58th section rather than the 59th. As against the pleader I should read it as referrable to the 59th section, the breach of which involves only pecuniary liability.

As the demurrer is to the whole claim I cannot allow it, and will leave the costs to be dealt with by the trial Judge, as the defendant besides demurring has pleaded.

A. H. F. L.

[CHANCERY DIVISION.]

RYAN V. MCCONNELL.

Bills of exchange and promissory notes—Notes as collateral security—Duties of holder—Laches of creditor—Release of principal debtor—Necessity of proving actual injury.

Where promissory notes of third persons were transferred by the defendant without endorsement as collateral security for a debt due by him to the plaintiff, who now sued the defendant for the amount of the debt, and the defendant raised the objection that the plaintiff had been guilty of laches in proceeding for the payment of the collateral notes, and that he had not notified the defendant of their non-payment:—

Held, that if the defendant had been injured by such laches or want of notice, and to the extent to which he had been injured, he should be exonerated from payment, but not otherwise; and that the trial Judge had pushed the law too far against the plaintiff in holding that having found the laches and want of notice as a matter of fact, it was a conclusion of law that detriment had followed to the defendant.

Statement.

THIS was an action brought by Peter Ryan against Theodore H. McConnell, to recover the price of certain goods purchased by the latter from him, in which he alleged, and the fact was that the defendant had deposited with him certain promissory notes as collateral security for part of his indebtedness, some of which he, the plaintiff, had collected, and credited the defendant with the proceeds less the costs.

The defendant made no mention in his statement of defence of these promissory notes, but at the trial, which took place before FALCONBRIDGE, J., at Toronto, on November 26th and 27th, 1889, the defendant sought to prove that the plaintiff had been guilty of laches in respect to the steps taken to collect those of the collateral notes which had not been collected, and evidence was taken on the subject.

On November 29th, 1889, the learned Judge gave judgment as follows:

FALCONBRIDGE, J.:—

I accept the statement of the plaintiff and of Mr. John Ryan that the notes in question were taken as collateral

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and not as payment of the account. I do that because in the first place there are two witnesses against one—all of them perhaps to some extent interested—but also for other reasons; namely, that on the defendant's own statement, the customers would be known to him and not to the plaintiff; that there was no discussion at any time when the notes were handed in as to the solvency or insolvency of any of the makers; that he can't say that any of them were ever refused, and does not remember ever being asked to put up more as margin, although he will not say that this is not so. Nothing appears to have been ever taken off for discount, although the defendant says that the plaintiff wanted them at as short dates as possible. All these circumstances are to my mind pregnant with the conclusion that the notes were taken as collateral, and not as payment. It is also to be observed that in the note taken for $60.19, there are included $29.50 of collection charges. The books were before the defendant, and he had the right to see,—if he did not see,—how that note was made up; and of course the charging of collection charges against the defendant is utterly inconsistent with the theory that these customer's notes were given or accepted as payment. On the second branch of the case, I think it is a very extraordinary thing that as these notes from time to time fell due, and were not paid, that the defendant should not have been notified, and have had the opportunity of coming forward and seeing what he could do to collect them, or assist the plaintiff to collect them. He knew the people, the plaintiff did not know them. At any rate, the defendant either knew them or knew from Chambers who they were, and he had the right, in my opinion, to receive notice, and to have the opportunity of using speedy efforts to collect them. I think there has been laches of an extreme kind in the plaintiff's action in that matter in not sending the notes for collection, it appears, for months afterwards, and then never saying anything to the defendant about it. The case cited by Mr. Mills of *Peacock* v. *Pursell*, 14 C. B. N. S. 728, does not go so far as I am going in this judgment; because in *Peacock* v. *Pursell*, the defendants had actually lost their remedy on the note by reason of its non-presentment within the proper time; but I regard the language of the Judges, particularly of Willes, J., in that case, where he says "If a creditor with a bill falling due is guilty of laches whereby the security becomes deteriorated or valueless, it becomes equivalent to actual payment."

Now, I take it that it does not need absolute proof that the defendant has suffered by the laches, but that it is a conclusion of law, as in the case of a surety, that he has a right to notice, and to have an opportunity of placing himself in a position that he might have occupied. I think, therefore, that the defendant is entitled to my judgment.

Judgment. Falconbridge, J.

Judgment was then ordered to be entered for an amount admitted to be due within the jurisdiction of the Division Court.

The plaintiff now moved the Divisional Court to vary the above judgment, and that judgment be entered for the plaintiff for the amount of the debt upon the ground "that there was no laches on the part of the plaintiff in his dealings with the notes held by him as collateral security for the payment of the goods sold by him to the defendant. The plaintiff was only bound to use reasonable endeavours in the collection of the said notes This he did and he was bound to do nothing more."

The motion came on for argument on December 7th, 1889, before BOYD, C., and ROBERTSON, J. By consent of the parties an affidavit made by the plaintiff's book-keeper was read setting out that he had charge of the collection of the notes given by the defendant as collateral security as aforesaid: that "the mode of collection of notes taken by the plaintiff from his customers was at the time the defendant's notes were taken, and still is to hand the said notes to the banks or express office where the same were payable at least ten days prior to the maturity thereof, and twenty days before the maturity thereof to notify the makers by a printed circular of which exhibit A. is a true copy: the general instructions given to the bank and express agents are and were to hold the said notes for twenty days after maturity if deemed advisable should they be dishonoured, at the end of which time if not paid they are returned to the plaintiff; the makers of all dishonoured notes are notified by circulars sent from Toronto a copy whereof is marked exhibit B., about six days before maturity; every

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effort is made to collect the said notes before resorting to collection by process by law which in many cases ends with the recovery of judgment at the expense of the customer, and without benefit to him; the said notes given by the defendant were dealt with in the ordinary way of collection as above set forth, and every effort was made to collect them before charging them back to the defendant:" that certain parties were not sued because they were reported as worthless.

Exhibit A. to the above affidavit was a simple notification that the plaintiff was the holder of the note in question, and that on a date named the note would be forwarded to the agent of the bank, where payable, with instructions to protest if not paid when due.

Exhibit B. was in the form of a letter notifying the debtor that unless the note was paid within a number of days specified it would be placed in suit.

Haverson, for the plaintiff. The Judge found that by our inaction in not collecting the other notes or notifying the defendant, the defendant was released. [BOYD, C. *Synod of the Diocese of Toronto* v. *De Blaquiere*, S.C. Dig. p. 296, is on the point.] If the defence had been raised on the record, the facts could have been fully gone into. I file an affidavit by consent now shewing what was done. Did the lack of notifying the defendant constitute a defence to the action? This question of notification was not raised in the case of *Synod of the Diocese of Toronto* v. *De Blaquiere, supra*. The defendant never attempted to show that he was damnified. Parsons on Notes and Bills, 2nd ed., vol. 2, p. 184, puts the law. We did all we could be reasonably asked to do, and we were guilty of no laches whatever. *Peacock* v. *Pursell*, the case on which this judgment is founded, is reported 14 C.B.N.S. 728, there the whole case turned upon the loss of the remedy against the endorser by the neglect of the plaintiff. In our case no remedies have been lost; *Walton* v. *Mascall*, 13 M. & W. 72, shows that the guarantor of a promissory note is not

entitled to notice of dishonour of the note. De Collyar on Guarantees, 2nd ed., p. 189, collects the authorities to the same effect. The defendant consents that the affidavit I now file should be read as though its purport had been given in evidence at the trial. This brings the point down to whether the defendant was required to prove actual damage and I submit that he was. Argument.

Mills, for the defendant. *Synod of the Diocese of Toronto* v. *De Blaquiere*, lays down the rule that applies to the case, and the question is, not whether there was damage—but if there was a duty cast on the plaintiff, and a breach of that duty. Whether a loss followed the breach of the duty or not, is immaterial. On the evidence there was a duty cast on the plaintiff to give such notice. I further submit that the rule is the same, whether the notes in question were given as payment or as collateral to the debt. The notes became due in December, 1885, and were not sent out for collection till March, and even then no notice was given to the defendant till 1885, when the writ was issued. [BOYD, C.—If they were principal and surety the delay alone would not discharge the surety.] All we have to do is to shew that there was a duty or implied contract that they should do something, and if they failed in that respect, we are discharged. *Camidge* v. *Allenby*, 6 B. & C. 373, distinguishes the point raised as to our not being parties to the notes. As having been the holders, though, when the plaintiff claimed, we were parties, and in the manner pointed out in that case. *Phillips* v. *Astling*, 2 Taunt. 206, shews that the plaintiff was bound to notify us within a reasonable time: *Hopkins* v. *Weir*, L. R. 4 Ex. 258, shows the principle. We can say to the plaintiff you have dealt with these notes as though we had no interest in them. *Smith* v. *Mercer*, L. R. 3 Ex. 51, shews that we being held liable on these notes, should have had notice that they were dishonoured. Then I rely on *Peacock* v. *Pursell*, 14 C.B.N.S. 728 cited in the judgment; and on *Kerr* v. *Cameron*, 19 U. C. R. 366; *Molsons Bank* v. *Girdlestone*, 44 U. C. R. 54, at p. 61; *Canadian Bank of Commerce* v.

Argument. *Green*, 45 U. C. R. 81. The last case I cite, amongst other points, on the principle of estoppel. See also Roscoe on Nisi Prius Evidence, 15th ed., pp. 621, 623; Redfield and Bigelow, L. C. on Bills and Notes, pp. 198, 210, which shews it makes no difference whether the notes are given as collateral or not. If held liable on these notes now, we could not collect a dollar of them; and when we could have collected them we received no notice. [BOYD, C.—Granted they have been guilty of laches, are you damnified? If so, you should be discharged, but if not, why should you be discharged?] We can never now be placed in the position we occupied when the notes fell due. Besides having a duty to do, it is sufficient for us to shew that they did not do it. Byles on Bills, 14th ed., p. 236, 237; Chalmers on Bills, 2nd ed., p. 158, Art. 192, may also be referred to.

Haverson, in reply. We have dealt with the notes without any laches, all we have not done is to notify the defendant of their dishonour; and the law shows that we were not bound so to notify him. *Camidge* v. *Allenby*, 6 B. & C. 373, is a different case. The note there was given in payment of goods. There is no duty to notify as the learned Judge seems to have supposed.

December 23rd, 1889. BOYD, C.:—

Promissory notes of third persons were turned over by the defendant without endorsement as collateral security for a debt due by him to the plaintiff. These not having been collected by the plaintiff the action is against the defendant for the amount of the debt. The real defence is not set up on the record, but as passed upon by the learned trial Judge it is that the plaintiff has been guilty of laches in proceeding for the payment of the collateral notes. The Judge finds laches, and as a conclusion of law that detriment has followed to the defendant, and has therefore refused to order payment. That is he finds the defendant discharged from the obligation to pay because the plaintiff did not exercise diligence in seeking to collect

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the notes. This is pushing the law too far against the plaintiff, who should not suffer unless his want of diligence has caused the defendant to suffer loss, and then only to the extent of that loss. In other words it is a question of evidence whether the defendant has been damnified by the tardiness of the plaintiff. Nor is the omission of the plaintiff to notify the defendant of his inability to recover against the makers of the notes a ground for discharging the defendant without more. If the defendant has been injured by the omission, and to the extent to which he has been injured, he should be exonerated from payment, but not otherwise: *Williams* v. *Price*, 1 Sm. & Stu. 587.

In Chitty on Bills, 10th ed., p. 219 it is said: "if the bill be given only as a collateral security, and the person delivering it be no party to it he will not be discharged from his original liability by the laches of the holder, unless he was really prejudiced by the omission." For this is cited per Abbott, C.J., in *Van Wart* v. *Woolley*, 3 B. & C. 439; *Walton* v. *Mascall*, 13 M. & W. 72; *Hitchcock* v. *Humfrey*, 15 M. & Gr. 539, which quite justify the general rule of the text-book. See also Parsons on Notes and Bills, 2nd ed. vol. ii., pp. 182-186; *Synod* v. *De-Blaquiere*, 27 Gr. 536, S. C. Dig. p. 296; Colebrooke on Collateral Securities sec. 114.

The new evidence which the parties agreed should be read shews reasonable diligence in endeavouring to collect the notes, and unless the defendant does at his own risk choose to take an inquiry before the Master as to any damage he may have sustained, there should be judgment for the amount claimed with costs to the plaintiff, including costs of the appeal.

ROBERTSON, J., concurred.

A. H. F. L.

[CHANCERY DIVISION.]

RE MCCAULEY AND CITY OF TORONTO.

Municipal corporations—Compensation—Expropriation—Arbitration and award.

Where the land itself upon which a trade is carried on, is expropriated, damage to the goodwill may be a proper subject of compensation. *Rickett's Case*, L. R. 2 H. L. 175, distinguished.

Statement. THIS was a motion to remit and refer back a certain award to the arbitrators under the following circumstances:—

Under 50 Vict. c. 71 (O.) power was conferred on the corporation of the city of Toronto to pass by-laws for entering upon, taking, and acquiring so much land in the said city as might be required for the purpose of a new drill shed for the volunteer force of the city of Toronto, without the consent of the owners of the lands to be taken, making due compensation therefor to the parties entitled thereto, under the conditions of the Consolidated Municipal Act of 1883, and amending Acts in that behalf. Accordingly, the corporation of the city of Toronto, in January, 1888, passed by-law No. 1933, entitled, "A By-law to take lands required for a new drill shed for the volunteer force of the city of Toronto;" and the same month they also passed a by-law, No. 1934, entitled, "A By-law respecting arbitration as to the matter of compensation to be paid for lands taken for the construction of the said drill shed;" and an arbitration was duly had to ascertain such compensation, John McCauley being one of the owners of the property on the said drill shed site. It was claimed on behalf of the said John McCauley, before the arbitrators, that he was entitled to be paid for the damage sustained by him by reason of the loss of or diminution in the value of the good-will of the business carried on by him on his premises, and evidence was tendered to prove the said loss, but was rejected by the arbitrators. On August 10th,

1889, the arbitrators made their award, and, in clause 6, stated as follows:— Statement.

"With respect to claims of John McCauley and Isabella Hill, it was contended that the arbitrators should receive evidence on the question of damages arising to the claimants from diminution of the good-will of the business carried on by them, respectively, on the premises expropriated, these claimants being compelled, by reason of the expropriation, to abandon the established businesses carried on by them, respectively, on the expropriated premises, and to secure new premises elsewhere, and to build up a new or partially new business. The arbitrators declined to receive such evidence, and the award does not include any allowance arising from such contention."

The award was adopted by the corporation of Toronto, on September 10th, 1889, and the present motion was to remit and refer the same back to the arbitrators, and that the arbitrators be directed to receive evidence with reference to any loss the said John McCauley might have sustained by reason of the loss or diminution in the value of the good-will of the business carried on by the said John McCauley on his premises.

The motion came on for argument upon December 17th, 1889, before BOYD, C.

Lash, Q.C., for John McCauley. Good-will is part of the value of the premises: Cripps on Compensation, 2nd ed., p. 95; *Regina* v. *Vezina*, 25 C. L. J. N. S., 407; *The Mayor, etc, of the City of Montreal* v. *Brown*, 2 App. Cas., 168; *Breakey* v. *Carter*, S. C. Dig. p. 256; *Senior* v. *The Metropolitan R. W. Co.*, 2 H. & C. 258; S. C. 32 L. J. Exch. 2251; *White* v. *Commissioners of Public Works*, 22 L. J. N. S., 591.

Biggar and *Worrell*, for the city of Toronto. The words "necessarily resulting" in our Act, R. S. O. 1887, c. 184, s. 483, are important to be noticed, as distinguished from the English Act. The loss of good will is specially pro-

Argument. vided for in the Hungerford Market Act: *Ex parte Ann Farlow*, 2 B. & Ad. 341. Good-will does not attach to the property in ordinary cases, nor in this: *Ripley* v. *Great Northern R. W. Co.*, L. R. 10 Ch. 435. *Senior* v. *The Metropolitan R. W. Co.*, 2 H. & C. 258 is over-ruled by *Ricket's Case*, L. R. 2 H. L. 175. See, also, *Metropolitan Board of Works* v. *McCarthy*, L. R. 7 H. L. 243; *Ford* v. *Metropolitan, etc., R. W. Co.*, 17 Q. B. D. 12; *Beckett* v. *The Midland R. W. Co.*, L. R. 3 C P. 82; *Wadham* v. *North Eastern R. W. Co.*, L. R. 14 Q. B. D. 746; *Bigg* v. *Mayor, etc., of London*, 28 L. T. N. S. 336; Allan on Good-will, pp. 113, 116; *Commissioners of Inland Revenue* v. *Glasgow and South Western R. W. Co.*, 12 App. Cas. 315.

Lash, in reply. The distinction in this case is, that the land is taken; in other cases, it is only injuriously affected: Lloyd's Law of Compensation, 5th ed., pp. 67, 114; Woolf & Middleton's Law of Compensation, 1st ed., at p. 117, marks the distinction.

December 18th, 1889. BOYD, C.:—

Ricket's Case, L. R. 2 H. L. 175, decides in a case where land is not compulsorily taken, but only injuriously affected, that injury resulting from diminution of good-will pertaining to business carried on upon the premises, is not an element of compensation. But when the land itself upon which the trade is carried on, is expropriated, it is decided, in *White* v. *Commissioners of Public Works*, 22 L. T. N. S. 591 (1870), by the Court of Exchequer, that damage to the good-will may be a proper subject of compensation. This last case, though not in the regular series of reports, has not been over-ruled, and is cited in all the most recent text books as of authority. The reason why this is a proper element of damage, when the land itself is taken so that the particular business is destroyed, is indicated in the language of different Judges. Thus, in *Senior* v. *The Metropolitan R. W. Co.*, 2 H. & C. 266 (1863), Pollock, C. B., says: "Loss of trade is loss of good-will,

and good-will is part of the value of the plaintiff's interest in the premises," and "loss of trade is an injury to the value of the land itself."

Judgment. Boyd, C.

So, in *Cameron* v. *Charing Cross R. W. Co.*, 16 C.B.N.S. 430, Willes, J., said, at p. 447: "Damage to a man's interest in land necessarily includes damage to the business interest which he carries on upon the land, by diverting it from its accustomed channel. Such an interest is not merely personal; it is an interest which a man enjoys in respect of the land; a reasonable expectation of profit from the exercise of his abilities in some particular place by carrying on business there. That reasonable expectation of profit is commonly called 'good-will,' and is a marketable thing." See, also, *Chamberlain* v. *West End of London Crystal Palace R. W. Co.*, 2 B. & Sm. 605 and 617. However these cases may be affected by the decision in *Ricket's Case*, the passages I have cited are good law, and applicable to the present appeal. The precise point determined in *Ricket's Case* is elucidated by the House of Lords in *Caledonian R. W. Co.* v. *Walker's Trustees*, 7 App. Cas. 259, as proceeding on the ground that the damage there claimed was merely a personal damage, and not affecting the land, because no land was actually taken: see pp. 276, 280, and 299.

Here the whole of the appellant's land, on which he has been conducting his business for some twelve years, has been taken. The evidence tendered, as to loss sustained by injury to his good-will, was admissible, and its effect should have been considered by the arbitrators. For this purpose the award will be remitted to them.

A. H. F. L.

[CHANCERY DIVISION.]

SWITZER v. LAIDMAN.

Defamation—Libel and slander—Pleading—Confession of plaintiff—Mitigation of damages—Justification.

Where in an action for slander and libel, imputing criminal offences, the defendant set up by way of mitigation of damages, that the plaintiff had confessed to a third party that he had done the acts charged against him:—

Held, that evidence of such a confession was only admissible under a plea of justification, unless the defendant added on the record that she had now good cause for discrediting that part of the admission or confession alleged to have been made by the plaintiff, although she honestly believed it to be true at the time she repeated the words complained of.

Held, also, that objection should have been taken to the pleading either by demurrer or by application to strike it out as embarrassing.

Statement.

THIS was an action for damages for libel and slander, brought by William Beatty Switzer, against Agnes Laidman, in which the plaintiff alleged in his statement of claim that the defendant, on various occasions, had falsely and maliciously written, and spoken, and published certain defamatory words, the effect of which may be shortly stated as being that the plaintiff had, some years ago, stolen some money from one Agnes Kennedy.

By her statement of defence the defendant pleaded not guilty, and then proceeded as follows:

2. If it is found that the defendant published the said libel and slanders, or either of them (which she does not admit, but denies), in mitigation of damages the defendant says: that in the year 1868 or 1869, Agnes Kennedy, of etc., who is the defendant's mother, on several occasions lost sums of money which in all amounted to over $100.

3. That the said sums of money were stolen out of a trunk and box belonging to the said Agnes Kennedy, which are in her house in the said township of Binbrook.

4. Said sums of money were so stolen at different times extending over a year, in small and larger sums, and it continued for a long while a great mystery to the said Agnes Kennedy and her family, as to who could possibly have stolen the said money.

5. That the plaintiff at that time was a near neighbour, and most intimate friend of the Kennedy family, and was constantly about the house.

6. The plaintiff about the year 1872 admitted and confessed to the said Agnes Kennedy that it was he who had taken the money which she had

lost, and asked her to forgive him, and that when he became able he would make restitution to her therefor; and the plaintiff told said Agnes Kennedy that he had watched for an opportunity when they were absent on Sundays at Church, and that he gained access to her said house by putting his arm through the back window and drawing back the bolt of the back door, all of which the said Agnes Kennedy repeated to her daughter, the defendant in this action. Statement.

7. The defendant further says, that if it is proved that she published said letter, or uttered the word complained of, or any of them (which she denies), that the same were published and spoken without malice, *bonâ fide*, in the honest belief of their truth to persons who had an interest in knowing the same, and on occasions of mutual privilege.

The action came on for trial at the Assizes, at Hamilton, on October 3rd, 1889, before STREET, J.

H. Carscallen, for the plaintiff.
Staunton, and *O'Heir*, for the defendant.

After the plaintiff had closed his case, Agnes Kennedy was called for the defence, and questions were put to her with reference to a certain occasion when she found money had been stolen out of a box in which she kept her money in her house. Whereupon the following took place:

THE COURT—What has this to do with the issue? Is there a justification, or is there not?

Mr. Staunton—No, My Lord.

THE COURT—Then on what principle can you give this evidence?

Mr. Staunton—I offer it on the principle that it is admitted in *Scott* v. *Sampson*, 8 Q. B. D. 491.

THE COURT—In *Scott* v. *Sampson*, it was held general evidence of character was—

Mr. Staunton—I offer it on the ground that in mitigation of damages I am entitled to offer it on that plea I have put there.

THE COURT—What you can do in mitigation of damages is, to plead justification to a part of the statement that is made.

Mr. Staunton—I offer the evidence, not in justification, but in mitigation substantially as set out in the plea.

Mr. Carscallen—I take the objection formally that without a plea of justification he cannot give the evidence.

THE COURT—I hold that you are not entitled to give it. Of course, Mr. Staunton, I think, subject to what Mr. Carscallen may say, that if you wish to set up these facts, by way of justification, that then I would give you time.

Statement.

Mr. Carscallen—I am content that a plea should be put on the record now of justification.

Mr. Staunton—It would put grave issues on my shoulders that I would have to prove as if in a criminal trial: and I do not want to be put to strict proof. I am not prepared to-day to go into strict proof.

THE COURT—I think that is a very strong reason that you should not be allowed to go into the evidence as the record is now—that you want to have the benefit of a plea of justification, without having its responsibility.

Mr. Staunton—Then I have no evidence, my Lord.

The learned Judge then directed the jury, and in the course of his remarks, said as follows:

STREET, J.:—

Some discussion has taken place in the course of the case as to what was proper evidence to be given under the case, as it was brought down to you. It has always appeared to me that where a person is charged with slander, there are two courses open, one of which ought to be taken. If the person making the slander desires to stand by it, he should say it is true. If he does not intend to stand by it, he should apologise for it—say that it was made in heat, or under a misapprehension, or make his excuse for it, and make his apology and withdraw it. It seems to me that a great many people have the idea that there is something unmanly and cowardly in withdrawing a statement that has once been made. No such feeling ought to prevail. If a man makes a statement hastily, without proper information, and finds out afterwards that he ought not to have made it, the proper thing—the only proper thing for him to do, is to withdraw it; but if he makes it deliberately, and intends to stand by it, then he ought to stand by it.

The law in some cases permits a man to give some facts in mitigation of damages where a man comes into Court and says: "I did not say it," or, "I did not say it, but if I did say it, I ought not to have heavy damages laid against me, because of some facts which I set up and prove." But where the facts upon which he relies are facts which are evidence that the statement is true, then they should not be pleaded except by way of statement that the charge is true. A man ought to do either one thing or another. If he means to say that the charge which he has made is true, he ought to say it is true; but he ought not to be

Judgment.

Street, J.

allowed to say, "I won't say it is true, but I will tell you certain facts which shew it is true, and I offer those—not as an answer to the action, but by way of reducing the damages." Now, that, it appears to me, is what the defendant wished to do here. I offered to the defendant's counsel the right to put fairly and squarely on the face of the pleadings here a statement that the charge of stealing was true; but the defendant's counsel does not wish to take the responsibility of putting the statement on the pleadings. He wishes to put it in another form; he wishes to set out certain facts which would show that this charge was true, but he does not wish to say fairly and squarely that the charge was true; and I do not think that the law, as I understand it, allows any defendant to take that position. I think that the position that the law compels him to take when he has facts which amount to an answer to the action, is to put them on the record as being an answer to the action. However, as he did not wish to put the facts into the shape in which I offered that they should be put—that is to say, as he did not wish to say on the face of the pleadings: "That statement that I made is true," I have ruled that no evidence could be given with regard to that at all. I mention this because both counsel have referred to the matter before you in their addresses; and you will understand that the plaintiff offered here to go on with the case, allowing the defendant to set up that the statement was true, so as to fight it out fairly and squarely on that issue.

The result of it all is, that the only defence set up by the defendant is, that she did not utter the words which are charged to have been uttered; and that would perhaps include the defence, that if they were uttered she did not mean them in the sense in which the plaintiff says she used them. If you find that they were uttered in the sense of a charge of theft, then you come to the next question of damages, and that, gentlemen, is a question which is entirely for the jury in a case of this kind. You will consider all the circumstances. Of course, the plaintiff has not pressed for vindictive damages, as it is called; he has asked you simply for a verdict of a moderate amount to show what you think of the case. If you find that the plaintiff is entitled to damages, you are entitled to give any sum which you think proper.

The jury found a verdict for the plaintiff, with $300 damages.

Argument.

The defendant now moved the Divisional Court to set aside the judgment entered for the plaintiff, and for a new trial.

The motion came on for argument on December 10th, 1889, before BOYD, C., and ROBERTSON, J.

Staunton, for the defendant. We say not that the plaintiff did steal, but that he said he did steal. STREET, J., refused to entertain the plea, unless we justified. We say we were not bound to plead or prove justification. STREET, J., refused to allow us to put in the evidence, because we declined to plead justification. We say we were entitled to give the evidence in mitigation of damages. There was no demurrer to the plea. We examined the defendant's mother *de bene esse*, and no objection was then taken to the evidence: *Scott* v. *Sampson*, 8 Q. B. D. 491, lays the law down as analyzed in *Wilson* v. *Woods*, 9 O. R. 687 by ROSE, J. That case goes further than we require, because it holds that even where one can prove justification, it is not necessary to do so, but the defendant may set the matter up simply in mitigation of damages. *Moore* v. *Mitchell*, 11 O. R. 21, has no bearing on this case. It is true it says *Wilson* v. *Woods*, is disapproved of, but not in this point. *Livingston* v. *Trout*, 9 O. R. 488, is another case. It is laid down in many cases that no one can entrap one into libelling him, and then recover: Odgers on Libel and Slander, 2nd ed. p. 316. I also refer to *Hibbs* v. *Wilkinson*, 1 F. & F. 608; *Cook* v. *Ward*, 4 M. & P. 99, which is a case of a man telling a story of himself, the repeittion of which he afterwards complained of as a libel. *Wills* v. *Carman*, 17 O. R. 223, shews a man need not justify in order that he may be permitted to give evidence in mitigation of damages. We have a right to shew (1) that we are not malicious, and one of the strongest proofs of this is, that the plaintiff said the same thing about himself: *Edgar* v. *Newell*, 24 U. C. R. 215; a man should always have the right to shew that he did not act maliciously: *Linford* v. *Lake*, 3 H. & N. 276: (2) We were entitled to plead to

damages. Consolidated Rule 573 especially provides that at least seven days' notice must be given if you intend to adduce evidence in mitigation of damages. What would be the use of this, if the evidence could not be given. Spreading it on the record is, and has been held, equivalent to giving notice, unless the Judge otherwise orders. I also refer to Odgers on Slander and Libel, 2nd ed. p. 316, 613. The English cases of newspaper libel shew that the question of fair comment is a question for the jury. In such cases they do not plead justification, they just plead fair comment, and then prove it true. Then we say there is no proof of the libel. An answer to a question where a man does not use the words complained of, does not support the allegation that the words were used: Odgers, Law of Libel and Slander, 2nd ed., p. 120. Argument.

Carscallen, for the plaintiff. There cannot be a plea of this kind in mitigation. The latest case is *Wood* v. *Earl of Durham*, 21 Q.B.D. 501; *Wills* v. *Carman*, 7 O.R. 223, is distinguishable. The defence there was under the Newspaper Libel Act, and that has no application here. This plea must be a justification on the facts. This plea was against Rules 399, 402. It is a statement of the evidence, not of the facts. These matters are not pleaded by way of defence. [*Staunton*, refers to Rule 573.] The defendant has not furnished such particulars as enables him to give evidence at the trial. There are a great many cases bearing on questions of rumour, most of them are collected in *Scott* v. *Sampson*, 8 Q. B. D. 491; see *Regina* v. *Newman*, 1 El. & B. 268; *Speck* v. *Phillips*, 7 Dowl. 470; *Underwood* v. *Parks*, 2 Str. 1200. *Eamer* v. *Merle*, not reported but referred to in *Scott* v. *Sampson*, 8 Q. B. D., 491; *Thompson* v. *Nye*, 16 Q. B. 175; *Bracegirdle* v. *Bailey*, 1 F. & F. 536; *Moore* v. *Mitchell*, 11 O. R. 21, as against the cases of *Wilson* v. *Woods*, 9 O. R. 687; *Livingston* v. *Trout*, 9 O. R. 488.

Staunton, in reply. The defence in denial covers the question of malice: *Pursley* v. *Bennett*, 11 P. R. 64, is another case. I should have costs, if there is a new trial.

Judgment.

Boyd, C.

December 23rd, 1889. BOYD, C.:—

This is an action of slander—the words complained of imputing a felony to the plaintiff.

The defence which sets up in mitigation of damages in effect that the plaintiff made confession of the crime to the defendant's mother, is a plea that should have been objected to either by demurrer or by application to strike it out as embarrassing: *King* v. *Dollar*, 23 Q. B. D. 388; and I think the Judge rightly ruled that evidence was not to be given under it, which went to establish the truth of the charge, unless it was so amended as to be pleaded in justification. This point is learnedly and exhaustively discussed in *Smith* v. *Richardson*, Willes 20, where the great majority of the Judges held that, though malice was the gist of the action, and that evidence proving the manner and occasion of speaking the words to shew that they were not spoken with malice, has always been admitted; yet, if the truth of the words should be allowed to be given in evidence for this reason, it ought to be in bar of the action which has never been pretended. The same law is declared in a recent case: *Watkin* v. *Hall*, L. R. 3 Q. B. 396, where Blackburn, J., adopts the language of Littledale, J., to this effect: "If the defendant relies upon the truth as an answer to the action, he must plead that matter specially, because the truth is an answer to the action, not because it negatives the charge of malice, but because it shows that the plaintiff is not entitled to recover damages." See also *Speck* v. *Phillips*, 5 M. & W. 279.

It does not meet this rule of pleading and practice to say that the defendant does not know whether the plaintiff stated the truth or not when he confessed to her mother. Proof of the confession would import its truth, if the plaintiff did not give counter evidence. It seems to me that the defendant could set up the matters now pleaded in mitigation of damages only, by admitting on the record that she has now good cause for discrediting the fact of such confession, though it was believed when the words

complained of were uttered. Having regard to a possible amendment which may enable the defendant to plead in mitigation of damages, I think the verdict should be set aside, with leave to re-plead or amend the pleadings and reserve the costs of trial, and this motion to abide the result of another trial.

Judgment. Boyd, C.

Had the plaintiff raised the objection at the proper time, the difficulty would not have occurred; and so I think the costs I have indicated should be reserved.

ROBERTSON, J.:—

Strictly speaking I do not think the evidence tendered at the trial by the defendant was admissible in mitigation of damages. The defendant says in her statement of defence, that the plaintiff "admitted and confessed to the said Agnes Kennedy that it was he who had taken the money which she had lost," &c. Now, to be allowed to prove that "confession," would in effect be proving the truth of the slander, and if it was true, that would be a justification, and the plaintiff could not recover, but the defendant does not say that the plaintiff should not recover, in fact she admits that the plaintiff is entitled to some damages, which is inconsistent with the consequences of the truth of the slander being proved.

I am, therefore, of opinion that the defence was not properly pleaded in mitigation, but the plaintiff should have demurred, or applied to strike out that part of the statement of defence as embarrassing; he did not do this, but took issue; there was, therefore, an issue to be tried. If the plaintiff had objected as above suggested, defendant could then have considered whether it would be safe for her at this late date to plead in justification under the circumstances.

I think, therefore, the defendant may be heard to say she was taken by surprise at the trial, and was not prepared to set up with the evidence then at hand such a defence. When the case was argued before us I was under

Judgment.

Patterson, J.

the impression that the evidence on the part of the plaintiff disclosed the fact that the defendant had merely made the statement as having been previously communicated to her by her mother, and did not utter the words charged as being true of her own knowledge, and supposing that to be the case, I was of opinion that the defendant should have been allowed to call her mother to prove that she, the mother, had made the statement in the first place to the defendant, and I think she would be within her strict legal rights to do so.

In *Duncombe* v. *Daniell*, 2 Jurist 32, the facts were: On the day of nomination of candidates for the representation of the borough of Finsbury, the defendant published in the *Morning Post* certain facts discreditable to one of the candidates (the plaintiff), which he alleged he had heard from one Wilkinson at a meeting of the electors. *Held*, that Wilkinson was an admissible witness to prove in mitigation of damages that he did in fact make the statement, which the defendant had published at the time and place alleged.

But upon reading the evidence, I find that such is not the fact, except in one instance, on the occasion when the defendant had the conversation complained of with Elizabeth Switzer, the plaintiff's wife, and then she does not do so in direct terms, but it might be inferred she so meant to express herself, and that she was so understood by the witness. She said then, "I think that Mrs. Switzer (plaintiff's mother) ought to be the last person to say anything about mother (defendant's mother), seeing that mother holds her son (the plaintiff) to be a thief." This witness was not cross-examined on the point as to whether she understood from the defendant that she (defendant) was merely repeating what her mother had previously told her. It is too late to name the author of the report for the first time in the pleading; he or she must be named at the time of publication, to raise any ground of defence: *Davis* v. *Lewis*, 7 T. R. 17; *Woolnoth* v. *Meadows*, 5 East 463.

But I think it would be open to the defendant to plead

in mitigation of damages the matters which she has already placed on the record, by adding thereto that she has now good cause for discrediting that part of the admission or confession, alleged to have been made by the plaintiff to her mother, although she honestly believed them to be true at the time she repeated the words complained of. Judgment. Robertson, J.

On the whole, therefore, I think the verdict entered for the plaintiff should be set aside, or a new trial had between the parties as to the slander complained of, with leave to the defendant to re-plead or amend the pleadings, as she may be advised; reserving the costs of the first trial, and this motion to abide the result of another trial.

A. H. F. L.

[CHANCERY DIVISION.]

TRADERS BANK OF CANADA v. THE G. & J. BROWN MANUFACTURING COMPANY.

Hire receipt—Default—Resumption of possession—Right to enter on premises—Practice.

Where machinery was sold upon the terms expressed in a hire receipt that "The title of and right to the possession of the above mentioned property wherever it may be, shall remain vested in the said vendor and subject to his order until paid for in full":—

Held, that the vendor or his assigns had the legal right (the purchase money being in arrear and unpaid) to enter upon the premises where the property was, in order to resume actual possession of the machinery, giving notice and using all care in so doing, but that it would be illegal for him to take possession by force, and an injunction might properly issue to restrain acts of force on behalf of the vendor, but only on the terms that the assignee of the vendee be likewise enjoined from using force in resisting the vendor.

Before taking possession of the machinery the vendor was ordered to give such security as is usual in replevin.

Statement. THIS was a motion to continue an interim injunction till the trial of this action under the following circumstances:

William Feeney, of the township of Madoc, being the owner of mill premises at Gilmour, on July 27th, 1889, mortgaged the same to the plaintiffs as security for certain sums of money in which he was indebted to them, and on October 29th, 1889, the plaintiffs took possession of the said mills under their mortgage, and commenced to work the same. Thereupon the defendants claiming to be entitled to possession of a quantity of the machinery in the said mills by virtue of a hire receipt, the same not being paid for, threatened to send men and remove the machinery if necessary by force, unless the plaintiffs would pay them the full balance due for the purchase money of the said machinery.

The said hire receipt was in the following words:

"I, William Feeney, etc., do hereby declare that I have this day purchased from F. J. Drake, etc., for which I agree to pay the sum of $2,200. I further agree that the title of and right to the possession of the above mentioned property, wherever it may be, shall remain vested in the said F. J. Drake, and subject to his order until paid for in full; and also till

all notes or renewals thereof and securities given for such payment are also paid in full. I also agree to give, as security for such payment, my note or notes, etc. This instrument being given by me in the terms of the Act respecting conditional Sales of Chattels, passed by the Ontario Legislature, 51 Vic. ch. 19. Statement.

"Dated at Tudor, this 11th day of June, A.D. 1889.

Witness (Signed) WILLIAM FEENEY.

(Signed) J. E. O'DONNELL."

Upon this document was endorsed the following assignment:

"For value received I hereby assign, transfer, and set over to the G. & J. Brown Manufacturing Co., all my right, title, and interest of, in, and to the above lien, and the property described therein, hereby authorizing and empowering them to use the same, and act thereunder in my name, place, and stead, as fully and effectually as I myself might or could in the premises.

"Dated June 28th, 1889. (Signed) F. J. DRAKE.

Witness

(Signed) J. EDGAR."

Upon November 12th, 1889, the plaintiffs applied *ex parte* for, and obtained from Robertson, J., an injunction restraining the defendants "from trespassing upon the mill premises of William Feeney, at Gilmour, in the county of Hastings, and from illegally molesting or interfering with the plaintiffs in the operation of the said mills, and from illegally removing or taking away any portion of the machinery in the said mills."

The plaintiffs now moved to continue this injunction till the trial, and the motion came up for argument before BOYD, C., on November 30th, 1889.

Lash, Q. C., and *Lefroy*, for the plaintiffs.

Hoyles, for the defendants.

The plaintiffs contended that under the above hire receipt, though the defendants might have the right peaceably to resume possession, or to replevy their machinery, they had no right against the will of the plaintiffs to go upon the premises, and forcibly retake the same. The defendants contended the contrary, and cited the following

Argument.

authorities: Story's Sales of Personal Property, 4th ed., p. 343, sec. 313; *Hill* v. *Freeman*, 3 Cush. 257; *Bigelow* v. *Huntley*, 8 Verm. 151; *Heath* v. *Randall*, 4 Cush. 195; *Wood* v. *Manley*, 11 A. & E. 34; Newmark on Sales of Personal Property, 1st ed., secs. 305-6; Benjamin on Sales (Bennett) pp. 269-70, sec. 320, 345 (*a*); *Polson* v. *Degeer*, 12 O. R. 275; *The Joseph Hall Manufacturing Co.* v. *Hazlitt*, 11 A. R. 749; *Stevens* v. *Barfoot*, 13 A. R. 366.

November 30th, 1889. BOYD, C.:—

The defendants hold an agreement affecting the machinery in question herein, by which the title and right to the possession thereof is to be and remain vested in them till paid for in full. They originally sold the machinery to one Drake; he sold to Feeney, taking the agreement above referred to, which was assigned by Drake to the defendants. The machinery was placed in the mill premises of Feeney upon which the plaintiffs afterwards obtained a mortgage as security for advances. The plaintiffs are now in possession under this mortgage, and the estate of Feeney has become vested in an assignee for creditors. The agreement in question was duly registered under the statute of Ontario, 51 Vic. ch. 19, sec. 6, whereby the rights of the defendants seem to be preserved as against the plaintiffs; nothing being as yet paid in respect of the price of the said machinery. The plaintiffs have obtained an injunction *ex parte* against the defendants trespassing upon the mill premises, and from illegally molesting or interfering with the plaintiffs in the operation of the said mills, and from illegally removing or taking away any portion of the machinery in the said mills. The plaintiffs' affidavits shew that the defendants claimed the said machinery on account of the default in payment, and upon the plaintiffs refusing to pay what was claimed, the defendants threatened to send men to the mills, and by force take away portions of the machinery claimed by them. This is not denied by the defence. To the extent to which force is threatened I think the injunction may have rightly issued in the first

Judgment.

Boyd, C.

instance, but the plaintiffs appear to be in the wrong in not acceding to the claim of the defendants for redelivery of the property, or at least wrong in not permitting them to remove what is theirs. Section 4 of the Act recognizes the right of the owner of a chattel conditionally sold to take possession thereof for breach of condition, and to retain the same for twenty days, to enable the "bailee or his successor in interest," to redeem the same as therein expressed. It is the common law right of a person whose chattels are on the land of another under some arrangement which has ended, to enter upon the land to resume possession of his goods, without thereby committing a trespass: *Patrick* v. *Colerick*, 3 M. & W. 483. But as said by Blackstone, in the passage cited in the argument of that case, "this right of recapture shall never be exerted where such exertion must occasion strife and bodily contention, or endanger the peace of society." The defendants had the legal right to enter upon the mill premises in order to resume actual possession of the machinery (giving notice and using all care in so doing), but it would be illegal for them to take possession by force. On the other hand, the plaintiffs are acting illegally in resisting the defendant's right to recover his property as provided in the statute: their proper course, if they wish to retain the machinery, is to pay the redemption price, or arrange new terms of purchase with the defendants.

The plaintiffs' injunction should be modified so to restrain only acts of force on the part of the defendants, and it is only equitable to impose as a term which is asked for by the defendants, that the plaintiffs should be likewise enjoined to a similar extent, so as not to interfere forcibly with the rights of the defendants in respect to the said machinery.

Costs will be reserved till the hearing on final order.

To obviate any possible objection to the defendants taking possession of the machinery they should give such security as is usual in replevin to the satisfaction of a registrar of the Court.

A. H. F. L.

[CHANCERY DIVISION.]

MACKLIN ET AL. V. DANIEL ET AL.

Will—Devise—Investments for legacies—"Paying out"—What time intended—Division of residue.

A testator gave two legacies to become due and payable in three and four years respectively from his decease, and instructed his executors to invest the same and pay the interest to the beneficiaries, and directed the investment of two separate sums for the benefit of two other devisees (one of whom was his sister) with a direction to pay them the interest for their lives, and proceeded, "and should there be a residue or surplus after paying out the foregoing bequests I will that the same be equally divided between my sisters and S. J. B., or the survivors of them at the time of winding up the affairs":—

Held, that the time for the division of the residue was, when sufficient funds were invested to produce the legacies and fulfil the directions of the will, and that it was not postponed until the legacies were paid over or to any subsequent time.

Statement.

THIS was an action brought by the executors of William John Mitchell for the construction of his will. The defendants were the two sisters and the niece of the testator, who were the residuary legatees.

The will directed the realization of his estate, and then proceeded as follows: "For the payment of the following legacies, that is to say: to Sarah Jane Barr, the sum of four thousand dollars shall become due and payable four years from my decease; and that the said sum shall be invested for her benefit, and that she shall receive the interest thereof by my executors. * *

To my relation David Thomas Mitchell, I will the sum of three thousand dollars, to become due and payable three years from my decease, to be invested for his benefit, he receiving the interest annually from my executors. * *

I will that my executors do safely invest the sum of one thousand dollars for the following purpose: that the interest of same as it accrues, shall be paid annually to my sister Rebecca Canning, during her natural life, and at her decease. * *

I will a like sum of one thousand dollars shall be invested by my executors for the benefit of * * Mary Smart,

and that the interest be transmitted annually during her natural life and at her decease." * * Statement.

Then followed a direction to the executors "to pay out the legacies herein bequeathed;" with the addition, "and should there be a residue or surplus after paying out the foregoing bequests, I will and bequeath that the same be equally divided between my sisters and Sarah Jane Barr, or the survivors of them at the time of the winding-up of the affairs."

The matter came on by way of motion for judgment, on November 27th, 1889, before BOYD, C.

Allan Cassels, for the plaintiffs. The two questions to be settled are, (1) can the interest which is received semi-annually on the investment of estate moneys be paid to those entitled semi-annually that instead of following strictly the direction in the will it should be paid annually; and (2) When can the residue of the estate, which is in the hands of the executors, after making provision for the legacies, be divided among those entitled to it? All the parties interested are agreed that the interest might be paid semi-annually. But the executors come to the Court for a construction of the direction in the last clause of the will to divide the residue or surplus "after paying out the foregoing bequests." Does it mean after the payment of the legacies at the times fixed, or after the investment of the money to produce the legacies? or, is the residue to be retained for the years while the investments are producing interest, and until the legacies are paid?

J. C. Hamilton, for Sarah Jane Reesor, (*née* Barr). There should be no division of the residue until after the "paying out" of the legacies; that is, paid over at the times fixed. The words in the will must be taken in their ordinary sense. The testator has used the words "invest," "receive," "become payable," "pay out," to mean and express—invest at present, pay interest as it accrues, and afterwards divide residue after the legacies invested are

Argument.

paid. [BOYD, C.—Why not carry that argument still further, and postpone the division of the residue until after the life interests granted have been ended and disposed of? It might strictly go that far]. *Cassels*—But if the division was to be postponed until the legatee Rebecca Canning was dead, there would be only one sister to participate in the residue, and the will directs a division among sisters.

Hamilton.—Not so, the words refer to the sisters and niece or the survivors of them, and claim that this is a clear case of joint tenancy. As to the right of survivorship; I refer to *Allan* v. *Thompson*, 21 Gr. 279; *Peebles* v. *Kyle*, 4 Gr. 334; *Corneck* v. *Wadman*, L. R. 7 Eq. 80; *Marriott* v. *Abell*, L. R. 7 Eq. at p. 482; *Bowers* v. *Bowers*, L. R. 8 Eq. 283; 5 Ch. 244; 2 Williams on Executors, 7th ed., 1088 and 1463; *Crooke* v. *De Vandes*, 9 Ves. 204; *Cripps* v. *Wolcott*, 4 Mad. at p. 15.

W. M. Douglas, for the testator's two sisters Mary Jane Daniel and Rebecca Canning. If all the directions in the will were to be carried out before any division of the residue, the will would make a bequest to Rebecca Canning of one-third of the residue after her death. It was not intended to postpone the division that long. The time intended was the getting in and arranging the estate, the investments to produce the legacies, &c.

BOYD, C., (at the close of the argument.)—

All the parties interested are agreed that the interest may be paid semi-annually, or as it is received; and as there is no object in retaining it for any time in the hands of the executors, I will direct that it may be paid semi-annually as received.

As to the division of the residue or surplus, I think Mr. Douglas's argument gives the most reasonable construction to the will. The testator intended that both his sisters should be living, and meant that they both should have a chance of participating in the division of the residue.

Judgment.

Boyd, C.

If Mr. Hamilton's argument is the correct one, that the residue was not to be divided until the legacies were paid over, it must be carried its full length and include the devises of life interest. I cannot draw the line at the legacies alone.

The testator was a layman, and drew his own will. He directed the funds to be got in by the executors, then invested for the benefit of the beneficiaries, and it then became their property. He seems to have thought the investment was the "paying out" for the legatees. He ear-marked the money, and so wound up the affair. I, therefore, decide that when sufficient funds are invested to provide for the legacies and fulfil the directions of the will, the residue may be divided. Costs out of the residue.

G. A. B.

[QUEEN'S BENCH DIVISION.]

MEAD v. TOWNSHIP OF ETOBICOKE AND GRAND TRUNK RAILWAY COMPANY.

Municipal corporations—Highway carried over railway—Liability of municipal corporation—Liability of railway company—R. S. O. ch. 184, sec. 531.

Notwithstanding any liability which may be cast by statute upon a railway company to maintain and repair a bridge and its approaches by means of which a highway is carried over their railway, such highway is still a public highway, and as such comes within the provisions of the Municipal Act, R. S. O. ch. 184, sec. 531, requiring every public road, street, bridge, and highway to be kept in repair by the municipal corporation, who are not absolved from liability for default by the liability, if any, of the railway company.

Statement. THE plaintiff alleged (2) that a certain public highway, known as the sixth line of the township of Etobicoke, was within the limits and jurisdiction of the corporation of Etobicoke; (3) that the said highway was crossed within the said township by the Grand Trunk Railway, and was carried over the said railway by means of a bridge and embankments; (4) that it was the duty of the corporation of Etobicoke and of the Grand Trunk Railway Company to keep the said bridge, embankments, and approaches thereto forming the said public highway, in proper repair and properly protected by sidings or other safe-guards, so that the same should not be in an unsafe and dangerous condition for persons lawfully travelling on the said highway, and passing over the said railway by means of said bridge and embankments; yet both of the said defendants, the corporation of Etobicoke and the Grand Trunk Railway Company, neglected to keep and maintain the approaches to the said bridge which carried the said highway over the said railway in proper repair and properly protected with railings or other safe-guards, but allowed the said approaches to the said bridge and said embankments, by means of which said highway was carried as aforesaid, to remain unprotected and without any railings or safe-guards, in such a state of repair as to be dangerous

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to persons lawfully travelling on the said highway; (5) that the plaintiff on the 7th June, 1888, while driving with a horse and buggy over that part of the road situated upon the embankment aforesaid, was thrown with his horse and buggy over the side of said embankment, in consequence of said neglect on the part of the said defendants; (6) that the plaintiff by and through the said neglect of the said defendants, and by being thrown over the said embankment as aforesaid, had his ankle bones broken and was otherwise bruised and injured; (7) that the plaintiff had ever since his being thrown as aforesaid been unable to attend to his military and other duties, and had incurred medical and other expenses, and had suffered great pain and loss.

The defendants the corporation of Etobicoke admitted that the said highway was crossed by the railway of the defendants the Grand Trunk Railway Company, who altered the level of the said highway, and carried the same over the said railway by means of a bridge and embankment, which were not needed by the said highway in its original condition; that the embankment so built by the said the Grand Trunk Railway Company was not fenced, and had no railing on either side thereof; and if such railings and safe-guards were necessary for the protection of the public, it was the duty of the said the Grand Trunk Railway Company to have placed the same on the said embankment when they first erected and placed the said embankment on the said highway and altered the highway from its original condition; that the said the Grand Trunk Railway Company had permitted the said highway to remain in its altered condition and without ever placing any railing or other safe-guards thereon, although they had been frequently notified and required so to do; that the accident to the plaintiff, if it happened without his own fault, which they did not admit, having no knowledge of the matter, could only have happened by reason of the change made in the highway by the Grand Trunk Railway Company, and by their neglect to make the said highway

Statement. so altered, as safe as it was in its original condition before the said company took upon them to alter the same. They claimed that they had not been guilty of any act of omission or commission by which they had become liable in any way to answer to the plaintiff in damages, and prayed to be dismissed with their costs. They also claimed by way of cross-relief against their co-defendants, that if the plaintiff was held entitled to recover damages, then their co-defendants might be ordered to indemnify and save them harmless of and from all such damages, and of and from all costs of this action; and of and from all other costs, damages, and expenses in connection with the matter in question in this action.

The defendants the Grand Trunk Railway Company of Canada said that they were not guilty by statute: Consolidated Statutes of Canada, ch. 66, sec. 88; The Railway Act, 51 Vic. ch. 29, sec. 287, both public Acts.

Issue thereon.

The cause was tried at the Winter Sittings of this Court, at Toronto, 1889, by ROSE, J., and a jury.

It appeared that the plaintiff was on the 7th June, 1888, driving along a highway in the township of Etobicoke, which is crossed by the Grand Trunk Railway Company's railway, and which that company had carried over their railway by means of a bridge and embankments forming the approaches to the bridge; that after he passed the bridge and was driving down the descent of the embankment and approach at the other side, his horse shied, and for want of a railing or guard he was thrown down the embankment and was injured. It appeared that the highway had been thus carried over the railway as long ago as 1857, but that the bridge had been raised in recent years.

The learned Judge submitted the following questions to the jury, to which they returned the following answers:

1. Q. Was the road reasonably safe and fit for travel without a guard at the place in question? A. No. 2. Q. If not, did the accident result from the want of such

guard? A. Yes. 3. Q. Did the buggy reach the bottom of the embankment in safety, and, if so, was the accident caused by Richey "grabbing" the lines? A. We believe the buggy did not reach the bottom in safety. 4. Q. Could the plaintiff have avoided the accident by the exercise of reasonable skill and diligence? A No; we believe the plaintiff used all caution under the circumstances. 5. Q. What would be a fair sum to allow the plaintiff as damages? A. $1,500. Statement.

May 4, 1889. The case was argued before the trial Judge.

Laidlaw, Q. C., for the plaintiff.
McMichael, Q. C., for the township of Etobicoke.
McCarthy, Q. C., for the Grand Trunk Railway Company.

May 14, 1889. ROSE, J.:—

I have not on this record to determine the question of the liability of the railway company to the municipal corporation, nor indeed the liability of the company to the plaintiff, as the plaintiff does not ask for any judgment as to the liability of the company in the event of my determining that the corporation is liable.

The corporation has not taken the necessary steps to have tried its rights over against the company, but upon application I will make such order as may appear just to enable the defendants to have such question determined.

The corporation is liable to the plaintiff under sec. 531, ch. 184, R. S. O. 1887, being also sec. 531 of 46 Vic. ch. 18, (O.), unless the effect of the Dominion legislation has been to relieve it of such liability.

I need not repeat the language of sec. 531. It is express in its terms—sub-sec. 4, a new provision, may be particularly noted.

There is no section of the Railway Act, ch. 109, R. S. C., which in terms deals with the question of the liability of the municipal corporation; and indeed if there were, the very serious question of jurisdiction to interfere would arise.

Judgment.
Rose, J.

For the purpose of this inquiry, it might well be admitted that the intention of the railway legislation was to place upon the railway companies the duty of maintaining and keeping in proper repair the bridges and approaches, including the fences; and that the effect of such legislation was to give municipal corporations a right to enforce or compel the performance of such duty; but, as I have said, unless the effect was also to relieve the municipalities from the duty imposed upon them by the Provincial legislation, the case would be within the decision in *Traversy* v. *Gloucester*, 15 O. R. 214.

By reason of the conflict, if there be a conflict, between the jurisdiction of the Parliament and Legislature, I am not able to apply the law laid down in cases cited by Dr. McMichael in his most able and interesting argument.

If section 531, with its new sub-section 4, were part of the Dominion legislation contemporaneous with or subsequent to the Railway Acts, one could hardly resist the conclusion that the intention was to give the public a right to require the municipalities to keep the bridges and approaches in repair, as portions of the highway, even if it also cast a duty upon the railway company constructing the bridge and approaches.

Both parties relied upon the case of the *Great Eastern R. W. Co.* v. *Hackney Board of Works*, 8 App. Cas. at pp. 691, 700.

So far as I am able to apply that decision in this case, it seems to me to assist the plaintiff against the township, for it draws a distinction between the road and the bridge supporting it. Lord Watson uses this language: "The real import of these enactments is that the substituted road shall be supported by means of a bridge provided by the railway company, the land upon which the old highway rested having been taken and used for railway purposes."

It may be, therefore, that the *road* still remains vested in the municipality, on whom rests the duty of maintaining and keeping it in a proper state of repair; and that the municipality may require the railway company to keep the bridge in repair.

I however rest my judgment upon the express language of section 531, and the absence of any legislation in terms relieving the municipality from the obligation imposed by such section, even if there be any power in the Dominion Parliament to interfere with the legislation of the Pro-

vincial Legislature on the subject. And I think I am following the principle of the decision in *Traversy* v. *Gloucester*. The continuing of the wide terms found in section 531, notwithstanding the railway legislation, is not without its significance. Judgment. Rose, J.

There will be judgment for the plaintiff for the sum found by the jury—viz.: $1,500 against the township of Etobicoke, with costs, except in so far as they have been increased by joining the railway company as a defendant, and if the township has been put to extra costs by reason of the railway company having been joined, it must have such costs against the plaintiff, excepting of course such costs as the township has incurred in claiming over.

I make no order either in favour of or against the defendant the railway company at the suit of the plaintiff, and I will hear any application the township desires to make to continue the proceedings for the recovery of its claim against such company.

The following cases were referred to: *Rex* v. *Kerrison*, 3 M. & S. 526; *Regina* v. *Ely*, 15 Q. B. 827; *Oliver* v. *North Eastern R. W. Co.*, L. R. 9 Q. B. 409; *North Staffordshire R. W. Co.* v. *Dale*, 8 E. & B. 836; and sec. 6, sub-sec. 4, sec. 47, sub-sec. 5, sec. 48, and sec. 80 of ch. 109, R. S. C.

Prior to the Michaelmas Sittings, 1889, the defendants the township of Etobicoke served notice of motion to set aside the findings of the jury, and the judgment granted or entered in this action, and to enter a judgment for the applicants with costs, or for a new trial upon the following among other grounds:

1. That they are not proper parties to this action, and that the action should have been brought against the Grand Trunk Railway Company alone.

2. That the defendants the railway company have raised a mound of earth on the highway of the defendants the corporation of the township of Etobicoke, which was not necessary to the road in its original state, without the consent of the municipality. This mound, if they had no authority to make it, is a public nuisance, and they are liable to indictment, and are liable to an action by any one who has been injured thereby.

Statement.

3. The Grand Trunk Railway Company are parties defendants to this action, and to avoid circuity of action the judgment should be against them primarily, if they are liable. If they are not held liable, it is because there is no nuisance, and therefore the corporation cannot be liable.

4. If the plaintiff consents that there should be no judgment in his favour against the Grand Trunk Railway Company, the municipality are acquitted.

5. That if the railway company received permission by any statute to interrupt the highway, it was under the condition that they would provide a good and sufficient substitute; and that if they did not provide such substitute, they are liable for the nuisance; and that if they did not so provide a substitute, and left the mound without fences or otherwise dangerous, the municipality were not bound to provide such substitute.

6. Whatever duty to repair the corporation may be under, it cannot arise until a sufficient road has been provided for them to keep in repair.

7. That if the Grand Trunk Railway Company did, in pursuance of the powers granted under the statute, take possession of and interrupt the highway under the jurisdiction of these defendants, the same being at the time a good and sufficient highway, they were bound both by common law and by force of the statute to provide a substitute, that is, a good and safe road across their railway and over the highway they had so interrupted; and that it is no part of the duty of the defendants the township of Etobicoke at common law, and no duty was cast upon them by the statute, to keep the bridge and embankment and approaches to the said bridge which had been erected and built by the said Grand Trunk Railway Company, or any part thereof, in proper repair and protected by rails or other safe-guards; and that the allegation to that effect in the fourth paragraph of the statement of claim was not and could not be supported or proved.

8. That the liability laid upon the several municipalities by the first clause of the 531st section of ch. 184, R. S. O., does not apply. The road, as they had originally held it, had been taken possession of by the railway company, and the substituted road was never accepted by the municipality, and its user by the persons travelling along was simply a use of what the railway company had provided as a substitute. Statement.

9. That it was not the duty of the defendants the corporation of the township of Etobicoke to see that the road which the railway company had made was a good and safe one, and they ought not to be liable because the railway company did not fulfill their duty.

10. That the said railway company are subject to the Railway Committee of the Privy Council, and not subject to the direction or order of the municipality, and therefore the defendants the corporation of the township of Etobicoke should not be made answerable for the default of the said company.

11. That it was not shewn that these defendants had any notice of the defective manner in which the said work was done by the said company.

12. That the finding of the jury that the accident had resulted from want of proper fences was not warranted by the evidence.

13. That, at all events, if there had been any liability on the part of the defendants the municipality of the township of Etobicoke, which they do not admit, the learned Judge should have made it a part of this judgment, when all parties were before the Court, that if any liability attached to these defendants, they should have been indemnified by the Grand Trunk Railway Company, and he should, if necessary, have made the proper order to that effect.

November, 25, 1889. The motion was argued before the Divisional Court, (ARMOUR, C. J., and STREET, J.)

Robinson, Q. C., and *McMichael*, Q. C., for the defendants the township of Etobicoke. The township corpora-

Argument.

tion are not liable, because the bridge in question does not come within sec. 531 of R. S. O. ch. 184. The railway company alone are liable. They referred to the Dominion Railway Act, 51 Vic. ch. 29, secs. 90, sub-sec. (*g*) 186, 187, 288; and to *Fairbanks* v. *Great Western R. W. Co.*, 35 U. C. R. 523; *Rex* v. *Kerrison*, 3 M. & S. 526; *Rex* v. *Lindsey*, 14 East 317; *Howitt* v. *Nottingham*, 12 Q. B. D. 16; *Regina* v. *Ely*, 15 Q. B. 827; *Oliver* v. *North Eastern R. W. Co.*, L. R. 9 Q. B. 409.

McCarthy, Q. C., for the Grand Trunk Railway Company. No third party notice was given, and the railway company, therefore, cannot be called upon to shew cause to a motion by their co-defendants: Wilson's Judicature Acts, 7th ed., p. 193; Eng. Rule 177; Con. Rule 328. The railway company owe no duty to the public in this respect: *Atkinson* v. *Newcastle*, 2 Ex. D. 441. The place where the accident happened is still part of the highway: *Great Eastern R. W. Co.* v. *Hackney Board of Works*, 8 App. Cas. 687. The question here is whether the liability is joint or single. I contend that the municipal corporation alone are liable to the public. The railway company have to do only what the Railway Committee of the Privy Council directs them to do. I refer to *Whitmarsh* v. *Grand Trunk R. W. Co.*, 7 C. P. 373; *Traversy* v. *Gloucester*, 15 O. R. 214. The Parliament of Canada has no power to limit the liability of a municipality, where the embankment extends, as here, 200 or 300 feet from the line of railway.

Laidlaw, Q. C., (with him *Kappele*,) for the plaintiff.

December, 21, 1889. The judgment of the Court was delivered by

ARMOUR, C. J.:—

As we understand the judgment of the learned Judge, he has not as yet determined how the judgment shall be entered as between the plaintiff and the Grand Trunk

Railway Company but has reserved his determination of that question and also of the question of the right of the corporation to relief over against the Grand Trunk Railway Company, upon an application to be made to him for that purpose; and our judgment must be taken to be therefore only a determination of the liability of the corporation of Etobicoke to the plaintiff, and to be without prejudice to the determination hereafter by the learned Judge of the said other questions. Judgment. Armour, C. J.

There is nothing in any of the Railway Acts applicable to the defendants the Grand Trunk Railway Company which has the effect of vesting in the railway company any highway which, under the powers granted to them by such Acts, they are authorized to carry over their railway by means of a bridge, and the property in such highway remains unaffected by the powers granted.

It may be that the railway company is bound to maintain and repair the bridge in question, with its approaches, but it is still, notwithstanding that liability on the part of the railway company, a public highway, and as such comes within the provisions of the Municipal Act requiring every public road, street, bridge, and highway to be kept in repair by the corporation, and the liability of the railway company to keep it in repair does not at all absolve the corporation from their liability to keep it in repair.

These provisions of the Municipal Act are imperative, and admit of no exceptions but those mentioned in the Act; and that these provisions have been enacted over and over again since power was given to railway companies to carry highways over their railways, without any exception being made of highways so carried over, affords strong evidence that the Legislature never intended to exempt the municipalities from their liability to keep in repair such highways.

I refer to *Traversy* v. *Gloucester*, 15 O. R. 214; *Tierney* v. *Troy*, 41 Hun 120; *Wilson* v. *Watertown*, 3 Hun 508.

The motion must be dismissed with costs.

[QUEEN'S BENCH DIVISION.]

WALKER v. BOUGHNER ET AL.

Specific performance—Contract to make provision by will for granddaughter—Action against executors—Uncertainty of promise and consideration—Services rendered to testator—Remuneration for.

Where a contract on the part of a testator, founded upon a valuable and sufficient consideration, that he will leave by his will to the other contracting party a sum of money as a legacy, is clearly made out, the representatives of the testator may be compelled to make good his obligation.

But where the testator, the grandfather of the plaintiff, promising to make the same provision for her by will as he should make for his own daughters, took her from the home of her parents at the age of twelve, adopted her, and maintained her, while she worked for him, for nine years, but, although he made his daughters residuary devisees, left the plaintiff nothing by his will, and paid her nothing for her services, and she sued his executors for specific performance of the contract or promise and in the alternative for wages :—

Held, that the case did not fall within the rule ; the promise made and the consideration for it being both of too uncertain a character to entitle the plaintiff to come to the Court for specific performance ; but that the circumstances gave rise to an implied contract for the payment of wages, and took the case out of the ordinary rule that children are not to look for wages from their parents, or those in *loco parentis*, in the absence of special contract, whilst they form part of the household.

Decision of PROUDFOOT, J., varied.

Statement. ACTION tried before PROUDFOOT, J., at St. Catharines, without a jury, on 6th June, 1889.

The plaintiff was the wife of Robert O. Walker; Paul Marlatt was her grandfather; her mother was Mary Catharine Book, one of the daughters of Paul Marlatt; her father was Adolphus Book. She alleged in her statement of claim that in the early part of the year 1878, she being then twelve years of age, and living with her father and mother, her grandfather, Paul Marlatt, requested her father and mother to allow her to go and reside with him, and become one of his household, until his death or her marriage, promising and agreeing with her parents and with her, that if they would allow her to do so, and if she should remain with him until his death or her marriage, whichever event should first happen, he would provide for her during that time as if she were one of his own family, and further that he would by his

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last will devise and bequeath to her a share of his estate equal to that which any one of his three daughters, Nancy Jane Beckett, Orpha Merritt, and Eliza Jane Patterson, should take under his will; and that the said Paul Marlatt represented to the plaintiff's parents, and to her, that if they should do as he desired the plaintiff's position in life would be greatly improved; that the plaintiff's father and mother, relying upon the promises and representations so made, relinquished the custody and control of the plaintiff to Paul Marlatt, who thereafter assumed the same; and that the plaintiff herself, also relying upon his promises and representations, went to live with him and to serve him as a member of his household, and changed the course and future of her life; that she lived in his household from the 8th April, 1878, until the 27th April, 1887, when she married; that during all that period she served him faithfully and well as a member of his household, and rendered many services to him, relying upon the promises and representations made to her, and in the belief that they would be carried out; that at the time of her marriage her grandfather, the said Paul Marlatt, gave her an outfit of about the same value as that given by him to his own daughters at the time of their respective marriages, but beyond this and her board, lodging, and clothing, she had received nothing for her services or in fulfilment of the said agreement; that the said Paul Marlatt died 22nd August, 1888, possessed of a large estate, having duly made his will dated 10th January, 1888, whereby he appointed the defendants Edward Boughner and John H. Tallman as his executors, and that they had proved the will; that by the said will three of the daughters of Paul Marlatt, namely, the defendants Eliza Ann Patterson, Orpha Merritt, and Nancy Jane Beckett, were made residuary legatees and devisees of his estate in equal shares, but the plaintiff was not mentioned in the will; that the said testator, Paul Marlatt, had thereby broken his agreement; and she claimed to have it specifically performed by declaring her entitled to share in the estate equally with the said three

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daughters, and by declaring their shares of the estate to be impressed with a trust in her favour to the extent of her interest therein; and in the alternative that she might be declared entitled to be paid out of the said estate wages at the rate of $200 a year from the 8th April, 1878, to the 27th April, 1887, for work and labour performed by her for the testator at his request.

The defendants in their statement of defence denied the agreement alleged by the plaintiff, and said that the plaintiff went to live with Paul Marlatt upon the understanding that she was to perform the ordinary duties of the household required of her by him, and that in return she was to receive the benefit of a comfortable home, including her board, lodging, and clothing, which fully recompensed her for the services she rendered him, and that the giving to her of a wedding outfit was a purely voluntary act on the part of the testator. They further set up that the agreement alleged was not in writing or under seal and was without consideration, and not binding upon him; that as to the claim for wages, the plaintiff received all that she was entitled to from the said Paul Marlatt, and that the claim was at all events exorbitant and excessive, and they set up the provisions of R. S. O. 1887 ch. 60 as a defence.

The plaintiff was called as a witness, and stated that Paul Marlatt and his wife came to her mother's house in March, 1878, and, after having dinner, they spoke to her mother and made an agreement with her that if she went and stayed with him until she was married, or till his death, he would do by her the same as he did by his own girls at the time of his death: in another place she stated the same thing, leaving out the words "until she was married": that she went a few days afterwards to live with Paul Marlatt, and remained with him until her marriage in 1887, when he gave her a wedding outfit; that she was sent to school part of the time until she was fifteen, by her grandfather; and that she took her part with the other members of the household in doing the work of the

house, and that a servant was kept in the house during the summer; that her grandmother, Mrs. Paul Marlatt, died in 1879, and that her grandfather asked her if she would stay on with him, and upon her saying she would if he wanted her, he replied that he could not do without her; but that during the whole nine years that she lived with him, nor afterwards, the alleged agreement was never mentioned; that she had four sisters and a brother; that her father and mother had been separated at one time before she went to live with her grandfather, but were living together at that time, but that they separated shortly afterwards, and had lived apart ever since. Statement.

The plaintiff's mother, Mary Catherine Book, was also called as a witness, and stated to the plaintiff's counsel the agreement as follows: "My father and mother came to me, and they asked me if I would let Annie go and live with them, that they would do as well by her as they would by their own girls, that they would have to have somebody, and they said if she stayed till she was married, or till their own death, they would do as well by her as by their own girls at his death." In cross-examination she stated the matter in the following way, after describing that her father and mother came and asked for the plaintiff:

Q. Then what next? A. Then my father said he would take Annie and do by her as his own girls.

Q. Anything else? A. He said he would do by her as his own girls at his death.

Q. Is that what he said? A. Yes.

Q. That he would take Annie and do by her as his own girls at his death? A. Yes.

Q. Is that all he said? A. No, I told you before.

Q. This was what he said? A. Yes.

Q. Did you say anything to them? A. Well, I said she might go.

This witness further stated that about two years after the plaintiff went to live with Paul Marlatt, being about the time the witness's husband finally went away from her, Paul Marlatt bought a home for her, three or four miles from his own house, and conveyed it to her for life, and after her death to her son, and that she and her son had

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sold it in Paul Marlatt's lifetime, and got the money for it. The evidence of Azuba Marlatt, a daughter-in-law of Paul Marlatt, detailed conversations with him. Franklin Book, another witness, was the plaintiff's brother: the learned Judge who heard his evidence stated that he did not place much reliance upon it. William Grubb, another witness, said that he was at Paul Marlatt's house shortly after he had taken the plaintiff, and that Paul Marlatt told him that he had agreed to take her as his own child, and give her the same as he would give his own girls after his death: in answer to a question put to him by the learned Judge, he said that Marlatt said he intended to give her the same as his daughters at his death The will of Paul Marlatt was put in: by it he bequeathed to his widow $800 out of his personal property; $50 to his son Abram Marlatt; $250 to his daughter Mary Catharine Book, the plaintiff's mother; and all the rest of his personal estate to be equally divided between his son Andrew, and his three daughters, Nancy Jane Beckett, Orpha Merritt, and Eliza Ann Patterson. His real estate was all specifically devised to a grandson and two sons, with a proviso that in the event of a failure of issue of his sons, the land devised to them should be sold and the proceeds divided amongst his wife and all his children in the manner therein specified.

At the conclusion of the evidence and argument judgment was delivered by PROUDFOOT, J., who thought that the agreement stated by the plaintiff was substantially and sufficiently corroborated by her mother and Mrs. Azuba Marlatt, and offered the plaintiff either a judgment for damages arising from the default of Paul Marlatt in not carrying out his agreement, or a judgment declaring the plaintiff entitled to share equally with the other daughters. The plaintiff's counsel elected to take the latter, and judgment was pronounced accordingly.

At the Michaelmas Sittings of the Divisional Court, 1889, the defendants moved against this judgment upon the

grounds that it was against the evidence; that there was no sufficient corroborative evidence in law to entitle the plaintiff to the relief granted; that the evidence shewed that the plaintiff had received all that she was entitled to at the hands of Paul Marlatt; and upon other grounds. Statement.

The motion was argued before ARMOUR, C. J., and STREET, J., on 6th December, 1889.

Moss, Q. C., for the defendants. Specific performance has been sought and granted; the pleadings and evidence would not support any other judgment; the plaintiff has deliberately accepted specific performance instead of damages; and the case must be treated as the plaintiff has put it forward; but the evidence is not sufficient to support such a judgment. No contract has been made out, and no claim for wages can be allowed. I refer to *Alderson* v. *Maddison*, 7 Q. B. D. 174; *Maddison* v. *Alderson*, 8 App. Cas. 467; *Campbell* v. *McKerricher*, 6 O. R. 85; *Wilde* v. *Wilde*, 20 Gr. 521; *Orr* v. *Orr*, 21 Gr. 397; *Jibb* v. *Jibb*, 24 Gr. 487; Con. Rule 402.

Lash, Q. C., for the plaintiff. The value of the services may be recovered on the refusal of the grandfather to carry out the contract, as part payment to a vendor may be recovered by a vendee on the refusal of the former to carry out the contract. There was part performance of the contract. See *McDonald* v. *McKinnon*, 26 Gr. 12; *Fitzgerald* v. *Fitzgerald*, 20 Gr. 410; *Halleran* v. *Moon*, 28 Gr. 319. The contract should be specifically performed by giving the plaintiff the same provision as the testator made for his daughters.

December 21, 1889. STREET, J.:—

There appears to be no doubt upon the authorities that where a contract is clearly made out on the part of a testator, founded upon a valuable and sufficient consideration, that he will leave by his will to the other contracting party a sum of money as a legacy, the representatives of

Judgment.

Street, J.

the testator may be compelled to make good his obligation. The case of *Hammersley* v. *DeBiel*, 12 Cl. & F. 45, is a leading instance of the enforcement of an undertaking of this kind, and, treated as being founded upon a contract, has been frequently followed and approved since: *Maunsell* v. *White*, 4 H. L. C. 1039; *Jorden* v. *Money*, 5 H. L. C. 185; *Randall* v. *Willis*, 5 Ves. 262; *Maddison* v. *Alderson*, 8 App. Cas. 467. The American authorities have adopted the same view. See Waterman on Specific Performance, edition of 1881, par. 41; *Shakespeare* v. *Markham*, 10 Hun 311. In the last mentioned case a doubt is expressed as to whether in any such case, especially when the contract is sought to be established by parol testimony, so patent a means for the evasion of the provisions for the security of property by the Statute of Wills should have been allowed. The Court in that case in their judgment go on to express the result of the cases as follows: "But in the cases in which such contracts are set up, and especially where they are attempted to be established by parol testimony, the temptation and opportunity for fraud is such that they are looked upon with suspicion, and the Courts require the clearest evidence that a contract founded on a valuable consideration, and certain and definite in all its parts, should be shewn to have been deliberately made by the decedent."

The circumstances under which the present claim is made appear to me to shew forcibly the prudence of adhering to the principles expressed in the language I have quoted.

Paul Marlatt and his wife went to the house of their daughter, Mrs. Book, in March, 1878, to get her consent to their adopting as their own their granddaughter, the plaintiff. A short conversation took place upon the subject after dinner, at which only Paul Marlatt and his wife, and the plaintiff and her mother, and perhaps her brother Franklin Book, were present. Paul Marlatt and his wife are both dead, and we are driven to depend on the recollection of the other parties as to the very words of a conversation which took place eleven years before the trial,

and was never repeated or apparently referred to during the lifetime of the person whose estate is now sought to be charged upon a statement of the language then used. It is not to be forgotten, too, that one of the witnesses who swears to what was said, was at the time a child not yet twelve years of age. I think that a careful consideration of these circumstances compels us to come to the conclusion that it would be unsafe to act upon the evidence that has been given, except in so far as it is borne out by what is natural and probable under the circumstances taken in connection with actual known facts. What Paul Marlatt undoubtedly did, was to adopt the plaintiff as his daughter, and she lived with him and worked for him until she was married. What he and his wife went to Mrs. Book's house for in March, 1878, was to propose that they should adopt the plaintiff, and it is plain that their proposal was accepted without hesitation. In the course of the conversation which took place it is not difficult to believe that the grandfather may have promised to treat the plaintiff as his own daughter, or even that she should share in his estate at his death with his own daughters. I do not think that the plaintiff's story or that of her mother really go beyond this, and, taking these to be the facts, there is not sufficient, in my opinion, to justify us upon them in declaring the plaintiff entitled as a matter of binding contract to insist upon a share in the estate, and I am obliged with great deference to differ in this respect from the conclusion at which my learned brother PROUDFOOT arrived. The promise alleged to have been made and the consideration for it are both of too uncertain a character to entitle the plaintiff to come to the Court for a performance of the promise.

Judgment. Street, J.

The plaintiff became the adopted daughter of her grandfather, and assisted at his house in the household work, and the question arises whether the circumstances are such as to give rise to an implied contract for the payment of wages. Where the parties stand to one another in the natural relation of parent and child, brother and sister, or other near relation, and are inmates of the same household, it is

Judgment.

Street, J.

well established that no such implied contract arises, and the same principle has been extended to the case where the person against whom the claim is made has stood in *loco parentis* to the other, as here, the presumption being that the services are gratuitous.

This case is not, however, precisely like that of a father who brings up his own daughter, and whose estate is sought to be made liable to her upon the ground that she has remained with him upon an unfulfilled promise to provide for her by his will. The plaintiff here was taken by the testator from her father's house when she was twelve years of age, and was already able to be useful, under circumstances which might well have been construed by her and her mother as entitling her to believe that she was to be remunerated for the services she should perform. The testator himself seems to have at one time looked upon himself as under a duty to make some provision for her in his will, for he spoke of leaving her a legacy of $200. I have arrived at the conclusion, though not without much doubt and hesitation, that these are circumstances taking the case out of the ordinary and most salutary rule, into which I should be sorry to break, that children are not to look for wages from their parents, in the absence of special contract, whilst they form part of their parents' household. The plaintiff married on 27th April, 1887. This action was begun on 3rd November, 1888. The Statute of Limitations has been set up, and the plaintiff is not entitled to recover anything for services prior to 3rd November, 1882. I think we should assess at $220 the value of her services between that date and 27th April, 1887, and that she should have judgment for that sum with full costs of this action and of the motion.

If the defendants prefer to give the plaintiff a share in the estate of the testator equal to that which her aunts take, by dividing the residue going to them into four parts instead of three, and giving her one of these parts instead of the sum at which we have assessed her services they are to be at liberty to do so.

I have referred to Wood's Master and Servant, 2nd ed., p. 115 *et seq.*; *Maddison* v. *Alderson*, 8 App. Cas. 467; *Sprague* v. *Nickerson*, 1 U. C. R. 284; *Andrus* v. *Foster*, 17 Vt. 556; *Bash* v. *Bash*, 9 Penn. St. 260; *Redmond* v. *Redmond*, 27 U. C. R. 220; *Osborn* v. *Governors Guy's Hospital*, 2 Str. 728; *Baxter* v. *Gray*, 3 M. & G. 771. Judgment. Street, J.

ARMOUR, C. J.:—

I doubt if I would have arrived at the same conclusion of fact as the learned Judge who tried this case. My impressions of the case have, however, been derived merely from reading the evidence, while his were derived from seeing and hearing the witnesses; his conclusion of fact is therefore more likely to be correct than the one I would have arrived at, and I therefore accept it.

I think, however, that the contract found by the learned Judge is too indefinite and uncertain to be made the subject of specific performance, or of an action for damages for its non-performance.

The rule, however, seems to be that where a party renders services to another in the expectation of a legacy and in sole reliance on the testator's generosity, without any contract express or implied that compensation shall be provided for him by will, and the party for whom such services are rendered dies without making such provision, no action lies; but where from the circumstances of the case it is manifest that it was understood by both parties that compensation should be made by will, and none is made, an action lies to recover the value of such services.

Applying this rule to the facts of this case and to the finding of the learned Judge thereon, I am of opinion that the plaintiff is entitled to recover the value of the services rendered by her to the deceased.

And I agree in the result arrived at by my brother STREET.

[QUEEN'S BENCH DIVISION.]

HUBERT ET AL. V. TOWNSHIP OF YARMOUTH.

Municipal corporations—Action to compel maintenance of road—Assumption of road by corporation—Statute labour done with consent of municipal officers—Remedy by indictment.

In an action to compel a municipal corporation to maintain and repair a street laid out by private persons, it appeared that such street was not established as a highway by by-law nor assumed for public user by any corporate act of the municipal corporation; but it was contended that the performance of statute labour thereon with the consent of the pathmaster, and on one occasion with the consent of the councillor for the ward and of the reeve, was evidence that it was otherwise assumed for public user:—

Held, that the acts required to work such an assumption must be corporate acts, clear and unequivocal, and such as clearly and unequivocally indicate the intention of the corporation to assume the road; and the acts relied upon in this case could not bind the corporation nor work such an assumption:—

Held, also, following *Hislop* v. *McGillivray*, 15 A. R. 687, that even if the street had been assumed for public user, the plaintiff's only remedy was by indictment, and the action was not maintainable.

Statement.

THIS was an action brought by Hubert, Orr, and Cochrane, against the corporation of the township of Yarmouth.

The plaintiffs alleged that they were owners of parts of lot four in the ninth concession, Yarmouth; that the allowance for road between the ninth and tenth concessions abutted on their lands; and that the lands lying south thereof had been sub-divided into city lots, and a plan thereof had been registered, made by one Harvey; that on the said plan and by the survey of Harvey a road was laid out as Hughes street, a continuation into the township of Yarmouth of the street known as Hughes street in the city of St. Thomas, to which the said lands were adjacent; that there never had been any public highway abutting upon the lands of the plaintiffs or by means whereof ingress and egress thereto and therefrom could be had except the said allowance for road and Hughes street; that the defendants had expended money on Hughes street, and had the statute labour usually performed thereon, and that the said street had been in public

use by the defendants as a highway; that it was the duty of the defendants to maintain and repair the said street and to keep the same in repair, yet the defendants had not maintained and repaired and kept in repair the said street; that it was the duty of the defendants to maintain and repair the said allowance for road, yet the defendants had neglected and refused to maintain and repair the same, and the same was impassable and out of repair, and at times during the past few years had been closed by the defendants; that by reason thereof the plaintiffs were excluded from ingress and egress to and from their respective lands over Hughes street and the said allowance for road, and the defendants had made them no compensation therefor, nor provided for their use any other convenient road or any means of access to their said lands; that the plaintiffs by reason thereof had been deprived of the full use and benefit of their respective lands, and had been put to great labour and expense in order to obtain a way of access to their said lands, and had been otherwise injured and put to loss and expense; and the plaintiffs claimed damages for the said wrongs, and that the defendants might be declared liable to maintain and repair Hughes street, and might be ordered to maintain and repair the same, or in the alternative that the defendants might be declared liable to maintain and repair the said allowance for road, and might be ordered to maintain and repair the same, and for further and other relief, and for costs. Statement.

The defendants admitted that the lands of the plaintiff Hubert abutted upon the said allowance for road, but denied that the lands of his co-plaintiffs abutted thereon, and denied that the lands of the plaintiffs lay adjacent to Hughes street; they denied that they had expended public money on Hughes street, and that they had had the statute labour usually performed thereon, and said that if statute labour had been performed thereon, it had been so performed without their authority; they did not admit any liability to maintain or repair Hughes street; the said allowance for road had been open continuously for several years;

Statement.

and they had never neglected or refused to repair and maintain the same; and it was at and for a long time before the time this action was brought, in sufficient repair. They also said that the plaintiff Hubert in April, 1889, promised the defendants' pathmaster that he would do his statute labour upon the said allowance for road, but neglected and refused to do so, and if it was out of repair and impassable, it was his fault and not the defendants'; that the plaintiffs informed the said pathmaster that they would not do any statute labour on the said allowance for road, as they desired to induce or compel the defendants to repair and maintain Hughes street, and to permit them to do statute labour thereon for that purpose; that the lands of the plaintiffs Orr and Cochrane did not abut upon the said allowance for road, or upon any road leading thereto, and they had no occasion to use the same; and if they were excluded from ingress and egress to and from their respective lands over the said allowance for road, the defendants were not responsible therefor, and were in no way bound to provide a way for them; that the plaintiffs Orr and Cochrane purchased their said lands from the persons who surveyed and laid out into lots the said lot number four, well knowing that their said lands did not abut upon any public highway, and if they were excluded from ingress and egress to and from their said lands over Hughes street, the defendants were in no way responsible therefor, and were not bound to provide a road for them; that the plaintiffs Orr and Cochrane ought not to have been joined with the plaintiff Hubert in so far as any remedy was sought for any alleged neglect of duty by the defendants in respect of the allowance for road, because their lands did not abut upon the said allowance for road, and they did not require to use the same for the purpose of a highway; that the plaintiffs were not, in any event, entitled to recover any damages which had been sustained more than three months before the commencement of this action; that the plaintiffs' remedy (if any) was by indictment and not by action; that the plaintiffs' statement of claim did not disclose any

cause of action, and they claimed the same benefit as if they had demurred thereto. Statement.

The cause was tried before ROSE, J., and a jury at the sittings of this Court at St. Thomas, in the autumn of 1889.

It appeared that on the 7th June, 1867, Horton, Yarwood, and Hughes, the owners of lot four in the ninth concession of Yarmouth, surveyed and laid it out into town lots, and extended a street in St. Thomas, called Hughes, northerly to a range of lots which they laid out on the north end of the lot, each town lot being about two chains in width by twelve and a half chains in depth, and abutting on the said allowance for road. Kettle creek crosses the said allowance for road at the rear of the said lot, and there had been a bridge across it which had been carried away, and afterwards an action was brought against the defendants for an injury sustained on this part of the allowance for road by reason of its being out of repair, and thereafter on the 1st September, 1879, they passed a by-law closing up against public travel, and till required for public use, five chains and fifty links thereof, extending from the limit between lots three and four, and fenced it in, and a man named Easterbrook being the only person immediately interested in having the allowance for road open, they provided him with another road. Hughes street was not fit for travel at this time, a creek, called Jordan, crossing it about three or four hundred yards out of the limits of St. Thomas. That in one of the years 1880-1-2 or 3, one Noble, who had bought one of the town lots between this creek and the limits, did two days' statute labour, as it seemed with the consent of the pathmaster, and the councillor for that ward. In August, 1886, the plaintiff Hubert bought fourteen or fifteen acres of the said range of town lots abutting on the allowance for road, and at this time the fence enclosing that portion of the allowance for road closed by the by-law had rotted away and disappeared, and at this time there were three other persons Orr, Cochrane, and McDonald, who had become the purchasers of some of the town lots north of the Jordan creek.

Statement.

In September, 1886, a petition signed by Horton, Yarwood, and Hughes, and by the plaintiff Hubert, setting out that for the last thirty years the statute labor on that part of lot four, 9th concession of Yarmouth, had been applied on roads distant from said lot, and that were of no benefit to the same, it being altogether shut off from all roads; that in order to have access to said land, which bordered on St. Thomas, a bridge must be built across Jordan creek on the line of Hughes street, that with approaches would cost $1,400; that as the land bordered on St. Thomas, it would very soon after the bridge was built be taken up and built upon by persons desirous of building outside the city limits, and thereby add greatly to the wealth of the township; and hoping that they would see it to be to the advantage of the township that the bridge should be built without delay; and praying that they would make a grant of $500 or thereabouts towards the building and completion of the bridge; and further that they should direct their pathmaster to expend the statute labour on the streets on said farm, was presented to the council of the defendant corporation, who refused to entertain it.

In the winter of 1886-7 Horton, Yarwood, and Hughes built a bridge across the Jordan, and in the summer of 1887 the plaintiffs Hubert, Orr, Cochrane, and Noble expended their statute labour on the approaches to the bridge on Hughes street by the consent of the pathmaster, but it did not appear that he had any authority to so consent, from any one. On May 3rd, 1888, Noble procured the clerk of the defendant corporation to make out for him a notice, which he posted on Hughes street, that parties taking earth or sod from this highway, without instructions from the township council, would be prosecuted.

On the 21st May, 1888, a petition was drawn up and signed by the plaintiffs Hubert and Orr and others, and afterwards presented to the council, setting out that all the statute labour, with the exception of a portion of last year's, imposed on lot number four had been expended on

other township roads for the past thirty years, and praying the council to instruct the pathmaster of that division to cause the statute labour of the parties living on said lot number four and of those on lot number five interested in Hughes street, to do their work on said road in the way of grading and making the approaches to said bridge, and that they would also give a small grant to assist them in making the road passable. The council refused to entertain this petition, but in the summer of 1888 the plaintiffs Hubert, Orr, and Cochrane, and McDonald again did their statute labour on Hughes street by the consent of the pathmaster and by the connivance of the councillor for the ward and of the reeve, who said that he would shut his eyes to it; that the pathmaster refused to allow statute labour to be done on Hughes street in 1889, and in June, 1889, the plaintiffs Hubert and Orr and others again petitioned the council for funds to put Hughes street in repair and that the statute labour should be expended thereon, which petition the council refused to entertain. Statement.

The plaintiff Hubert said that he had paid Axford, a neighbour, over a dollar a year for the privilege of going through his land on account of Hughes street being out of repair, but he did not say when he made the payments. It was admitted that Hughes street had not been established by by-law by the defendants, nor had the defendant corporation done any corporate act assuming Hughes street for public user.

The learned Judge left the following questions to the jury, which they answered as follows: (1) Q. In July last was the concession road in a good and proper state of repair? A. No. (2) Q. Has statute labour been usually performed on Hughes street? A. No. (3) Q. Did the council assume Hughes street as a public road or highway? A. Yes. (4) Q. At the commencement of this action was Hughes street in a good and proper state of repair? A. No. (5) Q. What pecuniary loss did Hubert sustain during the three months next preceding the 27th of July last, by reason of Hughes street not having been in a good

Statement.

state of repair? A. None. (6) Q. Or by reason of the concession road being out of repair? A. None.

Upon the jury returning these answers the learned Judge asked them if they had considered the pecuniary loss of a dollar that Hubert said he had paid to Axford, and a juror answered that they did not understand that he had paid anything. The learned Judge thereupon directed the jury to consider that, and having done so they gave $3 damages. The learned Judge thereupon directed judgment to be entered for the plaintiffs, declaring the right to have Hughes street kept open and repaired, the defendants to pay the costs, and for the plaintiff Hubert for $3 without costs further than above.

The defendants moved to set aside the verdict and judgment, and to dismiss the action, and to enter judgment for the defendants, or to set aside the findings of the jury (except their finding in answer to the 2nd and 6th questions submitted to them, and their finding in answer to the 5th question when they first returned with their findings), and for a new trial on the following among other grounds:

1. The findings of the jury, except those hereinbefore excepted, are against the law, evidence, and weight of evidence. 2. There was no evidence that the defendants ever assumed Hughes street as a public road or highway. 3. The evidence shews that Hughes street was laid out by private persons, and the defendants were therefore not liable to keep it in repair until established by by-law of the defendants' corporation, or otherwise assumed for public user by the defendants. 4. The defendants not having established Hughes street by by-law, and the jury having found that the statute labour had not been usually performed thereon, the defendants were not liable to keep the same in repair. 5. There was no evidence that the defendants assumed Hughes street for public user beyond the evidence that the pathmaster had permitted a little statute labour to be done thereon by the plaintiffs, but without any authority from the defendants, and the jury having found that the statute labour had not usually been

performed on said street, there was no evidence to support the second finding of the jury. 6. The defendants were not bound to maintain or repair Hughes street, because the evidence shews that the plaintiffs purchased their small lots, which were carved out of a township lot, surveyed and laid out into village lots by private persons, for speculative purposes, and they knew that there was no outlet for them over Hughes street before they purchased their said lots, and they took their chances upon being able to get ingress and egress to and from their lands, and therefore the defendants should not be compelled to maintain or repair said street. 7. The evidence shews that the defendants offered to repair the original road allowance at the rear of the lands of the plaintiff Hubert, and make the same sufficient for his purposes; but he declined to accept such offer, and refused to do his statute labour thereon, and the defendants therefore submit that they are not bound to repair and maintain Hughes street, in so far as the plaintiff Hubert is concerned, at all events. 8. The defendants were not legally bound, by statute or otherwise, to provide means of ingress or egress for the plaintiffs, or any of them, to and from their lands. 9. The plaintiffs made no demand upon the defendants before the commencement of this action to have the said road allowance repaired. 10. The plaintiffs are not entitled to a declaration to have Hughes street kept openand repaired. 11. The plaintiffs, if they are entitled to any remedy at all, should not have proceeded by action but by indictment. 12. There was no evidence that the plaintiffs, or any of them, suffered any damage by reason of any neglect of duty on the part of the defendants; but if so, this action was not brought within three months after the damages were sustained. 13. The jury having in the first instance found that the plaintiff Hubert had not sustained any damage, the learned trial Judge ought not to have directed them to find damages, or to have sent them back into the jury room to re-consider the matter, and the last answer to the fifth question should be set aside. 14. If the plaintiff Hubert sustained any damage it was only

Statement.

Statement.

in common with the rest of the public, and not special damage beyond others of the public, and therefore he was not entitled to bring this action. 15. The defendants having in their discretion offered to repair the said road allowance instead of Hughes street, it was a reasonable and proper exercise of their discretion and should not be interfered with. 16. The plaintiffs Cochrane and Orr ought not to have been joined with the plaintiff Hubert in this action.

November 26, 1889. The motion was argued before the Divisional Court (ARMOUR, C. J., and STREET, J.)

Glenn, for the defendants. By sec. 531, sub-sec. 2, of the Municipal Act, R. S. O. ch. 184, the coporation shall not be liable to keep in repair any road, &c., laid out by any private person, until established by by-law of the corporation, or otherwise assumed for public user by such corporation. In this case there was no by-law or formal assumption of the road. If the road was assumed as a corporation road at all, it must have been under sec. 524, as a road "whereon the public money has been expended for opening the same, or whereon the labour has been usually performed." The evidence in this case does not bring it within this section. I refer to *Butler* v. *Bray*, 11 Ir. R. C. L. (1877) 181; *Baxter* v. *Winooski Turnpike Co.* 22 Vt. 114; *Attorney-General* v. *Weston Plank Road Co.*, 4 Gr. 211; *Hislop* v. *McGillivray*, 15 A. R. 687.

G. T. Blackstock, for the plaintiffs. The council shut up the old road, and must be taken to have adopted the new one. See Angell on Highways, 2nd ed., p. 182. The plaintiffs are entitled under sec. 52, sub-sec. 5, of the Judicature Act, R. S. O. ch. 44, to a declaration that they should have ingress and egress to and from their property over the road. The non-repair prevents ingress and egress now. It is a question of fact whether there was an assumption by the defendants of this street as a highway, and if the evidence as to statute labour being done and as to the other matters is considered, can it be said there was

no evidence to go to the jury? I refer to *Regina* v. *Hall*, 17 C. P. 282; *Regina* v. *Plunkett*, 21 U. C. R. 536; *St. Vincent* v. *Greenfield*, 15 A. R. 567; *Rex* v. *Leake*, 5 B. & Ad. 469; *Regina* v. *Yorkville*, 22 C. P. 431. Argument.

December 21, 1889. The judgment of the Court was delivered by

ARMOUR, C. J.:—

Hughes street having been laid out by private persons, the defendant corporation was not liable to keep it in repair until it was established by by-law of the corporation or otherwise assumed for public user by the corporation.

It was clearly not established by by-law of the corporation, but it was contended that the performance of statute labour thereon with the consent of the pathmasters, and on one occasion with the consent of the councillor for the ward and of the reeve, was evidence that it was otherwise assumed for public user by the corporation.

But we do not think that such action as was given in evidence in this case by the pathmasters and one or two of the councillors, all of whom might be interested in having a road assumed by the corporation, could bind the corporation and work an assumption by the corporation of a road laid out by a private person.

The acts required to work such an assumption must be corporate acts, and here it was admitted that there was no corporate act of assumption; and the acts must be clear and unequivocal, and such as clearly and unequivocally indicate the intention of the corporation to assume the road.

It was contended also that the passing of the by-law closing a part of the allowance for road against public travel until required by the public, was an indication of the intention of the corporation to assume Hughes street for public user; but the time when and the circumstances

Judgment. under which such by-law was passed afford no indication
Armour, C.J. of such intention.

If, however, we had come to the conclusion that Hughes street had been assumed for public use by the corporation, we should have been obliged to hold that this action was not maintainable, and that the plaintiffs' only remedy was by indictment. I so held in *Hislop* v. *McGillivray*, 12 O. R. 749, and this was affirmed in the Court of Appeal in the same case, 15 A. R. 687, where Patterson, J. A., said, at p. 692: "The duty to repair where it exists, and where it is only the general duty created by section 531, can only be enforced by indictment, as was held by Chief Justice Armour. We pointed out the same thing in this Court in *Moulton* v. *Haldimand*, 12 A. R. 503, where some of us considered that specific duties, such as those imposed by section 535 on county councils, might be enforced by mandamus, but all agreed that indictment was the only mode of enforcing performance of the general duty to repair."

The action must, therefore, be dismissed with costs.

[COMMON PLEAS DIVISION.]

ROBERTSON V. LAROCQUE.

Husband and wife—Married woman—Separate business—Separate estate—Debt contracted with reference to—Liability—47 Vic. ch. 19 (O.)—Effect of.

The defendant, a married woman, married to her present husband in 1877, or 1878, and carrying on business separately from him by farming one of her former husband's farms, in 1883 and 1884, contracted the debt sued on. She was entitled to dower in the lands of her first husband, who died in 1875, which were sold, realizing a large sum, and also to her share in his personal estate, neither of which she had received.

Held, that the Act of 1884, 47 Vic. ch. 19 (O.), had not the effect of repealing the prior Acts, and that it was not necessary to shew that the defendant had married, or had acquired separate estate since the Act of 1884 came into force; that it was sufficiently shewn that she was possessed of separate estate, and that she intended it should be bound.

The plaintiff was, therefore, held entitled to have judgment against it.

R. S. O. ch. 132, sec. 5, sub-sec. 1, makes the earnings of a married woman in a trade or occupation in which her husband has no proprietary interest separate property.

Statement.

THIS was a County Court action, tried before MACMAHON, J., without a jury, at L'Original, at the Spring Assizes of 1889.

Peter O'Brian and *C. G. O'Brian*, for the plaintiff.
G. H. Watson and *John Butterfield*, for the defendant.

The action was to recover the sum of $299.87 from the defendant, who, at the time the debt was contracted, it was admitted, was a married woman. It was also admitted that the amount above stated was the correct balance of the plaintiff's claim.

To the statement of the defence "that the defendant was, at the time the debt was contracted and still is, a married woman," the plaintiff replied that, at the time of the contract, the defendant was possessed of separate estate, and contracted the debts in respect of her separate estate; and, also, that the defendant, for her separate benefit and as a separate employment, carried on a farm in East

Statement. Hawkesbury, and contracted the said debts in respect of such separate employment.

The plaintiff was a general retail merchant at East Hawkesbury.

The defendant, prior to her marriage with Francis Larocque, her present husband, was the widow of Charles Tweed, who died in the year 1875, intestate, leaving several children, the issue of his marriage with the defendant.

The real estate of the intestate Charles Tweed was sold, under an order of the Court, in April and July, 1888. It realized $13,500, out of which the defendant had not received the value of her dower, nor had she received her share of the personal estate. The personal property of the intestate was valued at $2,000, and his liabilities at the time of his decease were $500.

The defendant was married to Larocque in 1877 or 1878; and, according to the defendant's examination read at the trial, Larocque had a farm of his own, but he worked on the Tweed farm for the first two years after he married the defendant.

The defendant said she carried on the farm on the Tweed property, and had the control of it and managed the estate. "I have been sued by John Robertson for $299.87. The account is correct. I paid Robertson up, after Mr. Tweed's death, in full, and I have been dealing with Mr. Robertson all along, before I married Larocque and since that time. I got my account from Mr. Robertson, and Mr. Larocque paid $58.60 of the account—all that he was liable for at that time. Mr. Larocque has nothing to do with the rest of the account." * * I had $250 that I got out of my mother's estate from my brother, and I paid out that money for store bills in 1879. That was all that I got out of my mother's estate. Mr. Robertson sent me accounts from time to time, and it was charged to me. I was caretaker of the property. My husband's farm was a separate business from mine, and I knew that Mr. Robertson charged the account to me. I made pay-

ments to Mr. Robertson and took receipts in my own name. I paid some of the money I got from my brother to Mr. Robertson." Statement.

The plaintiff was called as a witness on behalf of the defendant, and his evidence was to the effect that the articles forming the account were got by the defendant for the family generally. There was no arrangement with the defendant that he was to be paid out of her separate estate. The plaintiff always thought she would see him paid. The account was commenced in Charles Tweed's name, and continued in Mrs. Charles Tweed's name. Anything Laroeque got, there was a distinction made. He paid for what he got himself.

It was admitted that the account was commenced about the 1st of January, 1883. Of the balance due the plaintiff, amounting to $299.87, the sum of $70.31 was contracted since the 1st of July, 1884, and the whole account was contracted by the defendant. She had, prior to striking the balance now claimed, paid to the plaintiff $55 on the 21st of February, 1888, and $361 on the 10th of April, 1888.

The learned Judge reserved his decision, and subsequently delivered the following judgment:

MACMAHON J.:—

Mr. Watson contended that all Acts passed prior to the Married Woman's Property Act, of 1884 (47 Vic. ch. 19) (O.), were thereby repealed, and that as it was not shewn that the defendant had received separate estate since the 1st of July, 1884, nor married since that date, the plaintiff could not succeed.

There was no repeal of the former Acts which, together with the 47 Vic. ch. 19, are included in the R. S. O. ch. 132, the third section of which provides that "the real estate of any woman married after the 2nd day of March, 1872, whether owned by her at the time of her marriage or acquired in any manner during her coverture, and the

Judgment.

MacMahon, J.

rents, issues, and profits thereof shall * * be held and enjoyed by her for her separate use, free from any estate therein of her husband during her lifetime, and from his debts and obligations, and from any claim by him as tenant by the curtesy," etc.

In the case of *Douglas* v. *Hutchison*, 12 A. R. 110, it was held that the defendant's right to dower in the lands of her first husband was not separate estate, as she was married to the defendant in November, 1871, and, therefore, prior to the time mentioned in above section 3, namely, 3rd March, 1872; and as a consequence she had not the *jus disponendi* without her husband's concurrence; and, therefore, her dower in the lands of her former husband did not constitute separate estate; and consequently her interest could not be sold under execution against her. On this ground alone, the Court of Appeal reversed the judgment of Osler, J. A., 6 O. R. 581.

His Lordship, C. J. Hagarty, in his judgment in *Douglas* v. *Hutchison*, at p. 113, says: "As I understand the decisions, it seems to me that the unsettled real estate of a married woman, married after the 2nd of March, 1872, is to be considered as her separate estate. The defendant in the case before us had her title to dower consummate on the death of her husband in 1870. While his widow, I think she could have sold or assigned her right to dower under the large words of our statutes. * * I also hold that it would be seizable under an execution against her; and as she could have assigned it so long as she was *sui juris*, might legally convey it to a purchaser. * * But she married again on the 2nd of November, 1871, prior to the time mentioned in the Act, namely, the 2nd March, 1872."

The defendant in the present case, having married since the 2nd of March, 1872, the dower in the lands of her first husband being "unsettled real property" (per Hagarty, C. J., in *Douglas* v. *Hutchison*, p. 113) is to be considered as her separate estate. It was exigible in execution: *Allen* v. *Edinburgh Life Assurance Co.*, 25 Gr. 306, which

is concurred in by Patterson, J. A., in *Douglas* v. *Hutchison*, at p. 116. Judgment. MacMahon, J.

The defendant had also as separate estate her share in her first husband's personal estate. The defendant was carrying on a business separate from her husband; she had separate estate at the time the debt sued for was contracted; she was contracting separately from her husband, intending that he should be in no way accountable for the debts she was contracting with the plaintiff, which she intended to pay herself; and the plaintiff was trusting to her paying the debt.

The only means of satisfying the debt the defendant has contracted is out of the separate estate she had at the time the contract was entered into; "and therefore the inference is conclusive that there was an intention, and a clear one, on her part that her separate estate should be bound." *Tullett* v. *Armstrong*, 4 Beav. 319 at p. 323, cited in *Lawson* v. *Laidlaw*, 3 A. R. 77, at pp. 86-7; *Wallace* v. *Hutchison*, 3 O. R. 398.

As to the liability of a married woman for debts contracted by her while carrying on a business on her own behalf, separately from her husband, see *Berry* v. *Zeiss*, 22 C. P. 231.

Berry v. *Zeiss* was a judgment on demurrer in 1881, under the Married Woman's Property Act then existing (R. S. O. (1877), ch. 125, sec. 7), and in giving judgment, Wilson, C. J., at p. 241, said: "There has not been any express decision upon this point, and I shall give my own opinion upon it, that debts contracted by a married woman in carrying on a business or employment, occupation, or trade, on her own behalf, or separately from her husband, may be sued for as if she were an unmarried woman, that is, without regard to separate estate such as Courts of Equity recognize as that particular class of property; there being no distinction between her separate estate by statute and her general estate, and the business so carried on in which the debt was contracted, necessitating, as I assume, that it should be carried on in the usual and ordinary manner in

Judgment.

MacMahon, J.

which business can only be conducted, that is, by means of personal contracts and personal liabilities on both sides."

Notwithstanding the wide language of the 7th section, in my view, the interpretation which should be put upon it is, that it created a statutory separate estate in favor of a married woman who was carrying on a trade or occupation separate from her husband; and that, in a judgment against her by reason of a debt or contract entered into by her by reason of such separate trade or occupation, such judgment should direct a charging of or a realization out of such married woman's separate estate, and that there could not be a personal judgment against her, as held by the learned Chief Justice in *Berry* v. *Zeiss*.

The 7th section was not included in the revision of 1887; but in 1887 the Married Woman's Property Act was amended by 50 Vic. ch. 7, sec. 22 (O.), which is included in the last revision, R. S. O. 1887, ch. 132, sec. 5, sub-sec. 1, which enacts that "Every married woman, whether married before or after the passing of this Act, shall be entitled to have and hold as her separate property, and to dispose of as her separate property, the wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation in which she is engaged or carries on, and in which her husband has no proprietary interest, or gained or acquired by the exercise of any literary, artistic, or scientific skill."

This section puts it beyond question that a married woman's earnings in a trade or occupation in which her husband has no proprietary interest is made separate property by the statute. So that, when a married woman enters into a contract or creates a debt in respect of a trade or occupation carried on by her, such contract or debt has relation to the separate property of the married woman in the trade or occupation so carried on.

The view I have endeavored to formulate is perhaps best illustrated in the judgment of Lindley, L. J., in *Palliser* v. *Gurney*, 19 Q. B. D. 519, at p. 521, who, in putting a construction upon the Imperial Act of 1882, 45 & 46 Vic.

ch. 75, sec. 1, sub-sec. 3 (from which the 3rd sub-sec. of sec. 3 of our Act is copied) said: "Sub-sec. 3 presupposes that some contract binding separate property has been entered into—that is—presupposes the existence of separate property at the time of making the contract, for otherwise there is no power to contract, and then provides that such contract shall then bind her separate property, that is, that her separate property shall be liable to her general engagements, a matter about which there was some question before the passing of the Act."

Judgment. MacMahon, J.

The defendant in this case, as I have already found, had, at the time the debt was contracted, separate estate as dowress in the lands of her first husband, Charles Tweed, and also separate property as the widow of the said Tweed out of the personal property left by him at his decease, which had not been reduced into the possession of her second husband; and, also, that she was at that time carrying on an occupation in which her husband had no proprietary interest.

There will be judgment for the plaintiff for the sum of $299.87, together with interest thereon from the 24th of October, 1888, and full costs of the suit against the defendant, Mary Ann Larocque, which said several sums of debt, interest, and costs to be paid out of her separate property to which she was entitled on the 1st of January, 1883, or to which she is entitled, or which is vested in her at this date or in any other person in trust for her.

[COMMON PLEAS DIVISION.]

REGINA v. FERRIS.

Canada Temperance Act—Conviction—Costs of commitment and conveying to jail.

A conviction for a breach of the second part of the Canada Temperance Act, imposed a fine of $100, and directed distress on nonpayment of the fine, and in default of sufficient distress imprisonment in the common jail for two months unless the fine and costs, including the costs of commitment and conveying to jail, were sooner paid.

Held there was no power under the Act to include the costs of commitment and conveying to jail; and the conviction was therefore bad, and must be quashed.

The reasoning in *Regina* v. *Tucker*, 16 O. R. 127, and *Regina* v. *Good*, 17 O. R. 725, followed.

Statement. AN order *nisi* was obtained in Easter Sittings, 1889, to quash a conviction for a breach of the second part of the Canada Temperance Act. The conviction was for a second offence, and fine of $100 was inflicted. The conviction directed distress on nonpayment of the fine, and in default of sufficient distress, imprisonment in the common jail for two months, unless the fine and costs, including the costs of commitment and conveying to jail, were sooner paid.

In Michaelmas Sittings, November 27, 1889, *V. Mackenzie*, Q. C., supported the order. There is no power to include the costs of commitment and conveying to jail. This clearly appears from *Regina* v. *Good*, 17 O. R. 725, and the principle of the decision in *Regina* v. *Tucker*, 16 O. R. 127. The English Acts were amended so as to give this power in case of all convictions imposing fines.

T. D. Delamere, contra. The statute read in connection with the form given by the Act of 1888, amending the Canada Temperance Act, clearly confers the power to include these costs.

November 28, 1889. ROSE, J. :—

Judgment.

Rose, J.

I think the motion must be made absolute on the ground that the defendant is ordered to be imprisoned for two months, unless the costs and charges of commitment and conveying to jail, should be sooner paid.

As pointed out in *Regina* v. *Tucker*, 16 O. R. 127, there is no provision in the Canada Temperance Act for enforcing payment of the fine, and the power to distrain is given by sec. 62 of the Summary Convictions Act, R. S. C. ch. 178, and sec. 66 is not applicable, as the imprisonment there directed is to be "in the manner and for the time directed by the Act, * * on which the conviction * * is founded," *i. e.*, by the Canada Temperance Act; and the Canada Temperance Act does not direct any imprisonment for non-payment of a fine.

Section 67 is applicable by the language of the second part, *i.e.*, "And whenever the Act or law on which the conviction is founded provides no remedy," for in the event of insufficient distress, then the Justice may commit "for any term not exceeding three months."

There is no provision for the costs and charges of either commitment or conveying to jail in this section; and so, following the reasoning in *Regina* v. *Tucker*, 16 O. R. 127, and *Regina* v. *Good*, 17 O. R. 725, the conviction must be quashed, but without costs, and with the usual order for protection.

GALT, C. J., and MACMAHON, J., concurred.

[COMMON PLEAS DIVISION.]

REGINA v. RUNCHY.

Criminal law—Common Pleas Division—Jurisdiction in criminal matters—One or more Judges sitting in absence of others.

The jurisdiction to hear motions for orders *nisi* in criminal matters vested in the Common Pleas Division of the High Court of Justice for Ontario, is the original jurisdiction of the Court of Common Pleas prior to Confederation, and by virtue of sec. 5 of C. S. U. C. ch. 10, the Court "may be holden by any one or more of the Judges thereof in the absence of the others."

On the return of an order *nisi* to quash a conviction, the Court was composed of two of the Judges thereof, the third Judge being absent attending to other pressing judicial work :—

Held, that the Court was properly constituted to dispose of the order.

Statement. ON a motion for an order *nisi* to quash a conviction certain moneys were paid into Court.

On the return of the order *nisi* the order was discharged, the Court being composed of GALT, C. J., and ROSE, J., who disagreed, MACMAHON, J., being absent attending to other pressing judicial work.

An application was made in Chambers before GALT, C. J., for an order for the payment of the money out of Court, which was on the application of the defendant enlarged to the Divisional Court.

In Michaelmas Sittings, December 7, 1889, *Delamere*, Q.C., supported the motion, which was opposed by *Marsh*, Q.C., on the ground that the Court giving the decision discharging the order *nisi* was not properly constituted, as only two of the members thereof were present.

The argument and authorities sufficiently appear from the judgment.

December 21, 1889. GALT, C. J. :—

By sec. 2 of 46 Vic. ch. 10 (D.) "The practice and procedure in all criminal causes and matters whatever in the

High Court of Justice shall be the same as the practice and procedure in similar causes and matter before the establishment of the said High Court." Judgment. Galt, C.J.

Before the establishment of the High Courts, the Courts of Queen's Bench and Common Pleas had jurisdiction in criminal matters, and this jurisdiction has always been exercised by any two of the Judges.

By sec. 5 of the same Act, it is plain the Legislature contemplated cases in which only two Justices heard the case; the provision being "such reservation" (that is, as to reserved cases), "shall be to the Justices of any Division of the High Court of Justice for Ontario, and the judgment and order of the Justices shall be certified under the hand of the President of such Division, or in his absence under the hand of the next senior Judge of such Division."

It cannot be assumed that the Legislature intended such a provision to apply to cases in which the President had heard the case, and then being temporarily absent, his certificate was dispensed with. Suppose, for instance, a member of the Court received leave of absence for say six months, then, according to Mr. Marsh's contention, no reserved case could be heard until that period had expired.

By sec 2 of 12 Vic. ch. 63, by which Act the Court of Common Pleas was established, it was provided "that the said Court shall be presided over by a Chief Justice and two Puisne Judges, any one or more of whom, * * in the absence of the other or others of them may lawfully hold the said Court."

By sec. 29 of the Judicature Act, 44 Vic. ch. 5 (O.), "A Divisional Court shall be constituted by two or three, and no more, of the Judges thereof." It is true this Act has no reference to criminal procedure, but there is no Act by which the jurisdiction of either the Court of Queen's Bench or the Court of Common Pleas is confined to the full number of the Justices of such Court and to those alone.

The motion must be absolute with costs.

Judgment. ROSE, J. :—

Rose, J.

A perusal of *Regina* v. *Eli*, 13 A. R. 526 ; *Regina* v. *McAuley*, 14 O. R. 643 ; and *Regina* v. *Beemer*, 15 O. R. 266, and the statutes therein referred to, makes it clear that the jurisdiction to hear the motion for the order *nisi* vested in the Common Pleas Division was the original jurisdiction of the Court of Common Pleas prior to Confederation. The words of sec. 2 of R. S. O. 1877, ch. 39, are "Her Majesty's Court of Queen's Bench for Ontario, and the Court of Common Pleas for Ontario *shall continue*," &c. The Judicature Act, 44 Vic. ch. 5 sec. 3, provides amongst other things that "the Court of Common Pleas shall be called the Common Pleas Division thereof."

It is thus clear that no new Court of Criminal jurisdiction has been created, but the old Courts have been continued. And as pointed out by the learned Chief Justice, the old practice and procedure have also been continued.

It follows therefore, that by virtue of the provisions of C. S. U. C. ch. 10 sec. 5, the Court "may be holden by any one or more of the Judges thereof in the absence of the others."

Mr. Marsh urged that sec. 9, read with sec. 5, limited the language of sec. 5. I have carefully considered both sections, and am unable to see that the argument is well founded. It seems to me that sec. 5 provides for the sittings of the Court for the disposition of its business generally, and that sec. 9 is confined to the sittings of a Judge in Practice Court solely.

The sole question remains—what is the "absence" referred to in sec. 5 ?

It was argued that it was confined to absence from mental or physical incapacity. It was grudgingly admitted that possibly absence from the country might, but argued that absence while engaged in other judicial work would not be covered.

I think no such limited or narrow meaning can be put upon the word. If a member of the Court should even

perversely, without any reason, absent himself from the sittings of the Court, I do not think the business before Court could thus be blocked; but am clear that his remaining away would be absence within the meaning of the section. Judgment. Rose, J.

In the present case, my learned brother MACMAHON was absent attending to other judicial work which was very pressing, and I quite agreee with the learned Chief Justice, that the remaining members of the Court had ample powers to sit and transact business during his absence.

I agree that the motion must be granted with costs.

MACMAHON, J., concurred.

[COMMON PLEAS DIVISION.]

DOAN v. THE MICHIGAN CENTRAL RAILWAY COMPANY.

Pleading—Defence of contributory negligence—Not guilty.

In an action against a railway company for damages sustained by the plaintiff by the death of his father, by reason, as alleged, of the defendants' negligence in omitting to give the necessary warnings of the approach of their train at a railway crossing, the defendants pleaded "not guilty," and referred to the statutes incorporating the company and to the C. S. C. ch. 66, secs. 1 to 83 inclusive, and sec. 131 :—

Held, that the plea was not a compliance with Rule 418 ; and also that the defence of contributory negligence could not be set up under it, but must be specially pleaded.

Statement. THIS was an action tried before STREET, J., and a jury, at St. Thomas, at the Fall Assizes of 1889.

The statement of claim was as follows :—

On or about the 8th of February, 1888, in the evening, the late John Doan, father of the plaintiff, was, with a horse and cutter, driving on the public highway, in the township of Yarmouth, and while crossing the defendants' railway, near Kingsmill station, was, by reason of the negligence of the defendants, their servants or agents, in the proper and necessary warnings of the crossing of a locomotive engine and a train of cars on said railway, not being given, struck by a locomotive engine in charge of the defendants, their servants or agents, and received such injuries therefrom that he died on the same day, and within twelve calendar months before the commencement of this action.

The defence set up was "not guilty," and referred to the statutes incorporating the defendants, and to the C. S. C. ch. 66, secs. 1 to 83 inclusive, and sec. 131.

The learned Judge submitted the following questions to the jury :—

1. Was the bell on either engine rung at the distance of at least eighty rods from the Edgeware road crossing, and kept ringing until the engine crossed the road? Answer, No.

2. Was the whistle on either engine sounded at the distance of at least eighty rods from the Edgeware road crossing, and at short intervals until the engine crossed the road? Answer, No. Statement.

3. Were the defendants guilty of negligence in not having the headlight on the front engine turned up at the time of the accident? Yes.

4. Might the deceased by the exercise of ordinary care have avoided the accident? Yes.

5. Did the accident occur before or after dark? About dark.

Upon the answer to the fourth question, the learned Judge entered judgment for the defendants.

The plaintiff moved on notice to set aside the findings of the jury, and for a new trial.

In Michaelmas Sittings, November 26, 1889, *G. T. Blackstock*, and *Crothers*, of St. Thomas, supported the motion. The defence of contributory negligence is not set up by the pleadings. The only defence is "not guilty." This does not comply with Rule 410. However, there is nothing in the statute authorizing the defence of contributory negligence being set up under this defence. Contributory negligence should have been specially pleaded: *Reist* v. *Grand Trunk R. W. Co.*, 15 U. C. R. 355, 364. Moreover on the evidence contributory negligence was not proved: *Weir* v. *Canadian Pacific R. W. Co.*, 16 A. R. 100; *Blake* v. *Canadian Pacific R. W. Co.*, 17 O. R. 177.

W. R. Meredith, Q. C., contra. There was sufficient evidence of contributory negligence, and on the evidence the jury have found for the defendants. The defence was properly set up, at all events the evidence having been given the defence can now be added if necessary: *Goose* v. *Grand Trunk R. W. Co.*, 17 O. R. 721; *Wakelin* v. *London and South Western R. W. Co.*, 12 App. Cas. 41; *Williams* v. *Great Western R. W. Co.*, L. R. 9 Ex. 157; *Small* v. *Grand Trunk R. W. Co.* 15 U. C. R. 283.

Judgment.

Galt, C. J.

December 21, 1889. GALT, C. J.:—

I may, in reference to the plea pleaded in this case, state that if anything turned on the form of the plea there could not be a greater disregard shown of Rule 418, and the plea could not be taken to have been pleaded by virtue of an Act of Parliament.

The three first references are to statutes incorporating the defendants, and the last is to Consol. Stat. C. ch. 66, secs. 1 to 83 inclusive, and sec. 131.

This does not conform in any respect to the requirements of the Rule.

It does not, however, signify whether the plea is simply a plea of "not guilty," or "not guilty by statute," so far as the question of contributory negligence on the part of the deceased is concerned, for there is no provision in the statute which would authorize such a defence.

As said by Robinson, C. J., in *Reist* v. *Grand Trunk Railway*, 15 U. C. R. 355, at p. 364: "The action is not for anything done by the company under the statute, but for a breach of duty, in omitting to carry out a direction given by the statute;" and in all other cases it will be found that where the defendants relied on the defence of "contributory negligence," it has been pleaded.

As we are of opinion that a new trial should be granted, it is inexpedient to refer to the evidence which we have very carefully considered.

The weight of evidence was in favour of the defendants as respects the first and second questions; and as regards the fourth, even if evidence was given, contributory negligence was not pleaded.

The motion will be absolute for a new trial, costs of the previous trial and of this motion to be costs in the cause to the successful party.

ROSE and MACMAHON, J. J., concurred.

[COMMON PLEAS DIVISION.]

REGINA v. BOYD.

Justice of the peace—Conviction—Carts used for hire—Necessity to be licensed under city by-law.

The defendant was convicted of a breach of a by-law passed under sec. 436 of R. S. O. ch. 184, which provided that no person should, after the passing thereof, without a license therefor, "keep or use for hire any carriage, truck, cart," etc. The defendant was the owner of waggons and horses which, at the date complained of, were employed in hauling coal and gas pipes for a gas company, for which defendant was paid by the hour or day. The defendant also engaged carts and horses which he hired out to haul earth, and which were so being used on the day complained of:—

Held, that the defendant came within the terms of the by-law, and was therefore properly convicted thereunder.

Statement.

An order *nisi* was obtained on behalf of the defendant William Boyd, to quash a conviction of the Police Magistrate of the city of Toronto, fining the defendant $2, "for that he did, on the 9th of October, 1889, keep or use vehicles for hire without a license, contrary to by-law No. 10 of the police commissioners of the said city."

The evidence was, that the defendant owned waggons and horses; and that on the day in question, and during the month of September last, his teams were employed in hauling coal and gas pipes for the Gas Company. He was paid fifty cents an hour for each team, or $5 per day of ten hours.

The defendant also engaged horses and carts which he hired out to haul earth, and they were so hauling earth on the dates named.

The defendant had no license.

In Michaelmas Sittings, December 5, 1889, *W. N. Miller*, Q.C., supported the motion. The defendant does not come within the terms of the by-law. The evidence shews that the defendant never kept any carts for hire. He is a contractor, and only keeps or uses carts as incidental to his contract. On the day in question the carts were being used

Argument.

by the defendant for the purpose of carrying out his contract with the Gas Company. The words of the by-law are "keep or use for hire." This means keep carts for hire, or use carts kept for hire.

Mowat, contra. The word "*use*" in the sense here means "employ." See meaning of word "use": Webster's Dictionary, Imperial Dictionary, Latham's Dictionary, Wharton's Law Lexicon; Addison on Contracts, 8th ed., 524. The defendant makes use, that is, employs his horses and carts in carrying coal and iron pipe for the Gas Company, for which he is paid fifty cents an hour for each team, or $5 a day of ten hours. The defendant, therefore, was properly convicted under the by-law: *Clarke* v. *Stanford*, L. R. 6 Q. B. 357; *Case* v. *Storey*, L. R. 4 Ex. 319; *City Council of Charleston* v. *Pepper*, 1 Richardson, South Car., 364.

December 21, 1889. MacMahon, J.:—

The Municipal Act R. S O. ch. 184, sec. 436, authorizes the boards of commissioners of police in cities to pass by-laws to regulate and license the owners "of horses, cabs, carriages, carts, trucks, sleighs, omnibusses, and other vehicles used for hire * * for the conveyance of goods or passengers," &c.

The second section of by-law No. 10, under which the defendant was convicted, was passed on the 31st July, 1889, and provided that: "No person shall, after the passing of this by-law, without being licensed so to do, keep or use for hire any carriage, truck, cart, sleigh, or other vehicle whatever."

Mr. Miller contended that the defendant did not come within the operation of the by-law, as, although he possessed horses and waggons and took contracts from the Gas Company and others for the carriage of goods, he does not "keep or use," such waggons for hire.

The defendant makes use of his horses and waggons to carry the coal and iron pipe for the Gas Company, and he is paid by the company for the cartage or carriage of such goods, *i. e.*, he uses his horses and waggons for hire.

Judgment.

MacMahon, J.

"Use" is synonymous with "employ." To employ one's horses and waggons in hauling coal for hire is to "use" them for the same purpose.

The words in sec. 436 of the Municipal Act are "used for hire" and the words in the by-law are "keep or use for hire" so the by-law copies the words of the Act.

The case of *City of St. Charles* v. *Nolle*, 11 Am. R. 440, is a very instructive case as to the power of municipalities in passing by-laws of the nature we are considering.

In regard to the horses and carts hired by the defendant with which he was hauling the earth referred to in the evidence, if these horses and carts are hired by the defendant from a party or parties in the city who pay a license, then the defendant is not liable for using such horses for hire in the manner stated. But if they are not hired from a person or persons paying a license fee, then the defendant is liable as to such horses and vehicles for an infraction of the by-law, for he is in no better position than if he hired the horses and carts outside the limits of the city, and brought them in and retained them on his premises, and "used them for hire" within the city's limits.

The defendant was properly convicted of using his own teams for hire without having obtained a license as required by law, and the conviction must be affirmed, and the motion dismissed with costs.

GALT, C. J., concurred.

ROSE, J., was not present during the argument, and took no part in the judgment.

[COMMON PLEAS DIVISION.]

PAYNE v. MARSHALL.

Gift inter vivos—Sufficiency of.

The defendant, having in her possession a large sum of money which her husband had given her, went with him to the bank to deposit it, and was about to do so when, on a question arising as to the power of withdrawing it in case of the wife's illness, the money, at the bank agent's suggestion, was deposited in both their names subject to withdrawal by either of them, and it remained on deposit uninterfered with by the husband up to the time of his death which occurred some months after :—
Held, that there was a good gift *inter vivos* to the wife.

Statement. THIS was an administration action tried before ROSE, J., without a jury, at Woodstock, at the Autumn Assizes of 1889.

The plaintiff was the sister and the heir-at-law of John Marshall, who was killed in a railway accident at Ingersoll on the 5th of December, 1888; and the defendant was the widow of the said John Marshall, who died intestate.

The defendant claimed a sum of $2,000 as a gift from the deceased to her.

The $2,000 was received on the 25th of September by the deceased in satisfaction of a mortgage for that amount held by him, and the payment was made to him in the presence of his wife, who had the money in her possession when both went to the bank, and the wife was about depositing the money to her own credit, and had, in fact, handed it to the teller for that purpose, when the husband interposed, and it was deposited to the credit of "John or Ann Marshall."

What took place between the parties at that time is thus stated on the cross-examination, at the trial, of Mr. Simpson, the bank manager :—

Cross-examined. By Mr. *Blackstock* :—

"Q. This account, you say, then stood in the name of John or Ann Marshall, in Ingersoll, subject to their signatures. Do you remember how that account came to be put in that shape? A. It was at my suggestion it was put in that way.

Statement.

Q. At your suggestion it was put in that way? You understood at the time that account was opened up that the person who was really to have it was Mrs. Marshall?

Mr. *Ball.*—I object

His LORDSHIP.—Objection will be noted.

Witness.—I cannot say.

Mr. *Blackstock.*—Q. Was that not the understanding that you had at that time? Was it not that it was put in the shape in which it was as a matter of convenience, but that in reality the money was to be Mrs. Marshall's?

His LORDSHIP.—Understood from whom?

Mr. *Blackstock.*—From Marshall and his wife; they were both present at the time were they not? A. They were both present at the time, and Mr. Marshall was quite willing to have that money put in Mrs. Marshall's name and said as much, and the account was to have been opened in that way.

Q. Originally this money was to be deposited to Mrs. Marshall's credit? A. Exactly.

Q. And subsequently as a matter of convenience his name was added? A. Exactly.

Mr. *Ball.*—Q. Did you know whose money it was? A. No, sir; I did not.

Q. Did not know anything about that? A. No.

Q. And it was put in their joint names at your suggestion? A. Yes, sir.

Q. Did they say whose name it was to be put in before that? A. Yes, sir.

Q. Who said that? A. Mrs. Marshall was depositing the money herself. She had the money in her possession when she came to the bank, and was going to deposit it in her own name. Then, the question arose, if anything should happen that he should want to draw it, could he draw the money as it was then deposited? I told him no, not unless the money was deposited subject to either signature; in that case he could get it whether Mrs. Marshall was there or not.

His LORDSHIP.—Q. She had the money in her possession, and was going to deposit it when a question arose? A. John Marshall asked if he could draw the money, it being deposited in her name. I told him he could not draw it unless the money appeared in his name as well as in hers; that is, the money was to be deposited to either of their signatures, which was acted upon and accepted by them both at the time.

Mr. *Ball.*—That was on the 25th September, 1888? A. To the best of my knowledge; I speak from that account.

His LORDSHIP.—Both of them were present at that time? A. They were.

Q. And what did you say was the date?

Mr. *Ball.*—25th September, 1888.

Mr. *Blackstock.*—Mrs. Marshall had the money and was making the deposit? A. She had.

Statement.

Q. It was she who gave the money to you? A. She did not give it to me, she gave it to the teller.

Q. She made the actual physical deposit in the bank? A. Yes sir.

Q. And it was for the purpose of enabling him to draw although she was making the deposit that you made this suggestion? A. Exactly, sir."

Mr. Ball put in as part of the plaintiff's case a portion of the defendant's examination for the purpose of discovery, in which she stated as follows in relation to the gift of the $2,000 to her and the reason for its being deposited in the bank to their joint credit:

"He (my husband) was to give it to me anyway, because I was to have it. He just gave it to me to do what I liked with. I was with him when he deposited it in the bank to the credit of both of us. He could draw it out. I drew none of this money out in his lifetime, neither did he. At his death it was in the bank to the credit of both of us, and it is there in the same way yet. I claim this money as a gift from my husband to do with as I like. The banker said he had better deposit it to the credit of both of us, so my husband could draw it out if I was sick."

The learned Judge at the close of the case delivered the following judgment in favour of the defendant so far as regards the question of a gift by the deceased to his wife of the $2,000.

November 6th, 1889. ROSE, J.:—

We have to deal here with the probabilities as well as the direct testimony. We have two parties, intermarrying twenty-eight years ago, by their joint industry accumulating certain property. One of them dies and leaves no children. I have always thought it to be a very hard case that the law, on such a state of facts, does not give the widow the whole of the property. It seems to me that a partnership thus had, in which, by joint effort, property is acquired should by law go to the survivor; and that a claim by relatives outside is a claim not supported by natural justice, and should only be yielded to when by strict rule of law the Court is compelled to decree in their favour.

Approaching the case in that light, no doubt affects one's opinions, and perhaps leads one to regard the evidence more favourably towards the claimant than if the claim were not, as I believe it to be, founded in natural justice.

Holding the view I do, I must not deprive the widow of the property which I think is hers, in justice, unless the evidence convinces me that she does not properly claim it.

Judgment.

Rose, J.

I find from the evidence offered on the part of the plaintiff, confining myself now solely to the question of the money, that the husband and wife went to the bank to deposit this money; the money was in the manual possession of the wife, she was about to deposit it in her own name; a question arose as to the convenience of transferring or withdrawing it in the event of anything happening to her, and upon the suggestion by the banker himself, the money was placed in their joint names not as indicating ownership, but merely for the purpose of withdrawing the money from the bank, if it became necessary. I have then the statement made by the defendant herself, the administratrix, that this money was given to her on that day. That statement is not contradicted by evidence, but is supported by the general run of the evidence of other witnesses indicating that the husband intended that the wife should have the property. It is true, one of the witnesses speaks of his intention to make a will: that statement applies to property other than this money in respect to which I have direct evidence.

I have no reason to doubt the statement made by the widow, which in itself would be sufficient in law, if by corroborative evidence I am convinced of the truthfulness of the witness.

It does not need, as I read the cases, corroboration as to the exact point, but such general corroboration of her testimony as will enable the Court to rely upon it. There is no question here as to creditors: it is a question simply as to the intention of the parties; and I find the fact to be, that on the 25th day of the month this money was given by the husband to the wife. That they went to the bank for the purpose of depositing it in her name, is evidence of her ownership. It was deposited in their joint names, simply and solely, as a matter of convenience for the purpose of withdrawing the money in the event of anything happening to the wife.

I find that issue in favour of the wife.

A motion was made to the Divisional Court against that part of the judgment finding that there was a gift by the deceased to his wife, the defendant, of the sum of $2,000,

Argument. deposited in the joint names of Marshall and his wife in the Traders' Bank, at Ingersoll, on the 25th day of September, 1888.

In Michaelmas Sittings, 1889, *Ball*, Q. C., supported the motion. The evidence shews that there was not a perfect gift to the wife. The husband never gave up dominion over the money. He never parted with the entire interest in it. He could at any moment up to the time of his death, have drawn the money out of the bank. There are none of the requisites of the gift here: *Clement* v. *Cheeseman*, 27 Ch. D. 631; *Richards* v. *Delbridge*, L. R. 18 Eq. 11, 16; May on Fraudulent Conveyances, 2nd ed., 402-3; Taylor on Evidence, 8th ed., sec. 975; *Re Breton's Estate*, 17 Ch. D. 416; *Shower* v. *Pilck*, 4 Ex. 478; *Irons* v. *Smallpiece*, 2 B. & Al. 551; *Bourne* v. *Fosbrooke*, 18 C. B. N. S. 515, 524; *Schaffer* v. *Dumble*, 5 O. R. 716.

G. T. Blackstock, contra. The evidence of the manager of the bank, and the defendant, clearly shews that there was a gift of the money to the wife. The husband had parted with all control over the money, and the only object of putting it in his name, as well as the wife's, was as explained, merely to enable the husband to draw out the money for the wife in case she should want it, and from illness or otherwise, should be unable to draw it out herself; and the husband never attempted to assert any right to it: *Grant* v. *Grant*, 34 Beav. 623; *Re Murray, Purdham* v. *Murray*, 9 A. R. 369; Williams on Personal Property, 13th ed., 392.

December 21, 1889. MacMahon, J.:—

As my learned brother Rose points out in his judgment there is ample corroboration of the evidence of the defendant as to the gift of the $2,000 by her husband to her.

The question then arises whether the money being deposited in the manner stated can affect her right to retain the gift?

Judgment MacMahon, J.

It having been found there was an absolute gift to the wife, she could the day before her husband's death have withdrawn the whole fund from the bank and retained it in her possession as her own money; as if it was hers just prior to its being deposited—although deposited in the name of her husband and herself—it would most certainly have been hers had she withdrawn it from the bank just prior to her husband's death.

There is no doubt the husband could have withdrawn the money and have deposited it to his own credit; but unless the wife after the gift to her made a re-gift or re-transfer of the money to him, his removal of the money from its place of deposit would not deprive the wife of her right to that money and to follow it if it had been deposited to his own credit. The money being put in the husband's name as well as the wife's, was not intended in any way to change the rights of the wife in the ownership of the sum deposited, but was merely deposited in that way for the sake of convenience so that it could be drawn upon in the event of the wife's illness.

In the case of a gift *inter vivos*, as was stated in *Carpenter* v. *Soule*, 88 N. Y. 257: "There must be a delivery of the gift—the donor must part with his dominion over it, it must not rest in a mere promise." That authority is quoted with approval by his Lordship Chief Justice Hagarty, in *Travis* v. *Travis*, 12 A. R. at p. 442. And Osler, J. A., in the same case, at p. 450, cites *Harris* v. *Clark*, 3 N. Y. 93, where in relation to the same class of gifts, the following language was used: 'Gifts are valid without consideration or actual value paid in return. But there must be delivery of possession—The contract must have been executed. The thing given must have been put into the hands of the donee, or placed within his power by the delivery of the means of obtaining it." *Baskell* v. *Hassell*, 107 U. S. Rep. 602, is also cited. Both those decisions being in accordance with the law as laid down in *Irons* v. *Smallpiece*, 2 B. & Al. 551; *Shower* v. *Pilck*, 4 Ex. 478.

Judgment. MacMahon, J.

In *Irons* v. *Smallpiece*, the pair of horses claimed by the plaintiff as a gift from his father were never in possession of the donee, but remained in possession of the father until his death. In *Shower* v. *Pilck*, the cheque mentioned therein was placed by the father in the hands of his infant son from whose possession the father immediately thereafter re-took it, and said to the infant's nurse, "I am going to put this away for my own son;" and it remained with and was in possession of the father at his death.

Those cases of *Irons* v. *Smallpiece* and *Shower* v. *Pilck*, were relied upon by counsel for the plaintiff, but there is a wide difference between these cases and the present case, because the donor here did not retake possession of the money comprising the gift, and up to the very hour of her husband's death the wife had as complete dominion over the money in the bank as if she had taken it home and retained exclusive possession of it.

Putting the case in the most favourable view possible for the plaintiff, by regarding the money deposited as the property of husband and wife jointly, on the husband's death the wife was entitled to the whole by survivorship.

The right of the survivor to the whole of the personal property held under a joint ownership is thus stated in Williams on Personal Property, 13th ed., pp. 392-3, "As a * * consequence of the unity of joint ownership, the important right of survivorship, which distinguishes the joint tenancy of real estate, belongs also to a joint ownership of personal property. Whether the subject be a chattel real, as a lease or a chose in possession as a horse, or a chose in action, as a debt or legacy, the surviving joint owner will be entitled to the whole, unaffected by any disposition which the deceased joint owner may have made by his will, unless the joint tenancy should have been previously severed in the lifetime of both the parties."

And where there was a bequest of money to a husband and wife jointly, the Court will preserve the wife's right by preventing the husband from alienating the property during her life: *Atcheson* v. *Atcheson*, 11 Beav. 485, at p. 491.

It is not, however, necessary to elaborate this view of the case.

Judgment.

MacMahon, J.

There was from the evidence and from all the surrounding circumstances of the case a clear intention on the part of the donor to make a gift of this money to the donee, and equally conclusive evidence of an actual receipt by her of the money as a gift from her husband.

In the view I entertain the plaintiff's motion must be dismissed with costs.

GALT, C.J., concurred.

ROSE, J., was not present at the argument, and took no part in the judgment.

[CHANCERY DIVISION.]

DAWSON v. FRASER.

Will—Construction—"Family now at home"—Subsequent departure from "home"—"Family"—Dower—Election—Maintenance—Duration—Bequest of maintenance devolving upon personal representatives.

Where a testator provided by his will: "that the farm be kept till the youngest surviving child comes of age, at which time I would desire the property to be sold and the proceeds to be divided equally between all my children, and my wife. * * My will is, that I would like the farm rented to some good tenant, on the best terms possible, the rent to be used in the support and maintenance of the family now at home." The farm referred to was the only real property possessed by the testator either at the time of making his will or at his death. One of the testator's children, though living on the farm at the time of the testator's death, afterwards left it, and went to reside elsewhere:—

Held, per FERGUSON, J., that the words "family now at home" were *designatio personarum*, and that the child in question did not forfeit her vested right to share in the rents by afterwards leaving the home.

She afterwards died intestate, before the testator's youngest surviving child came of age:—

Held, per BOYD, C., that her share of the rents devolved on her personal representatives.

Where a provision is made for maintenance, the duration of which is defined by the testator, it will go on for the prescribed period notwithstanding the death of the beneficiary, because to avoid an intestacy the Court will adjudge it to the representatives of the deceased:—

Held, also, *per* FERGUSON, J., that the widow was intended to be included in the word "family":—

Held, also, *per* FERGUSON, J., that the widow was put to her election as to dower, since owing to the direction to lease the farm, all the provisions of the will could not be carried into effect consistently with the dower being set apart.

Statement.

THIS was a petition brought by W. H. L. Dawson and J. A. M. Dawson, infants, by William Munns, their next friend, and Joanna Dawson, in a certain action wherein they were plaintiffs, and Eva Matilda Fraser, Edwin Hunter, Sophronia L. P. Cook, and Emily Fierheller, were defendants.

The petition set out that William Dawson died in 1881, leaving a will containing the following provisions:

"First, my will is, that all the loose property should be disposed of to the best advantage, so soon after my decease as convenient (reserving thereout one horse and two cows), also the wheat in the ground to be sold and the hay.

"Second my will is, that the farm be kept till the youngest surviving child comes of age, at which time I would desire the property to be sold,

and the proceeds to be divided equally between all my children and my wife, giving my two boys $200 more than the rest. In the event of the death of my children, leaving lawful issue, my will is, that their share shall go to such issue. In the event of the death of any of my said heirs leaving no issue, my will is, that his or her share shall be equally divided between the surviving heirs. My will is, that my just debts and testamentary expenses be paid out of the proceeds of the loose property, and the balance to be divided between the heirs. My will is, that I would like the farm rented to some good tenant, on the best terms possible, the rent to be used in the support and maintenance of the family now at home." Statement.

The petition then went on to state, as the facts were, that at the time of the making of the above will, and at his death, the testator was the owner in fee simple of a certain farm in East Gwillimbury: that at the time of the making of his will and at his death, the members of his family living with him on the said farm were the present petitioners, and the defendant Eva Matilda Fraser, Joanna Dawson, she being his wife, and the other three his children: that after the testator's death, Eva Matilda Fraser married Alexander D. Fraser, and lived with him at Port Cockburn, in the district of Muskoka, from that time until about the time of her death: that Joanna Dawson was appointed by the Surrogate Court guardian of the infant plaintiffs after their father's death: that after the death of the testator the farm was leased for ten years, and the rent, $370 per annum, was made payable semi-annually into the Federal Bank at Newmarket, to the joint credit of Joanna Dawson and the defendant Edwin Hunter, who had similarly been appointed guardian of the estate of Eva Matilda Fraser, she having been under age at the testator's death: that after the marriage of Eva Matilda Fraser, and after she ceased to reside on the farm, a question was raised as to the parties entitled to the said rents under the will, having regard to the clause of the said will whereby it was directed that the said rent was "to be used in the support and maintenance of the family now at home;" whereupon this action was instituted for the purpose of determining that question, and judgment was pronounced herein on May 18th, 1885, declaring the three petitioners and Eva Matilda

Statement. Fraser entitled to the rents of the farm, one-fourth of which was ordered to be paid to the latter (a), who, how-

(a) The following is the judgment here referred to, and is the judgment of FERGUSON, J., spoken of by BOYD, C., in his judgment:

FERGUSON, J.—The will in question, so far as appears material, is as follows [setting out the provisions of the will as above]:

Then follows a provision in respect to the tenant not cutting timber, &c. and the appointment of executors to the will.

There is at present no difficulty as to the ultimate disposition of the property. There are but two matters as to which I am asked to express an opinion. One is, as to the meaning of the last clause of the will, above quoted; the other, as to whether the widow is put to her election as to her dower. The farm that the testator directed to be rented is the only real property of which he was possessed at the time of making the will or at the time of his death. As he directed this to be sold when the youngest child attains her full age, it is I think clear that the renting of the farm directed is a renting of it till that period. Counsel said that the youngest child is now six years of age.

The farm has been rented and the tenant has (professedly under the terms of the will) been required to pay his rent into the Federal Bank at Newmarket to the joint credit of Johanna Dawson and Edwin Hunter, she having been appointed by the Surrogate Court guardian of the infant plaintiffs, and he (Edwin Hunter) having been so appointed guardian of the defendant Eva Matilda Fraser. At the time of the making of the will and at the time of the death of the testator the members of his family living with him upon the farm were his wife, the plaintiff, Joanna Dawson, the infant plaintiffs, William H. L. Dawson and John A. M. Dawson, and his daughter the defendant Eva Matilda Fraser (then Eva Matilda Dawson.)

The tenant of the farm has paid his rent into the bank, and there is now a considerable sum. After the death of the testator, the daughter, the defendant Eva Matilda Fraser, ceased to live upon the farm, and went to live with her husband at Port Carling, it is said, and at the place of her husband's father; she, Eva Matilda Fraser, was at the time of the testator's death under age.

The difficulty has arisen about the proper division and application of the rents. This seems to have been the cause of the bringing of this action. It was stated at the bar that two other daughters of the testator were at the time of the making of the will and at the time of the death of the testator married, and not living on the farm (at home.) These are doubtless the two named in the fourth paragraph of the statement of the defendant Eva Matilda Fraser as being with herself daughters of a former marriage of the testator.

It was contended that the defendant, Eva Matilda Fraser, when she married and ceased to live at the "home" mentioned by the testator, became *foris familiated*, and ceased to be entitled to any share or interest

ever, died in August, 1888, intestate, leaving her husband and one child, an infant, her surviving, and no administrator had been appointed to her estate: that Edwin Hunter now refused to pay out any portion of the rent until the rights of the parties were determined. Statement.

The matter came up for argument on December 8th, 1889, before BOYD, C.

Shepley, for the widow of W. Dawson, petitioner, cited Simpson on Infants, p. 289; *Cowper* v. *Scott*, 3 P. W. 119; *Bayne* v. *Crowther*, 20 Beav. 400; Jarm. on Wills, 5th Am. ed., Vol. 1 p. 698.

Armour, for the infants, cited *Boraston's Case*, 3 Co. 19 *a.*; Hawkins on Wills, 2nd Am. ed., p. 237; *Hanson* v. *Graham*, 6 Ves. 239; *Doe Goldin* v. *Lakeman*, 2 B. & Ad. 30.

in the rents. The case *Jubber* v. *Jubber*, 9 Sim. 503, appears to me to be more nearly in point on this subject than any I have been referred to on the subject, or any that I have seen. Here the testator gave his wife the use of all his property for the benefit of herself and unmarried children, that they might be comfortably provided for so long as she should live, and after her death to be disposed of amongst all his children. There were four married and three unmarried children. One of the three married after his death, and it was held that the widow and the three children who were unmarried at the testator's death were entitled equally to the income of the property during the widow's life. The learned Vice-Chancellor in giving judgment said, at p. 507: "The term 'unmarried' is *designatio personarum*; and if once the child is entitled to participate in the fund by filling the character of an unmarried child, he will not lose that right if he subsequently marries." In the present case the words "the family now at home" are *quoad* the children, quite as strong words as were the words in the case I have referred to. I think the defendant Eva Matilda Fraser was entitled to participate in the fund by filling the character and falling under the description used by the testator. I think the words are *designatio personarum*, and that she did not forfeit her right by marrying and leaving that home. I think the words "now at home" cannot readily be otherwise understood. I am aware that many authorities appear to indicate the contrary of this conclusion, but I think those of them that I have examined distinguishable owing to definite character of this text or context, which ever it may be properly called.

As to whether or not the widow is embraced in the meaning of the words "family now at home" it is to be remarked, that although the primary meaning of the word "family" is in many cases said to be

Judgment.

Boyd, C.

December 19th, 1889. BOYD, C. :—

My brother Ferguson has already decided that Eva Matilda, though married and living away from home, was entitled to a share of the rents under that provision of the will which gives the rents for the support and maintenance of "the family now at home." As one of that family at the death of the testator, he held in effect, that her aliquot portion became vested, and this being so, it is of obvious consequence that her death will not affect the right of her representative. The direction of the will is, that the rents of the farm be so applied till the youngest surviving child comes of age, a period not yet reached. There is, therefore, the carving out of a chattel interest in the rents of the farm from the death of the testator

children, yet it is a word that admits of a variety of applications, and the construction to be put upon it in a particular will must depend upon the intention of the testator to be collected from the whole context of the will. In the case *Hutchinson* v. *Tenant*, 8 Ch. D. at 542, the late Sir George Jessel, then Master of the Rolls, said: "For there is no reported case in which the word 'family' when used by a married man has been held to include his wife as well as his children." I find, however, that it was held in the case *Blackwell* v. *Bull*, 1 Keen 176, by the then Master of the Rolls, (Lord Langdale), that the testator in the words "my family" intended to comprise his wife, and looking at the will in this case, and the context, and what appears to me to be the manifest intention of the testator, I am of the opinion that the meaning is, that the widow is entitled to share in this fund. That is, speaking apart from any question of election or the like, and solely in respect of construction, I think she was embraced in the expression "the family now at home."

As to whether or not the widow is put to her election, I think that owing to the direction to lease the farm, which was the whole of the real estate, all the provisions of the will could not be carried into effect consistently with her having the right of dower, or the dower being set apart, and I think the case *Rody* v. *Rody*, 29 Gr. 324, is well in point on the subject. I think the widow was put to her election.

These three points that I have disposed of, are those that were dwelt upon in the argument. If there are other matters that it is necessary to determine, counsel must speak to the case again, and I will hear them at any convenient time.

The costs of all parties should, I think, be out of the fund. I think this is according to the common rule.

till the majority of the youngest surviving child. Now the distinction is marked in the cases between those where a provision is made for maintenance of indefinite duration, and those where the duration is defined by the testator. In the former case the provision will not be carried beyond the life of the beneficiary, in the latter it goes on for the prescribed period, notwithstanding the death of the beneficiary, because to avoid an intestacy the Court will carry on it to the representatives of the deceased.

Judgment. Boyd, C.

The present case falls within the line of authorities of which *Bayne* v. *Crowther*, 20 Beav. 400, is most frequently cited. It is matter of astonishment that the provision intended apparently for personal support and maintenance should be continued after the death of the individual, but the Courts have declined to cut it down where the testator has defined the period during which it is to run. See per James, L. J., in *Re Ord, Dickinson* v. *Dickinson*, 12 Ch. D. 25, and contrast this with *Wilkins* v. *Jodrell*, 13 Ch. D. 564, at p. 569, per Hall, V. C. My opinion is, therefore, that the share of this daughter in the rents devolves upon her personal representative.

A. H. F. L.

[QUEEN'S BENCH DIVISION.]

REGINA v. MCMAHON ET AL.

Criminal law—Indictment for murder—Evidence, admissibility of—Statements of deceased after being shot—Complaint—Cross-examination of Crown witness—Particulars of complaint—Res gestæ—Dying declaration.

At the trial of the prisoner upon an indictment for murder, a witness for the Crown swore upon direct examination that deceased lived about thirty rods from him, and that one night, about half an hour after he had heard shots in the direction of deceased's house, deceased came to the witness's house, and asked the witness to take him in, for he was shot. The witness did so, and deceased died there some hours afterwards.

Evidence of statements made by deceased after being taken into the witness's house was rejected.

Upon a case reserved it was contended on behalf of the prisoner: (1) that his counsel was entitled to ask the witness in cross-examination whether deceased mentioned any particular person as the person who attacked him; (2) that statements made by deceased after he arrived at the witness's house were admissible as part of the *res gestæ*; (3) that such statements or some of them were admissible as dying declarations:—

Held, (1) That the admission of evidence of a complaint having been made ought properly to be confined to rape and its allied offences, but even if such evidence is admissible in other cases, it can only be so where, as in such offences, the complainant has been examined as a witness; and moreover, in this case, when deceased asked the witness to take him in, for he was shot, he was not making a complaint at all, but merely assigning a reason for asking to be taken in, and the question proposed to be asked was not relevant.

(2) That the statements made by deceased after he was taken into the house were not admissible as part of the *res gestæ*, being made after all action on the part of the wrong doer had ceased through the completion of the principal act, and after all pursuit or danger had ceased.

Regina v. *Bedingfield*, 14 Cox 341, and *Regina* v. *Goddard*, 15 Cox 7, followed.

(3) That upon the evidence the statements made by deceased after being taken into the house were not made under a settled hopeless expectation of death, and were therefore not admissible in evidence as a dying declaration.

Statement. THE prisoners Todd Quick and Benjamin McMahon were indicted jointly for the murder of one Holton.

At the trial before ROSE, J., at Chatham, *W. R. Meredith*, Q. C., appeared for the prisoner Quick, and *Pegley* for the prisoner McMahon. At the close of the case for the Crown the learned Judge directed the acquittal of the prisoner Quick, and the trial of the prisoner McMahon proceeded, and he was found guilty.

Statement.

Holton lived alone in a log house upon the north-half of lot 19 in the 8th concession of Tilbury East, and one Thomas Maris lived upon the south-half of the same lot, and one Patrick McMahon lived on lot 18 in the 7th concession. The concession line between the 7th and 8th concessions was a travelled road, and there was a side road, also travelled, running between the lots 18 and 19 in both concessions; the houses of Holton and of Maris fronted on this side road, and McMahon's house fronted on the concession line between the 7th and 8th concessions. At the south-west corner of McMahon's lot, and at the intersection of the side road with the concession line, there was a schoolhouse.

About half-past nine on the night of the 16th July, 1888, persons at McMahon's house heard shots fired in the direction of Holton's house, and heard some one holloaing "murder," whom they took to be Holton; they went down from McMahon's house to the concession line, and after some five or more minutes' delay there, assisting a neighbour in drawing a reaping machine over a bridge, they proceeded along the concession line towards the school house, and as they were proceeding they heard a horse and buggy coming up the side road from the direction of Holton's; they began to walk faster in order to meet the horse and buggy by getting to the side road before it got to the concession line, but this they were unable to do, and the horse and buggy turned west along the concession line; they then went down the side road to Holton's house; they did not go in, but called for him, and he did not answer, and after stopping there a while, they heard Holton calling over at Maris's; they then went over to Maris's, and going into the house found Holton on the floor.

Thomas Maris testified in examination-in-chief that his house was about thirty rods from Holton's house; that on the night of the 16th July, 1888, he went to bed about nine o'clock; that before he went to bed, about a quarter of an hour, or half an hour, or twenty minutes, he could not say exactly the time, he heard two shots fired in the direction of Holton's; that after he went to bed he heard Holton coming around to his house.

Statement.

Q. "What did you hear? A. He asked me to take him in, sir, for he was shot. Q. One moment. You were in bed, were you, when he came to your place? A. Yes, sir. Q. Or had you got up? A. I was in bed when I heard him outside. Q. You don't understand my question. Were you in bed or out of bed when Holton came to your place? A. I was in bed, sir. Q. And Holton then spoke. I do not want you to tell what he said. He spoke, did he? A. Yes, sir. Q. What did you do then? A. I jumped out and went and met him, and asked him what was the matter. Q. Do not tell anything that Holton said at the time, merely tell what you did and saw. You got up then and went to your door? A. Yes, sir. Q. And who did you see there? did you see Holton there? A. No, sir, not before I went a little way outside. Q. And had he come on to your land at this time, or was he upon the side road? A. He was upon my land, sir. Q. What position was he in, standing up or lying down, or how? A. Standing up, sir. Q. Was he walking towards you or standing still? A. I could not say, sir. Q. Did you notice anything about him at that time before he went into your house? A. No, sir. Q. Notice whether there was any wound upon him or not? A. No, sir. Q. How was he dressed? A. He had nothing on him, sir. Q. No clothes at all? A. No clothes at all. Q. Not even a shirt? A. Not even a shirt. Q. He was naked then? A. He was naked."

Witness also said that he went back again and put something on, and told him he would put something on and bring him into the house, and when he got him in he dropped on his knees on the floor; after that he went and got a sheet and put it over him, and then got a bed for him to lie on; that he crawled on to the bed with a little of his assistance; that after he got into the house and got him a bed to lie on, he saw that he was shot; that there was a bullet hole in his side; that it was then ten o'clock, and that Holton died at five o'clock the next morning.

During the cross-examination of this witness the following took place:

Mr. Meredith—I propose to ask the witness if the deceased mentioned any particular person as the person who attacked him.

His Lordship—Do you object to that?

Mr. Lount (Counsel for the Crown)—I do not think that would be evidence, a statement made by the deceased at that time.

His Lordship—Why do you ask?

Mr. Meredith—It is laid down in Taylor on Evidence that while not to be asked by the Crown, it may be asked by the other side.

His Lordship—Do you think Mr. Meredith, you can obtain from the witness such statements as enable you to put it under the other head?

Mr. Meredith—No, my Lord, I would put it the other way.

His Lordship—I would like to see some authority; at present I cannot think of anything.

Mr. Meredith—Perhaps I can leave that to be spoken to in the morning.

His Lordship—Oh, certainly.

Statement.

The case for the Crown was closed without any thing further being said on the subject of the proposed question. After several witnesses had been examined for the defence, the following occurred:

Mr. Pegley—Maris was a witness called, and his cross-examination was not closed.

Mr. Lount—It must have been closed before you commenced your defence.

Mr. Pegley—He was called on the Quick branch, but his examination was not closed.

His Lordship—Why do you say it was not closed.

Mr. Pegley—There was a point arose as to the right to examine him upon some point.

His Lordship—As to whether or not you could ask him what the deceased said.

Mr. Pegley—Yes.

His Lordship—You will have to establish your right to ask that; you are correct in your position if you do establish that, that he stood down as far as Mr. Meredith's cross-examination was concerned, but that was not on your cross-examination. You would have to call him now, I think, as an independent witness.

Mr. Pegley—I desire to call him.

His Lordship—In the first place you would have to establish your right in law to have him give that testimony.

Mr. Pegley—I submit, my lord, that the statements were made in the expectation of death, and are in such a position as would entitle his ante-mortem statement to be given.

His Lordship—There is no evidence at present that he made any statement to this man prior to the physicians being called in, and he was under the apprehension of death.

Mr. Pegley—That I propose to establish through Maris.

His Lordship—The evidence did not establish that when Maris was in the box.

Mr. Pegley—He was not cross-examined fully upon that point, and his attention was not directed to it. And then I submit it is admissible upon the other ground, that that is a statement made in connection with the transaction that is the subject of the charge.

His Lordship—Have you any case showing that a statement made by a man after he had opportunity for reflection and consideration, is a statement made as part of the *res gestæ*.

Mr. Pegley—I will show to your Lordship an extract from Taylor.

Statement.

HIS LORDSHIP—That is, where the Crown is allowed to give general statements, the prisoner may cross-examine as to particular statements.

Mr Pegley—I submit we have the right to put him in the witness box, and ask him what these statements were, proving from him that he was in either one position or the other, whether as an ante-mortem statement or that it was a statement made immediately after what took place.

HIS LORDSHIP—You have cited no authority for the second proposition; none of those cases are authorities; each one is quite distinguishable. What is the principle upon which these statements are admitted as part of the *res gestæ*? If you can prove that they are statements made in anticipation of death, that may be another thing. Do you object to the evidence, Mr. Lount?

Mr. Lount—If my learned friend is putting this in as an ante-mortem statement properly established, I do not know that I can offer any objection, but beyond that I do object.

Mr Pegley—I put it in on both grounds, my Lord; I tender it on both grounds.

HIS LORDSHIP—At present I am against you as to its being part of the *res gestæ*. If you can establish that it is ante-mortem in the ordinary sense of the term, I will, of course, receive it—shall have to receive it.

Mr. Pegley—The only evidence, your Lordship will see, of the murder is the evidence of this man.

HIS LORDSHIP—Not any statement made by him.

Mr Pegley—That he was shot.

HIS LORDSHIP—That is not the evidence of the murder. The evidence of the murder is the evidence of the surgeon who finds the bullet wound in the body, finds the bullet there, and testifies to the death happening from the wound.

Mr. Pegley—I do not know whether I am correct in stating that Mr. Maris said also that he said he had been shot.

HIS LORDSHIP—He may have said that; I don't remember for the moment.

Mr. Lount—I was stopped, I did not offer it.

HIS LORDSHIP—I noticed that Mr. Meredith warned that he was going to object, and Mr. Lount then prevented the evidence coming out. I have made no note of any such statement.

Mr. Pegley—The authority I was quoting to your Lordship touches this point: "So on an indictment for highway robbery the fact that the prosecutor a few hours after the attack made upon him complained to a constable that he had been robbed, will perhaps be admissible." The case cited in support of that is *Rex* v. *Wink*, 6 C. & P.

HIS LORDSHIP—I will reject the evidence on the one ground, and reserve the point if it becomes necessary for the consideration of the Court as to whether it is admissible upon that ground. You may tender it, and I will receive it if you can shew it is an ante-mortem statement. That case you cite shews that you may shew there was a statement, but not what the statement was.

Mr. Pegley—In no case can the particulars of a complaint be disclosed

by witnesses for the Crown, &c., but the details of the statement can only be elicited by the prisoner's counsel on cross-examination. Statement.

His Lordship—Certainly, the Crown offering in evidence that a general statement was made or rather that a statement was made, then the prisoner's counsel may ask what that statement was; that is what that case shews. At present I am against you.

The following evidence was then given:

John A. McGregor sworn—Examined by Mr. Pegley.

Q. Were you at Mr. Maris's house the night Mr. Holton was murdered? A. Yes, sir. Q. What time did you get there? A. About half-past eleven. Q. You are a magistrate, I believe? A. No, sir. Q. Did you take the depositions from the old man? A. Yes, sir. Q. What became of that? A. It is lost; I do not know what became of it; I searched for it too, but I cannot find it. Q. What did you do, how did you come to take it? A. I was asked to take it, as the man was dying. Q. By whom were you asked? A. I do not just remember; I think it was by Dr. O'Keefe. I think so, I am not positive as to that. Q. How did you judge that the man was dying? A. Oh, I saw the wound that he had received, and I supposed from the appearance of the man he could not live; in fact he said he was dying. Q. Did he make his will? A. Yes, sir. Q. At the same time? A. Afterwards, I think.

His Lordship—Q. Had the doctor been there at the time? A. Yes, sir, the doctor had been there. Q. But he had gone away had he. A. I think he had gone away at that time, but returned afterwards—went for another doctor.

Mr. Pegley—Q. Who was the second doctor? A. Dr. Ellis. Q. How long after that did he die? A. He died about five o'clock in the morning; I was not there when he died—just when he died.

His Lordship—Q. What hour was it at that time? A. It was about half-past eleven I got there. Q. And when was it he told you he was dying? A. It would be an hour perhaps afterwards, or half an hour afterwards. Q. Were you present when the doctor was there? A. Yes sir.

Mr. Pegley—Q. Then he expressed to you that he was dying? A. Yes, sir. Q. Was that at the time he made the statement or before he made the statement? A. I think it was afterwards.

Mr. Lount—Q. After he made the statement he said he was dying?

Mr. Pegley—Q. Did he express the desire to make a statement himself, or did you ask him to make a statement? A. I asked him to make a statement at the request of those who were there, myself amongst the others. Q. Did you tell him he was dying? A. Well I do not think I did. Q. Did the doctor tell him that? A. No, I think he did not, he did not in my presence, not at that time. Q. That would be Dr. O'Keefe? A. Neither of the doctors were there at the time the deposition was taken; they had both gone away if my memory serves me right. Q. And you do not know what became of that deposition? A. No, I do not. Q. Where did you last see it? A. Either in my office or in my room, I do not know

Statement.

which. Q. You cannot tell where it is now? A. No. Q. Did you look for it? A. I did. I made diligent search for it.

Mr. Pegley—I submit I might now ask this witness what he said.

His Lordship—You have not shewn at the time the statement was made what apprehension he was under at all. You have shewn that after the statement was made he made an observation; you have not shewn anything he did prior to making the statement or anything he said with reference to death. When was it he made his will, before or after the statement? A. I think it was afterwards; I am not clear as to that.

Mr. Pegley—Q. How long after? A. Oh it might be an hour or it might be before, I am not positive. Q. Do you know who drew the will? A. Yes, John Burgess. Q. Is he here? A. He is not here.

His Lordship—You have not shewn up to this time by the evidence what was his apprehension at the time of making the deposition.

Mr. Pegley—Q. Did the old man say anything to you about his own state or condition before he made the statement? A. No, I think not. I do not think he did. I do not think he said anything to me about how he was hurt, or how he had received the injury until I came to write it down.

His Lordship—You misunderstand. As to his prospects of recovery? A. Oh no, I think not.

Mr. Pegley—Q. Could you tell anything from his manner, did he speak anything about his family? A. No, he had no family. Q. Did he say anything to those around him about his death? A. I do not think so; he was suffering very much, a great deal.

Mr. Pegley—It seems to me the whole circumstances, the nature of the wound inflicted upon him, and the fact of his making his will—

His Lordship—This was all subsequently.

Mr. Pegley—But was closely subsequent.

His Lordship—If I rule in your favour, I have to say that there is evidence that he was under the apprehension of death when he made the statement. Unless you could argue that his condition was such that it afforded cogent evidence of such an apprehension—

Mr. Pegley—Well, he appears, according to all accounts, to have been mortally wounded.

His Lordship—I suppose the doctors are not in attendance. Q. Had Dr. Ellis been there before you drew up this statement or heard what he had to say? A. I do not think so, I think he arrived afterwards.

Dr. Ellis recalled.

Mr. Pegley—Q. What time did you get to Holton's that night? A. Somewhere about twelve o'clock. Q. Were you there at the time he made the statement? A. No, I think he had made the statement before I got there. Q. From the nature of the wound that was inflicted on him, would it lead a person to believe he was killed or going to die? A. I do not understand your question. Q. Well, was he very grievously wounded? A. He was.

His Lordship—It is a question of what was present in his mind at the time he made the statement. I do not know that the doctor can assist us as to that.

Mr. Pegley—Q. Did he tell you as to the statement? Did he speak as to the statement he had made to you? A. No. Q. You did not get there until about twelve o'clock? A. It was about twelve o'clock or shortly afterwards. Q. Was there any doctor in attendance before you got there, or were you first? A. Dr. O'Keefe had been there, and had come back for me. Statement.

His Lordship—Dr. O'Keefe would know whether anything passed between him and Holton; Dr. Ellis attended there after the statement was made.

Dr. O'Keefe recalled.

Mr. Pegley—Q. I believe you were called to attend Holton? A. Yes, sir, I was the first one that got there. Q. What time did you get there?

His Lordship—At the time you first attended, was there anything that passed between you and the wounded man as to his state or condition or prospects of recovery. A. No, my Lord, not the first time. Q. He made no statement to you shewing apprehension of death or belief that he would recover? A. No, my Lord. Q. Neither one way or the other? A. Did not mention it at all. Q. And there was nothing that you could form an opinion from professionally as to whether he apprehended death or not? A. I could not tell at that time I did not know myself. Q. He was suffering from the shock, I suppose? A. Yes, sir. Q. Sensible? A. He was quite sensible, and was sensible until the last; at that time there had not been any external bleeding at all.

Thomas Maris, recalled.

Mr. Pegley—Q. You were there when Mr. Holton came to the house? A. Yes, sir. Q. Were you there at the time the statement was made by him to Mr. McGregor? A. Yes, sir. Q. Had anything taken place between you and Mr. Holton that would shew what the state of his mind was as to his condition? A. No, sir. Q. Did he use any expression to you as to whether he was going to live or die? A. Well sir, not then he did not.

His Lordship—Prior to Mr. McGregor taking the statement from him? A. No, sir.

Mr. Pegley—Q. Did he at the time of the statement? A. No, sir. Q. Were you there when the will was drawn? A. Yes, sir. Q. Did you have any conversation with him after the will was drawn, and after the statement? A. No, sir, no conversation. Q. He did not tell you anything about how this happened after the statement? A. No, sir. Q. Did not repeat it? A. No, sir.

Mr. Pegley—The only ground I can rely upon, your Lordship, is just the serious nature of the wound, and the conduct of the man with regard to it.

His Lordship—There has to be apprehension of death, does there not?

Mr. Pegley—My argument is that he was under that apprehension all the time.

His Lordship—The difficulty I have in following you there is that the medical gentlemen in attendance himself was not able to form an opinion at the moment until he further examined, and that there was nothing that enabled him to conclude that the wounded man was under apprehension

Statement. of death. I think the words are "apprehension of death;" "under the sensible conviction of their impending death," are the words used. On the evidence so far, Mr. Pegley, I must reject the evidence.

Mr. Pegley—I tender it, your Lordship.

HIS LORDSHIP—Certainly.

The learned Judge reserved the question for the consideration of this Court, whether, as regards the prisoner McMahon, the evidence tendered by Mr. Pegley, as above stated, was improperly rejected, and whether the evidence of statements made by the deceased were improperly rejected as dying declarations.

On December 4, 1889, the case was argued before ARMOUR, C. J., and FALCONBRIDGE, and STREET, JJ.

W. R. Meredith, Q.C., and *Pegley*, for the prisoner.

1. The Crown put the witness Maris in the box, and the prisoner had the right to cross-examine him upon his evidence-in-chief. The fact that the deceased made a complaint is good evidence: Roscoe's Digest of Criminal Evidence, 10th ed. p. 28; Stephen's Digest of Evidence, p. 11. The particulars of the complaint may be asked in cross-examination: *Regina* v. *Walker*, 2 Moo. & R. 212; *Regina* v. *Eyre*, 2 F. & F. 579; *Regina* v. *Wood*, 14 Cox 46.

2. The evidence was admissible as part of the *res gestæ*. *Regina* v. *Bedingfield*, 14 Cox 341, is against this contention, but Cockburn, C. J., in that case says, that the law ought to be that such evidence is admissible. That, coming from the strongest opponent of the rule we are seeking to enforce, is something in our favor. The following cases may be referred to: *Regina* v. *Lunny*, 6 Cox 477; *Rex* v. *Foster*, 6 C. & P. 325; *Thomson* v. *Trevanion*, Skin. 402, per Holt, C. J.; *Aveson* v. *Kinnaird*, 6 East 193; Taylor on Evidence, 8th ed., secs. 581-3; *Commonwealth* v. *Hackett*, 2 Allen (Mass.) 136, 139; *Albany Law Journal*, vol. 40, pp. 142, 327; *The State* v. *Driscoll*, 72 Iowa 583; *The State* v. *Schmidt*, 73 Iowa 469; *Kirby* v. *Commonwealth*, 77 Va. 681; 46 Am. Reps. 747; *Louisville* v. *Buck*, 19 N. E. Reporter 453; *Driscoll* v. *The People*, 47 Mich.

413; *The People* v. *Vernon*, 35 Cal. 49; *Travellers' Ins. Co.* v. *Mosley*, 8 Wallace 397; *Field* v. *The State*, 34 Am. Reps. 476; *The People* v. *Ah Lee*, 60 Cal. 85; *American Law Review*, vol. 14 (N. S. vol. 1), p. 817; vol. 15 (N. S. vol. 2), pp. 1, 71; *Commonwealth* v. *McPike*, 3 Cush. 181. Argument.

3. The evidence of what the deceased said is admissible as a dying declaration. The rule laid down in *Rex* v. *Woodcock*, 1 Leach 500, is still the law, as shewn by *Regina* v. *Morgan*, 14 Cox 337; *Regina* v. *Bedingfield*, *ib.* 341; *Regina* v. *Cleary* 2 F. & F. 850.

J. R. Cartwright, for the Crown. The case was reserved really on the *res gestæ* question alone. In *Rex* v. *Foster*, 6 C. & P. 325, cited by counsel for the prisoner, the statement was made immediately after the deceased was knocked down. *Regina* v. *Goddard*, 15 Cox 7, is the latest case; I rely on it and *Regina* v. *Bedingfield*. On the dying declaration question, I refer to *Regina* v. *Jenkins*, L. R. 1 C. C. R. 187; *Regina* v. *Osman*, 15 Cox 1; Taylor on Evidence, 8th ed., sec. 718, *et seq.*; Archbold's Criminal Pleading and Evidence, 20th ed., p. 254.

December 21, 1889. The judgment of the Court was delivered by

ARMOUR, C. J.:—

The counsel for the prisoner in argument before us made three contentions: 1st. That Maris having in his direct examination testified that Holton asked him to take him in, for he was shot, the counsel for the prisoner was entitled to ask Maris in cross-examination the question proposed, if Holton mentioned any particular person as the person who attacked him; 2nd. That the statements made by Holton after he arrived at Maris's house were admissible in evidence as being part of the *res gestæ*; and 3rd. That such statements or some of them were admissible in evidence as dying declarations.

The question proposed to be put in the cross-examina-

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tion of Maris was not persisted in by counsel; it was left to be spoken to in the morning; it was not spoken to in the morning; and the case for the Crown was closed without anything more being said about it; and the question whether it could have been so put has not been reserved for our consideration; it could, however, only have been put if relevant; and whether it was relevant will be further discussed hereafter.

Counsel likened the case to one of rape, where the Crown may ask the prosecutrix whether she made any complaint, and if so, to whom; and if she mentions a person to whom she made complaint, may call such person to prove the fact that she made such complaint; and thereupon the counsel for the prisoner is entitled to ask the prosecutrix and the person to whom she complained, upon cross-examination, the particulars of the complaint that she made; and he urged that the deceased having said when he got to Maris's house that he was shot, that that was a complaint made by him, and that counsel was therefore entitled upon cross-examination to ask Maris what the deceased said were the circumstances under which he came to be shot.

But the case is not to be likened to the case of rape, where the prosecutrix is examined as a witness; for there the evidence that she complained—that she presently discovered the offence—is given for the purpose of giving greater probability to the truth of her story and as confirmatory of her evidence; but where the prosecutrix is not examined as a witness, the evidence that she made complaint is not admissible as confirmatory evidence; for there is no evidence of the prosecutrix to confirm; and is not otherwise admissible except it be a part of the *res gestæ*. And accordingly in *Regina* v. *Guttridge*, 9 C. & P. 471, the prisoners being indicted for rape, and the person upon whom the offence had been committed not being present at the trial, it was proposed by the prosecution to ask a witness for the Crown whether the person upon whom the offence had been committed did not complain to her the

next day; but, objection being made by the prisoner's counsel that such evidence was only admissible as confirmatory of the evidence of the person upon whom the offence had been committed, and as she had not been examined as a witness, there was no evidence to confirm, and it was thereupon not receivable, Parke, B., said "I think the safest course will be to reject the evidence, as it is not part of the *res gestæ*, but merely confirmatory evidence."

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In *Regina* v. *Megson*, 9 C. & P. 420, and *Regina* v. *Nicholas*, 2 C. & K. 246, in the former of which the person upon whom the offence had been committed was dead, and in the latter the person upon whom the offence had been committed was a child of six years old, who could not be sworn as a witness for want of religious belief, evidence of the fact of a complaint having been made was given, but it was so given without any objection being made to it.

"Indeed, the complaint constitutes no part of the *res gestæ*, it is only a fact corroborative of the testimony of the complainant; and, where she is not a witness in the case, it is wholly inadmissible": Greenleaf, 14th ed. vol. 3, sec. 213. See also *The People* v. *McGee*, 1 Denio 19.

The principle upon which the fact of a complaint having been made is admissible in rape where the prosecutrix has been examined as a witness as confirmatory of her evidence is founded upon ancient practice, and upon the peculiar nature of the offence, and ought properly to be confined to rape and its allied offences.

It is stated, however, in most English text books that the principle is applicable to other cases besides rape and its allied offences. "Where a person has been in any way outraged, the fact that this person made a complaint is good evidence, both relevant and admissible": Roscoe 10th ed. 28.

The only authorities cited for this application of this principle are *Rex* v. *Wink*, 6 C. & P. 397, and *Rex* v. *Ridsdale*, York Spring Assizes, 1837, Starkie on Evidence, 469. In the former case, on an indictment for robbery, the prosecutor stated that about twelve o'clock at night he

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was attacked and robbed by the prisoner and three other persons. He also stated that at between five and six o'clock on the next morning he went to a constable and complained to him of the robbery. He further stated that he then mentioned the name of a person as the name of one of the persons who had robbed him. "Carrington, for the prosecution.—Does your Lordship think that I ought to ask him what name he mentioned? Patteson, J.—No, I think you ought not; but when you examine the constable, you may ask him whether, in consequence of the prosecutor mentioning a name to him, he went in search of any person, and, if he did, who that person was." In the latter case the same learned Judge, Patteson, on an indictment for shooting at the prosecutor, held that evidence was admissible to shew that the prosecutor immediately after the injury had made communication of the fact to another, but that the particulars could not be given in evidence.

It does not appear that in either of these cases objection was taken to proof of the fact of the complaint being made. The authority of these cases has been questioned in the United States, and it is not clear upon what ground the principle applicable to rape and its allied offences can be held applicable to other cases "where a person has been in any way outraged." See *Haynes* v. *The Commonwealth*, 28 Gratt. 942, and *American Law Review*, vol. i., N. S., at p. 834, where the subject is discussed by Prof. Thayer.

Admitting, however, that this principle is applicable to such "other cases," it can only be applicable, as in rape and its allied offences, where the prosecutor has been examined as a witness; and is not therefore applicable to this case.

But when deceased asked Maris to take him in, for he was shot, this was not making a complaint within the meaning of the cases referred to, nor was it making a complaint at all, but merely assigning a reason for asking Maris to take him in, just as if he had asked Maris to take him in, for he was cold, or naked, or hungry, or sick, or dying, and did not make relevant the question proposed to be asked.

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Now, as to the second contention, it is to be observed that it does not appear at what particular time after the arrival of the deceased at Maris's house the statements were made by him which it was proposed to put in evidence as a part of the *res gestæ;* but assuming them to have been made immediately after his arrival, I do not think that they formed a part of the *res gestæ*, and were therefore not admissible.

In *Regina* v. *Bedingfield*, 14 Cox 341, the prisoner went into the room of a house where the deceased, with whom he had relations, was, two women being in the yard. In a minute or two the deceased came suddenly out of the house towards the women with her throat cut, and on meeting one of them she said something, pointing backwards to the house. In a few minutes she was dead. In the course of the opening speech on the part of the prosecution it was proposed to state what she said; it was objected on the part of the prisoner that it was not admissible; and Cockburn, C.J., said he had carefully considered the question and was clear that it could not be admitted, and therefore ought not to be stated, as it might have a fatal effect. "I regret," he said, "that according to the law of England, any statement made by the deceased should not be admissible. Then could it be admissible having been made in the absence of the prisoner, as part of the *res gestæ?* but it is not so admissible, for it was not part of anything done, or something said while something was being done, but something said after something done. It was not as if, while being in the room, and while the act was being done, she had said something which was heard."

Counsel for the prosecution afterwards proposed to prove what she said, and Cockburn, C. J., said it was not admissible. "Anything," he said, "uttered by the deceased at the time the act was being done would be admissible, as, for instance, if she had been heard to say something, as 'Don't Harry.' But here it was something stated by her after it was all over, whatever it was, and after the act was completed."

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This ruling was much criticized, and a letter was written by Mr. Taylor, the author of the work on Evidence, to the "Times," finding fault with it, to which the Chief Justice replied in a pamphlet published by him in which he stated that, knowing beforehand that the question would arise at the trial, he sought the advice and assistance of his colleagues Mr. Justice Field and Mr. Justice Manisty, and that having carefully considered the facts and the authorities, they came to the deliberate conclusion that the evidence was inadmissible, and that he had the authority of his learned brothers for saying that they adhered to the opinion they then came to. He also stated that "if the prisoner having been found guilty" (the evidence having been admitted) "the Court of Appeal on the question being submitted to them had held the evidence inadmissible, as I am firmly persuaded they would have done, and I do not speak unadvisedly, they would have done," &c. This decision thus appears to have had the support of Field and Manisty, JJ., and probably of the Court of Appeal.

In this pamphlet the Chief Justice formulated the following answer to the question: What is the meaning of the term *res gestæ*, as applied to a criminal case? "Whatever act or series of acts constitute or in point of time immediately accompany and terminate in the principal act charged as an offence against the accused from its inception to its consummation or final completion, or its prevention or abandonment, whether on the part of the agent or wrongdoer in order to its performance, or on that of the patient or party wronged in order to its prevention, and whatever may be said by either of the parties during the continuance of the transaction with reference to it, including herein what may be said by the suffering party, though in the absence of the accused, during the continuance of the action of the latter, actual or constructive, as, *e.g.*, in the case of flight or applications for assistance, form part of the principal transaction, and may be given in evidence as part of the *res gestæ* or particulars of it; while, on the other hand

statements made by the complaining party after all action on the part of the wrongdoer, actual or constructive, has ceased through the completion of the principal act or other determination of it by its prevention or its abandonment by the wrongdoer, such as, *e.g.*, statements made with a view to the apprehension of the offender, do not form part of the *res gestæ*, and should be excluded."

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In *Regina* v. *Goddard*, 15 Cox 7:—On a Saturday night the deceased was at home; the prisoner, her husband, was seen to come home about eleven, p.m., and almost immediately the next door neighbours heard a noise as of the furniture being knocked about; then two steps were heard to run up-stairs, the noise being as of light footsteps going first, followed by heavier ones. A woman's scream was heard proceeding from the upper part of the house; then two persons were heard to run quickly down again, followed immediately by a series of piercing screams. One of the neighbours, Mrs. Sharman, came out into the yard of her house, found the deceased standing in the yard in a pool of blood, and took her into her house, fetching, at the deceased's request, another neighbour, Mrs. Worrall. When Mrs. Worrall arrived, which was some ten minutes after the screams had been heard, the deceased was standing at Mrs. Sharman's door. Two witnesses testified that she then looked pale and was in a fainting condition, and had the appearance of dying, and she then made a statement as to the cause of her injuries, which the prosecution proposed to put in as part of the *res gestæ*, but it was objected to and disallowed by the learned Judge, Hawkins.

These cases are the latest expositions of the law in England upon the subject, and I think that we ought to follow them, and following them, we must say the statements made by the deceased after he arrived at Maris's house were inadmissible in evidence; they were made after all action on the part of the wrongdoer, actual or constructive, had ceased through the completion of the principal act, and after all pursuit or danger had ceased.

It was argued that the rule laid down by the Chief

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Armour, C.J.

Justice in *Bedingfield's Case*, and afterwards formulated in his pamphlet, required statements admissible as part of the *res gestæ* to be too contemporaneous; and that we ought to follow cases in the American Courts, where the rule is held not to be so limited; but the decisions of the American Courts are the decisions of the Supreme Court of each State, and are by no means uniform; some holding the rule quite as strictly as the Chief Justice did, and others not so strictly. I refer to *State* v. *Carlton*, 48 Vt. 636; *State* v. *Estoup*, 39 La. An. Rep. 219; *State* v. *Molisse*, 38 La. An. Rep. 381; *Mayes* v. *State*, Sup. Ct. Miss., Feb. 7th, 1887, referred to in note by reporter in 58 Am. Rep. 184; *Jones* v. *State*, 71 Ind. 66; *State* v. *Pomeroy*, 25 Kansas 349; *The People* v. *Ah Lee*, 60 Cal. 85; *Louisville N. A. R. W. Co.* v. *Buck*, 19 N. E. Rep. 453; *Commonwealth* v. *Densmore*, 12 Allen 535; 21 Albany L. J. 484 and 504; 22 Albany L. J. 4; and *Lund* v. *Tyngsborough*, 9 Cush. 36, in addition to the cases cited on the argument.

As to the third contention, the evidence shewed that after deceased arrived at Maris's house, Dr. O'Keefe was set for and arrived about 10.30 p. m., and found him in a weak condition, suffering apparently from a great deal of shock; that he examined him and prescribed an opiate for him, and gave directions that he should be kept quiet; that he then drove away to get some instruments, in case an operation would be justified, and came back about 11.30 p. m. or 12 midnight, bringing Dr. Ellis with him; that nothing passed between Dr. O'Keefe and the deceased on the first occasion as to his state, or condition, or prospects of recovery; that the deceased made no statement to him shewing apprehension of death or belief that he would recover; that he did not mention it at all; that there was nothing from which he could form an opinion professionally as to whether he apprehended death or not; that he (Dr. O'Keefe) did not know himself; that during the interval between Dr. O'Keefe's first and second visits, one McGregor, a magistrate, took the deceased's

deposition, and afterwards that a will was drawn for him; that nothing was said by the deceased before or at the time of his making the deposition to shew what his expectations were as to his recovery or as to his death, and it was not until after he had made the deposition that the doctors told him that he could not live, and after he was so told he made no statement. Under the circumstances it is impossible for us to say that the deceased was under a "settled hopeless expectation of death," when he made the deposition, and it was therefore not admissible in evidence as a dying declaration: *Regina* v. *Jenkins*, L. R. 1 C. C. R. 187; *Regina* v. *Cleary*, 2 F. & F. 850; *Regina* v. *Morgan*, 14 Cox 337; *Regina* v. *Osman*, 15 Cox 1; *Regina* v. *Smith*, 16 Cox 170, and *Regina* v. *Gloster*, 16 Cox 471.

Judgment. Armour, C.J.

The conviction must be affirmed.

[COMMON PLEAS DIVISION.]

CAMERON v. CUSACK.

Fraudulent preference—Sale to defeat creditors—Setting aside—Seduction—Judgment creditor.

A person knowing that a claim was to be made against him by the father of a young woman for her seduction, some six days before the writ issued therefor arranged with his brother, who was aware of all the facts, to sell out to him his estate, receiving for himself $150, the balance to be applied in payment of his liabilities, the intention being not to acknowledge or treat the claim for seduction as a liability. The action for seduction was proceeded with and judgment recovered thereon:—

Held, that the father having a cause of action at the time of the transfer was a person who might become creditor within the meaning of the statute; and having become a judgment creditor the sale having been made with intent to defeat his claim must be set aside.

Barling v. *Bishopp*, 29 Beav. 417, followed.

Ex parte Mercer, 17 Q. B. D. 290, distinguished.

Statement. THIS was an interpleader issue tried before ROSE, J., without a jury, at St. Thomas, at the Autumn Assizes of 1889.

Glenn, for the plaintiff.

Colin Macdougall, Q. C., for the defendant.

The learned Judge reserved his decision, and written arguments were permitted to be put in. Subsequently he delivered the following judgment, in which the facts appear:

November 16, 1889. ROSE, J.:—

The proper finding of fact seems to me to be that the plaintiff's brother, A. M. Cameron, knowing that a claim was to be made upon him—arising out of the seduction of Annie Cusack, who appears upon this record as defendant, having obtained an assignment from her father William Cusack—determined to dispose of his estate, reserve at least $150 for himself, and apply the balance in payment of claims of creditors other than William Cusack, and

then leave the country ; and all this to avoid the payment of the claim. Judgment. Rose, J.

The sale to the plaintiff was made on the 22nd August : the writ was issued on the 28th of the same month, and the defendant A. M. Cameron left the country also in August.

The plaintiff was fully aware of all the facts, and with full knowledge made the purchase knowing that he was thus becoming possessed of all the assets liable to execution and promising to " pay all liabilities," but intending not to acknowledge this claim or to treat it as a liability.

There is a clear distinction on the facts between this case and that of *Ex p. Mercer, In re Wise*, 17 Q. B. D. 290, where the settlement was made without reference to a claim for damages for breach of promise of marriage, all the Judges being of the opinion that the settlor had not such claim in his mind when he made the settlement.

Here not only was it in mind, but it induced the sale and disposition of the property, and there was no reason for thus disposing of the property, if it was intended to pay the claim.

I find, therefore, that the transaction here sought to be impeached, was entered into with the intent to defeat the claim for which William Cusack recovered judgment.

But it was urged that this claim did not constitute William Cusack (the girl's father) a creditor.

It is clear that he became a creditor, and a judgment creditor, and that a cause of action existed at the time of the transfer ; and the transfer having taken place with the intention to defeat the claim, the mischief existed which the statute was meant to prevent.

As it seems to me, the principle of *Barling* v. *Bishopp*, 29 Beav. 417, governs this case.

In that case, Sir John Romilly, M. R., refused to give effect to the argument, that the actions, trespass, were only to try a right ; and held that the effect of the deed being " to defeat persons who might become his creditors," it came within the 13th Eliz. ch. 5.

Judgment.

Rose, J.

This case was, I understand, lately followed by the learned Chancellor of this Province in *McCullough* v. *Field*, unreported, where the cause of action was defamation.

I observe in the written argument that accompanies the papers, the objection that the exemplification of judgment is not evidence against the plaintiff.

This objection was not taken before me, and is apparently merely formal. Annie Cusack was, as I remember it, present in Court, and if the objection had then been raised, could easily have been overcome.

The case was treated before me as if the cause of action in the original suit had been shewn; and I think it is too late to take the objection now; but in order that no question may hereafter arise, I will permit the evidence to be given, and will suspend the formal giving of judgment until this is done. The defendant's counsel may apply to me for an appointment, and on its return, I will hear the evidence in Toronto, the costs to be in the cause. If the plaintiff does not desire to press this objection, he may notify the defendant's solicitor, when, upon notification being sent to the registrar of this Division, I will direct judgment to be entered; or, if the defendant desire, I will give judgment on my present expression of opinion.

I have examined the cases referred to by Mr. Glenn, but am of the opinion that the cases in bankruptcy and insolvency do not apply.

In *Ex parte Mercer, Barling* v. *Bishopp*, is referred to, and no Judge says that it is bad law. The point considered was, whether the intent to defraud must be inferred against the belief of the Judge finding the fact, merely because the result proved that the impeached transaction did in fact prevent the claim being realized.

As put by Lord Esher, M. R., at p. 299, the question was, whether "If the natural or necessary effect of what the settlor did was to defeat or delay his creditors, the Court must find that he actually had that intent;" and it was held that the Court was not so bound.

Judgment.
Rose, J.

Grantham, J., in referring to *Barling* v. *Bishopp*, states how the judgment in that case is qualified by the judgment in *Ex parte Mercer*, but says nothing as to its being affected in so far as it brought the claim within the statute; and although Cave, J., at p. 294, makes use of some language which would seem in the plaintiff's favour, he does not object to the decision, and his observations must, I think, be confined to the facts before him, which differed widely from those now under consideration.

The question in these cases, as put by Lopes, L. J., at p. 302, is, "Whether, having regard to all the circumstances, the settlor intended to defeat or hinder his creditors."

That question in this case must, I think, be answered in the affirmative.

[COMMON PLEAS DIVISION.]

REGINA V. FREEMAN.

Gaming—Selling property by lot or chance—R. S. C. ch. 159, sec. 2—Conviction, form of—R. S. C. ch. 178, sec. 87.

Section 2 of R. S. C. ch. 159, prohibits the sale of "any lot, card, or ticket, or other means or device for * * selling or otherwise disposing of any property, real or personal, by lots, tickets, or any mode of chance whatsoever."

The complainant went to the defendant's place of business, and having been told by defendant that in certain spaces on two shelves there were in cans of tea a gold watch, a diamond ring, or $20 in money, he paid $1 and received a can of tea, which, containing an article of small value, he handed the can back, paid an additional 50 cents, and received another can, which also contained an article of small value. He handed this can back also, paid another 50 cents and secured another can, which also contained an article of small value. He then refused to pay any more money, and went away, taking the third can and the article in it with him. On a complaint laid by him before the police magistrate, the defendant was convicted in that he "unlawfully did sell certain packages of tea, being the means of disposing of a gold watch, a diamond ring, $20 in money, by a mode of chance, against the form of the statute," &c.:—

Held, that the transaction came within the terms of said sec. 2, so as to make the defendant liable to conviction thereunder:—

Held, also, that "The Summary Convictions Act" applied to cure any defect in the form of the conviction.

Statement.

In Michaelmas Sittings, 1889, an order *nisi* was obtained on behalf of Roswell Freeman to quash a conviction made by the police magistrate of the city of Toronto.

The defendant on the information of David Archibald, staff-inspector, was convicted, under sec. 2 of R. S. C. ch. 159, the "Act respecting lotteries," &c.

The conviction was that the said Roswell Freeman on the 3rd December, 1889, at the said city of Toronto, &c.,

"Unlawfully did sell certain packages of tea, being the means of disposing of a gold watch, a diamond ring, twenty dollars in money, by a mode of chance, against the form of the statute in such case made and provided;" and imposed a fine of $20 and costs.

The evidence given on the trial before the police magistrate was as follows:

"*Robert Vaughan.*—I know the Traders Tea Company's place, No. 5, King street west, in the city of Toronto. The defendant is the manager

and partner of the firm, which consists of himself and four others. The defendant is paid a commission on the sales of the tea, and has an interest in the profits of the business. I went into the shop on the 3rd instant, and I asked for a package of tea. It was handed to me by an employee, one Matthew Fisher. I paid $1.00. It was opened by Fisher. It contained tea and a pair of cuff buttons. There were shelves with rows of cans of tea. Fisher told me that there was a gold watch, a diamond ring, or twenty dollars within a certain space on two shelves in one of the cans. I paid fifty cents and was handed another can, which was opened and contained tea and a small pair of earrings. I paid another fifty cents and was handed down another can, which was opened and contained a little over a pound of tea and a pair of earrings. I then refused to make any further deal, and was handed the last can of tea containing the earrings. Each time I was told, or my attention was called to the fact, of there being the gold watch or the diamond ring, or the $20 in one of the set of cans from which I was selecting those I was buying. I pointed out the cans I wanted on each occasion. I was afterwards referred to Freeman by Fisher. Freeman explained his system, as he did afterwards in a case against Fisher. * * He sells a can of tea at $1.00. The purchaser after opening it, can sell it back to him for fifty cents, and by paying the additional fifty cents, can buy a new can and open it, and repeat it as often as he likes. The other articles in the cans go back into the tea. Sometimes, the defendant said, parties buy packages for $1.00 and sell it back for fifty cents, and leave the shop without anything except the fifty cents. The defendant admitted under oath, the salesman states if you buy that lot you will get a gold watch, a diamond ring, or $20 bill. He also admitted that these articles were in some of the cans, and that if a party selected a can in which either of these articles happened to be, he would get the articles. He also stated that one man bought cans to the value of about $25, and got in one of them a lady's gold watch."

Statement.

In the same sittings, *Lount*, Q. C., and *Bigelow*, supported the order. The conviction is under R. S. C. ch. 159, sec. 2. There is no infringement of the statute. The Act strikes at lotteries by chance. The definition of a lottery is given in Webster's Dictionary, tit. Lottery, "a distribution of prizes by lot or chance." This is the definition adopted in *Taylor* v. *Smetten*, 11 Q. B. D. 207; *Hunt* v. *Williams*, 52 J. P. Cas. 821. The 42 Geo. III. ch. 119, under which English decisions are based, is essentially different from our Act. The defendants wished to introduce their celebrated brand of tea. The system adopted here was a selling of tea and buying it back again. This was not the selling a chance, but a certainty—namely, the tea; and unless it is shewn to the contrary, it must be

Argument. assumed on the evidence that the tea was worth the money paid for it. There is no disposal of any property by means of a chance. There was a sale of the tea, and the gold watches, &c., were merely prizes offered as advertisements or inducements for the sale of the tea. They also referred to *Regina* v. *Dodds*, 4 O. R. 390; *Regina* v. *Jamieson*, 7 O. R. 149.

G. W. Badgerow and *Curry*, contra. The canon of construction is laid down in *Reed* v. *Ingham*, 3 E. & B. 889; *Morris* v. *Blackman*, 2 H. & C. 912; Bishop on Statutory Crimes, 2nd ed., secs. 952, 956; *Regina* v. *Harris*, 10 Cox C. C. 352; *Follett* v. *Thomas*, L. R. 6 Q. B. 514, 521. There was not a *bonâ fide* sale of the tea, but a "chance" to obtain a watch, or ring, or $20 in money. The sale of the tea, was merely a "device" to sell. Instead of *Taylor* v. *Smetten*, 11 Q. B. D. 207, assisting the defendant it was in the Crown's favour, as what was done was clearly a distribution of prizes by lot or chance. See also *Bell* v. *State*, 5 Snead, Kentucky, 507.

December 12, 1889. ROSE, J.:—

It was made clear upon the argument that the transaction in question was not a sale of teas, but the sale of a chance to obtain a gold watch, a diamond ring, or $20 in money.

The complainant paid $1 and received a can of tea. The prize in the can not being of sufficient value, he handed back the can of tea and paid an additional fifty cents and received and opened a second can. The prize in the second can being also of little value, he handed back both can of tea and prize, and paid another fifty cents, and received and opened a third can, but the prize being still almost worthless, he refused to pay any more money, and went away, having the third can of tea and prize in his possession.

It is thus manifest that he purchased one can of tea and three chances of obtaining a valuable prize for $2. The

vendor, on the occasion of each purchase, called the complainant's attention to the fact that in the row of cans on the shelf from which he was selecting, there was a prize of either a gold watch, a diamond ring, or $20 in money.

Judgment.

Rose, J.

It seems idle to discuss the question. Can any one reasonably ask a finding of fact to the effect that the defendant was selling tea, and merely using the prizes as an advertisement or means of inducing the sale of the tea? Must not the finding be, that the object really sought for, and for the chance of obtaining which the money was paid, was one of the three prizes named?

If so, then the evidence brings the case clearly within the Act, which prohibits the sale of "any lot, card, or ticket, or other means or device for * * selling or otherwise disposing of any property, real or personal, by lots, tickets, or any mode of chance whatsoever."

The watch, for instance, was personal property to be sold or disposed of by the chance of selection of one out of a given number of cans of tea, and this chance lot or device was sold to the complainant.

The form of the conviction was criticized. It was objected that it stated the offence to be the selling of tea "being the means for disposing of a gold watch," &c.

I do not think that it is useful to discuss this objection, for by section 87 of the Summary Convictions Act, ch. 178, R. S. C., "No conviction * * shall, on being removed by *certiorari* be held invalid for any irregularity informality or insufficiency therein, provided that the Court or Judge, before which or whom the question is raised is, upon perusal of the depositions, satisfied that an offence of the nature described in the conviction * * has been committed, over which such justice has jurisdiction, and that the punishment imposed is not in excess of that which might have been lawfully imposed for the said offence." The Summary Convictions Act is made applicable by section 3, even if section 87 be not otherwise applicable.

I am satisfied that the sale of the tea was a means or

Judgment.

Rose, J.

device for selling the watch or ring or $20 in money; and so that there has been committed an offence of the nature described in the conviction.

Regina v. *Laut* was referred to. This was a decision on a case reserved by myself, for the opinion of the Judges of the Queen's Bench Division upon this statute, from the Court of Oyer and Terminer for York, held on the 2nd of February, 1886. I do not find it of any assistance, for the case states there was no evidence of any sale or other carrying out of the proposed scheme.

Taylor v. *Smetten*, 11 Q. B. D. 207, so far as applicable, (the statutes not being the same,) is not in the defendant's favour, and *Regina* v. *Dodds*, 4 O. R. 390, and *Regina* v. *Jamieson*, 7 O. R. 149, are clearly distinguishable.

I think the motion must be dismissed with costs.

GALT, C. J., and MACMAHON, J., concurred.

[COMMON PLEAS DIVISION.]

MAXWELL V. SCARFE.

Creditors' Relief Act—Entry by sheriff of moneys received under execution—"Forthwith," meaning of.

Held, that the word "forthwith," contained in sec. 4 of the Creditors' Relief Act, R. S. O. ch. 65, with reference to the entry by the sheriff of money levied under execution, must receive a strict construction, and means "without any delay."

Even if equivalent to "within a reasonable time," a delay of fifteen days after the sale was *held* to be not reasonable.

Statement.

THIS was an action tried before ARMOUR, C. J., without a jury, at Brantford at the Autumn Assizes of 1889.

The action was brought to recover the sum of $311, levied by the sheriff under a writ of *fieri facias* issued by the plaintiff against the goods of one Bailey.

The plaintiff, on the 9th day of November, 1887, delivered to the defendant to be executed a writ of *fieri facias* at his suit against the goods of one Bailey; and, on the 11th day of November, 1887, the defendant made his warrant for the execution of the said writ to one Hewson, his bailiff. A sale of the goods of Bailey under (among other processes) this writ took place on the 14th day of November, 1887, which sale was for cash, and under it money was realized in respect of the said writ to the amount of $311. This money was not all paid to the bailiff until the 24th day of November, 1887, when the last $26 of it was paid.

On the 26th day of November, 1887, the bailiff handed to the defendant at Brantford his cheque on the Bank of British North America at Paris, marked by the said bank as good, and made payable at Brantford at par, which cheque the defendant deposited to his own credit in the Bank of Commerce at Brantford, on the same day, and on the 29th day of November, 1887, made the entry of the money levied under the said writ required by the Creditors' Relief Act.

Statement. On the 2nd day of December, 1887, a writ of *fieri facias* at the suit of one Metcalfe, against the goods of the said Bailey, was delivered to the defendant to be executed; and, on the 27th day of December, 1887, two certificates under the said Act of claims against the said Bailey, at the suits respectively of one Culp and one Schaffer, were delivered to the defendant.

This action was commenced on the 15th day of December, 1888, and on the 29th day of December, 1888, the defendant notified the plaintiff's solicitor that he intended to distribute the money in his hands on the 2nd day of January, 1889, and a statement was made out by him shewing a distribution of the money, in respect of the claims of the plaintiff, Metcalfe, Culp, and Schaffer.

John Crerar, (of Hamilton), for the plaintiff.
Heyd, (of Brantford), for the defendant.

September 21, 1889. ARMOUR, C. J.:—

I am unable to find upon the evidence that the bailiff Hewson was a special bailiff, in such wise that the sheriff was relieved from responsibility in respect of his acts; and, even if I took the view of the evidence most favourable to the sheriff, I do not think that upon such view I could so hold as a matter of law: *Alderson* v. *Davenport*, 13 M. & W. 42.

I am of opinion that Hewson was the sheriff's bailiff, and that the levy by Hewson under the warrant of the sheriff, and the acts and receipts of Hewson thereunder, must be deemed to be the levy and the acts and receipts of the sheriff.

Primâ facie a sheriff's sale is to be considered to be for ready money and immediate delivery: *Aldred* v. *Constable*, 6 Q. B. 370; and there was no evidence to shew that the sale of the goods of the execution debtor was other than it professed to be, a sale for ready money and immediate delivery.

Judgment.
Armour, C. J.

The sale of the goods changed the property in the goods from the execution debtor to the purchaser, and discharged the execution debtor *pro tanto*, and the sale was complete when the execution debtor lost his property in the goods which became vested in those by whom they were bought, and the sheriff thereupon became responsible to the execution creditor for their price: *Swain* v. *Morland*, 1 Brod. & B. 370.

It must be considered, therefore, that when the sale of the goods of the execution debtor was had on the 14th day of November, 1887, the sheriff had thereby then levied the money under the execution to the extent of the price for which the goods were sold, and it became his duty thereupon "*forthwith*" to make the entry prescribed by R. S. O. ch. 65, sec. 4.

The word "forthwith" has sometimes received a free construction, and sometimes a strict one, according to the circumstances under which it has been used.

An act has sometimes been held to have been done "forthwith" when done within a reasonable time, and an act has sometimes been held to have been done "forthwith" only when done with the least possible delay.

Having regard to the circumstances under which the word "forthwith" is used in this statute, and to the purposes and provisions of the statute, and to the abuses which a different construction would open the door to, I think it should receive a strict construction, and that the entry required by the statute to be made by the sheriff should be made, as it undoubtedly can be made, and in this case could have been made, without any delay: *Ex parte Lamb*, 19 Ch. D. 169.

I think, however, that giving the word "forthwith" used in the statute, a free construction, and holding it to be equivalent to "within a reasonable time," the sheriff failed to perform his duty, and did not, within a reasonable time after he levied the money, make the entry prescribed by the statute, and had he done so the money levied would have been distributable between the plaintiff's and Metcalfe's claims only.

Judgment.

Armour, C. J.

The plaintiff is therefore entitled, in my opinion, to recover from the sheriff the amount of the money levied to which he would have been entitled upon a distribution of the money levied in respect of his and Metcalfe's claims only.

The proceedings taken by the sheriff for distribution after this action was commenced, taken as and when they were, could afford no defence to this action.

The amount to which the plaintiff would have been entitled, upon a distribution made between his claim and that of Metcalfe, would have been $154.94, and upon this sum the sheriff ought to pay interest from the time when he ought to have distributed it, up to the time he paid the sum of $102.14 into Court, and on the balance to the present time.

I therefore direct judgment to be entered for the plaintiff against the defendant for the sum of $66.42 damages; and as this case was clearly within the jurisdiction of the County Court, I allow only County Court costs; but as the plaintiff had reason to believe, when he brought this action, that his claim was beyond the jurisdiction of the County Court I allow no set-off of costs to the defendant.

[COMMON PLEAS DIVISION.]

BROWN V. MCLEAN.

Mortgage—Payment and discharge of prior mortgages—Execution against mortgagor—Mistake—Subrogation—Neglect to search for executions.

The plaintiff advanced money to the owner of real estate to pay off existing mortgages thereon, and took and registered a mortgage on the property for the amount, paid off the prior mortgages and registered discharges of them, the defendant having all the time an execution against the lands of the mortgagor in the hands of the sheriff of the county in which the lands were situate, of which the plaintiff was ignorant, his solicitors having neglected to search :—

Held, that the plaintiff was entitled to be subrogated to the rights of the original mortgagees, and to priority over the defendant's execution, to the amount paid to discharge the prior mortgages, upon the ground of mistake, he having done so under the belief that he was obtaining a first charge ; and that he was not disentitled to relief, because by using ordinary care he might have discovered the mistake, the defendant not having been prejudiced thereby.

Statement.

THIS was an action tried before STREET, J., without a jury, at the Berlin Assizes, on the 21st of October, 1889.

W. Cassels, Q.C., and *Milligan*, for the plaintiff.
Garrow, Q.C., for the defendant.

The facts appear in the judgment.

November 9, 1889. STREET, J.:—

The defendant was a judgment creditor, and had a *fi. fa.* lands in the sheriff's hands. The judgment debtor was the owner of the equity of redemption of the lands in question, subject to two mortgages outstanding in different hands. The plaintiff agreed to advance him money to pay off the existing mortgages, and took from him and registered, after the defendant's writ had been placed in the sheriff's hands, a mortgage for the amount of his advance. He then advanced the money which was applied in payment of the prior mortgages, and these were then discharged at his request, by the respective mortgagees, in the statutory form.

Judgment.

Street, J.

At the time these two mortgages were paid off and discharged the plaintiff was entirely ignorant of the existence of the defendant's execution, the solicitors employed by him having neglected to search in the sheriff's office.

The defendant then directed the sheriff to advertise for sale under his execution the lands in question, and the plaintiff brings this action to have it declared that the defendant's rights against these lands as execution creditor are subject to the right of the plaintiff to be repaid the amounts which he has paid upon the two mortgages which have been discharged.

The defendant in his statement of defence insists that he is entitled to sell the land clear of any mortgages whatever, inasmuch as the mortgage to the plaintiff is subsequent to the defendant's execution, and the mortgages which were prior to it have been discharged.

The case of *Fisher* v. *Spohn*, 4 C. L. T. 446, decided by Patterson, J. A., in October, 1883, was strongly relied on by the plaintiff, and has some features in common with the present case. Smith was a judgment debtor and owner of an equity of redemption subject to a mortgage he had given to the plaintiff Fisher. Whilst a writ of *fi. fa.* lands against him was in the sheriff's hands Smith sold and conveyed the property to House. House, as part payment for the land, gave the plaintiff a mortgage, and the plaintiff in ignorance of the existence of the *fi. fa.* accepted it in full of the former mortgage from House, which he thereupon discharged in the statutory form. The lands were sold under the *fi. fa.*, and the judgment creditor purchased them with knowledge of the facts for a trifling sum, and claimed to hold them clear of any mortgage. It was held that because the lands subject to the plaintiff's mortgage were vested in House at the time that mortgage was discharged, the discharged operated as a reconveyance to House, and not to the judgment debtor whose interest was not enlarged because he retained no interest. A declaration was therefore made that the property passed to the purchaser at the sheriff's sale charged with the amount which, immediately

before the conveyance from Smith to House, was due upon the mortgage from Smith to the plaintiff with subsequent interest thereon. Judgment. Street, J.

The decision is based upon the construction placed upon the section of the Registry Act, now sec. 69, R. S. O., ch. 114, which provides that a certificate of discharge, when registered, shall operate as a conveyance to the mortgagor, his heirs, executors, administrators, or assigns, or any person lawfully claiming by, through, or under him or them, of the original estate of the mortgagor.

If that decision correctly lays down the law, it establishes that where the owner of the equity of redemption has created a new mortgage, and then procures a discharge of the original mortgage: the effect of the discharge is to operate as a conveyance to him, and not to the new mortgagee of the estate vested in the original mortgagee; the effect of the discharges in the present case was, then, to vest the estate of the original mortgagor in the judgment debtor, and not in the plaintiff, and so to enlarge the estate of the judgment debtor. So that, it appears to me, the plaintiff is not helped by that decision.

I should prefer in any event to give to the statutory discharge a more innocent effect than that of which it is suggested as being capable by the judgment in *Fisher* v. *Spohn*, and to treat it merely as replacing the mortgagee's estate in the person best entitled to it, without allowing it to affect the real rights of any person.

If there be no question of mistake here, entitling the plaintiff to relief, I can see no ground for holding that the statutory discharge following the payment of the encumbrances, prior to the defendant's execution, could have any other effect than to give the judgment creditor the same rights exactly, as if the judgment debtor had himself paid off the mortgages. If an execution debtor assigns an equity of redemption whilst execution against him is in the sheriff's hands, and the assignee reduces or discharges the mortgage, it appears to me that, upon the proper construction of the statute, the improvement in the nature or

Judgment. Street, J.

quality of the estate enures to the benefit of the execution creditor, under ordinary circumstances.

I think, however, that the plaintiff here is entitled upon the ground of mistake to be subrogated to the rights of the original mortgagees to the extent of allowing him a priority over the defendant for the amount he paid to discharge their mortgages. It is clear beyond question that he would not have discharged these mortgages had he been aware of the existence of the defendant's *fi. fa.* He would either have refused to make the advance altogether, or he would have had the mortgages assigned to himself instead of discharging them.

It is equally clear that the defendant has not been in any way prejudiced by what has happened, and that no injustice will be done by replacing him in his former position.

Watson v. *Dowser*, 28 Gr. 478, was relied on by the defendant as a case on all fours with the present. There one Camp had the legal estate, and had contracted to sell to Dowser, who had paid part of the purchase money. Dowser made two mortgages upon the property, and then made a mortgage to a loan company. The company were aware of the existence of the prior mortgages, but took the promise of one Jones, a solicitor, to procure discharges of them. Relying on this promise, they paid Camp the balance of the purchase money, whereupon he conveyed to Dowser. Jones failed to procure discharges of the two prior mortgages, and the loan company sought to be declared prior to the other two mortgages to the extent of the vendor's lien of Camp, which they had satisfied. It was held, however, that they were not so entitled. In that case, however, it appears that, relying on the promise of Jones to have the prior mortgages discharged, they had paid off Camp's claim without taking an assignment of it; so that it is difficult to see how a case of mistake can be made out.

In the case referred to in *Watson* v. *Dowser*, of *Imperial Loan and Investment Co.* v. *O'Sullivan*, 8 P. R. 162,

there appears to have been no stipulation or intention on the part of the person making the third advance that he should have any priority over the second mortgagee although his advance was applied in part payment of the first mortgage. Judgment. Street, J.

It is further argued by the defendant that there was gross negligence here on the part of the plaintiff and his solicitors in failing to search in the sheriff's office for executions against the mortgagor, and there is no doubt that this is true; but it is not every case even of such negligence as existed here that the Court will treat as disentitling the persons guilty of it to relief on the ground of mistake.

It is said that each instance of negligence must depend to a great extent upon its own circumstances, and when no injury has been caused to the party against whom relief is sought the Courts have leaned in the direction of giving it, notwithstanding very clearly established negligence on the part of the person coming for relief. See the cases referred to under sec. 856 of Pomeroy's Equity Jurisprudence.

The cases in which the Court has most strongly insisted upon negligence as being a bar in cases where relief is sought on the ground of mistake, appear to be cases of mistake in the making of contracts. Negligence has been more leniently dealt with, where it has been with regard to matter of fact or legal rights: *Howes* v. *Lee*, 17 Gr. 459; *Willmott* v *Barber*, 15 Ch. D. 96 at p. 106; *Smith* v. *Drew*, 25 Gr. 188; *Barnes* v. *Mott*, 64 N. Y. 397; *Young* v. *Morgan*, 89 Ill. 199; Sheldon on Subrogation, sec. 28.

I have not overlooked the broad terms in which the law upon this point is laid down by Lord Campbell, in *Duke of Beaufort* v. *Neeld*, 12 Cl. & F. 248, at p. 285: but that was a case in which a mistake was set up as an answer to a written contract, and the language used is to be read as applying to the subject matter of the case.

I think, therefore, that the plaintiff advanced his money and discharged the prior mortgages under the mistaken

Judgment.

Street, J.

belief that he was obtaining a first charge; and that he is not disentitled to relief by reason of the fact that, by using ordinary care, he might have discovered the defendant's execution, because the defendant has not been in any way prejudiced by the mistake.

The plaintiff is entitled, in my opinion, to a declaration that, to the extent of the amount which he has advanced to pay off the prior mortgages, he is entitled to priority over the defendant's execution. The defendant has contended that he is entitled to priority over the plaintiff, and having failed in his contention, I see no reason why he should not pay the costs of the action, and the judgment should go accordingly. See also *Re Hime and Ledley*, 13 P. R. 1.

[QUEEN'S BENCH DIVISION.]

FLATT V. WADDELL.

TOWNSEND V. WADDELL.

Company—Defective incorporation of—Actions by, dismissed with costs—Liability for costs, of intending corporators and solicitors—Malice—Want of reasonable and probable cause—Liability upon unpaid shares.

Actions brought in the name of a road company against the present plaintiffs were dismissed with costs on the ground that the company had never been incorporated according to law. The present actions were brought against four of the corporators of the company, three of them composing the firm of solicitors who had conducted the former actions on behalf of the supposed company, and all four having expressly authorized the bringing of the former actions, seeking to recover the costs of such former actions, execution therefor against the company having been returned *nulla bona* :—

Held, that, in the absence of malice and want of reasonable and probable cause in bringing the former actions, the present actions were not maintainable against the defendants as corporators or as solicitors bringing actions on behalf of plaintiffs who had no legal existence.

It was contended by the plaintiffs before the Divisional Court that the defendants were members of a *de facto* corporation in which they held shares that were not fully paid up, and that recovery could be had against them to the extent of the amounts remaining unpaid upon their shares, but no such case was made upon the pleadings or at the trial.

The Court treated this contention as not having been raised, and reserved leave to the plaintiffs to raise it in fresh actions, as they might be advised.

Statement.

IN the year 1878 the four defendants, R. R. Waddell, Kezia A. Waddell, his wife, and James N. Waddell and Frank R. Waddell, their two sons, with a fifth person, filed a declaration under ch. 152, R. S. O. 1877, intending to incorporate themselves into a road company by the name of "The Hamilton and Flamboro Road Company" for the purpose of purchasing the roads and works of the Hamilton and Milton Road Company. The purchase was made in the name of the new company; the four defendants with a fifth person acted as the directors of the company from the time of its supposed formation until it was declared by the Court of Appeal never to have been incorporated, as hereinafter mentioned.

In the year 1885 an action was brought in the name of the company against the now plaintiff, Flatt, who disputed

Statement.

its right to collect tolls from him, and another action was at the same time brought against the now plaintiff, Townsend, who also disputed its right to collect tolls from him. The bringing of these actions appeared to have been expressly authorized by the four defendants, and the firm of Waddell & Waddell, composed of the three defendants other than Kezia A. Waddell, were the solicitors in whose name the action was brought, and by whom the proceedings were carried on throughout.

The defendants in those actions, amongst other defences, pleaded that the Hamilton and Flamboro Road Company had never been incorporated according to law, and the Court of Appeal (13 A. R. 534) ultimately decided this point in favour of the defendants in those actions, holding that no such corporation had ever been formed according to law, and dismissing the actions with costs. The defendants in those actions taxed their costs and issued execution, and their executions were returned "no goods." Each of the defendants in those actions now brought an action against the four defendants above named, seeking to recover the costs incurred in the former actions.

The claim was put upon two grounds: the first one was against R. R. Waddell and his two sons, alleging them to be solicitors, and to have issued the writs in those actions without authority from any person or corporation; the second ground was that the four defendants were an association, and brought this action in the name of the association of which they were members. The defendants denied their liability upon any ground; asserted that the only members of the firm of Waddell & Waddell were the two sons; that the defendant Kezia A. Waddell was a married woman; and that the plaintiffs, having taken a judgment and issued execution for their costs against the plaintiffs in the former actions by their corporate name, could not set up that no such corporation existed. The plaintiffs joined issue upon these defences, and replied that Kezia A. Waddell had separate estate.

Statement.

Both actions were tried on 8th May, 1889, before ARMOUR, C. J., at Hamilton, without a jury, who dismissed both actions with costs, upon the grounds set forth by him in the following judgment:—

In *Cotterell* v. *Jones*, 11 C. B. 713, Williams, J., said: "It is clear that no action will lie for improperly putting the process of the law in motion in the name of a third person, unless it is alleged and proved to have been done maliciously and without reasonable or probable cause; but, if there be malice and want of reasonable or probable cause, no doubt the action will lie, provided there be also a legal damage."

This statement of the law was approved of by the Judicial Committee of the Privy Council in *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee*, 2 App. Cas. 186, and it is unnecessary for me to say more than that the decision in that case covers the whole ground upon which a recovery is sought in this, and shews conclusively that this action is not maintainable.

See also *Collins* v. *Cave*, 4 H. & N. 225, and *Fivaz* v. *Nicholls*, 2 C. B. 501.

This action (*Townsend* v. *Waddell*) must therefore be dismissed with costs, as also the action brought on the same grounds of *Flatt* v. *Waddell* in the C. P. D.

At the Easter Sittings, 1889, of the Divisional Court the plaintiff in each action moved to set aside the judgment directed by the Chief Justice, and to enter judgment for the plaintiffs upon the ground that the judgment directed was contrary to law and the evidence, and that there was evidence of malice on the part of the defendants.

Both motions were argued together on 4th June, 1889, before FALCONBRIDGE and STREET, JJ.

Osler, Q. C., and *F. Fitzgerald*, for the plaintiffs. The solicitors warrant the plaintiffs, and are liable if it is found that there are no plaintiffs. All the defendants authorized the bringing of the former actions, and are liable as a part-

Argument.

nership or an inchoate company for the costs incurred. The cases are clear that where a solicitor issues an unauthorized writ there is responsibility. These cases have usually been decided upon summary applications, but an action will lie wherever there is a right on summary application. The cases are: *Robson* v. *Eaton*, 1 T. R. 62; *Doe Davies* v. *Eyton*, 3 B. & Ad. 785; *Bayley* v. *Buckland*, 1 Ex. 1; *Pearse* v. *Cole*, 16 Jur. 214; *Ruthin* v. *Adams*, 7 Sim. 345; *Fenton* v. *Green*, L. R. 7 Eq. 267; *Newbiggin* v. *Armstrong*, 13 Ch. D. 310; *Nurse* v. *Durnford*, *ib.* 764; *In re Savage*, 15 Ch. D. 557; *Cape Breton Co.* v. *Fenn*, 17 Ch. D. 198; *Clark* v. *Cullen*, 9 Q. B. D. 355; *Reid* v. *Thames Navigation Co.*, 13 A. R. 303, 312. Upon these authorities, the three solicitors, at all events, are liable; they knew all the circumstances, they brought the actions, alleged a corporation, and did not prove it. The person who takes out the process of the Court is liable unless he shews authority for doing so. The principle of the liability of the agent to shew his procuration or become personally responsible, applies. The two last cases go further, and upon them we should be entitled to succeed against all the corporators. The defendants also became a *de facto* corporation by the course they took; and a liability to creditors exists against the members of a *de facto* corporation, to the extent of their unpaid stock subscriptions: Morawetz on Corporations, 2nd ed., vol. 2, sec. 755. Malice and want of reasonable and probable cause are in fact shewn. Ignorance of law does not excuse; and charging the defendants with knowledge of all that the Court of Appeal has found, their conduct must have been actuated by malice.

Bain, Q. C., and *F. Waddell*, for the defendants. *Newbiggin* v. *Armstrong* and the other cases cited are entirely different from this. The Court will not order a person not a party to the record to pay the costs: *Pechell* v. *Watson*, 8 M. & W. 691; *Hayward* v. *Giffard*, 4 M. & W. 194; *Rees* v. *Evans*, 2 Q. B. 334. *Re Jones*, L. R. 6 Ch. 497,

lays down the rule that only where the solicitor is the real plaintiff, is he ordered to pay costs. In this case there was a client—a *de facto* corporation. There is no evidence here that the company cannot pay costs ; at any rate, the fact that the company has no property is no reason for making the solicitors pay costs. The cases of trading corporations are not applicable ; there could not be a road partnership ; it was either a corporation or nothing. The English cases in which persons have intended to form a joint stock company and it has not gone into operation, are quite different from this. Members of inchoate companies are not partners : Morawetz, 2nd ed., sec. 748 ; *Fay* v. *Noble*, 7 Cush. 188 ; *Stout* v. *Zulick*, 7 Atlantic Reporter 362 ; *Mackay* v. *Macfarlane*, 12 P. R. 149. Argument.

Osler, Q. C., in reply, referred to Broom's Legal Maxims, 6th ed., p. 246.

February 7, 1890. The judgment of the Court was delivered by

STREET, J. :—

The four defendants in this action authorized the bringing of an action against each of the plaintiffs, in the name of the Hamilton and Flamboro Road Company, believing that they and a fifth person were incorporated under that name. It was held by the late Chief Justice of the Queen's Bench Division that the actions were maintainable, and that the defendants in them could not set up the irregularities in the incorporation of the company, if any such existed. This decision was reversed by the Court of Appeal, it being held by them that the supposed incorporation had never taken place ; that the plaintiffs' corporation had never been legally formed, and that the defendants might set this up as a defence. See *Hamilton, etc., Road Co.* v. *Townsend*, 13 A. R. 534. The now plaintiffs, the defendants in the former actions, have placed their present

Judgment.

Street, J.

claim to recover the costs of those actions from the individual members of the supposed corporation upon three grounds: The first ground urged is that, inasmuch as it has been decided that no corporation existed to bring the former actions, they must be taken to have been brought by the individual members of the supposed corporation who authorized the proceedings, and that they individually are therefore liable for the costs. It seems, however, to be clearly settled by the cases referred to in the judgment of Chief Justice Armour, that, in the absence of malice and want of reasonable or probable cause, the persons against whom costs have been awarded by the judgment of the Court in any action are the only persons against whom they can be recovered. The Court of Appeal, while holding that the alleged corporation had not been legally formed, and had, in consequence, no right to succeed, dismissed the actions with costs, to be paid by the plaintiffs in those actions. The plaintiffs in those actions are described in the proceedings as being a corporate body, formed under a particular statute, and it is against the corporate body, and not against any association or set of individuals, that costs have been awarded. The award of costs against a corporation, declared by the same judgment to have no legal existence, is not necessarily a nullity; it may perhaps have effect against assets belonging to it by reason of a possible *de facto* existence. At all events, there is no award of costs against the present defendants, and as no absence of reasonable and probable cause and no malice on their part in bringing the former actions was shewn, no action will lie against them for the recovery of these costs.

The second ground taken by the plaintiffs before us was that the three defendants who are solicitors should be ordered to pay the costs of the former actions, because they were not justified in bringing actions on behalf of plaintiffs who have no existence. We have referred to the cases cited in support of this contention, but can not find that any of them carry the law to the length necessary to render the solicitors liable under the present circumstances. See

Pearse v. *Cole*, 16 Jur. 214; *Clark* v. *Cullen*, 9 Q. B. D. 355; *Robson* v. *Eaton*, 1 T. R. 62; *Doe Davies* v. *Eyton*, 3 B. & Ad. 785; *Ruthin* v. *Adams*, 7 Sim. 345; *In re Savage*, 15 Ch. D. 557; *Schjott* v. *Schjott*, 19 Ch. D. 94. Judgment. Street, J.

The members of the supposed corporation had *primâ facie* complied with the forms prescribed by statute, and had assumed a corporate name: they had the usual officers of a corporation, and had for years carried on a corporate business in which they held certain shares; there is no reason to suppose that they ever had the slightest doubt of the existence of a corporation properly created; they had indeed been held by the former Chief Justice of this Court in the former actions to have a legal corporate existence. It would be an extremely unjust extension of the liabilities of solicitors to hold that, in undertaking for a corporation the prosecution of its rights, they also undertake a personal responsibility for the costs of the action, in case some defect should be discovered in its formation. The second ground, upon which it is sought to hold the three solicitor defendants liable, must, therefore, we think, be treated as insufficient.

The plaintiffs further urged that, at all events, the defendants were members of a *de facto* corporation, in which they held shares which were not fully paid up, and that recovery could be had against them to the extent of the amounts remaining unpaid upon their shares. No such case was made upon the pleadings, nor was it suggested at the trial; no evidence was directed to it, and any facts bearing upon it which appear in the notes were brought out in connection with other matters.

The question of the liabilities of shareholders in a *de facto* corporation is a new one in this Province, and it would be unfair to the defendants to consider it until they have had an opportunity of raising their defence properly; we think the proper course will be to treat it as not having been raised at all in the present litigation, and to dismiss the actions in both cases, without prejudice to any rights which the plaintiffs may have to proceed against the defendants

Judgment. Street, J.

for the amount, if any, unpaid upon the shares subscribed for by them in the intended corporation. The actions will be dismissed with costs, including the costs of the motions before the Divisional Court.

[COMMON PLEAS DIVISION.]

THE TRUSTEES FOR SCHOOL SECTION NO. 24 OF THE TOWNSHIP OF BURFORD

v.

THE CORPORATION OF THE TOWNSHIP OF BURFORD AND THE TRUSTEES FOR SCHOOL SECTION NO. 23 OF THE TOWNSHIP OF BURFORD.

Public schools—Formation of school sections—Map of—Evidence of—Land belonging to one school section assessed to another section—R. S. O. ch. 225, sec. 11—Rolls finally passed—R. S. O. ch. 180, sec. 57.

As evidence of the formation of school sections in a township by the municipal council thereof a rough sketch or map designated "school section map township of B," but without signature, seal, or date, having the appearance of being very old and there being no other map to be found, was produced from the proper custody. In 1888, before this action was commenced, but after the beginning of the agitation which gave rise thereto, the municipal council passed a by-law "to make alterations in school section map," and authorized the clerk to correct the map, etc.; and that when any difficulty arose as to boundaries of school sections recourse was had, at least in some instances, to this map:—

Held, that the map must be assumed to be drawn in pursuance of section 11 of the "Public Schools Act," and therefore afforded evidence of the original division of the township into school sections by the township council

Plaintiffs complained that for the years 1883 to 1887 certain lots which formed part of their section had not been so assessed, but had been assessed as part of school section 23, and the taxes thereon levied and paid over to section 23, and that plaintiffs were entitled to be paid their taxes either by the township or by section 23. In each of these years, so far as regards this matter, the rolls were finally passed by the Court of Revision and certified by the clerk, etc.:—

Held, that the plaintiffs could not now maintain such claim, for they were bound by section 57 of R. S. O. ch. 180 (1887), under which the rolls as finally passed by the Court of Revision, etc., were valid and binding on "all parties concerned," the plaintiffs coming within that designation, but apparently they were not entitled to the notice provided for by section 41 of that Act.

Statement.

THIS was an action by the plaintiffs against the defendants, complaining that long before and ever since the year

1883 section 24 contained, and had embraced within its limits as parts and parcels thereof, amongst other lands, 120 acres of lot 20, in the 4th concession, the north half of lot 21 and the north half of lot 22, in the 5th concession, and lots 23 and 24, in the 6th concession of the said township: that the defendants, the township corporation, collected and received payment of certain school taxes in the years 1883, 1884, 1885, 1886, and 1887, in respect of the lands above mentioned: that it was the duty of the defendants, the corporation of the township, to have collected, received, and held these taxes for the plaintiff; but instead they wrongfully, illegally and improperly collected and received the same as and for moneys of the defendants, the board of public school trustees for section 23, in the same township; and illegally and improperly paid over the same to the said board of public school trustees of section 23; and the plaintiffs after alleging several demands made by them, averred that they had lost and been wrongfully deprived by the corporation of the township, or the other defendants, of divers large sums of money and the interest thereon; and they claimed against the defendants, or some of them, for money payable, for interest, and for moneys owing to them, the plaintiffs. Statement.

The defendants, the corporation of the township, alleged that the plaintiffs did not, during the several years in question, give notice to them that the lands mentioned in their statement of claim as having been erroneously assessed for school rates were improperly assessed as being in school section 23; but, on the contrary, the plaintiffs allowed the assessment rolls for each of the years to be finally revised and passed pursuant to the statute and other the law in that behalf, and allowed the moneys from time to time to be paid by these defendants to their co-defendants without objecting thereto, and acquiesced in the said assessments, and submitted to the same as proper assessments; and submitted that the plaintiffs were estopped, &c. They also alleged that in respect of the moneys claimed by the plaintiffs, they derived no benefit, but the benefit, if any,

Statement.

accrued to their co-defendants, and they submitted that any cause of action there might be arose solely between the plaintiffs and the defendants, the board of trustees of section 23.

The defendants, the board of trustees of school section 23, alleged that the lands mentioned as having been improperly assessed for school rates were, during the years in respect of which the complaint was made, a part of school section No. 23, of the township, and not a part of school section 24, as claimed by the plaintiffs; and in the event of these lands being held to be part of school section No. 24 they submitted that the lands having been assessed as part of section 23, and the assessment rolls during the said several years having been finally revised and passed, and the moneys realized from the assessments having been duly collected and paid over to them, the defendants, the trustees of section 23, the plaintiffs, were debarred from setting up that the lands were part of section 24.

The action was tried before FERGUSON, J., at Brantford, at the Chancery Sittings 1889.

J. W. Bowlby, for the plaintiff.

Harley, for the defendants, township of Burford.

A. J. Wilkes, for the defendants, School Section 23.

October 9, 1889. FERGUSON, J.:—

It was conceded that the provisions of the Act, 13 & 14 Vic. ch. 48, sec. 18, which, so far as relevant here, substantially appear in sec. 39, ch. 64 of the Con. Stat. U. C., 1859, and in sec. 9 of ch. 225, R. S. O., 1887, taken from 48 Vic. ch. 49, sec. 9, are the provisions applicable. The same appears substantially in sec. 78, R. S. O., 1877, ch. 204.

It was, no doubt, at one time the duty of the municipal council of the township to form portions of this township, where no schools had been established, into school sections. This was not disputed. It was not shown that this

particular locality fell under the exception by reason of schools having been established prior to the imposition of this duty in the places now occupied by sections 23 and 24 respectively, or in other such places; and it was not disputed that this duty had existed in regard to this particular locality, nor that the corporation of the township had in fact formed this part of the township into school sections in the performance of their duty imposed by statute; but no by-law, resolution, or other proceeding or minute of the council could be found showing in what manner this had been done. Nothing of this character has been found, excepting a rough sketch or map without signature, seal or date, which, however, on its face is called "School Section Map, Township of Burford." This has the appearance of being very old, and it was produced from the proper custody.

The plaintiffs' counsel repudiated the map, and contended that it was not evidence at all. It was, however, put in by counsel for the defendants, or one of them.

By 16 Vic. ch. 185, sec. 25, consolidated as sec. 49 of ch. 64, C. S. U. C., 1859, it is provided that "The township clerk shall prepare in duplicate, a map of the township, showing the divisions of the township into school sections * * and shall furnish one copy of such map to the county clerk, for the use of the county council, and shall retain the other in the township clerk's office for the use of the township corporation."

This provision now appears substantially as sec. 11, ch. 225, R. S. O., 1887, taken from 48 Vic. ch. 49, sec. 11; and, without setting forth the intermediate enactments on the subject, if any, I think that it may be assumed that there has all along existed substantially this statutory provision.

On the 3rd day of July, 1888, the township council passed by-law No. 350. This was said to be, and no doubt was, after the agitation that gave rise to this action, but long before the commencement of the suit, which was not till the 15th day of February, 1889.

Judgment.

Ferguson, J.

This by-law on its face says it is a "By-law to make certain alterations in school section map," and this rough sketch or map produced is the only thing of the kind that can be found. This by-law recites, "Whereas it is evident that the east 120 acres of lot number 20, concession 4, the whole of lot number 22, concession 5, and the whole of lot number 24, concession 6, belong to school section number 24, though shown on the map as belonging to school section 23." It then enacts that the clerk be authorized and instructed to correct said school section map by placing the property so described, in school section number 24.

This map, as I have said, is a rough one, but it is certainly plain. The duty of preparing such maps is by the statute cast upon the township clerk, who, it is not to be assumed, I think, is in each instance a professional draftsman, and there is some ground, in my opinion, for thinking that what was intended by the Legislature is not any ornamental or highly finished map. This one has an old appearance, is produced from the proper custody, as I have said, where the map should, according to the statute, be for the use of the township council, or corporation, and it must be the map referred to in by-law No. 350 of July, 1888, for there is none other; and I am of the opinion that it affords evidence of the original division of this township into school sections by the township council.

It will be borne in mind that the school section map in the hands of the township clerk is for the use of the township corporation by the very words of the Act; and some evidence was given, and more spoken of to show that when any difficulty arose respecting boundaries in making school assessments recourse was had, or at least in some instances, to this map. According to the map, the 120 acres of lot 20, in the 4th concession, is not embraced in section 24.

The plaintiffs claim that the north half of 21, in the 5th concession, should be in section 24. The map shows that the whole of this lot 21 is within it.

Judgment. Ferguson, J.

The plaintiffs claim that the north half of lot 22, in the 5th concession, should be in section 24. The map shows that none of this lot is within section 24.

The plaintiffs claim that lots 23 and 24, in the 6th concession, should be in section 24. According to this map, lot 23, in the 6th concession, is within section 24, but 24, in the 6th concession, is not, so that, according to this map, the contention of the plaintiffs as to boundaries of the school section is in part well founded, but to a large extent is without any foundation.

The by-law making alterations in this map gives to section 24, by the alterations made, so far as I can see, the parcels of land claimed by the plaintiffs to belong to that section which, according to the map as it was before, did not belong to it; and this seems also to afford some evidence that this is the identical map referred to and recognized by the by-law.

The assessment rolls from the year 1853 to the year 1883 were produced for the purpose of showing that during this period the assessment had uniformly been, as the plaintiffs contend it should have been, during the years in question. After some contention as to the admissibility of these rolls as evidence, it was admitted that the assessment from 1853 to 1883 had been as if section 24 contained the parcels of land mentioned in the first clause of the statement of claim. It is, however, entirely plain that after 1883 there was a change as to the boundaries in the lands assessed as and for school section 24. No cause has been assigned or shown for this change; and it appears to me more likely attributable to a discovery or supposed discovery that the assessments had not, up to the time of the change, been properly made, and certainly they had not been made according to this map. After the change the assessments were not uniform, that is, they were not every year precisely alike as to the lands embraced in section 24, for the purpose of school assessment. This want of uniformity appears in the statement of claim, but in the view that I have taken of the case, it is not needful that I should further pursue the matter here.

Judgment.

Ferguson, J.

As to the boundaries of the section 24, and the land it really embraced before the passing of by-law 350 before mentioned, I cannot think the evidence satisfactory. I am, however, of the opinion that what it shows in this respect is, that the boundaries and the lands really embraced in 24 were as indicated by the map, and that assuming the assessments from 1853 to 1883 to have been made as stated and admitted they were erroneously so made. It may be that if one had in evidence all that was done in the matter by the council this would appear to be different, but I must decide according to the evidence that I have, and not according to what I have not.

The complaint of the plaintiffs when shortly stated is, that from 1883 to 1887 some lands were assessed for school purposes as belonging to school section 23, which, as the plaintiffs say, really belonged to school section 24.

It was admitted at the bar that ever since 1879 the school moneys of these sections were collected just as they were assessed, and that they were paid over as they were collected, except in the year 1883, when the assessment of the east 120 acres of lot 20, in the 4th concession, was left a blank in the column for the number of the school section, and the clerk, after having examined the map of school sections, inserted, in accordance with it, the number 23.

In each of the years in question the assessment roll was without objection, so far as the matters of this action have any concern, revised and finally passed.

Sec. 57 of R. S. O., 1877, ch. 180, and sec. 65 of R. S. O., 1887, ch. 193, seem substantially the same.

The provision is, that the roll, as finally passed by the Court, and certified by the clerk as passed, shall except in so far as the same may be further amended on appeal to the Judge of the County Court, be valid, and bind all parties concerned, notwithstanding any defect or error committed in or with regard to such roll, or any defect, error or misstatement in the notice required by sec. 41 of the Act, or the omission to deliver or transmit such notice.

Judgment.
Ferguson, J.

What the plaintiffs complain of—even assuming that there is ground for their contention—is certain defects or errors in the roll for each of the years in question, and the provision is, that after being finally passed by the Court it shall be binding on all parties concerned. The plaintiffs were concerned in each of these rolls, and I think they fall under the expression, "all parties concerned," though apparently not entitled to the notice mentioned in sec. 41 of R. S. O., 1877, ch. 180, R. S. O., 1887, ch. 193, sec. 47.

The true position of the parties regarding the assessment—assuming that they were in part erroneous—was, I think, stated in argument by Mr. Wilkes. It was this: The persons whose lands lying in section 24 were assessed for school rates for section 23, were wrongfully so assessed, and might have appealed, but did not do so. They submitted to the assessment, and voluntarily paid the rates imposed by it.

In cases where there is no jurisdiction at all to make the assessment, it appears the roll is not binding, even after being passed and certified. With this, however, school section No. 24 had no concern in reality. What section 24 had to complain of—assuming as aforesaid that there was error in the assessment—was that some of the land lying within this section 24 had not been assessed at all, for, if the lands lay within 24, no matter that they might have been assessed as lands belonging to one or even more neighbouring sections and such assessments assented to or not objected to by the owners, yet so far as section 24 was concerned, the lands were as lands not assessed for school rates at all. Their complaint would shortly be: *Certain lands lying within section 24 have not been assessed;* and looking at the matter in this way, which I think is the proper way, I am of the opinion that the rolls for the several years in question are valid, binding and conclusive against the plaintiffs; and it being admitted that the rates were collected according to the rolls and paid over according to the collections, I do not see

Judgment. Ferguson, J.

how the plaintiffs can succeed in respect of these assessments.

The plaintiffs made another claim in respect of certain interest on moneys belonging to the township that came, as it was said, to equalize townships that had not borrowed, with those that had borrowed, from the Municipal Loan Fund. The amount, if the plaintiffs should be held to be right, was admitted to be $13.46. The particulars of the foundation of the claim were not discussed I apprehend, partly at least, because this admission was made. These moneys were, as was admitted, distributed according to the gross populations of the school sections; and what the plaintiffs say is, that the population of school section 24 was curtailed by the error alleged to be in the assessment rolls, some of the land on which people lived not having been assessed for rates for this section 24, and these same lands having been assessed for rates of section 23, the population of 23 was accordingly and correspondingly increased, and that in this way section 23 got more than its proper proportion, and section 24 less. The $13.46 is worked out on the assumption that the plaintiffs are wholly right in their contention as to the boundaries of the sections.

According to my view, the plaintiffs were not wholly right in this respect, but largely wrong. This money is claimed, I suppose, under the count, for moneys received for the use of the plaintiffs. I am not told which of the rolls this year's population was taken from. The assessments are not entirely uniform. I have no sufficient means of determining what fractional part, if any part, the plaintiffs are entitled to; the amount is almost infinitesimally small, and a fractional part of it would of course be smaller yet. The money was no doubt honestly distributed by the township corporation, and I do not feel called upon to make any further effort regarding it.

Counsel have, according to agreement, furnished me with figures showing the amount that the plaintiffs would be entitled to if they were held to be entitled to recover,

and wholly right in their contentions. This shows a claim for $191.81, exclusive of interest, but including the $13.46 lastly considered by me. Judgment. Ferguson, J.

I am, for the reasons that I have endeavoured to give, of the opinion that the plaintiffs cannot recover.

As to the matter of costs, the municipal council have not done their duties accurately. The want of proper care in this respect had probably the effect of inviting trouble and litigation. The defendants, section 23, have, I think, received some rates that should have gone to section 24, the plaintiffs. Section 24 is probably really entitled to some fractional part of the $13.46, however great the difficulty may now be in recovering back trust moneys that have been honestly paid over.

The difficulty may be an insuperable one, but that would not affect the moral right; and I have arrived at the conclusion that the dismissal of the action should be without costs.

Action dismissed without costs.

[COMMON PLEAS DIVISION.]

DAWSON v. THE CORPORATION OF THE TOWN OF SAULT STE. MARIE ET AL.

Public schools—High schools—Incorporated town in judicial district—Right to appoint high school board, and erect school—Necessity of appointment by by-law—Proof of ownership of land—Appropriation of money.

On a motion to continue an injunction to restrain the corporation of a town in a judicial district from paying over to the high school board of said town, and the said board from receiving, the sum of $15,000 raised by by-law of said town, for acquiring a site and erecting a high school thereon:—

Held, that under the provisions of secs. 4 and 10 of R. S. O. ch. 226, taken in connection with sec. 1 of 50 Vic. ch. 64 (O.), incorporating the said town, the corporation were authorized to appoint a high school board therefor, and to pass the by-law for the erection of said school; and that the consent of the Lieutenant-Governor, provided for by sec. 8, was not required, as this was not an additional high school:—

Held, also, that the appointment of the board must be by by-law; but a by-law therefor passed after the motion was made, but before the hearing thereof, was sufficient.

The Court refused to entertain an objection that the board were about to build the school on land not acquired by them, for it could not be assumed that the money would be spent until the title to the land had been acquired; and also it was not necessary to shew that specific portions of the $15,000 had been appropriated to the purchase of the land and the erection of the building.

Statement. THIS was a motion by *Shepley* to continue an injunction restraining the defendants, the corporation of the town of Sault Ste Marie, from paying to the other defendants or to the Sault Ste. Marie high school board, the sum of $15,000, raised by the corporation of Sault Ste. Marie under a by-law passed by said corporation for the purchase of a site and erection of a high school for said town of Sault Ste. Marie, and restraining the other defendants from receiving the said money or acting as such high school board, on the grounds set out in the judgment.

October 15, 1889. *Shepley*, for the plaintiff.

Masten, for the defendants, the town of Sault Ste. Marie.

Douglas, for the defendants, the High School Board.

October 26, 1889. GALT, C. J.:— Judgment. Galt, C.J.

The first objection is, that the Sault Ste. Marie high school board is not a legally constituted high school board, there not being any power or authority to constitute a high school board except within a duly organized county.

This is the principal objection; and I shall consider it before referring to the other grounds.

Mr. Shepley contended that the town council has no power to create a high school board without the sanction of the Lieutenant-Governor.

He argued that the town of Sault Ste. Marie is not within any county; it is within a judicial district; and, therefore, as there is no county council, R. S. O. ch. 226, sec. 10, does not apply. He contended also that the sanction of the Lieutenant-Governor was requisite under the circumstances of the case.

By 50 Vic. ch. 64, "An Act to incorporate the town of Sault Ste. Marie," sec. 1, it is enacted "'The corporation of the town of Sault Ste. Marie' * * shall have all the rights, powers, and privileges enjoyed and exercised by incorporated towns separated from counties in the Province of Ontario, under the existing municipal laws of the said Province, except where otherwise provided by this Act."

By sec. 10 of ch. 226, it is enacted that "For all high school purposes every * * town separated for municipal purposes from the county in which it is situated, shall be a county; and its municipal council shall be invested with all the high school powers possessed by county, city, or town councils."

It was on the words "separated * * from the county in which it is situated," that Mr. Shepley relied, as shewing that the town of Sault Ste. Marie did not come within the provisions of the statute, because it was not separated from a county as there was no county but a judicial district.

It appears to me this objection is answered by the words of the statute 50 Vic. ch. 64, viz., that the corpor-

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Galt, C.J.

ation shall have all the rights, &c., of towns separated from the county in which it is situated; and then by the words of sec. 10, above referred to, under these circumstances it would for high school purposes be itself a county.

This being the case we find by sec. 4 of ch. 226, that "there shall be a high school * * in every county"; consequently it was the duty of the council of the town of Sault Ste. Marie to establish a high school.

This is not a case coming under sec. 8 of the Act as contended for by Mr. Shepley. This was not an additional high school; and therefore its establishment was not subject to the approval of the Lieutenant-Governor.

The second objection is, the said the Sault Ste. Marie Board was not constituted by appointment of the trustees thereof by by-law of the town of Sault Ste. Marie.

In my opinion the appointment should have been made by by-law; but, since this application was made, and before the case came before me, a by-law has been passed, so that if this action should proceed to trial this objection could not be allowed, as a proper appointment would then be shewn.

The third objection is, that the said Sault Ste Marie high school board are attempting to build a high school on lands which are not acquired by them.

The observations made by Proudfoot, V. C., in the case of *Little* v. *Wallaceburg*, 23 Gr. 540, at p. 546, are very applicable to this ground, viz.: "I cannot assume the defendants are going to spend $6,000 on property to which they have no title." A portion of the money was to be expended on the purchase of the necessary site; and I have no doubt that before this is done a clear title will be shewn.

The last objection is, that a specific portion of the $15,000 should have been appropriated to the purchase of the land, and the remainder to the erection of the buildings.

I can find nothing in the statute that renders such a declaration necessary.

The motion must be dismissed, and the interim injunction dissolved; costs reserved, to be disposed of at the trial by the Judge.

[COMMON PLEAS DIVISION.]

BROWN ET AL. EXECUTORS OF JOHN WOODS V. STUART DAVY AND CATHARINE DAVY.

Donatio mortis causa—Gift inter vivos—Evidence of—Board, nursing, and attendance on parent—Right to recover for.

A testator, who was afflicted with an incurable disease, went to stay with his married daughter, one of the defendants hereto, and was tended and nursed by her, and was afterwards joined by his wife, who remained with him until his death which took place shortly after. Nearly three months after he had been at defendant's house, another daughter asked him to give defendant the price of a piano, when he said he would not do that, but, pointing to a box in which he kept some money and promissory notes, and which he kept locked, retaining the key, said it was defendant's to do what she liked with, and that there was sufficient for all. No change was made in the possession of the box and its contents, it continuing in his possession up to the time of his death, he taking what money he required for his own use and for presents to his wife and daughters, the defendant at his request sometimes taking out money for him for such purposes. The notes were never otherwise alluded to:—

Held, that neither a good *donatio mortis causa* nor gift *inter vivos* to defendant was shewn, but that the testator's intention was that defendant should be paid for her services, and she was accordingly allowed for his board and her attendance on him as well as for the board of his wife.

Statement.

THIS was an action tried before MACMAHON, J., at Kingston, without a jury, on the 8th of October, 1889.

The plaintiffs were the executors of the estate of the late John Woods, who died at Kingston, on the 30th of January, 1889; and the defendant, Catharine Davy, was a daughter of the testator; and the defendant, Stuart Davy, was her husband.

John Woods, the testator, lived at the village of Pittsburg, some distance from Kingston, and, being afflicted with a cancer in the face and neck, came to Kingston, on a visit to the defendants, on the 6th of September, 1888, when, the disease making rapid progress, he determined on remaining with his daughter, and a room was fitted up for him on the ground floor in the defendant's house, and he was tended and nursed by the defendant, Catharine Davy, and her sister, Dora Davy.

The action was brought to recover the sum of $290 in cash, and four promissory notes amounting in the aggregate

Statement.

to $286.45, two of which viz., one for $100 and one for $116 being payable to the order of the testator, and the two smaller ones payable to bearer. The money and notes were in a box belonging to the testator which he kept locked, the key being sometimes entrusted to Catharine Davy for short periods, both before and after the alleged gift to Catharine, when she would, at the request of her father, open the box to take out small sums of money for his immediate requirements, or to give such sums as he desired to his wife or daughters. But generally the key was put in a purse, and retained by the testator until two weeks prior to his death, when he delivered it to his wife.

Mrs. Woods remained at Pittsburgh until the 15th of November when there was a sale of her husband's property, after which she joined her husband at the defendant's house.

A few days after the sale the auctioneer, who conducted it, brought to the defendant's house and delivered to John Woods three of the above mentioned notes and $42.80 in cash, all being deposited in the box in the room occupied by Woods.

At the trial the defendant, Catharine Davy, stated that, about two weeks subsequent to the sale and the placing of the notes and the $42.80 in the box, her sister, Harriett Vanalstine, asked her father to give her (Catharine) the price of a piano, in place of the one sold at the same time with Woods's furniture. Woods replied that he would not do that, but, pointing to the box in which the money and notes were kept, said, that the trunk and the contents were hers (Catharine's) to do what she liked with; that her husband was delicate, and a little money towards building a house would be better than a piano to her. She said she accepted the gift, and thanked him for it. In regard to the key, she said: "The key was in the purse the same after the gift as before it. I never bothered my head about the trunk. I did nothing after in relation to the trunk."

Catharine Davy's evidence was corroborated by her sister,

Mrs. Vanalstine, as to what was said by Woods when he spoke of giving the trunk to Catharine; but she said that the gift was coupled with the burthen of the payment by Catharine of the doctor's bill and the funeral expenses: that Woods stated the gift had nothing to do with the will, and that he was giving the box and its contents to Catharine for the trouble she had had with him. Mrs. Vanalstine also understood from what her father said, that what money he wanted to spend, should come out of the trunk, and he (Woods) thought there would be about $300. Statement.

Mrs. Woods also corroborated Catharine, saying that her husband told her he wanted Catharine to have the trunk, to pay the expenses and to pay for her trouble. Her husband stated there was $540 in the trunk.

Dora Davy, the eldest daughter of John Woods, stated that, some time after the notes and $42.80 had been put in the box, she, at her father's request, counted the money, and found $540.

The defendant Catharine stated that out of respect for her father she never counted the money during his lifetime, and did not take the trouble to see what was the extent of the gift to her, nor did she take the key of the trunk; and things went on after he had told her the trunk was hers just the same as they had gone on before. She said all the money in the trunk at her father's death was $290.

Woods gave his wife $20, and Dora Davy $10, and Catharine Davy $10, just prior to Christmas, 1888; and Mrs. Woods stated that was the last money taken from the trunk prior to her husband's death; but Catharine Davy, in her examination for discovery, said she took $10 or $20 from the trunk two weeks before her father's death, which was just prior to Woods giving the key of the trunk to his wife.

The defendant Catharine, in her statement of defence, set up 1. That there was a *donatio mortis causa* of the money and notes by her father to her. 2. That she attended her father during his illness, and that intending to

Statement. reward her for her care, nursing, and attendance, he gave her the said sum of money, and the said four promissory notes as a gift *inter vivos*. 3. In the alternative, she set up that for the said consideration of her nursing and attendance, her father declared himself a trustee for her of the said notes and money.

Macdonald, Q.C., and *Machar* for the plaintiff.
McIntyre, Q.C., for the defendants.

December, 11, 1889. MACMAHON, J.:—

There was no attempt on the part of the counsel to argue that what was done by the deceased formed a good *donatio mortis causa*.

There was no such delivery or taking possession of the trunk or its contents, as to confer any property in the money or notes to the defendant Catharine. The money was being constantly made use of by Woods for his own requirements, and in gifts to the defendant Catharine, and to her husband, and also to the testator's other daughters, so that up to his death, he treated and regarded it as his own, and exercised complete dominion over it; and about the time the last money was taken from the trunk, he made his wife the custodian of the key, which he would not have done had he designed the defendant Catharine to have the whole contents of the trunk.

Where there is a completed gift *inter vivos* it becomes irrevocable. Did Catharine treat what was said by her father as being an irrevocable gift to her of the trunk and its contents? Her acts, and what she did at the command of the deceased, are all indications of the contrary.

Although Harriett Vanalstine corroborated Catharine Davy as to what Woods said, when speaking of the trunk, it is clear Woods did not regard what he was saying as constituting a present gift, for she said she understood that what money her father wanted to spend until his death should come out of the trunk; and her father said there

would be about $300 left; and it was to be what was left at his death that Catharine was to have, which could not by any possibility form a good gift *inter vivos* as the deceased still retained dominion over the entire sum— in fact might have spent the whole of the money prior to his death. Judgment. MacMahon, J.

Moreover, the father only spoke of the money in connection with the payment of the funeral expenses and doctor's bill and satisfying Catharine for her care and trouble in nursing him, saying there was ample to pay all. The notes were never alluded to except in the way indicated, when it is alleged Woods pointed to the trunk, and, it is said, spoke of the contents.

There is a case of *Carpenter* v. *Soule*, 88 N. Y. 251, 257, (cited in *Travis* v. *Travis*, 12 A. R. at p. 442), where the Court says: "There must be a delivery of the gift, the donor must part with his dominion over it, it must not rest in a mere promise."

In the present case the donor was continually exercising dominion over the alleged gift, which rested merely in promise as to any balance there might be in existence at the donor's death. The decisions in *Harris* v. *Clark*, 3 N. Y. 93; *Baskell* v. *Husall*, 107 U. S. R. 602, are cited with approbation by Osler, J. A., in *Travis* v. *Travis*, at p. 450; and these cases follow the English authorities: *Irons* v. *Smallpiece*, *Shower* v. *Pilck*, 4 Ex. 478, and *Bourne* v. *Fosbrooke*, 18 C. B. N. S. 515, in holding that in order to make a valid gift *inter vivos*, the property forming the gift must be delivered to the donee, or be placed under his absolute control, "or placed within his power by the delivery of the means of obtaining it."

There was not in this case any declaration of trust on the part of Mr. Woods, nor was there any dealing with the property in a way that would constitute him a trustee thereof in favour of Catharine Davy.

In *Warriner* v. *Rogers*, L. R. 16 Eq. 340, at p. 348, V. C. Bacon said: "The rule of law upon this subject I take to be very clear, and, with the exception of two cases which

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have been referred to" (*Richardson* v. *Richardson*, L. R. 3 Eq. 686, and *Morgan* v. *Malleson*, L. R. 10 Eq. 475), "the decisions are all perfectly consistent with that rule. The one thing necessary to give validity to a declaration of trust—the indispensable thing—I take to be, that the donor, or grantor, or whatever he may be called, should have absolutely parted with that interest which had been his up to the time of the declaration, should have effectually changed his right in that respect and put the property out of his power, at least in the way of interest." This decision was followed and approved of by Sir Geo. Jessel, M.R., in *Richards* v. *Delbridge*, L. R. 18 Eq. 11. See, also, *Milroy* v. *Lord*, 4 De G. F. 264, at p. 274.

What the deceased John Wood evidently intended was, to pay his daughter, the defendant Catharine, for the trouble he had occasioned, and for nursing him during his last illness; and he thought there was sufficient money in the trunk to recompense her, and to pay the funeral expenses and the doctor. He told his wife, when he gave her the key, to open the trunk and see what money was left, as he wanted to pay the doctor before he died, and to pay Catharine for her trouble; and he said there was plenty of money to pay for all. Mrs. Woods said she tried but could not open the trunk; and for that reason the physician was not paid out of the money therein.

To the like effect is the evidence of George Brown, one of the executors, who saw Woods about the first week in January, when he said he would leave the key of the trunk with his wife; and that he wanted to pay the funeral expenses and the doctor, and to pay Catharine for her trouble in keeping him, and to give the rest to his wife, as she would want some money before matters were settled.

To make these payments and compensate Catharine, and leave something for his wife, Woods must have thought there was a much larger sum of money in the trunk than Catharine states she found when she got the key from her mother, and took possession of the trunk. After the defendant Catharine got the key, and took possession of the

money and notes, she gave the money to her husband Stuart Davy, who deposited the same to his own credit in a bank, where it remained for some time. Judgment. MacMahon, J.

I must hold that the money amounting to the sum of $290, and the four promissory notes are the property of the estate of the late John Woods. There would be no implied promise to pay for services rendered by a daughter to a parent; but the deceased intended that Catharine should be paid for her services, and expressed such intention, and designated the source from which the money for such payment should be made.

Dr. Sullivan, who attended the deceased, said the disease from which he died, was of so loathsome a nature that Woods could not gain admission to a hospital in Kingston; and that he regarded $11 or $12 per week as not an excessive charge for such a patient.

Woods was not confined to the house until after the 20th of September, so I allow for nineteen weeks at $12 per week—$228. Mrs. Woods lived at the defendant's from the 15th of November, until the death of her husband, and I allow the defendants for her board during that period, the sum of $30.

There will be judgment for the plaintiffs on their claim for $290, being the amount of the money and for the four notes mentioned in the pleadings, with full costs; there will be judgment for the defendants on their counter-claim, for the sum of $258, with full costs, to be set off against the plaintiff's claim and costs.

[COMMON PLEAS DIVISION.]

REGINA v. KING.

Constable—Acting under warrant of commitment—Protection of, when jurisdiction of magistrates over offence, and warrant valid on its face.

A warrant of commitment issued by two justices of the peace, for non-payment of a fine and costs imposed on J. D., who had been convicted of an offence under the Indian Act, directed the constables of the county of B. to take and deliver J. D. to the keeper of the common jail of the county, to be kept there for two months, unless the fine and costs imposed, including the costs of conveying to the jail, should be sooner paid :—

Held, that the justices having had jurisdiction over the offence, and the warrant being valid on its face, it afforded a complete protection to the constable executing it, and that the defendant was properly convicted of assaulting the constable while attempting to execute the warrant, notwithstanding that the awarding of the punishment may have been erroneous, in directing imprisonment for non-payment of the fine and costs, including costs of conveying to jail, as not authorized by the said Act.

Statement. THE prisoner was tried at the Autumn Assizes, 1889, for the county of Brant, before Mr. Justice Street and a jury, and found guilty on an indictment which charged him with having, at the township of Oakland, in the said county, assaulted one William Brown, then being a constable in the due execution of his duty as such.

The constable assaulted was, at the time the assault was committed, attempting within the county of Brant to execute a warrant in his possession in the following words :

Canada, Province of Ontario, County of Brant, To wit. } Warrant of commitment upon a conviction for a penalty in the first instance.

To all or any of the constables or other peace officers in the county of Brant, and to the keeper of the common gaol of the said county, at Brantford, in the said county of Brant.

Whereas, Jane Davidson, of the township of Oakland, was on this day convicted before the undersigned, one of her Majesty's Justices of the Peace in and for the said county of Brant, for that she did on the 19th day of August, 1889, at the township of Burford, unlawfully supply intoxicating liquor to one John Fraser, an Indian, without the sanction of a medical man or under the direction of a minister of religion, contrary to chapter 43 of the R. S. C., Jonathan Thatcher, being complainant: and it was thereby adjudged that the said Jane Davidson for her

offence should forfeit and pay the sum of fifty dollars, and should pay to the said Jonathan Thatcher the sum of eight dollars and seventy-five cents for his costs in that behalf; and it was thereby further adjudged that if the said several sums should not be paid in six days the said Jane Davidson should be imprisoned in the common gaol of the county of Brant, at Brantford, in the said county for the space of two months, unless the said several sums and the costs and charges of conveying the said Jane Davidson to the said common gaol should be sooner paid. And whereas the time in and by the said conviction appointed for the payment of the said several sums has elapsed, but the said Jane Davidson hath not paid the same or any part thereof, but therein hath made default. These are therefore to command you, the said constables or peace officers or any of you, to take the said Jane Davidson, and her safely to convey to the common gaol at Brantford aforesaid, and there to deliver her to the keeper thereof together with this precept. And I do hereby command you the said keeper of the common goal to receive the said Jane Davidson into your custody in the said common gaol, and there to imprison her for the space of two months, unless the said several sums, and costs and charges of conveying her to the said common gaol, amounting to the further sum of two sixty-five shall be sooner paid unto you the said keeper; and for your so doing this shall be your sufficient warrant.

Statement.

Given under my hand and seal this eleventh day of September, in the year of our Lord 1889, at Hatchley in the county of Brant aforesaid.

Signed JAMES YATES, J. P. (L.S.)
SAMUEL C. SWEAZEY. J.P. (L.S.)
For the county of Brant.

This warrant was signed and sealed by two justices of the peace for the county of Brant, and had by them been delivered to the constable to be executed.

Mr. Justice STREET, at the trial, reserved for the opinion of the Justices of this Division, sitting as a Court for Crown cases, the question whether the constable, while attempting to arrest Jane Davidson with no authority other than the warrant above set forth, was acting in the execution of his duty as a constable.

If the answer should be in the affirmative, the conviction should be upheld; and, if in the negative, it should be set aside.

On November 21, 1889, the case was argued before the Justices of this Division.

Mackenzie, Q.C., for the prisoner.
No one appeared for the Crown.

Judgment.

MacMahon, J.

December 21, 1889. MACMAHON, J.:—

Mr. Mackenzie, for the prisoner, urged that the warrant was illegal on its face, and that the constable could not lawfully arrest Jane Davidson by virtue thereof, because it was a warrant of commitment against her for the non-payment of a fine and costs, when the Indian Act, under which the conviction was had, only authorizes imprisonment or the infliction of a fine and costs, and makes no provision for imprisonment for non-payment of the fine and costs.

Counsel for prisoner referred to Archbold's Criminal Pleading, (20th ed.,) 731, where it is said: "If any officer be killed in attempting to execute a writ or warrant invalid on the face of it, or against a wrong person, or out of the district in which alone it could be legally executed * * the killing would be manslaughter only."

As stated during the argument, in *Gosset* v. *Howard*, 10 Q. B. 411, at p. 437: "A test which has been often applied to the validity of warrants is, what the consequences would be if resistance were made and the officer killed."

The question then arises: What is the defect in a warrant which will make it illegal, and so render it unavailing as a protection to the constable executing it?

Archbold, at pp. 731-2, says: "If the warrant were illegal and void on the face of it, (see 1 Hale 459, 1 East P. C. 3101) or issued with a blank in it, and the blank afterwards filled up * * *Rex* v. *Hood*, 1 Moo. C. C. 281; or issued with an insufficient description of the defendant, as for instance if it were to take the son of J. S. (*ib.*); or if it be attempted to be executed against C. instead of B., the killing would be manslaughter only."

The authorities referred to in the above extract require to be considered in order to understand the nature or character of the defect in a warrant which will make it invalid, and so ineffective as a protection to a constable, as the wording of the text is unsatisfactory, and might prove misleading.

In 1 Hale 459 (457) he states: "The second kind of malice implied is, when a minister of justice, as a bailiff, constable, or watchman, &c., is killed in the execution of his office, in such a case it is murder. Judgment. MacMahon, J.

If the sheriff's bailiff comes to execute a process, but hath not a lawful warrant, as if the name of the bailiff, plaintiff, or defendant be interlined or inserted after the sealing thereof by the bailiff himself, or any other, if such bailiff be killed, it is but manslaughter, and not murder.

But if a process issuing out of a Court of record to a sergeant of mace, sheriff, or other minister, be erroneous, as if a *capias* issue when a distringas should issue, yet the killing of such a minister in the execution of that process is murder, although he executes the process by night or upon a Sunday: *Mackally's Case*, 9 Co. Rep. 68 *a*.

But if the process be executed out of the jurisdiction of the Court, the killing of the minister is only manslaughter, and so it is, if the issuing of the process were void and *coram non judice*. * * And although the warrant of the justice be not in strictness lawful, or if it express not the cause particularly enough, yet if the matter be within his jurisdiction as justice of the peace, the killing of such officer in the execution of his warrant, is murder; for in such case the officer could not dispute the validity of the warrant, if it be under seal of the justice": 14 H. 8-16.

In *Rex* v. *Hood*, 1 Moo. C. C. 281, it was held that a warrant leaving a blank for the Christian name of the person to be apprehended, and giving no reason for omitting it, but describing him only as the son of J. S. L. and stating the charge to be for assaulting A. B. without particularizing the time, place, or any other circumstance of the assault, is too general and unspecific; a resistance to an assault thereon, and killing the person attempting to execute it, will not be murder.

The law as laid down in 1 Hale is similarly stated in 1 East P. C. 310: "If the process be defective in the frame of it; as if there be a mistake in the name or addition of

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MacMahon, J.

the party; or if the name of the party or of the officer be inserted without authority, and after the issuing of the process; and the officer in attempting to execute it is killed; this is only manslaughter in the party whose liberty is invaded"

And in Hawkins, P.C., 8th ed., vol. 2, ch. 13 sec. 11, p. 130, in considering the duty of a constable to arrest, it is there stated, "It is the better opinion at this day, that a constable, or even private person, to whom a warrant shall be directed from a justice of the peace to arrest a particular person for felony, or any other misdemeanor *within his jurisdiction*, may lawfully execute it, whether the person mentioned in it be in truth guilty or innocent, and whether he were before indicted for the same offence or not, and whether any felony in truth were committed or not. For however the justice himself may be punishable for granting such a warrant without sufficient grounds, it is reasonable that he alone should be answerable for it, and not the officer, who is not to examine or dispute the reasonableness of his proceeding.

See also Russell on Crimes vol. i., 5th ed., 978.

The warrant is a justification to the constable even if the justice commit for more offences than he ought, or after a limited time: Comyn, tit. Imprisonment, H. 8, citing Dub. Skin 445, 566.

In *Price* v. *Messenger*, 2 B. & P. 158, the head note is: "If an officer seize goods in obedience to the warrant of a magistrate, whether that warrant be legal or not, he cannot be sued without a previous demand of a copy and perusal of the warrant, according to 24 Geo. II. ch. 44. If the warrant be to seize 'stolen goods' and the officer seize goods which turn out not to have been stolen, he is still within the protection of 24 Geo. II. ch. 44."

And Lord Eldon, in giving judgment in the case, said, at p. 162: "The Act therefore takes it for granted that the officer may be said to act in obedience to the warrant of a justice of the peace, though such justice had no jurisdiction, and though the warrant be an absolute nullity.

For it is as much a defect of jurisdiction if the Justice grant an improper warrant in a case over which he has jurisdiction, as if he had no jurisdiction over the case at all."

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In *Regina* v. *Davis*, Leigh & Cave C. C. 64, the prisoner was convicted of common assault on James Evans, a bailiff who arrested the prisoner in the execution of his duty as bailiff of a County Court, and the prisoner committed the assault in resisting such arrest. During the argument Blackburn, J., referred to *Rogers' Case*, Foster's Crown Law., p. 311, where he said: "It was ruled by Lord Hardwicke that, provided the process be not defective in the frame of it, and issued by a Court or magistrate having jurisdiction in the case, the killing of a minister of justice in the execution of it will be murder, although there may have been error or irregularity in the proceeding previous to issuing the process; for the officer must at his peril pay obedience to it. And, therefore, if a *capias ad satisfaciendum*, *fieri facias*, writ of assistance or any other writ of the like kind, issue directed to the sheriff, and he or any of his officers be killed in the execution of it, it is sufficient upon an indictment for this murder to produce the writ and warrant without shewing the judgment or decree."

The Court for Crown Cases Reserved acted upon the law as stated by Blackburn, J. from Foster, and affirmed the conviction.

At common law a lawful warrant from a justice who had jurisdiction of the cause justified the officer who executed it although it was irregularly awarded; but the officer was not excused where the justice had no jurisdiction in the cause. The statute 24 Geo. II., ch. 44, sec. 6, was therefore passed to protect officers who are not competent to ascertain with certainty the jurisdiction of the magistrate, and who are liable to be indicted if they neglect to obey the warrant: Chitty's Criminal Law, vol. 1, p. 69.

In the case we are considering, it is not pretended that the justices had not jurisdiction over the offence of which

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Jane Davidson was convicted, and against whom the warrant was issued and handed to the constable William Brown. It is not disputed that Brown was a constable for the county of Brant; or that the arrest of Jane Davidson under such warrant was about being made within the county of Brant at the time the accused committed the assault upon the constable, and for which he was convicted.

"The Constables' Guide," edited by Sir Adam Wilson, when at the bar, deals, at p. 49, with the question as to when a warrant will afford protection to a constable when acting thereunder, as follows: "The necessity of knowing who should issue the warrant is apparent when it is considered that the warrant is only of validity:—1st. When it is issued by one who holds such an office as confers upon him the authority to do so; 2nd. When such person has jurisdiction over the offence; and 3rd. When he has power to order it to be executed in the particular place. First, then, as to the officer or court which issues it. The rule of law, is that where the court or justice has *jurisdiction* over the offence, cause of action or complaint, and proceeds *erroneously*, the officer who executes the warrant or process will be protected from the consequences of the arrest; but when the court or justice has no jurisdiction at all, the officer executing the process and all parties concerned in it are liable for the consequences."

The justices having jurisdiction over the offence, notwithstanding they may have acted erroneously in awarding punishment, still, as the warrant is not defective on its face from any of the causes mentioned in the numerous authorities to which we have been referred, so as to render it invalid, it affords a complete protection to the constable who executed it.

The constable cannot stop to consider the validity of the warrant of a justice issued within his jurisdiction to apprehend a person therein. He (the constable) being a ministerial officer, is bound at his peril to act upon such a warrant.

There will be judgment for the Crown on the case reserved.

ROSE, J.:—

Judgment.

Rose, J.

I quite agree that judgment must be for the Crown.

My learned brother has cited a passage from Hale [460.] I find in Tomlin's Law Dictionary, under Homicide VII. the law laid down in similar language: "And though the cause of the arrest be not expressed with sufficient particularity in a magistrate's warrant, yet if it contain all the essential requisites of a warrant, and the magistrate had jurisdiction over the subject matter, the killing of the officer executing the warrant will be equally murder; for *it is not in the power of the officer* to dispute the validity of such a warrant if it be under the seal of the justice," referring to 1 Hale 459; 1 East P. C. 310.

The language found in East is, "So though the cause be not expressed with sufficient particularity, the officer is justified if enough appear to shew that the magistrate had jurisdiction over the subject matter. This must however be understood of a warrant containing all the essential requisites of one."

In *Hoye* v. *Bush*, 2 Scott N. R. 86, at p. 92 appears language in the judgment of Tindal, C. J., which shews that what is required is, that the warrant should be in such form as to leave nothing to "the judgment and discretion of the constable," who is a ministerial officer charged with the execution of the warrant according to its terms. Tomlin's Law Dictionary, tit. Constable, IV. Warrant of Justices.

In *Regina* v. *Allen*, 17 L. T. N. S. 222, at p. 226, Blackburn, J., said: "In the present case the form of warrant adopted may be open to objection, and probably might, on application to the Court for a writ of *habeas*, have entitled the prisoners to be discharged from custody, but we entirely agree with the opinion of Lord Hale (2 P.C.) that though defective in form the gaoler or officer is bound to obey a warrant in this general form, and consequently is protected by it."

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Rose, J.

In that case the arrest was under Irish warrants, not backed in England, and which did not specify with what particular felony the parties named were charged.

I may adopt the language of Mr. Justice Blackburn as entirely applicable to the case now before us, and say that, "to cast any doubt on this subject would, we think, be productive of the most serious mischief, by discouraging the police in the performance of their duties, and by encouraging the lawless in a disregard of the authority of the law."

In my opinion, the question reserved for our opinion must be answered in the affirmative.

GALT, C. J., concurred.

[COMMON PLEAS DIVISION.]

LIPSETT V. PERDUE.

Infant—Lease by for benefit of—Avoidance of during infancy—Costs—Order for payment by infant.

An infant cannot during infancy avoid a lease by him, reserving rent for his benefit, and possession of the demised premises will be ordered to be given in an action by the lessee for that purpose. *Hartshorn* v. *Early*, 19 C. P. 139, and *Slator* v. *Brady*, 14 Ir. C. L. R. 61, 342, followed.

The discretion given by Rule 1170 as to costs authorizes the imposition against the infant of the costs of an action to enforce such lease, including the costs of the official guardian, paid by the plaintiffs.

Statement. THIS was an action for the recovery of the possession of land, tried before STREET, J., without a jury, at Walkerton, at the Spring Assizes of 1889.

The learned Judge reserved his decision, and subsequently delivered the following judgment, in which the facts are fully stated:—

April 23, 1889. STREET, J.:—

The defendant is an infant between nineteen and twenty years of age, and appeared by the official guardian. He had received the land in question without consideration, other than the payment to his father of an annual charge of $250, by a conveyance from his father, on the 11th of August, 1888. Early in September, 1888, the plaintiffs, who are farmers, applied to the defendant's father for a lease of the property. The terms of the proposed lease were fully discussed, and finally settled between the plaintiffs, the defendant, and the defendant's father, who is described as being an intelligent, practical farmer, well aware of the value of property.

The evidence satisfies me that the rent, $250 a year reserved in the lease, is a fair rent. The lease was then drawn up by the defendant, who was then a law student,

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Street, J.

and was executed by all parties on the 13th of September, 1888, in the presence and with the full concurrence of the defendant's father. A few days afterwards, the defendant and his father went to the plaintiffs, and told them that they had heard unfavorable reports concerning them, and that, as the lease was not binding because of the infancy of the defendant, they would not be bound by it. Upon the plaintiffs remonstrating, the defendant's father said that they had made a sale of the place, and were not going to lose the chance of selling. The plaintiffs insisted upon their rights; the defendant notified them that the lease was void: that he would not be bound by it: refused possession; and on the 31st of December, 1888, entered into a contract to sell the property to a third person. Thereupon, this action is brought to restrain the sale, for damages, if the lease should be held invalid, and for general relief, under which the plaintiffs' counsel asked at the trial for possession of the property.

The counsel for the infant submitted that the lease was void, or, at all events, that it was not a lease for the infant's benefit, and should be declared not binding upon him on that account.

The evidence satisfied me that the plaintiffs were respectable men, possessed of several hundred dollars' worth of personal property over and above their debts, which were trifling, and that there was nothing in the controversies which they had had with two former landlords for which they were to be blamed, or which rendered them undesirable tenants. Where their statements of fact conflict with those of the defendant, I should accept theirs in preference to his.

As a matter of law the lease is voidable and not void. The question is, whether effect ought to be given to the defendant's attempt at avoiding it.

The lease is for a term of three years from the 1st of March, 1889, for $250, payable by two equal payments of $125 each, on January 1st and February 1st, in each year.

The defendant objected that these payments should have

been made to mature at an earlier period of the year, and that the lease was an improvident one in that respect. Judgment. Street, J.

This objection, however, does not appear to have occurred to the defendant or his father until after the defendant's statement of defence was filed. These dates were deliberately fixed by the defendant, under his father's advice, when the lease was entered into, and I do not think I should declare it of no effect upon that ground alone.

The real truth of the matter appears to be, that the defendant and his father, after making the lease, found a chance of selling the place and determined to get rid of the lease upon that account. If the lease were one that had been entered into by the defendant improvidently, and without proper consideration and advice, I should have been inclined to scrutinize more jealously the reasons urged against its continuance. I find it, however, in the main, a fair lease at a fair rent, made to fairly responsible men, who have hitherto always paid their rent to their landlords. My impression from what I saw of the parties was that the defendant was fully a match for the plaintiff in making a bargain, even had he not had his father to assist him.

Upon the whole, I am of opinion that the attempt of the defendant to avoid the lease should be treated as ineffectual, and that the plaintiff should have judgment for possession.

The disposition to be made of the costs is a matter by no means free from difficulty. The plaintiffs will, in the first place, pay the costs of the guardian *ad litem*, but I cannot think that justice will be done by leaving the plaintiffs to bear the whole costs of the litigation, in which I think they have been right, and the defendant has been wrong.

I have found no satisfactory authority, and no intelligible principles laid down, in either the books or the cases. At law, it appears that an infant defendant might be made liable for costs: *Anderson* v. *Warde*, Dyer 104; *Gardener* v. *Holt*, 2 Stra. 1217.

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Street, J.

In Equity the practice has certainly not been to give costs against an infant personally: *Westgate* v. *Westgate*, 11 P. R. 62, although they have frequently been ordered to be paid out of the infant's share of an estate before the Court.

Rule 1170 gives a discretion as to costs which seems wide enough to extend to the present case. I think this is a proper case for the exercising of this discretion, and that the defendant should be ordered to pay the plaintiffs' costs, including the costs which they pay the guardian, these being added to their own upon the authority of Rule 1179.

The defendant moved on notice to set aside the judgment entered against him, and to have the judgment entered in his favour.

In Michaelmas Sittings, November 18th, 1889, *Moss*, Q. C., supported the motion. The defendant being an infant, had the right to avoid the lease. *Maddon* v. *White* 2 T. R. 159, would seem to show that a lease for an infant's benefit binds him; but in Woodfall on Landlord and Tenant, 14th ed., 36, note, it is said that this last case is not now considered good law. In any event the lease can be avoided as it appeared not to be for the infant's benefit: Simpson on Infants, 27-8, 73; Platt on Leases, 30-1; Pollock on Contracts, 4th ed., 33. It was a lease which no reasonable man would have entered into. The times at which the rent was payable were not reasonable as the payments should have been required to have been made at earlier periods of the year. The evidence also shewed that the tenants were most undesirable ones.

Lash, Q. C., contra. The law is now well settled that an infant cannot avoid a lease made during infancy when it is for his benefit, and the learned Judge has expressly found it was for his benefit: *Hartshorn* v. *Earley*, 19 C. P. 139: *Slator* v. *Brady*, 14 Ir. R., C. L. 61, 342. See also Mac-

pherson on Infants, 470; Bingham on Infants, ch. 2, sec. 4, 6; Addison on Contracts, 8th ed., 123; *Zouch* v. *Parsons*, 3 Burr. 1801. The learned Judge has disposed of the question as to the times at which the rent was payable, and the desirableness of the tenants. Argument.

December 21, 1889. ROSE, J.:—

I think the law is well settled that an infant cannot during infancy avoid a lease made, reserving a rent for his or her benefit: *Hartshorn* v. *Early*, 19 C. P. 139 at p. 142. (2) That the fact that the rent reserved was not the best does not render it void: *Slator* v. *Brady*, 14 Ir. C. L. R. 61, at p. 65, 342, (3) That it is not enough to say that the lease *might not*; it must be shewn that it *could not* be for the infant's benefit: S. C., p. 65.

We have not here to determine whether such a lease can or cannot be avoided by an infant upon attaining his majority. Nor can we assume that in this case the infant will, upon attaining his majority, avoid it. Until avoided, it is a good lease, and so the judgment moved against in "declaring the plaintiff entitled to the possession of the land in question, under the lease in the pleading mentioned," merely declared that which is clear law.

But it was urged that the Court is bound to declare the lease void, as it clearly was not for the infant's benefit. Whatever might have been our duty if it had been clearly shewn that the lease was not for the infant's benefit, we need not determine as, on the facts here, at the least, we should say that it may be that it is for his benefit. The infant is a clerk in a law office, within a year or two of his majority, and must be assumed to have some knowledge of life, even if by presumption of law he has not sufficient mental capacity to enable him to judge for himself. His father is a farmer, and between them the terms of the lease were settled and agreed upon. As we cannot, on the evidence, say that it may not be for his benefit, we should not interfere. Why the terms of payment of rent should

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Rose, J.

have been fixed as they were, I do not know, but I cannot say that they were to the infant's detriment. As to that, and as to the tenants not being desirable, I am not disposed to differ from the finding of my learned brother Street. I do not refer to the facts more fully, as they are sufficiently set out in my learned brother's judgment.

Some question was made as to the case brought down for trial on the pleadings.

It is apparent that the question which the parties came down to try was, whether the lease was binding upon the defendant, he having given notice that he would not be bound by it, being an infant, and because he had heard unfavourable reports concerning the plaintiffs. The defendant substantially failed, and the judgment is right unless there is doubt as to the order directing the infant defendant to pay the costs.

Having referred to the authorities cited by my learned brother, and to *Earl of Orford* v. *Churchill*, 3 V. & B. 59, where the costs were directed to be paid out of the infant's share of an estate, and to Simpson on Infants, pp. 463, 501; Macpherson on Infants, p. 361, and the case there referred to of *Defries* v. *Davies*, 3 Dowl. 629, I think the order made is right.

The distinction between ordering costs to be paid out of the infant's estate, and ordering the infant to pay the costs to be realized out of his estate, is too fine to be practical. I see no reason why, in a proper case, there should not be an order for costs against an infant, to be recovered in the usual way.

In *Defries* v. *Davies*, the Court had so little tenderness for the infant that it held that, where he could not satisfy the costs out of his estate, he must afford the creditor the satisfaction of having his person in execution.

In my opinion, the judgment was right, and the motion must be dismissed with costs.

GALT, C. J., and MACMAHON, J., concurred.

[CHANCERY DIVISION.]

PHELPS & CO. V. ST. CATHARINES AND NIAGARA CENTRAL RAILWAY.

Railways and railway companies—Bonds— Debentures — Charge on the "undertaking"—Earnings of road—44 Vict. ch. 73, sec. 35 (O.)

Certain execution creditors of a railway company sought to attach a bank deposit of moneys collected from the earnings of the road, which was resisted by bondholders of the company, who claimed a charge upon such moneys. The company's Act of incorporation, 44 Vict. ch. 73, sec. 35 (O.), enacted that the bonds in question were "to be taken and considered to be the first and preferential claims and charges upon the undertaking."

Held, that the bondholders were entitled to a preferential charge upon the deposit.

In railway parlance the "undertaking" has been defined to mean the complete work from which returns of moneys or earnings arise, and a charge upon the undertaking means that these earnings are liable for the satisfaction of the charge.

Statement.

THESE were two appeals, one on behalf of the St. Catharines and Niagara Central Railway Company, and the other on behalf of the plaintiffs in this action, from an order made upon the 30th day of November last past, by His Honour Judge Senkler, local Judge for the county of Lincoln, whereby garnishee issues were directed between the Michigan Central Railway Company as plaintiffs, and the above named plaintiffs, judgment creditors, as defendants, and between certain bond-holders of the defendant railway as plaintiffs and the plaintiffs in this action, the judgment creditors, as defendants.

The plaintiffs, in their appeal, asked that an issue might be refused to the bond-holders, and that their claims might be barred "on the ground that as holders of bonds or debentures of the St. Catharines and Niagara Central Railway, they had no lien or claim upon any specific portion of the company's assets, and are not therefore entitled to the above moneys which have been attached herein to answer the debt of the judgment creditors."

The original attaching order was made upon October 7th, 1889.

Statement. The remaining facts and circumstances of the case sufficiently appear from the judgment of the learned Chancellor.

The two appeals came on for argument together, before BOYD, C., upon December 16th, 1889.

Aylesworth, for the defendants in the action, and for the bond-holders. The defendant company was incorporated by the 44 Vic. (O.) c. 73, and I refer especially to sec. 35. 51 Vic. ch. 78 (D.) makes the company subject to Dominion Legislation, 51 Vict. c. 29 (General Railway Act) secs. 93, 94, 95, are incorporated with this special Act. We say that this is a fund set apart for the Michigan Central Company; and refer to *Hancock* v. *Smith*, 41 Ch. D. 456; *In re General Horticultural Co., Ex parte Whitehouse*, 32 Ch. D. 512

Collier, for the execution creditors. The "undertaking" has been defined in *Gardner* v. *London, Chatham, and Dover R. W. Co.*, L. R. 2 Ch. 201, 217; *Wheatley* v. *Silkstone and High Moor Coal Co.*, L. R. 29 Ch. D. 715. *Bowen* v. *Brecon R. W. Co., ex parte Howell*, L. R 3 Eq. 541, shews that the bond-holders cannot proceed except on behalf of all. In *Re Hull Barnsley and West Riding Junction R. W. Co.*, 40 Ch. D. 119. *Ames* v. *Trustees of Birkenhead Docks*, 20 Beav. 332, at p. 346, is the strongest case. There was simply a debt and no trust; and if the defendant company could cheque out the money it can be attached. I also refer to *Swiney* v. *Enniskillen, Bundoran, and Sligo R. W. Co.*, 2 Ir. R. C. L. 338 (1868); *Bouch* v. *Sevenoaks, Maidstone, and Tunbridge R. W. Co.*, L. R. 4 Ex. D. 133.

December 20th, 1889. BOYD, C.:—

Upon the evidence before me, I am not able to follow the argument of counsel for the bond-holders that their rights depend on sec. 95 of the Railway Act of 1888, (Dom.) As I understand, the bonds held by these appellants were issued or created in October, 1886, under the provisions of

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Boyd, C.

sec. 35 of the Railway's Act of Incorporation, 44 Vict. ch. 73 (1881) (O.) This railway was declared to be subject to the legislative control of the Dominion by 51 Vict. ch. 78 (1888), sec. 3 of which Act made applicable to the Railway secs. 4 to 39, both inclusive, of the General Railway Act which was passed in the same session: 51 Vict. ch. 29. sec. 95 relates to bonds, &c., "hereby authorized to be issued," that is, not to securities then in existence, but to those to be subsequently issued under the provisions of that general Act. I take that to be the clear meaning of sec. 95, and if I am right as to the facts above detailed, the scope and effect of the appellants' bonds must depend upon the proper construction of sec. 35 of the incorporating Act.

The only expression in sec. 35 which needs to be considered, is the word "undertaking." Does this cover the agreement in question which is a bank deposit of moneys collected from the earnings of the road? Have these bond-holders by virtue of their securities any preferential claim on this account and these moneys?

Now, in railway parlance, the "undertaking" has been defined to mean the completed work from which returns of money or earnings arise, and a charge upon the undertaking means that these earnings are destined for the satisfaction of the charge. That is very plain from the judgments in *Gardner* v. *London, Chatham, and Dover R. W. Co.*, L. R. 2 Ch. 217; *In re Panama, New Zealand, and Australian Royal Mail Co.*, L. R. 5 Ch. 318; and *Blaker* v. *Herts and Essex Waterworks Co.*, 41 Ch. D. 407. As illustrative of the position: this going concern is to be likened to a fruit-bearing tree, the produce of which the incumbrancer is to enjoy. This definition will apply to any part of a road which is completed, or in a condition to make earnings. If the earnings are the produce of the railroad, they cannot be intercepted by an execution or a garnishing creditor of the company as against a statutory mortgagee or incumbrancer who is declared to have a first or preferential claim and charge upon the undertaking.

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Boyd, C.

While there may be no specific lien on these particular moneys, yet the bondholders, as a privileged body, are entitled to be satisfied thereout in priority to ordinary creditors, such as Phelps. Unless it be contended that the bond-holders are paid, I do not see for what purpose an issue should be directed as between the bond-holders and the attaching creditors. The right of the bond-holders, if they wished to enforce their security, would be to have a receiver appointed, and to have the profits of the concern first applied for their satisfaction. It appears to me that this fund, so far as it is to be apportioned as earnings of this road, has its destination fixed by the scheme of the statute. The whole advantage of the bond-holders' security would be drained from them if the earnings of the company could be thus laid hold of by outside creditors.

It is not argued or suggested that the bonds are not valid and existing securities, and this being assumed, there is nothing to attach, and nothing in respect of which there can be an issue, for the statute protects all the earnings of the company for the benefit of the bond-holders upon whose enterprise and capital the undertaking was launched.

The bond-holders' appeal should be allowed, and the cross-appeal dismissed with costs.

A. H. F. L.

[COMMON PLEAS DIVISION.]

HAMILTON v. MASSIE ET AL.

Central Prison—Rules creating indictable offence—Authority to make—Section of Act imposing penalty—Indictment under—Handcuffing—When justifiable.

Under the authority conferred by sec. 6 of R. S. O. ch. 217, (1877), on the Inspector of Prisons to "make rules and regulations for the management, discipline, and police of the Central Prison, and for fixing and prescribing the duties and conduct of the warden and every other officer or servant employed therein," the following rules were made, providing, amongst other things, (Rule 201) that any officer or employee who should knowingly bring or attempt to bring in to any prisoner any tobacco, should be at once dismissed and criminally prosecuted: and (Rule 219) that employees of contractors must strictly conform to all rules and regulations laid down for the guidance of guards or employees of the prison, and any infraction of such rules and regulations by such employees will be promptly dealt with. By section 27 of the Act, any person giving any tobacco to any convict, (except under the rules of the institution), or conveying the same to any convict, shall forfeit and pay the sum of $40 to the warden, to be by him recovered in any Court of competent jurisdiction.

The plaintiff, a workman in the Central Prison, in the employment of a contractor therein, was detected conveying tobacco to a convict, whereupon the warden directed a constable to arrest him, which he did, and though under no apprehension of plaintiff making any attempt to escape, handcuffed him, and led him through the public streets of Toronto to the police station. On the charge preferred the plaintiff was indicted:—

Held, that the plaintiff was subject to an indictment and therefore the arrest was legal.

Per GALT, C. J., and ROSE, J.—Under section 6, authority was conferred to make the rules, and for disobedience thereof the plaintiff was subject to indictment, the remedy not being limited to that prescribed by section 27.

Per MACMAHON, J.—The power conferred by section 6 is limited to the objects therein expressed, and does not authorize the making of a rule to conflict with section 27, or which would cause an offence to be created indictable at common law, but that the plaintiff was by virtue of section 25 of R. S. C. ch. 173, subject to indictment under section 27, the remedy thereunder not being limited to the recovery of the penalty.

Held, however, that under the circumstances the handcuffing was not justifiable and the constable was liable in trespass therefor, but no liability attached to the warden as the evidence failed to shew that he was a party to it.

Statement.

THIS was an action tried before ROSE, J., and a jury, at Toronto, at the Winter Assizes of 1889.

The plaintiff, a workman in the prison, in the employment of one Brandon, a contractor for work in the Central Prison, Toronto, was detected in the act of conveying tobacco to one Berry, a convict confined in the prison.

Statement.

The defendant Massie, the warden, directed the other defendant, McGrath, a constable, to take the plaintiff into custody. The constable thereupon arrested him, and he was indicted for the offence. The arrest was made in the Central Prison. As the constable arrived at the door with the plaintiff, he took out a pair of handcuffs and handcuffed the plaintiff, and in broad daylight led him handcuffed from the prison to King street, thence to Adelaide street, along Adelaide street to St. Andrew's Square, and from thence to No. 3 Police Station in St. Andrew's Market, where he was locked up. There was no evidence to shew that the defendant Massie took any part in the handcuffing.

The jury assessed the damages contingently at $200; and on the 6th of September, 1889, the learned trial Judge directed judgment to be entered for the plaintiff as against the defendant McGrath, for $200, with full costs; and for the defendant Massie, dismissing the plaintiff's action as against him with costs.

The following is the judgment of the learned Judge:

September 6, 1889. ROSE, J.:—

The facts were not in dispute, and at the close of the evidence the case went to the jury merely to assess the damages contingently. If I should be of opinion that there was a case to go to the jury in law and on the facts, then judgment was to be entered for the plaintiff; and if of the opinion that the plaintiff's case failed in law, or on the facts, then judgment was to be entered for the defendants.

The plaintiff was clearly guilty of an infraction of Prison Rule 201. The intention to commit an offence was apparent from the act itself as well as from prior conduct.

The rules were made by the inspector under R. S. O. ch. 217, 1877 (R. S. O. ch. 238, 1887,) and approved by the Lieutenant-Governor in Council on the 31st December, 1881, as well as of the provisions of sec. 28 of ch. 238. In so far as such rules have the force of a statute any infraction of them is a misdemeanor under sec. 25, R. S. C. ch. 173, and punishable accordingly.

If sec. 28 of ch. 238 is to be read as not creating an

offence "of some other kind," then the act complained of done by the plaintiff was a misdemeanor under sec. 25, ch. 173. Judgment. Rose, J.

The breach of the rule was indictable as a misdemeanor at common law. See *Rex* v. *Robinson*, 2 Burr. 799, cited in *Rex* v. *Harris*, 4 T. R. 202, at p. 205. See also *Rex* v. *Smith*, 2 Doug. 441, 446; Maxwell on Statutes, 2nd ed., p. 244.

These references will also show the reason why the provision in sec. 28 of ch. 238, for recovering a penalty for the infraction of the rule laid down by such section would not prevent an indictment. It will be observed that there is a material difference between the language of the rule and the section: *Rex* v. *Wright*, 1 Burr. 543, and *Regina* v. *Buchanan*, 8 Q. B. 883, may also be referred to on this point.

The plaintiff having been found committing an indictable offence, was liable to be immediately apprehended without a warrant, and to be forthwith taken before a neighbouring justice of the peace, to be dealt with according to law, under the provision of section 24 of R. S. C. ch. 174.

And, so in my opinion, the arrest and taking before the magistrate have been justified.

But the plaintiff was at once handcuffed, and thus taken through the streets.

There was no evidence that this was necessary to prevent Hamilton's escape, or that he had attempted to escape. Indeed, the evidence leads to quite the contrary conclusion. It was, therefore, without justification. See *Wright* v. *Court*, 4 B. & C. 596, at p. 598.

A further report of the same case, is found in 6 D. & R. 623, where, at p. 624, the judgment of the Court is given by Bayley, J., as follows: "The defendants have also justified the handcuffing the plaintiff in order to prevent his escape; but they have not averred that it was necessary for that purpose, or that he had attempted to escape, or that there was any danger of his escaping: and such a degree of violence and restraint upon the person cannot be justified even by a constable, unless he makes it appear that there are good special reasons for his resorting to it." In this Holroyd and Littledale, JJ., concurred.

This case is referred to in the 5th ed. of Addison on Torts, p. 660, where the learned author says: "If a constable abuses the legal authority conferred upon him by

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detaining a prisoner an unreasonable time without taking him before a magistrate, or by unnecessarily handcuffing him, he cannot protect himself under the warrant. A constable or peace officer has no right to handcuff an unconvicted prisoner, unless he has attempted to escape, or except it be necessary in order to prevent his escaping."

The English law has always been sensitively careful of the liberty of the person, something not always well remembered in these days; and while the Courts have always protected its officers in the discharge of duty, they never have, nor indeed can they brook injustice being committed in the name of law.

There was not the slightest evidence offered here to justify the handcuffing, and the amount of damages awarded cannot in any degree be deemed large when the jury were informed that the plaintiff was in broad daylight led handcuffed from the Central Prison to King street, thence to Adelaide street, along Adelaide street to St. Andrew's square, and from there to No. 3 police station, where he was locked up.

Clearly upon the law and evidence the detective is liable in trespass; and judgment must be entered against him for the damages, $200 and costs of suit.

I do not think the plaintiff is entitled to recover against the defendant Massie.

If I have taken the proper view the arrest was justifiable, and in directing McGrath to take the plaintiff into custody Massie did no wrong, and there is no evidence I think to justify a finding that Massie in anywise directed the handcuffing; that was in my opinion the act of McGrath alone.

The plaintiff testified that Massie told McGrath to arrest him, and "then McGrath moved towards the door with me, and as he came to the door he took out the handcuffs and shackled my hands, and as he turned he said to Mr. Massie, 'you will be down at three o'clock to lay the charge,' and he said 'yes,' and then I was taken," &c.

Mr. Wheeler, the plaintiff's uncle, called by the plaintiff, said that he was not at all clear whether Massie was or was not in the room when the handcuffs were put on, and did not hear any orders given by Massie to the detective to "take him down." "The only thing I heard in the matter was detective McGrath ask the warden if he was coming down, and he said he would be down at three o'clock, that is just as he had the handcuffs on him; he would be down at three o'clock, and lay a charge, or something like that."

Judgment must be entered for the defendant Massie, dismissing the plaintiff's action with costs. Judgment. Rose, J.

In Michaelmas Sittings, 1889, *Bigelow* moved to set aside the judgment entered for the plaintiff against the defendant McGrath, and to have the judgment entered in his favour.

In the same Sittings, *McGillivray* also moved to set aside the judgment entered for the defendant Massie, and to have the judgment entered in the plaintiff's favour as against him.

In the same Sittings, November 20, 1889, *Bigelow* supported the defendant's motion, and shewed cause to the plaintiff's motion. The first question is as to the mode of punishment. There are two remedies provided for, namely, (1) a criminal prosecution under the rules made by the inspector under sec. 6 of R. S. O. ch. 238, and (2) the infliction of a penalty under sec. 28. The remedies are cumulative, and the plaintiff was subject to either of them. The arrest was therefore legal and valid. Then as to the handcuffing. The constable certainly had the right to handcuff. It is a matter that must not be too closely scrutinized. The cases are referred to in the judgment of the Judge at the trial. As to the defendant Massie, the evidence clearly shews that he was no party to the act of the constable in handcuffing the plaintiff.

McGillivray shewed cause to the defendant's motion, and supported the plaintiff's. Under sec. 28 of R. S. O. ch. 238 (1887), a specific pecuniary penalty is imposed for the offence, and the only mode of punishment is the infliction of the penalty to be recovered in any Court of competent jurisdiction. The plaintiff therefore was not subject to indictment and his arrest was illegal, and both the defendants are liable. Then as to the right to handcuff. The defendant McGrath exceeded his duty in handcuffing the plaintiff. The authorities clearly shew that a constable has no authority to handcuff a prisoner unless he attempts to escape, or the constable is apprehensive that

Argument. he is about to do so. The evidence failed to shew anything of the kind here. Then as to Massie, he countenanced the handcuffing, and was in fact instrumental in its being done, and is therefore responsible for it.

December 21, 1889. GALT, C. J.:—

As a difference of opinion exists as to the mode of procedure in cases like the present (although in the present instance it does not affect the right of the parties) I deem it expedient to express my opinion. The charge upon which the defendant Massie directed the arrest of the plaintiff was for an infringement of Rule 201 of the rules and regulations made by the inspector of prisons, which enacts that any officer or employee who shall bring into the prison any tobacco to any prisoner "shall be at once dismissed, and criminally prosecuted."

Rule 219 provides that "all officers, foremen, inspectors, or other employees of the contractors who may under the regulations be permitted to enter the prison workshops or yard, must strictly conform to all rules and regulations laid down for the guidance of guards or employees of the prison, and any infraction of such rules and regulations will be promptly dealt with."

These rules were made under the provisions of ch. 217 R. S. O. sec. 6, which have been fully set out in the judgment of my brother ROSE. It is manifest the inspector has no power to make any rules except as regards persons employed in the prison.

It is also clearly stated in the rules that persons employed by a contractor are to be subject to those rules, and such rules having been approved by the Lieutenant-Governor in Council are binding on the warden.

By sec. 21, of R. S. O. ch. 217, 1877; R. S. O. ch. 238, 1887, sec. 23, "The warden of the Central Prison shall reside within such prison, and shall be the chief executive officer of the same under the direction of the inspector, and as such shall have the entire executive control and manage-

ment of all its affairs, subject to the rules, regulations and written instructions from time to time duly made by the inspector, and approved by the Lieutenant-Governor in Council, and he shall be held responsible for the faithful and efficient administration of the offices of every department of the institution."

Judgment. Galt, C. J.

It was therefore his duty to proceed against the plaintiff, who had been beyond question guilty of an infraction of Rule 201.

Mr. McGillivray, however, contended that as under sec. 28 of R. S. O. ch. 238, a specific pecuniary penalty was imposed no other proceedings could be taken than those therein mentioned, and therefore the arrest of the plaintiff was illegal.

I cannot agree with this contention for this reason, the section in question embraces *all* persons whether they were officers of the prison or not, and had the defendant not been in the employment of one of the contractors, beyond question he would have been liable under this section; but as he was in such employment, he was not only liable under it, but was also liable to punishment under the rule. The punishment by the rule has no reference to any pecuniary penalty, it enacts that a person guilty shall be at once dismissed and criminally prosecuted.

The statute has reference to all persons, and enacts a penalty. The rule refers to only one class of persons, and would have no application to any persons who do not come within its provisions. To give effect to Mr. McGillivray's contention, would be to hold that there was no greater control over persons admitted to the prison and to the supervision of the labour of the prisoners, than over the public generally.

I am, therefore, of opinion that if Massie directed the arrest of the plaintiff, he was justified in so doing.

As respects the manner in which the plaintiff was treated after his arrest by defendant McGrath, I fully concur in the judgment of my brother ROSE.

Judgment. Rose, J.

Rose, J. :—

As to the question of the breach of prison rules being indictable at common law, it is necessary to understand clearly what was done.

As stated, the rules were made under the provisions of sec. 6 of R. S. O., 1877, ch. 217. That section is as follows:

"6. The said inspector shall have power, and it shall be his duty, to make rules and regulations for the management, discipline and police of the Central Prison, and for fixing and prescribing the duties and conduct of the warden and every other officer or servant employed therein, * * but no such rule or regulation shall have any effect until and unless it is first approved of by the Lieutenant-Governor in Council."

Rules were made and approved of by the Lieutenant-Governor in Council. Among them were the rules in question, viz., 201 and 219.

Rule 201, provided "That any officer or employee who shall knowingly bring in or carry out, or endeavour to bring in or carry out, or knowingly allow to be brought in or carried out, to or from any prisoner, any money, clothing, provision, tobacco, letters, papers or other articles whatsoever, shall at once be dismissed and criminally prosecuted."

Rule 219, provided that "All officers, foremen, instructors, or other employees of the contractors who may, under the regulations, be permitted to enter the prison, workshops or yard, must strictly conform to all rules and regulations laid down for the guidance of guards or employees of the prison; and any infraction of such rules and regulations by the employees of contractors, will be promptly dealt with."

The plaintiff was at the time of the committing of the grievances complained of, a workman in the prison, in the employ of one Brandon, a contractor, and therefore made by Rule 219 subject to the provision of Rule 201.

And first, did section 6 authorize the passing of Rules 201 and 219?

I cannot doubt that the words: "to make rules and regulations for the management, discipline and police of the said Central Prison," are quite wide enough to cover the rules in question. Judgment. Rose, J.

The word "police," is a word of the most comprehensive signification. It is dealt with most fully in Tomlin's Law Dictionary, from which I make the following extract.

"Police, [not improbably from Πολις, a city.] The term public police and economy, is applied by Blackstone to signify the due regulation and domestic order of the kingdom but is more generally applied to the internal regulations of larger cities and towns, particularly of the metropolis; whereby the individuals of the State, generally speaking, or of any town or city within itself, *like members of a well governed family, are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners, and to be decent, industrious, and inoffensive in their respective situations.*"

It apparently has been deemed necessary for the management, discipline and police of the prison, that these rules should be made; and, in my judgment, they were well warranted by the statute.

Then such rules having been made, and the plaintiff having made himself subject to them, by taking employment in the prison under the contractor, was a breach of them, or of Rule 201, an offence indictable at common law?

Rex v. *Harris*, 4 T. R. 202, at p. 205, is I think decisive of that question. I quote from Lord Kenyon, C. J.'s judgment: "So here, this statute gave authority to the King in council to make the order in question; and the disobeying it becomes an indictable offence at common law."

The cases are collected in Wilberforce on Statute Law, at p. 70, where *Regina* v. *Walker*, L. R. 10 Q. B. 355, is referred to. That was a case where there had been disobedience of an order of commissioners under the statute, and the disobedience was held to be a misdemeanor.

Lush, J., said, at p. 358: "An order made under a power given in a statute is the same thing as if the statute enac-

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ted what the order directs or forbids; the statute delegates to others, here the commissioners, the power to say what shall or shall not be done."

But it is said that the disobedience of the rules in question is not punishable by indictment because of the provisions of sec. 27 of the same Act. (R. S. O. 1877 ch. 217.)

That section is as follows: "No spirituous or fermented liquors shall, on any pretence whatever, be brought into the Central Prison for the use of any officer or person in the institution, except the warden, or for the use of any convict confined therein (except under the rules of the institution); and any person giving any spirituous or fermented liquors, or tobacco, or snuff, or cigars, to any convict (except under the rules of the institution), or conveying the same to any such convict, shall forfeit and pay the sum of forty dollars to the warden, to be by him recovered for the use of the prison, in any Court of competent jurisdiction."

Rex v. *Robinson*, 2 Burr. 799, is relied on as shewing that because the section provides a penalty the remedy by indictment is taken away.

It is to be observed that the Rule 201, provides for dismissal from employment; the sec. 27 for forfeiture of a penalty. The words "and criminally prosecuted" in the rule add nothing, unless criminal prosecution can be maintained. The words are not impotent, if an indictment be either for disobedience of the rule or the section.

In *Rex* v. *Robinson*, 2 Burr. 799, the defendant was indicted for disobeying an order of maintenance of grandchildren.

The statute 43 Eliz. ch. 2, sec. 7, enacts, that fathers, grandfathers, &c., shall maintain their children and grandchildren, &c., in such manner as the justices shall direct; and it annexes a penalty of £20 per month, to be recovered in a summary way, by distress, &c., under the 11th section.

The Court, at p. 804, held the offence to be indictable, for the reason that "*a remedy existed before the statute of 43 Eliz., for disobedience of an order of sessions is an offence indictable at common law.*"

So here a remedy existed before the passing of ch. 217, for disobedience of "an order made under a power given in a statute," is an offence indictable at common law. Judgment. Rose, J.

Again, in *Rex* v. *Robinson*, Lord Mansfield said: "Here, the relief is to be assessed and directed by order of sessions; and a particular proceeding, in a summary way, is prescribed by the Act, as a particular sanction and method of punishment, in case of failure. But it is to be presumed, that the Legislature then knew and considered 'that disobedience to an order of sessions was an offence indictable at common law.' So that they must have intended that there should be, and there actually are, two remedies in the present case; one to proceed by way of indictment for disobeying the order, where the weekly payment is neglected or refused to be made; the other to distrain for the twenty shillings penalty after the expiration of the month."

It will be observed that, in that case the offence was created and a mode of punishment provided by the same section; and yet as the common law method of an indictment had not been taken away in express terms it continued, although the result was a cumulative punishment.

In my best judgment, *Regina* v. *Robinson* is a strong authority in favour of the defendants; for, if I am correct in my view that the order or rule made by the inspector was authorized by the statute, then disobedience to it was indictable at common law; and when the Legislature provided that an offence of the same character should make the offender liable to a penalty, it must be taken to have intended that as cumulative, for the rule passed pursuant to the statute must be read as part of the Act, and so as if it and section 27 were found in the same statute. See also *Rex* v. *Harris*, 4 T. R. 202.

It seems to me that Lord Mansfield made it clear by his illustration as to keeping an ale house without license, which was held not indictable, because it was no offence at common law, and the statute which makes it an offence has made it punishable in another manner.

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Rose, J.

That is, in *Rex* v. *Robinson*, it was enacted that disobedience to the order of sessions should make the offender subject to a penalty, which disobedience was also, prior to the statute, punishable by indictment at common law, while in the ale house case the penalty was incurred for an offence not punishable by indictment at common law.

So here the penalty of $40 is incurred for disobedience to the statute, while for disobedience to the rule, dismissal from employment is the penalty; and disobedience to the rule also renders the offender liable to indictment.

It comes to this, either there was no power to make a rule subjecting the offender to dismissal, or the disobedience to the rule is punishable by indictment.

Perhaps after all it does not much matter if, as my learned brother MacMahon thinks, that the disobedience to the section 27 renders the offender subject to indictment, as the result would be the same whether indicted for disobedience to the rule or the statute.

I agree to what my learned brother MACMAHON has said as to the other grounds argued, and as to the disposition of the motions.

MACMAHON, J.:—

The facts necessary to an understanding of the case are so succinctly set out in the judgment of my learned brother Rose, at the trial, and the reasons assigned for his judgment are so clearly stated therein that I deem it advisable to set out his judgment in full, which is as follows. [The learned Judge then set out the judgment of ROSE, J., at the trial, ante p. 586]:

What was urged by counsel for the plaintiff was, that as sec. 28 of R. S. O. ch. 238, (1887) prescribed that for a violation of the provisions thereof by conveying tobacco, &c., to any convict confined in the Central Prison a penalty of $40 is imposed, which could be recovered by the warden in any Court of competent jurisdiction, and that that was the only penalty, the plaintiff should not have been placed under arrest by Mr. Massie for an indictable misdemeanor.

Judgment. MacMahon, J.

After the best consideration I have been able to give to the question, I think that the contention of plaintiff's counsel as to that is correct.

The 6th sec. of ch. 238 provides that "the said inspector" (of prisons) "shall have power, and it shall be his duty, to make rules for the management, discipline and police of the said Central Prison, and for fixing and prescribing the duties and conduct of the warden and every other officer, or servant employed therein, and for the * * correction, punishment and reward of persons confined therein," &c.

Rule 201 made by the inspector, and put in at the trial provides that: "Any officer or employee who shall knowingly bring in or carry out, or endeavour to bring in * * any * * tobacco * * shall be at once dismissed and criminally prosecuted."

It was under the authority of the above rule, made by virtue of the power assumed to have been conferred by sec. 6 of the Act, that the arrest of the plaintiff was ordered. But for the reasons I shall presently state I think no power was conferred by sec. 6 to make the rule promulgated by the inspector.

Rex v. *Harris*, 4 T. R. 202, and *Rex* v. *Robinson*, 2 Burr. 799, referred to in the judgment of my learned brother ROSE, are the authorities upon which he relied in holding that the plaintiff was liable to prosecution as for a misdemeanor at common law.

By the 26 Geo. III., ch. 6, sec. 1, it is enacted that all persons going on board ships coming from infected places shall obey such orders as the King in Council shall make, without annexing any particular punishment. And it was held in *Rex* v. *Harris*, that the disobedience of an order issued by the King in Council under that Act was an indictable offence and punishable as a misdemeanor at common law.

The foundation for the decision in *Rex* v. *Harris*, rested on the judgment in *Rex* v. *Robinson*, 2 Burr 799, where there is a lengthened argument of counsel on the point involved in the case; and in the judgment of Lord Mans-

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field, all the authorities up to that date, (1759), appear to have been considered.

Lord Kenyon, in *Rex* v. *Harris*, 4 T. R. 202 at p. 205, gives the following short conspectus of the case in 2 Burr. 799: "In *Rex* v. *Robinson*, the defendant was indicted for disobeying an order of maintenance of his grand-children. The statute 43 Eliz. ch. 2, sec. 7, enacts 'that fathers, grandfathers, &c., shall maintain their children and grand-children, &c., in such manner as the justices shall direct'; and it annexes the penalty of £20 per month, to be recovered in a summary manner by distress, &c., under the 11th section. The prosecutor in that case, however, thought proper to prefer an indictment for disobeying an order of the justices made upon him; and, after verdict, a motion was made in arrest of judgment, which was argued very ably, on the ground that, as the Act of Parliament had annexed a specific punishment, and prescribed a particular mode of proceeding, it was not an indictable offence. But the Court, after great deliberation, were clearly of opinion that, as the Act of Parliament had given the justices power to make the order, the breach of it was indictable as a misdemeanor at common law." He then proceeds: "So here this statute gave authority to the King in council to make the order in question; and the disobeying of it becomes an indictable offence at common law."

Grose, J., in giving judgment said, at p. 206: "The Act of Parliament having given power to the King in Council to make the order in question, and not having annexed any specific punishment to the disobedience of it, it is undoubtedly a common law offence, and must be punished accordingly."

Lord Mansfield, in giving the judgment of the Court in *Rex* v. *Robinson*, 2 Burr. at p. 803, said: "The rule is certain 'that where a statute creates a new offence, by prohibiting and making unlawful anything which was lawful before; and appoints a specific remedy against such new offence, (not antecedently unlawful), by a particular sanction

and particular method of proceeding, that particular method of proceeding must be pursued, and no other'; and this is the resolution in *Castles Case*, Cro. Jac. 643. But where the offence was antecedently punishable by a common law proceeding, and a statute prescribes a particular remedy by a summary proceeding: there, either method may be pursued, and the prosecutor is at liberty to proceed either at common law or in the method prescribed by statute, because there the sanction is cumulative, and does not exclude the common law punishment. * * So, in the present case, a remedy existed before the statute of 43 Eliz., for disobedience to an order of sessions is an offence indictable at common law. * * So that * * there actually are two remedies in the present case; one to proceed by way of indictment for disobeying the order, where the weekly payment is neglected or refused to be made; the other to distrain for the twenty shillings penalty after the expiration of the month."

Judgment. MacMahon, J.

The judgment in that case that an indictment would lie proceeded on the ground that the common law remedy existed for disobedience of an order of sessions prior to 43 Eliz., although the 43 Eliz. pointed out a particular punishment by fine, and a method for the recovery of the penalty inflicted.

In *Rex* v. *Harris*, the Act itself made no provision for punishment, but provided for the King in Council making such orders as were deemed advisable for carrying out and enforcing the provisions of the Act. And it was for a violation of the order so made that the offence of the defendant Harris was held punishable by a common law proceeding.

In the case we are considering, a new offence is created by the 28th section of the Act to which a money penalty is attached, and the method is pointed out how the penalty is to be recovered, and this amount when recovered applied.

The offence is created and the penalty completely provided for by that section, so there was no hiatus to be

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filled in order to render the enactment complete; and it is that which creates the marked difference between the section in our Act and the 26 Geo. III., under which *Rex* v. *Harris* was decided, where it required the order of the King in Council to create an offence.

In my opinion (although I would have expressed it with much greater confidence, but for the view entertained by my brother ROSE,) no power or authority is conferred upon the inspector by section 6 to make a rule which could interfere with the provisions of section 28, or which could cause an offence to be created indictable as a misdemeanor at common law.

By section 6, the power conferred upon the inspector is, I conceive, limited, and confined to making regulations for the management of the prison, and prescribing the duties of the warden, and officers, and servants, and for the correction, punishment and reward of prisoners confined therein; and such power in no way includes the authority to make that portion of Rule 201 creating the offence, which the plaintiff was attempting to commit when arrested, an indictable one.

By section 25 of R. S. C., ch. 173, "Every wilful violation of any Act of the Parliament of Canada or of the Legislature of any Province of Canada, which is not made an offence of some other kind, shall be a misdemeanor, and punishable accordingly."

The offence created by section 28 of R. S. O. ch. 238, "is not made an offence of some other kind," and so is an indictable misdemeanor, and the plaintiff could have been prosecuted under an indictment.

The plaintiff was arrested in the act of conveying tobacco to one Berry, a convict, confined in the Central Prison, and Mr. Massie, the warden, ordered McGrath to take him into custody.

The learned trial Judge has referred to the authorities governing this case, where a constable is guilty of excess in handcuffing a prisoner whom he has arrested.

In Burn's, Justice of the Peace (30th ed.,) at p. 1137, under

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MacMahon, J.

the title of "Warrant of Apprehension," the author thus summarizes the law: "The party arrested should not be treated with any unnecessary harshness, beyond what is actually necessary for his safe custody; and therefore it has been held that a constable has no right to handcuff a person whom he has apprehended on suspicion of felony, unless he have attempted to escape, or it be necessary to prevent him from escaping: *Wright* v. *Court*, 4 B. & C. 496, 6 D. & R. 623." See also *Griffin* v. *Coleman*, 4 H. & N. 265.

The defendant Massie was justified in ordering the plaintiff's arrest, he being caught by Massie and McGrath in the act.

It is not found as a fact, nor do I think it could be found consistently with the evidence, that Massie ordered McGrath to handcuff the plaintiff upon his arrest. If no instructions were given by Massie as to the handcuffing, then what was done by McGrath in handcuffing the plaintiff, was done by him in his capacity as a police officer, and "one is not answerable for acts done upon the information or suggestion by an officer of the law, if they are done not as merely ministerial acts, but in the exercise of the officer's proper authority or discretion:" Pollock on Torts, 191.

The result is, that the defendant McGrath's motion to set aside the plaintiff's judgment against him, will be dismissed with costs; and the plaintiff's motion to set aside the judgment in favour of the defendant Massie, is dismissed with costs.

[COMMON PLEAS DIVISION.]

WATT v. CLARK.

Malicious prosecution—Right of defendant to prove plaintiff guilty of the criminal charge laid.

In an action for malicious prosecution the claim which was put in issue was that defendant did on a certain day charge plaintiff with having on two or three occasions committed wilful perjury.

The learned Judge at the trial ruled that the defendant could not go into evidence to contradict plaintiff on his statement as to the perjury, or to establish the truth of the facts desired to be set up:—

Held, that the ruling without qualification was too broad; for though a defendant in an action for malicious prosecution is not bound to prove the plaintiff's guilt as charged in the criminal proceedings, still he is at liberty to do so if it be necessary to establish reasonable and probable cause.

Quære, as to the onus being on the plaintiff to establish his innocence.

Statement. THIS was an action for malicious prosecution brought by the plaintiff against the defendant.

The cause was tried before STREET, J., and a jury, at Chatham, at the Spring Assizes of 1889.

The defendant procured four several indictments for perjury to be sent before the grand jury at Chatham, all of which were ignored by them.

The jury found a verdict in favour of the plaintiff, and judgment was entered in his favour.

In Easter Sittings, 1889, a motion was made to set aside the judgment, and for a new trial among other grounds on those set out in the judgment of ROSE, J.

In Michaelmas Sittings, 1889, the defendant in person supported the motion.

Pegley, contra.

December 21, 1889. ROSE, J.—

It was made clear at the hearing of the motion that we could not interfere on what I may call the general merits.

But the defendant pressed upon us that the first claim in the statement of claim was founded on a prosecution that

began on the 8th December, and which had not been determined. Reference to the evidence and the charge of my brother Street shews however that the plaintiff was committed on such charge, and that the charge was for alleged perjury in respect of which one of the bills was ignored. Judgment. Rose, J.

This objection fails.

The further objection that I desired to consider was, that evidence was rejected improperly.

The ruling complained of was as follows:

"His Lordship.—I do not understand that; you are confining yourself to a cross-examination of the plaintiff upon his statement that he did not commit this perjury: that is what you are cross-examining him about.

Mr. Arnold.—Certainly.

His Lordship.—Under these pleadings you cannot go into evidence to show the truth; under these pleadings you would be bound by his statement, that is to say, you cannot produce evidence yourself to contradict him upon these pleadings or to establish the truth of the facts that you want to set up. However, in the meantime, you can go on with your examination. He has denied that he committed the perjury, and you have a right to cross-examine him upon that statement."

In my opinion this ruling, without qualification, is too broad.

The statement of claim was put in issue, and the defence specifically set up was absence of malice, and the existence of reasonable and probable cause. No doubt a defendant, in a malicious prosecution, is not bound to prove the guilt of the plaintiff as charged in the criminal prosecution; but if it is necessary to do so to establish reasonable and probable cause, he is quite at liberty to prove it.

The defence might in fact be "you were guilty; I knew it, and acted upon my knowledge, and such knowledge afforded reasonable and probable cause."

Indeed, Bowen, L. J., in *Abrath* v. *North Eastern R. W. Co.*, as reported in 11 Q. B. D. C. A. 440, at p. 455, goes much further, and says:

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Rose, J.

"This action is for malicious prosecution, and in an action for malicious prosecution the plaintiff has to prove, *first, that he was innocent* and that his innocence was pronounced by the tribunal before which the accusation was made; secondly, that there was a want of reasonable and probable cause for the prosecution * * and lastly," malice.

This case is very fully referred to and commented on in "The Law Relating to Actions for Malicious Prosecution, by Herbert Stephen (1888)." In a foot note to p. 108, the learned author states that he does not know of any other authority for this proposition.

Certainly there is no dissent from that view by any of the learned Judges in that case, and I am not sure that Brett, M.R., does not say substantively the same thing, for at p. 448, he says: "It is not enough for the plaintiff to shew, in order to support the claim which he has made, that he was innocent of the charge upon which he was tried; he has to shew that the prosecution was instituted against him by the defendants without any reasonable or probable cause."

Again, on p. 449, "And I wholly differ from the suggestion that it is sufficient for the plaintiff to shew that he was innocent of conspiracy and that in the end there was no substantial ground for charging him with conspiracy."

In the House of Lords 11 App. Cas. 247, no comment is made on this proposition; but on the contrary the Lords approve of the law as laid down by the Lord Justices of the Court of Appeal.

It is not necessary in this case to pronounce any opinion as to whether such onus lay upon the plaintiff, but I would venture to suggest that at any rate in view of the above expression of opinion, wide latitude should be allowed to a defendant in proving reasonable and probable cause.

The law is thus summarized in the Blackstone edition of Taylor on Evidence, 8th ed., sec. 1667: "The record is conclusive evidence for the plaintiff to establish the fact of acquittal, although the parties are necessarily not the same in the action as in the indictment; but it is no evidence

Judgment.

Rose, J.

whatever, that the defendant was the prosecutor, even though his name appears on the back of the bill, or of his malice, or of want of probable cause; and the defendant, notwithstanding the verdict, is still at liberty to prove the plaintiff's guilt."

If I were convinced that the defendant had been prevented from adducing evidence in this case by reason of the ruling complained of, which evidence would have gone to shew the truth of the charges of perjury as establishing reasonable and probable cause, I should have been for granting a new trial; but I find that in the defence two witnesses were called to establish that the plaintiff had in fact stated that he would put Clark to as much costs as he could—the denial of such statement having been charged as perjury in one of the indictments, and this evidence was admitted without objection, and the defendant's counsel must therefore have known that similar evidence, or evidence on a similar principle, would also be admitted, and must have refrained from tendering it for some good reason.

I therefore think the motion must be dismissed with costs.

My brother Osler has favored me with a perusal of the manuscript judgment of the C. P. Division in the case of *Vanderburg* v. *Besley*, decided in September, 1879, in which reference is made to the case of *Shrosbery* v. *Osmaston*, 37 L. T. N. S. 792, and which will repay perusal.

GALT, C. J., concurred in dismissing the motion.

MACMAHON, J., concurred with ROSE, J.

[CHANCERY DIVISION.]

IN THE MATTER OF ROMAN CATHOLIC SEPARATE SCHOOLS.

Public schools—Separate schools—R. S. O. (1887) ch. 225, sec. 120, subsec. 2—ib., ch. 227, sec. 40.

Held, that if the assessor is satisfied with the primâ facie evidence of the statements made by or on behalf of any ratepayer, that he is a Roman Catholic pursuant to R. S. O. (1887) ch. 225, sec. 120, subsec. 2, and thereupon (asking and having no other information) places such person upon the assessment roll as a separate school supporter, this ratepayer, though he may not, by himself or his agent, give notice in writing pursuant to R. S. O. (1887) ch. 227, sec. 40, may be entitled to exemption from the payment of rates for public school purposes, he being in the case supposed assessed as a supporter to Roman Catholic separate schools.

Held, also, that the Court of Revision has jurisdiction, under R. S. O. (1887) ch. 225, sec. 120, subsec. 3, on application of the person assessed, or of any municipal elector (or ratepayer, as under R. S. O. (1887) ch. 227, sec. 48, subsec. 3), to hear and determine complaints, (*a*) in regard to the religion of the person placed on the roll as Protestant or Roman Catholic, and (*b*) as to whether such person is or is not a supporter of public or separate schools within the meaning of the provisions of law in that behalf, and (*c*), which appears to be involved in (*b*), where such person has been placed in the wrong column of the assessment roll for the purposes of the school tax.

It is also competent for the Court of Revision to determine whether the claim of any person wrongfully omitted from the proper column of the assessment roll, should be inserted therein upon the complaint of the person himself, or of any elector (or ratepayer).

Held, also, that the assessor is not bound to accept the statements of, or made on behalf of, any ratepayer under R. S. O. (1887) ch. 225, sec. 120, subsec. 2, in case he is made aware, or ascertains before completing his roll, that such ratepayer is not a Roman Catholic, or has not given the notice required by sec. 40 of R. S. O. (1887) ch. 227, or is for any reason not entitled to exemption from public school rates.

Held, also, that a ratepayer, not a Roman Catholic, being wrongfully assessed as a Roman Catholic and supporter of separate schools, who through inadvertence or other cause does not appeal therefrom, is not estopped (nor are other ratepayers) from claiming with reference to the assessment of the following or future years, that he is not a Roman Catholic.

Held, lastly, that a ratepayer, being a Roman Catholic, and appearing in the assessment roll as such and as a supporter of separate schools, who has not given the notice required by R. S. O. (1887) ch. 227, sec. 40, is not (nor are other ratepayers) estopped from claiming, in the following or future year, that he should not be placed as a supporter of separate schools with reference to the assessment of such year, although he has not given notice of withdrawal mentioned in R. S. O. (1887) ch. 227, sec. 47.

Statement. THIS was a case submitted to the Chancellor by the Minister of Education, in pursuance of the Public Schools Act of Ontario, R. S. O. 1887, ch. 225, whereby the

following questions were submitted, and argued before the Divisional Court of the Chancery Division. Statement.

FIRST QUESTION.

Section 120 (1) of the Public Schools Act provides :

"The assessor or assessors of every municipality shall set down the religion of the person taxable, distinguishing between Protestant and Roman Catholic, and whether supporters of Public or Separate Schools."

Section 120 (2) of the same Act provides :

"The assessor shall accept the statement of, (or made on behalf of) any ratepayer, that he is a Roman Catholic, as sufficient primâ facie evidence for placing such person in the proper column of the assessment roll for Separate School supporters, or if the assessor knows personally any ratepayer to be a Roman Catholic, this shall also be sufficient for placing him in such last mentioned column."

The Separate Schools Act, R. S. O., 1887, ch. 227, sec. 40, provides :

"Every person paying rates, whether as proprietor or tenant, who, by himself, (or his agent), on or before the first day of March in any year, gives to the clerk of the municipality notice in writing that he is a Roman Catholic, and supporter of a Separate School situated in the municipality or in a municipality contiguous thereto, shall be exempted from the payment of all rates imposed for the support of Public Schools, and of Public School libraries, or for the purchase of land or erection of buildings for Public School purposes, within the city, town, incorporated village, or section in which he resides for the then current year, and every subsequent year thereafter, while he continues a supporter of a separate school ; and the notice shall not be required to be renewed annually."

QUESTION.

Is or is not a ratepayer, who has not, by himself or his agent, given notice in accordance with the last foregoing section, entitled to exemption from the payment of rates imposed for the support of Public Schools or for other Public School purposes, as in that section mentioned ?

SECOND QUESTION.

Is it or is it not open to the Court of Revision of the municipality, under section 120 (3) of the Public Schools Act, on the complaint of a person placed by the assessor in the column of the assessment roll for Separate School Supporters;

Or, on the complaint of any other person being an elector, to try and determine complaints in regard to

(*a*) The religion of the person placed by the assessor on the roll as taxable as Protestant or Roman Catholic ;

(*b*) Whether such person is a supporter of Public Schools or of Separate Schools within the meaning of the provisions of the law in that behalf ?

THIRD QUESTION.

Is or is not the assessor bound to accept the statement of, or made on behalf of any ratepayer under section 120 (2) of the Public Schools Act in

Statement.

case he is made aware or ascertains before completing his Roll that such ratepayer is not a Roman Catholic, or has not given the notice required by section 40 of the Separate Schools Act, or is for any reason not entitled to exemption from Public School rates?

FOURTH QUESTION.

1. In case a ratepayer, not being a Roman Catholic, is in any year wrongfully assessed as a Roman Catholic and supporter of Separate Schools, and through inadvertence or other cause did not appeal therefrom: Is he or is he not estopped from claiming in such following or future year with reference to the assessment of such year, that he is not a Roman Catholic.

2. Or, is a ratepayer, being a Roman Catholic and appearing on the assessment roll as a Roman Catholic and supporter of Separate Schools, although he had not given the notice under sec. 40 of the Separate Schools Act, and not having given the notice of withdrawal mentioned in sec. 47 of the Separate Schools Act: Is he or is he not estopped from claiming in such following or future year that he should not be placed as a supporter of Separate Schools with reference to the assessment of such year, although he had not given the said notice of withdrawal.

Under the circumstances stated in either of the last two paragraphs, if the ratepayer himself is estopped, are or are not the other ratepayers of the municipality estopped also, and without remedy by appeal in such following or future year?

The case came on for argument upon December 13th, 1889, before BOYD, C., and ROBERTSON, J.

Moss, Q.C., and *Dr. O'Sullivan*, appeared respectively in support of the opposing contentions.

Moss, Q.C.—The case has to do with R. S. O., 1887, ch. 227, especially sec. 48, which is similar to *ib.* ch. 225, sec. 120, subsec. 2. The questions arise principally between people who claim to be supporters of Roman Catholic Separate Schools, and assessors and collectors of rates. As to the course of legislation—there was an Act, 18 Vic. ch. 131, (1855), with reference to the formation of Separate Schools, but it is embodied substantially in C. S. U. C., ch. 65, which seems as far back as it is necessary to go to see what the position of Separate Schools was at that time. Secs. 18 to 36 of that Act provided for the formation of Roman Catholic Separate Schools, and provided for the mode in which such Schools

were to be created and formed within the various municipalities in the Province and for the election of trustees. Argument.

Then inasmuch as *primâ facie* every ratepayer was liable to pay the rates for the Public Schools, it is provided for the manner in which supporters of these Separate Schools (sec. 29) should protect themselves from liability for the Public Schools; sec. 30 provides in furtherance of the same object, the clerk of the municipality gives a certificate; sec. 31 provides against a fraudulent claim for exemption. This was the primary provision for exemption from Public School rates, and provided for giving an annual notice, and that the effect of the notice should only be to exempt for one year.

The next provision was in 26 Vict. ch. 5, (1863), and came into effect after December 31st, 1863. By sec. 14 of that Act the provision as to persons paying rates giving notice was continued, but the notice is not required to be given annually as theretofore. It is further provided that it should be the trustees' duty to transmit to the clerk of the municipality a correct list of the supporters of the Separate Schools.

[ROBERTSON, J.: Is there not a subsequent provision enabling a supporter of a Separate School to withdraw from being such?]

Yes, in the Act I am considering there is such a provision: sec. 18 of this Act provides for such withdrawal.

In addition then to changes as to the manner of giving the notice, and the effect of it, there was this change as to the trustees' duty to transmit a correct list to the clerk, thus giving him a check on the notices received by him claiming exemption. This was to prevent people escaping from paying any rates at all for either set of schools.

This, in 1863, is the first appearance of such provision. The penalty for fraudulent notice is also continued right down to the present time.

The clerk then would examine the notices received claiming exemption, and compare them with the trustees' list, and put on the list of Separate School supporters

Argument.

those on the trustees' list who had given notice and claimed exemption.

[BOYD, C.: But how would the trustees have complete knowledge?]

I do not think there is any express provision. Of course they have access to the collectors' and assessors' rolls.

[BOYD, C.: But this would afford no adequate check.]

Sec. 14 provides that every one not on the trustees' list shall be rated for the Common Schools. This we say was the state of the law under the Act of 1863. The first change after that was made in 1874 by 37 Vic. ch. 28, which consolidated all previous Acts with reference to Public Schools: (22 Vic. ch. 64, being C. S. U. C. c. 64, 23 Vic. ch. 49, 34 Vic. ch. 33). That Act also provided (sec. 46) that the township councils should do certain things, which the next Act amended (40 Vic. ch. 16, O.) so as to affect the matters now under consideration. By sec. 13 of that Act, sec. 46 of the Act of 1874 was amended by inserting sub-secs. 4 *a*, 4 *b*, 4 *c*, 4 *d*, 4 *e*, and amongst other things it was provided that in the assessment roll a distinction should be made between persons as to their religion, and as to whether they were supporters of Separate or Public Schools, and that the clerk of the township, in the collectors' roll, shall distinguish between Public and Separate School rates.

Under these provisions certain duties were imposed: (1) as to the assessor, who for the first time is directed to distinguish in the annual assessment roll between Public and Separate Schools and their supporters, and the Court of Revision is to determine complaints as to persons being wrongfully placed; (2) the clerk of the township is to make out the collectors roll in which further columns are to be put so as to distinguish Public from Separate School rates; (3) the collector is to collect and levy upon the taxable property all sums of money legally imposed thereon in respect to Public and Separate Schools.

[BOYD, C.: Before that these separate rates were levied by the trustees?]

Yes, the Acts of 1859, C. S. U. C. ch. 64, and 1863, 26 Vic. ch. 5, gave them that power.

[BOYD, C.: Had they the right to ascertain on whom to levy, or the municipal functionaries?] Argument.

The latter I think: the trustees looked to them for this. In 1877, 40 Vic. ch. 16, O., these provisions are to some extent substituted for the former mode of proceeding in such matters, but it was made optional for the trustees to avail themselves of these new provisions or not, and if they wished to do so they had to give notice to the clerk of the municipality.

[BOYD, C.: So the Act of 1863 was still in force?]

Yes. Then those provisions in the Acts of 1874, 37 Vic. ch. 28, O., and 1877, 40 Vic. ch. 16, O., were carried into the R. S. O. 1877, ch. 204, sec. 78, sub-secs. 5, 6, 7.

In 1879, 42 Vic. ch. 34 was passed, and was the next enactment dealing with the subject, and by sec. 26 a new provision is made (in sub-sec. 3) as to what the assessor is to do in proceeding to set down persons as Separate or Common School supporters, and as Roman Catholics or Protestants. This is a supplement to the other provisions as to his duty. The statement made by or on behalf of ratepayers as to their being Roman Catholics is to be taken as sufficient *primâ facie* evidence for placing them in the column of Separate Schools. This is a new provision.

[BOYD, C.: Does that Act define how the assessor was to go to work to obtain his information? simply from those in the house?]

I think so; the Act provides for diligent inquiry.

In ch. 206, of R. S. O., 1877, secs. 31, 32, and 33 are re-enactments of the sections as to the giving of the notice in the Act of 1863, 26 Vic. ch. 5, for purposes of exemption, and the duty of the trustees to make up their list. In 1886, by 49 Vic. ch. 46, the Separate School Law is consolidated, and to some extent extended; secs. 31, 32, and 33 of R. S. O., 1877, ch. 206, are re-enacted but the provision left out as to the transmission of lists by the Separate School trustees. Sec. 41 of the Act of 1886 still provides as to the ratepayer giving notice, but omits the provisions as to the trustees furnishing lists to the clerk of the municipality, otherwise the

Argument.

provisions are re-enacted. Sec. 78 of R. S. O. 1877, ch. 204, as to the assessor's duty, is brought into this Act of 1886 by sec. 49. The legislation concludes with R. S. O. 1887, ch. 225, the Public Schools Act, and the Separate Schools Act, *ib.*, ch. 227, in the latter of which secs. 41, 42, 43, and 50 of Act of 1886, 49 Vic. ch. 46 are re-enacted in secs. 40, 41, 42, and 49 of the Act of 1886, in sec. 48.

This being the state of legislation the question arises as to the right of persons claiming exemption from Separate School rates, and as to the powers of the Court of Revision. We say notice is the basis of all exemption from Public School rates, having regard to the above legislation; *primâ facie* all are liable for Public School rates. It has been said in *Re Ridsdale and Brush*, 22 U. C. R. at p. 124, that the Legislature intended the provisions for working the Common Schools to be the rule, and the provisions as to Separate Schools the exception, carved out of the other for the benefit of separatists, per Burns, J., *ad loc. cit.*, and Gwynne, J., in *Harling* v. *Mayville*, 21 C. P. 499, says at p. 511, that he agrees with the above view expressed by Burns, J.; also in *Free* v. *McHugh*, 24 C. P. 13, Hagarty, C. J., at p. 21, says he also accepts the statements of Burns, J., and Gwynne, J., and that it lies on every one claiming exemption to show what takes him out of the general rule. Now there is nothing in any of these statutes to shew any means of exempting yourself as a separatist except the notice. The intention is clear to protect the Public School rate against possibility of any one exempting himself except by taking the statutory steps. The assessor's list or the school trustee's list were under any circumstances nothing but *primâ facie*, and the clerk could always see that a man had not only given notice, but was on the trustee's list. It is not incumbent on any Roman Catholic to support the Separate Schools of Roman Catholics, and under sec. 93 of the B. N. A. Act no Legislature probably could impose any such obligation now. The first question should be answered, that no one is exempt who has not given notice.

As to the second question, with reference to the position of a person before the Court of Revision, under sec. 120 of the Public Schools Act, R. S. O. 1887, ch. 225, or under sec. 48 of ch. 227, the Separate Schools Act, it is surely obvious that the Court can make the assessor's roll as perfect as it can be in respect to this matter of Separate or Public School supporters. The Separate Schools Act gives the appeal to any ratepayer: the Public Schools Act to any elector. Argument.

[BOYD, C.: The question is, whether there is a right of appeal to the Court of Revision by a person other than the one assessed?]

Yes, and whether they can appeal in reference to this matter of the assessor's list, to prevent wrongful entries being made.

Then, as to whether the assessor is bound to accept the statement made by or on behalf of any ratepayer.

[BOYD, C.: He surely should not reject the statement of a man himself that he is a Roman Catholic, because some one makes him aware that he is not. "Making aware" is simply giving warning of an alleged state of facts which may or may not be true. If he ascertains it for a fact it may be different. If "made aware" is to be read as equivalent to "ascertains as a fact," it could be answered with more precision].

I think the last is what is meant, and that in such case the assessor is not bound to accept the statement. Then, as to the notice having been given: is the assessor, if he discovers a person has not given notice, to put him on the list of Separate Schools? I submit not.

[BOYD, C.: There is nothing to make the clerk show what returns he has had from the Roman Catholics, is there?]

I think not, except that I suppose every one is bound as a rule of law to disclose to the assessor any reasonable information he asks for. The clerk gives each person a certificate of exemption.

[BOYD, C.: A man tells the assessor truly that he is a Roman Catholic and supporter of a Separate School, but

Argument.

afterwards changes his mind and fails to give notice thereof to the clerk, then the assessor would be justified in making the alteration in his roll. That is what you would contend ?]

Yes.

As to the fourth question : is a person who by law is a supporter of a Separate School, and is put upon the list by inadvertence, to be dealt with by the assessor in future years as properly upon the roll, though the assessor has learnt of the inadvertence, merely because he has not appealed ? I submit there is no question of estoppel. Acquiescence would not create estoppel unless it has led to the other party being injured. As to the position of a person who has not given the notice of exemption, see *In re Ridsdale and Brush*, 22 U. C. R. 122.

We concede that if a man is rightfully assessed he cannot get out of the liability except by giving the notice of withdrawal. But if wrongfully assessed he can go at once to the Court of Revision and need not wait till the following year to give his notice of withdrawal. He can say, "am I, because I was put on the list wrongfully last year, debarred from at once going before the Court of Revision and shewing the true state of facts ; I cannot be estopped from shewing the true facts, unless my acquiescence last year has put some one in such a position that I cannot be allowed to shew the true facts now."

Any ratepayer has the right, upon giving the proper notices, to come to the Court and have a person's true status put right.

[BOYD, C.: To put an extreme case : a Protestant cannot have himself rated as a supporter of Separate Schools, against the will of the other Protestants.]

Exactly so.

Dr. O'Sullivan : I consider I am here as *amicus curiæ* rather than as representing any one. The Act of 1863, 26 Vic. ch. 5, by the preamble refers to the restoration of certain rights which the Roman Catholics formerly possessed. It was taken from the Act of 1855, 16 Vic. ch. 185, the

Argument.

the C. S. U. C. ch. 65, in which the notice is mentioned, but there is no list of the trustees. In the Act of 1853 the trustees had (16 Vic. ch. 185, sec. 4,) to send in to the local superintendent a correct list. I do not find such a provision in any subsequent Act. I do not think it necessary to consider the Acts before 1853. The Act of 1855, 18 Vic. ch. 131, provides only for the notices to the clerks of the municipality. The Act of 1863, 26 Vic. ch. 5, required the list from the trustees; this, I think, constitutes the restoration of rights referred to in the preamble.

What is a Separate School, and who are its supporters? The Act of 1863 mapped out a radius within which a Separate School might be established, viz., three miles. Now, after you have your geographical area, the next thing is, to find your supporters. Now, it might be supposed all of the denomination within the limit would be *primâ facie* supporters. But I admit it is not so. There are, however, two classes of persons who are by the Act of 1863 Separate School supporters and so liable: viz. (1) those who send their children to the schools; and (2) those who contribute to the schools, which means those who contribute a sum of money which they would have contributed had no Separate Schools existed, viz., the Common School rate.

These schools set out with the patronage of the above two classes,—they are *ipso facto* supporters, however, in every school section.

Sec. 25 of the Act of 1863, 26 Vic. ch. 5, prevents such persons having anything to say as to the Common Schools. Sec. 18 provides for the withdrawal of support,—and having to give notice of withdrawal; it follows that if no notice were given, a Roman Catholic was liable to support both Separate and Common Schools. Under sec. 14, (1) a notice may be given by any ratepayer; and once given, he shall be exempt from Public School rates, provided he be a supporter of Separate Schools; (2) the trustees shall make a list, and unless on the list, a ratepayer shall be liable to pay Common School rates, which seems contradictory to the first provision.

Argument.

The trustees had the register of their schools at their disposal and knew who were their supporters, and so the duty was imposed upon them of sending in their list.

Where the question of notice comes up, I question whether it can apply except to those who are not contributories, and who do not send children to the schools.

There is no clause in the Act of 1863, 26 Vic. ch. 5, exempting those who pay Separate School rates from paying also Common School rates unless it is that one sec. 14. The plain object of sec. 14 was to supply the clerk of the municipality with notice. If a ratepayer's name appears on the trustees' list, he is exempt, not because of the notice but because of the list.

I ask that the statute should be construed as a remedial statute. If the first part of sec. 14 is inconsistent with the second part, the second part would, according to the well known rule, prevail. The intention of the Legislature is best served by making the trustees' list prevail: so that where the ratepayer has not sent in his notice, yet if his name is included in the list sent in by the trustee, that is sufficient. The case *Earl of Derby* v. *Bury Improvement Commissioners*, L. R. 4 Exch. 222, is on an analogous question to that arising in sec. 14.

The list sent in by the trustees again was an annual list. The ratepayers' notice was for one year. The trustees' list is therefore more valuable, for it is supplied every year. In the Act of 1863, 26 Vic. ch. 5, sec. 14 alone protects Separate School supporters from the Common School trustees, and that continued to 1874, 37 Vic. ch. 28. There is a section there, sec. 193, not to be found in any previous Act. It is the first intimation that Separate School supporters could not be reached by a Public School trustee. That clause, sec. 193, repeals by implication whatever there is inconsistent in the Act of 1863. The law, as in 1863, stood in that condition till 1867, when the B. N. A. Act was passed. By the Act of 1863, the trustees had certain duties and responsibitities, amongst others the provisions as to the list; these they had in 1867, and I submit that no Act of

the Ontario Legislature can relieve them of their duties, or affect their rights. The Act of 1886, 49 Vic. ch. 46, undertakes to repeal all the Separate School law, and I submit it is clearly *ultra vires*. The Act cannot validly transfer the duty of the trustees to the assessors, or their rights, duties, and privileges. Every person who sends his children to Separate Schools is now exempt from Public School rates. In 1877, 40 Vic. ch. 16, O., and 1879, 42 Vic. ch. 34, (O.) the provisions as to assessors were made; and there is no doubt the machinery so provided is binding on the Public Schools, and so far as it does not conflict with the Act of 1863, it is binding on the Separate Schools. A man must have recourse to the machinery of the Act of 1863 before he can divest himself of the character of a Separate School supporter. The notice alone is necessary or sufficient to relieve a ratepayer from his liability as a Separate School supporter. The Legislature may substitute other machinery for that of the Act of 1863, but such machinery must be made subordinate to the unalterable law, so far as the law of 1863 is unalterable. Argument.

From my view of the case, it is not of much account what is the function of the Court of Revision.

[BOYD, C.: You say the starting point is the trustees' list, the other side say it is the assessor's list. There is a radical difference between you].

Moss, in reply. It is plain a consistent reading can be given to sec. 14 of the Act of 1863, 26 Vic. ch. 5, the trustees' list being intended as a check on fraudulent notices. In Hardcastle on Statutes, p. 173, it appears that a subsequent contrarient statute is not to affect a prior one, when it is clear that the prior Act was not intended to be affected. Here, the fact that both parts of sec. 14 were again and again re-enacted, shews a clear intention that one was not intended to defeat the other. A reasonable contention must be given to give the whole section effect. A notice must be given: this shall be followed by a certificate: but in order to enable the clerk to see that no one gets off improperly by a fraudulent notice, the trustees are to furnish a list. There

Argument.

is a point of distinction between payment and rating. If you are not on the trustees' list you shall be rated; but if you produce your certificate you shall not be required to pay. This is the view of Burns, J., in the *Ridsdale Case*, 22 U. C. R. 122. If you want to take yourself out of the general rule you have to comply with all the requisites. Here, he can only take himself out of the general rule by giving the notice. The question is, can he put himself in the position to be exempt from Common School rates unless he has given that notice to the clerk? That provision is still an existing law with reference to exemption.

The case referred to by Dr. O'Sullivan does not touch the point or help the Court with reference to the constitutional question. The Confederation Act does not prevent the Legislature from dealing with Separate Schools: *Board of Trustees of Belleville Separate Schools* v. *Grainger*, 25 Gr. 570. Here, no appeal or protest has been lodged with the Governor-General, as pointed out in that case. There is that special mode of adjusting rights pointed out.

December 23rd, 1889. *Per Curiam*:—

1. If the assessor is satisfied with the *primâ facie* evidence of the statement made by or on behalf of any ratepayer that he is a Roman Catholic, and thereupon (seeking and having no further information) places such person upon the assessment roll as a Separate School supporter—this ratepayer, though he may not by himself or his agent give notice in writing pursuant to sec. 40 of the Separate Schools Act, R. S. O., ch. 227, may be entitled to exemption from the payment of rates for Public School purposes,—he being in the case supposed, assessed as a supporter of Roman Catholic Separate Schools.

2. The Court of Revision has jurisdiction on application of the person assessed, or of any municipal elector [or ratepayer, as in the Separate School Act, R. S. O. 1887, ch. 227, sec. 48, (3)], to hear and determine complaints:

(*a*) In regard to the religion of the person placed on the roll, as Protestant or Roman Catholic, and

(*b*) As to whether such person is or is not a supporter of Public or Separate Schools within the meanings of the provisions of law in that behalf, and

(*c*) [Which appears to be involved in (*b*)] whether such person has been placed in the wrong column of the assessment roll for the purposes of the school tax.

Judgment. *Per Curiam.*

It is also competent for the Court of Revision to determine whether the name of any person wrongfully omitted from the proper column of the assessment roll should be inserted therein upon the complaint of the person himself or of any elector [or ratepayer].

As to the trial of any other fact or particular, under sec. 120 of the Public Schools Act, the answers already given appear to exhaust all facts and particulars thereunder.

3. The assessor is not bound to accept the statement of or made on behalf of any ratepayer under R. S. O. 1887, ch. 225, sec. 120 (2), in case he is made aware or ascertains before completing his roll that such ratepayer is not a Roman Catholic, or has not given the notice required by sec. 40 of the Separate Schools Act, or is for any reason not entitled to exemption from Public School rates.

4. (*A*) A ratepayer, not a Roman Catholic, being wrongfully assessed as a Roman Catholic and supporter of Separate Schools, who through inadvertence or other causes does not appeal therefrom, is not estopped (nor are other ratepayers), from claiming with reference to the assessment of the following or future year, that he is not a Roman Catholic.

4. (*B*) A ratepayer, being a Roman Catholic, and appearing in the assessment roll as a Roman Catholic and supporter of Separate Schools, who has not given the notice in writing of being such supporter, mentioned in sec. 40 of the Separate Schools Act, is not (nor are the other ratepayers) estopped from claiming in the following or future year, that he should not be placed as a supporter of Separate Schools with reference to the assessment of such year, although he has not given notice of withdrawal mentioned in sec. 47 of the Separate Schools Act.

A. H. F. L.

[COMMON PLEAS DIVISION.]

WALTON v. HENRY.

Landlord and tenant—Distress—Damages—Debt—50 Vic. ch. 23, sec. 3, (O.)—O. J. Act—Counter-claim.

The defendant having distrained for rent in arrear, the plaintiff claimed that defendant was indebted to him in damages for breach of the covenants in the lease to repair, and to lease to plaintiff an adjoining piece of land, and obtained *ex parte* an interim injunction restraining proceedings under the distress which was dissolved on the ground of concealment of facts.

Held, that the damages claimed by the plaintiff were not a "debt" within sec. 3 of 50 Vic. ch. 23 (O.), so as to constitute a set-off against the rent; and although under the O. J. Act they might be the subject of counter-claim they would not justify an injunction as against a distress levied as here.

Statement.

THE defendant in April, 1889, leased a farm to the plaintiff, and covenanted to put the buildings in repair; and also covenanted that an adjoining piece of five acres should be used by himself and his family so long as he pleased; but that if he leased it, he would lease it to the plaintiff at $20 per annum. At the time of the lease, one Spurgeon, who had previously been in occupation of the five acres, was in possession and remained in possession for several months thereafter; but the land was cultivated by the defendant. The defendant also made repairs to the buildings, which he alleged, and the plaintiff denied, were in fulfilment of his covenant except those to be done on a barn. The repairs to the barn were agreed to be made before harvest in 1889; and the defendant swore that he ordered lumber in July, and was proceeding to make the repairs to the barn, when he found that they had been done by the plaintiff without notice to him.

Half a year's rent having fallen due, the defendant distrained. The plaintiff served the bailiff on the premises, but before seizure, with a notice under R. S. O. ch. 143, sec. 29, claiming to set off $235 for damages for breach of the covenant referred to; and upon the defendant's refusal to admit the claim, applied for an injunction on affidavits, alleging the distress, and that the defendant was indebted

to the plaintff in the sum of $235 for damages for breach of the covenants to repair and to lease the adjoining five acres to him. An injunction was granted *ex parte* restraining the defendant from proceeding with the distress, and directing the plaintiff to pay the rent into Court. Statement.

The injunction order was drawn up without limiting the time of its operation, and no opportunity was given thereby to the defendant to show cause.

E. D. Armour, for the defendant, moved to dissolve the injunction on affidavits, setting out all the facts, on the ground that it was irregular in being made perpetual, and in not giving a day to show cause; and on the ground of concealment of the true state of facts as to Spurgeon's occupation of the adjoining five acres, and as to the repairing; and on the ground that there was no "debt due" which the plaintiff was entitled to set off against the rent, but a claim for damages only, which would become a debt only should the plaintiff finally succeed and enter judgment therefor; and for an order for payment out of the money paid into Court.

Gordon Hunter, showed cause.

December 21, 1889. MACMAHON, J.:—

[The learned Judge after considering the affidavits and evidence proceeded.]

There was, in the affidavit upon which the order was granted, and in the statements made, if not a misrepresentation, at least a concealment of an important fact in regard to the alleged breach by the defendants of one of the covenants in the lease.

On this ground alone the defendant is entitled to have the injunction dissolved.

As to a part of the damages claimed by the plaintiff for making repairs. If there was a breach of the covenant by the defendant because of non-repair, it was such breach almost at the commencement of the tenancy,

Judgment.

MacMahon, J.

so that could not be considered as a ground for an application for an injunction when the order was made.

In Kerr on Injunctions, 3rd. ed., p. 14, it is stated that one reason why an injunction might be granted, is, where "the injury would be a grievous one, or at least a material one, and not adequately reparable by damages." And at p. 15: "A man who has a full and complete remedy by damages cannot be heard to say that the damage is irreparable."

The whole ground for obtaining an injunction in this case was, to keep the property of the plaintiff in *statu quo*, and released from the landlord's right for rent until damages could be recovered against the latter, by reason of the alleged breach of covenant on his part.

In fact the plaintiff says in effect by the claim endorsed on the writ, that he has a complete remedy by recovering damages.

I do not think the plaintiff's claim is a "debt" within 50 Vic. ch. 23, sec. 3, so as to form the subject of a set-off against the defendant in respect of his rent.

In *Weigall* v. *Waters*, 6 T. R. 488, it was ruled that in an action on covenant for his rent by a landlord, the defendant cannot set-off any uncertain damages that he may be entitled to recover against the landlord on any of the covenants in the lease.

Under the Judicature Act in an action by the landlord on the covenant for the rent the damages resulting to a tenant, by reason of a breach by the landlord of the covenants in the lease, might form a ground of counter-claim. But I am clearly of opinion that a claim by the tenant for damages against the summary remedy of the landlord by distress should not form the ground of an injunction against the latter, after a distress has been levied.

There was no "debt" due the defendant which he could set off within the 50th sec. of the Act of 1887. See *Cockburn* v. *Sylvester*, 1 A. R. 471, which is most conclusive against the defendant's claim being considered a debt.

Judgment.

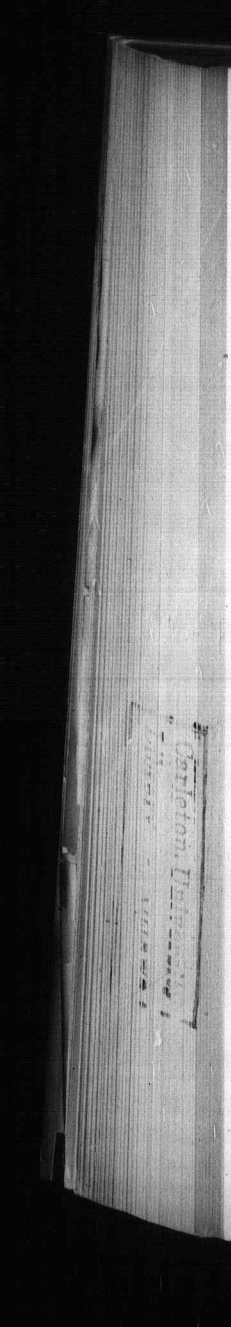
MacMahon, J.

Besides, I think a reference to the form embodied in sub-sec. 2 of sec. 3 of 50 Vic. ch. 23, shews what the Legislature had in view when making use of the word "debt," instead of "claim," or "demand," or "damages."

The first ground is ample in itself to entitle the defendant to have the injunction dissolved, which is ordered with costs.

The defendant is entitled to have the money paid into Court, paid out to his order.

END OF VOL. XVIII.



A DIGEST

OF

ALL THE CASES REPORTED IN THIS VOLUME

BEING DECISIONS IN THE

QUEEN'S BENCH, COMMON PLEAS, AND CHANCERY DIVISIONS.

OF THE

HIGH COURT OF JUSTICE FOR ONTARIO.

ACCEPTANCE.

See SALE OF LAND.

ACKNOWLEDGMENT.

See LIMITATIONS, STATUTES OF, 2, 3.

ACQUIESCENCE.

See LANDLORD AND TENANT, 1.

ACTION.

Remedy by—Mandamus.]—*See* MUNICIPAL CORPORATIONS, 1.

Cause of.]—*See* DIVISION COURTS, 1.

Right of.]—*See* DEFAMATION, 2.

ADMINISTRATORS.

See EXECUTORS AND ADMINISTRATORS.

ALIENATION.

Restraint on.]—*See* WILL, 3.

ANNUITY.

See WILL, 8.

APPEAL.

See VOTERS' LISTS.

ARBITRATION AND AWARD.

1. *Publication, what is—Partnership—Right of arbitrators to declare lien.*]—*Held*, that an award is published (for the purpose of regulating the time for an application to set it aside) when the parties have notice that it may be had on payment of charges. It is not needful that there should be notice of the contents of the award before it can be said to be published.

Arbitrators upon a reference to settle disputes between parties, found the balance due from the firm to one of the partners, and declared in the award that this balance was a lien upon the assets to be paid out of them specifically.

Held, that they had the power to give this direction, and the partner in question had power to sell to satisfy the lien out of the specific property applicable of which he was joint owner. *Redick* v. *Skelton*, 100.

2. *Misconduct of arbitrators — Receiving ex parte statements.*]—Upon a motion to set aside an award on the ground that the arbitrators improperly received statements from one of the parties in the absence of the other:—

Held, that it is not necessary in such a case to impute any intentional impropriety of conduct to the arbitrators, nor to shew that their decision has been in any way influenced by what has occurred; it is only necessary to shew that their minds may possibly have been influenced against the applicant by the communications that have taken place.

And where it appeared that after the close of the evidence and while the arbitrators were considering it, some explanations in regard to an account were given to them by one party to the arbitration in the absence of the other on a certain evening, and that when the arbitrators and the parties all met the next morning, one of the arbitrators said that they had had an explanation about the account, and wanted to know what the other party had to say about it:—

Held, that the award was bad, and must be set aside. *Re Ferris and Eyre et al.*, 395.

See MUNICIPAL CORPORATIONS, 8, 10.

ASSAULT.

See MALICIOUS PROSECUTION.

ASSESSMENT AND TAXES.

1. *Insurance company — Head office and branch office—Meaning of "branch" or "place of business" in Assessment Act—Assessment of income at branch office.*]—The defendants were a life insurance company with their head office at H., in this Province, and transacted business by agents in K., who received applications for insurances which they forwarded to the head office from which all policies issued, ready for delivery: the premiums on same also being collected by the agents in K. In an action by the corporation of the city of K. to recover taxes, assessed against the defendants on income, it was contended that the defendants' only place of business was in H., and that their business was of such a nature that they could not be assessed at K., and that they had elected under R. S. O, ch. 193, sec. 35, sub sec. 2, to be assessed at H. on their whole income.

Held, that the defendants had a branch or place of business at K.

Held, also, that the amount of premiums, received year by year at K. being ascertainable was assessable at that branch or agency as "gross" income. *Corporation of Kingston* v. *Canada Life Assurance Co.*, 18.

(Reversed by the Divisional Court.)

2. *Tax sale—Patented lands advertised and sold as unpatented—Deed—Interest of locatee—R. S. O. ch. 193, secs. 188, 189.*]—Certain patented lands, which were sold for taxes, were described in the advertisement as unpatented, and in the

treasurer's deed as "all that," etc., "being composed of all the right, title, and interest of the lessee, locatee, licensee, or purchaser from the Crown, in and to lot," etc.

Held, that the treasurer by his deed having purported to sell the interest only of a locatee or purchaser from the Crown, the power he exercised was directed to that particular estate only, which, being non-existent, there was nothing that the power could operate upon, and that the deed was invalid.

Semble, the sale was not "fairly conducted," as the advertisement describing the lands as unpatented was of such a character as to damp the sale.

Decision of BOYD, C., affirmed. *Scott* v. *Stuart*, 211.

See COVENANTS FOR TITLE—PUBLIC SCHOOLS, 1, 3.

ASSIGNMENT.

See BANKRUPTCY AND INSOLVENCY.

ATTACHMENT.

Earnings of road.]—*See* RAILWAYS AND RAILWAY COMPANIES, 2.

AWARD.

See ARBITRATION AND AWARD.

BAGGAGE.

Company for carriage of—By-law against soliciting.]—*See* MUNICPAL CORPORATIONS, 4.

BANKRUPTCY AND INSOLVENCY.

1. *Assignment for creditors—Personal estate only—48 Vic. ch. 26, (O.)*]—An assignment for the benefit of creditors though confined in terms to the assignor's personal estate professed to be drawn under 48 Vic. ch. 26, (O.)

Held, that it was nevertheless not within the Act; and this action, being brought by the assignee to set aside a chattel mortgage, must be dismissed.

It is clear that it was intended under the Act to bring all the estate of the assignor into the hands of the assignee for general distribution.

Held, also, that all reference to the real estate having been struck out from the form used for making the assignment, the omission was not a "mistake, defect, or imperfection" within section 10, and capable of amendment under that section. *Blain* v. *Peaker*, 109.

2. *Assignment for the benefit of creditors—Sheriff as assignee—Death of sheriff—R. S. O. ch. 124—Action by judgment creditor—Fraudulent preference.*]—An assignment for the benefit of creditors made to a sheriff under R. S. O. ch. 124, is made to him as a public functionary, and on his death the care and administration of the estate assigned devolves upon his deputy, and thereafter upon his successor in office.

It is not competent to the sheriff to disclaim or decline to act as such assignee.

Where an assignment under the statute had been made to a sheriff, who died shortly after, and proceedings were subsequently taken in their own names by judgment creditors of the assignor to set aside a transfer of property as fraudulent:

Held, that the plaintiffs, suing alone, had no *locus standi* to maintain the action.—*Brown et al.* v. *Grove et al.*, 311.

3. *Fraudulent preference—Sale to defeat creditors — Setting aside—Seduction — Judgment creditor.*]—A person knowing that a claim was to be made against him by the father of a young woman for her seduction, some six days before the writ issued therefor, arranged with his brother, who was aware of all the facts, to sell out to him his estate, receiving for himself $150, the balance to be applied to payment of his liabilities, the intention being not to acknowledge or treat the claim for seduction as a liability. The action for seduction was proceeded with and judgment recovered thereon:

Held, that the father having a cause of action at the time of the transfer, was a person who might become a creditor within the meaning of the statute; and having become a judgment creditor, the sale having been made with intent to defeat his claim, must be set aside.

Barling v. *Bishopp*, 29 Beav. 417, followed.

Ex parte Mercer, 17 Q. B. D. 290, distinguished.—*Cameron* v. *Cusack*, 520.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

Notes as collateral security — Duties of holder—Laches of creditor —Release of principal debtor — Necessity of proving actual injury.]—Where promissory notes of third persons were transferred by the defendant without endorsement as collateral security for a debt due by him to the plaintiff, who now sued the defendant for the amount of the debt, and the defendant raised the objection that the plaintiff had been guilty of laches in proceeding for payment of the collateral notes, and that he had not notified the defendant of their non-payment:—

Held, that if the defendant had been injured by such laches or want of notice, and to the extent to which he had been injured, he should be exonerated from payment, but not otherwise; and that the trial Judge had pushed the law too far against the plaintiff in holding that having found the laches and want of notice as a matter of fact, it was a conclusion of law that detriment had followed to the defendant. *Ryan* v. *McConnell*, 409.

See GIFT, 2—LIMITATIONS, STATUTE OF, 1.

BILLS OF SALE AND CHATTEL MORTGAGES.

See BANKRUPTCY AND INSOLVENCY, 1.

BONDS.

See RAILWAYS AND RAILWAY COMPANIES, 2.

BONUS.

See MUNICIPAL CORPORATIONS, 2.

BUSINESS.

See ASSESSMENT AND TAXES, 1—WILL, 9.

BY-LAW

Not finally passed—Work done under it—Quantum meruit.]—*See* MUNICIPAL CORPORATIONS, 3.

Regulating baggage waggons.]—*See* MUNICIPAL CORPORATIONS, 4.

Invalid by-law—Injunction restraining acting under—Subsequent passing of valid by-law.]—*See* MUNICIPAL CORPORATIONS, 6.

Appointment of High School Board.]—*See* PUBLIC SCHOOLS, 2.

Motion to quash.]—*See* MUNICIPAL CORPORATIONS, 2, 9—JUSTICE OF THE PEACE, 1.

CANADA TEMPERANCE ACT.

1. *Village joined to another county for municipal purposes—Jurisdiction of justices of county within which village is situated—Conviction differing from minute of conviction—Validity of.*]—The defendant was convicted by two justices of the peace of the district of M., for a breach of the second part of the Canada Temperance Act for selling liquor at the village of B., in the district of M. The Act was in force in the village of B. only by reason its being for municipal purposes within the county of V., within which county the Act was in force, and there was no evidence to shew that the Act was in force in the district of M. within which B. was situated.

Held, that the justices of the peace of M. district had no jurisdiction to convict the defendant, for he could only be convicted by justices of the peace whose commission ran into V. county.

The adjudication and minute of conviction did not award distress, but provided that in default of payment forthwith of fine and costs, imprisonment, while the conviction ordered in default of payment forthwith, distress, and in default of sufficient distress, imprisonment.

Held, following *Regina* v. *Brady*, 12 O. R. 358, 360-1, that the conviction was bad. *Regina* v. *Higgins*, 148.

2. *Conviction—Costs of commitment and conveying to jail.*]—A conviction for a breach of the second part of the Canada Temperance Act, imposed a fine of $100, and directed distress on non-payment of the fine, and in default of sufficient distress imprisonment in the common jail for two months unless the fine and costs, including the costs of commitment and conveying to jail, were sooner paid.

Held, there was no power under the Act to include the costs of commitment and conveying to jail; and the conviction was therefore bad, and must be quashed.

The reasoning in *Regina* v. *Tucker*, 16 O. R. 127, and *Regina* v. *Good*, 17 O. R. 725, followed. *Regina* v. *Ferris*, 476.

CARTS.

Licensing.]—*See* JUSTICE OF THE PEACE, 3.

Baggage Waggon.]—*See* MUNICIPAL CORPORATIONS, 4.

CASES.

Adams and Kensington Vestry, In re, 27 Ch. D. 394, specially referred to and followed.]—*See* WILL, 7.

Anderson v. *Canadian Pacific R. W. Co.*, 17 A. R. 747, followed.] *See* MUNICIPAL CORPORATIONS, 5.

Bank of Upper Canada v. *Murphy*, 7 U. C. R. 328, distinguished.]—*See* DIVISION COURTS, 2.

Barling v. *Bishopp*, 29 Beav. 417, followed.]— *See* BANKRUPTCY AND INSOLVENCY, 3.

Cowan v. *O'Connor*, 20 Q. B. D. 640, followed.] — *See* DIVISION COURTS, 1.

Diggles, In re, Gregory v. *Edmondson*, 39 Ch. D. 253, specially referred to.]—*See* WILL, 7.

Hartshorn v. *Early*, 19 C. P. 139, followed.]—*See* INFANT.

Hinton v. *Heather*, 14 M. & W. 131, followed.] — *See* MALICIOUS PROSECUTION, 1.

Hislop v. *McGillivray*, 15 A. R. 687, followed.] — *See* MUNICIPAL CORPORATIONS, 12.

Hynes v. *Smith*, 27 Gr. 150, followed.]—*See* LIEN, 1.

Kehoe v. *Brown*, 13 C. P. 549, observed upon.] — *See* DIVISION COURTS, 2.

Mercer, Ex parte, 17 Q. B. D. 290, distinguished] — *See* BANKRUPTCY AND INSOLVENCY, 3.

Moore v. *Hynes*, 22 U. C. R. 107, distinguished.]—*See* COVENANTS FOR TITLE.

McVean v. *Tiffin*, 13 A. R. 1, followed.]—*See* LIEN, 1.

Newcombe v. *DeRoos*, 2 E. & E. 271, followed.] — *See* DIVISION COURTS, 1.

Regina v. *Bedingfield*, 14 Cox 341, followed.]—*See* CRIMINAL LAW, 2.

Regina v. *Brady*, 12 O. R. 358, 360-1, followed.—*See* CANADA TEMPERANCE ACT, 1.

Regina v. *Goddard*, 15 Cox 7, followed.]—*See* CRIMINAL LAW, 2.

Regina v. *Good*, 17 O. R. 725, followed.] — *See* CANADA TEMPERANCE ACT, 2.

Regina v. *Tucker*, 16 O. R. 127, followed.] — *See* CANADA TEMPERANCE ACT, 2.

Ricket's Case, L. R. 2 H. L. 175, distinguished.]—*See* MUNICIPAL CORPORATIONS, 10.

Slator v. *Brady*, 14 Ir. C. L. R. 61, 342, followed.]—*See* INFANT.

Smith v. *Poole*, 12 Sim. 17, followed.]—*See* LIMITATIONS, STATUTE OF, 2.

Sutton v. *Johnstone*, 1 T. R. 493, distinguished.]—*See* MALICIOUS PROSECUTION, 1.

Thompson v. *Montgomery*, 41 Ch. D. 35, distinguished.]—*See* TRADE MARK.

Trice v. *Robinson*, 16 O. R. 433, distinguished.]—*See* EXECUTORS AND ADMINISTRATORS.

Wanty v. *Robins*, 15 O. R. 470, referred to.]—*See* LIEN, 1.

Re Winstanley, 6 O. R. 315, followed.]—*See* WILL, 3.

CENTRAL PRISON.

See CRIMINAL LAW, 3.

CHATTEL MORTGAGE.

See BANKRUPTCY AND INSOLVENCY, 1.

COLLATERAL SECURITY.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

COMPANY.

See CORPORATIONS.

COMPENSATION.

See MUNICIPAL CORPORATIONS, 10.

CON. RULES.

Rule 418.]—*See* PLEADING.

Rule 867.] — *See* CONTEMPT OF COURT.

Rule 1170.]—*See* INFANT.

CONTEMPT OF COURT.

Order—Solicitor to repay money into Court—Disobedience of—Order for committal—Con. order 867.]—A solicitor in an action had obtained an order for the payment out to him of certain moneys in Court, and upon such order obtained the moneys. Subsequently an order was obtained rescinding the above order and directing the solicitor to forthwith repay the said moneys into Court, and to pay the costs of the application. On his non-compliance therewith a motion was made for his committal:

Held, that the order for committal should go, for what was sought by the motion was the punishment of the solicitor for his contempt in disobeying the order of the Court; and that Con. Rule 867, had no application.—*Pritchard* v. *Pritchard*, 173.

CONTRACT.

See SALE OF LAND.

CONTRIBUTORY NEGLIGENCE.

Want of repair of streets.]—*See* MUNICIPAL CORPORATIONS, 5.

Defence of.]—*See* PLEADING.

CONVERSION.

See DAMAGES—SALE OF GOODS.

CONVICTION.

See CANADA TEMPERANCE ACT—GAMING—JUSTICE OF THE PEACE—MUNICIPAL CORPORATIONS, 7.

CONSTABLE.

Acting under warrant of commitment—Protection of, when jurisdiction of magistrate over offence, and warrant valid on its face.]—A warrant of commitment issued by two justices of the peace, for non-payment of a fine and costs imposed on J. D., who had been convicted of an offence under the Indian Act, directed the constables of the county of B. to take and deliver J. D. to the keeper of the common jail of the county, to be kept there for two

months, unless the fine and costs imposed, including the costs of conveying to the jail, should be sooner paid :—

Held, that the justices having had jurisdiction over the offence, and the warrant being valid on its face, it afforded a complete protection to the constable executing it, and that the defendant was properly convicted of assaulting the constable while attempting to execute the warrant, notwithstanding that the awarding of the punishment may have been erroneous, in directing imprisonment for non-payment of the fine and costs, including costs of conveying to jail, as not authorized by the said Act. *Regina* v. *King*, 566.

CORPORATIONS.

1. *Company—Illegal acts done by meeting of shareholders—Right of minority to investigation—By-laws ratifying illegal acts—Invalidity of—Injunction.*]—In a company consisting of seven shareholders, the plaintiffs, four of the shareholders holding 25 per cent. of the stock, claimed that there had been mismanagement of the company's funds in the payment out of large sums to the president and secretary, for salaries or services without any legal authority therefor, and in the failure to declare any dividends though the company had made large profits, and that no satisfactory investigation or statement of the company's affairs could be obtained, though frequently applied for, and that it was impossible to ascertain the company's true financial standing. Under these circumstances an investigation of the company's affairs was directed.

At a meeting of four of the directors, constituting the majority, held after proceedings taken by the minority to disallow the illegal payments made to the president and secretary, and without proper notice to the minority of such meeting or its objects, a resolution was passed ratifying the payments made to the secretary; and at an adjourned meeting of which also the minority received no notice, by-laws were passed ratifying the payments made to the president and secretary.

Held, that the resolution and by-laws were invalid, and could not be confirmed by the shareholders, and an injunction was granted restraining the company from acting thereunder, or from holding a meeting of shareholders to ratify and confirm same.—*Waddell* v. *Ontario Canning Co. et al.*, 41.

2. *Company—Defective incorporation of—Actions by, dismissed with costs—Liability for costs, of intending corporators and solicitors—Malice—Want of reasonable and probable cause—Liability upon unpaid shares.*]—Actions brought in the name of a road company against the present plaintiffs, were dismissed with costs on the ground that the company had never been incorporated according to law. The present actions were brought against four of the corporators of the company, three of them composing the firm of solicitors who had conducted the former actions on behalf of the supposed company, and all four having expressly authorized the bringing of the former actions, seeking to recover the costs of such former actions, execution therefor against the company having been returned *nulla bona* :

Held, that, in the absence of malice and want of reasonable and probable cause in bringing the former actions,

the present actions were not maintainable against the defendants as corporators or as solicitors bringing actions on behalf of plaintiffs who had no legal existence.

It was contended by the plaintiffs before the Divisional Court that the defendants were members of a *de facto* corporation in which they held shares that were not fully paid up, and that recovery could be had against them to the extent of the amounts remaining unpaid upon their shares, but no such case was made upon the pleadings or at the trial.

The Court treated this contention as not having been raised, and reserved leave to the plaintiffs to raise it in fresh actions, as they might be advised.—*Flatt* v. *Waddell*—*Townsend* v. *Waddell*, 539.

Head office—Branch office.]—*See* ASSESSMENT AND TAXES, 1.

See MUNICIPAL CORPORATIONS.

COSTS.

Of commitment and conveying to jail.] — *See* CANADA TEMPERANCE ACT, 2—CONSTABLE.

See CORPORATIONS, 2—INFANT—JUSTICE OF THE PEACE, 1—TRADE MARKS.

COUNTER-CLAIM.

See LANDLORD AND TENANT, 2.

COUNTY.

See CANADA TEMPERANCE ACT, 1.

COUNTY JUDGE.

Appeals to.]—*See* VOTERS' LISTS.

COURT.

One or more Judges sitting in absence of others.]—*See* CRIMINAL LAW, 1.

Contempt of.]—*See* CONTEMPT OF COURT.

See DIVISION COURTS—HUSBAND AND WIFE, 1.

COURT OF REVISION.

Jurisdiction of.] — *See* PUBLIC SCHOOLS, 3.

See VOTERS' LISTS.

COVENANTS FOR TITLE.

Covenant against incumbrances and for quiet enjoyment—Municipal corporations — Local improvement rates.]—Action on covenants in a deed of land whereby the defendant covenanted that he had done no act * * whereby or by means whereof the lands * * were, or should, or might be in anywise impeached, charged, or affected, or encumbered, in title, estate, or otherwise however, and that the grantees should enjoy them free from all incumbrances.

It appeared that a scheme of local improvement which resulted in the imposition of a fixed rate for ten years, as a charge upon the lands conveyed, to defray the expense of the improvement, was undertaken at the instance and upon the petition

of the defendant and other property holders interested, under R. S. O. 1887, ch. 184, sec. 612, sub-sec. 9.

The by-law creating the charge was passed before the conveyance to the plaintiff, although the precise sum to be paid by each parcel was not ascertained by apportionment till after the conveyance.

The by-law also contained a provision for commutation at the option of the owner.

Held, (affirming the decision of ROBERTSON, J.), that the action of the defendant in joining in the petition, was the means by which an incumbrance was created on the property, and was a breach of the covenants for which the plaintiffs were entitled to recover.

Held, also that the plaintiffs were entitled to damages in this action to a sum sufficient to remove the charge.

Per BOYD, C.—Different would be the conclusion if the taxes had been imposed by municipal authority without the intervention of the defendant; *Moore* v. *Hynes*, 22 U. C. R. 107, distinguished. *Cumberland et al* v. *Kearns*, 151.

CREDITORS' RELIEF ACT.

Entry by sheriff of moneys received under execution — "Forthwith," meaning of.]—*Held*, that the word "forthwith," contained in sec. 4 of the Creditors' Relief Act, R. S. O. ch. 65, with reference to the entry by the sheriff of money levied under execution, must receive a strict construction, and means "without any delay."

Even if equivalent to "within a reasonable time," a delay of fifteen days after the sale was *held* to be not reasonable. *Maxwell* v. *Scarfe*, 529.

CRIMINAL LAW

1. *Common Pleas Division—Jurisdiction in criminal matters—One or more Judges sitting in absence of others.*]—The jurisdiction to hear motions for orders *nisi* in criminal matters vested in the Common Pleas Division of the High Court of Justice for Ontario, is the original jurisdiction of the Court of Common Pleas prior to Confederation, and by virtue of sec. 5 of C. S. U. C. ch. 10, the Court "may be holden by any one or more of the Judges thereof in the absence of the others."

On the return of an order *nisi* to quash a conviction, the Court was composed of two of the Judges thereof, the third Judge being absent attending to other pressing judicial work:—

Held, that the Court was properly constituted to dispose of the order. *Regina* v. *Runchy*, 478.

2. *Indictment for murder—Evidence, admissibility of—Statements of deceased after being shot—Complaint—Cross-examination of Crown witness—Particulars of complaint—Res gestæ—Dying declaration.*]—At the trial of a prisoner upon an indictment for murder, a witness for the Crown swore upon direct examination that deceased lived about thirty rods from him, and that one night, about half an hour after he had heard shots in the direction of deceased's house, deceased came to the witness's house, and asked the witness to take him in, for he was shot. The witness did so, and deceased died there some hours afterwards.

Evidence of statements made by deceased after being taken into the witness's house was rejected.

Upon a case reserved it was con-

tended on behalf of the prisoner: (1) that his counsel was entitled to ask the witness in cross-examination whether deceased mentioned any particular person as the person who attacked him; (2) that statements made by deceased after he arrived at the witness's house were admissible as part of the *res gestæ*; (3) that such statements or some of them were admissible as dying declarations:—

Held, (1) That the admission of evidence of a complaint having been made ought properly to be confined to rape and its allied offences, but even if such evidence is admissible in other cases, it can only be so where, as in such offences, the complainant had been examined as a witness; and moreover, in this case, when deceased asked the witness to take him in, for he was shot, he was not making a complaint at all, but merely assigning a reason for asking to be taken in, and the question proposed to be asked was not relevant.

(2) That the statements made by deceased after he was taken into the house were not admissible as part of the *res gestæ*, being made after all action on the part of the wrong doer had ceased through the completion of the principal act, and after all pursuit or danger had ceased.

Regina v. *Bedingfield*, 14 Cox 341, and *Regina* v. *Goddard*, 15 Cox 7, followed.

(3) That upon the evidence the statements made by deceased after being taken into the house were not made under a settled hopeless expectation of death, and were therefore not admissible in evidence as a dying declaration. *Regina* v. *McMahon et al.*, 502.

3. *Central prison—Rules creating indictable offence—Authority to make—Section of Act imposing penalty—Indictment under—Handcuffing—When justifiable.*]—Under the authority conferred by sec. 6 of R. S. O. ch. 217, (1877), on the Inspector of Prisons to "to make rules and regulations for the management, discipline, and police of the Central Prison, and for fixing and prescribing the duties and conduct of the warden and every other officer or servant employed therein," the following rules were made, providing, amongst other things, (Rule 201), that any officer or employee who should knowingly bring or attempt to bring in to any prisoner any tobacco, should be at once dismissed and criminally prosecuted; and (Rule 219) that employees of contractors must strictly conform to all rules and regulations laid down for the guidance of guards or employees of the prison; and any infraction of rules and regulations by such employees will be promptly dealt with. By section 21 of the Act, any person giving any tobacco to any convict, (except under the rules of the institution), or conveying the same to any convict, shall forfeit and pay the sum of $40 to the warden, to be by him recovered in any Court of competent jurisdiction.

The plaintiff, a workman in the Central Prison, in the employment of a contractor therein, was detected conveying tobacco to a convict, whereupon the warden directed a constable to arrest him, which he did, and, though under no apprehension of plaintiff making any attempt to escape, handcuffed him, and led him through the public streets of Toronto to the police station. On the charge preferred, the plaintiff was indicted:

Held, that the plaintiff was subject to an indictment, and therefore the arrest was legal.

Per GALT, C. J., and ROSE, J.—Under sec. 6, authority was conferred to make the rules, and for disobedience thereof the plaintiff was subject to indictment, the remedy not being limited to that prescribed by section 27.

Per MACMAHON, J.—The power conferred by section 6, is limited to the objects therein expressed and does not authorize the making of a rule to conflict with section 27, or which would cause an offence to be created indictable at common law, but that the plaintiff was by virtue of section 25 of R. S. C. ch. 173, subject to indictment under section 27, the remedy thereunder not being limited to the recovery of the penalty.

Held, however, that under the circumstances the handcuffing was not justifiable, and the constable was liable in trespass therefor, but no liability attached to the warden as the evidence failed to shew that he was a party to it.—*Hamilton* v. *Massie et al.*, 585.

Slander, charging criminal offence.]—*See* DEFAMATION, 3, 4.

DAMAGES.

Measure of—Conversion of logs—Knowledge.]—In an action for the conversion by the defendant of certain logs of the plaintiff which had been cut without permission on the plaintiff's land, and purchased by the defendant and hauled to his mill, and there cut into lumber, the measure of damages was held to be the value of the logs as they were in the defendant's yard at the time they were demanded by the plaintiff, without any deduction for cutting and hauling, it appearing that the defendant knew that he was buying logs taken from the plaintiff's land, or at least that he suspected that such was the fact, and wilfully abstained from inquiry.

Semble, had the defendant been an innocent purchaser, a different measure of damages might have been applied.—*Smith* v. *Baechler*, 293.

Necessity for proving.]—*See* BILLS OF EXCHANGE AND PROMISSORY NOTES.

Mitigation of.]—*See* DEFAMATION, 4.

See COVENANTS FOR TITLE—LANDLORD AND TENANT 2—INSURANCE, 1—MASTER AND SERVANT, 1.

DEBENTURES.

See MUNICIPAL CORPORATIONS, 2—RAILWAYS AND RAILWAY COMPANIES, 2.

DEDICATION.

See WAYS.

DEED.

See ASSESSMENT AND TAXES, 2—LIEN, 1.

DEFAMATION.

1. *Husband and wife—Action of libel—Right of married woman to sue alone—Married Woman's Property Act, 1884—R. S. O. ch. 132, sec. 3 (2)—Demurrer.*]—A married woman may bring an action of libel in her own name without joining her husband as plaintiff.

The omission of the words "either in contract, or in tort or otherwise," found in sec. (2) of the Married Woman's Property Act, 1884, from sec. 3 (2), R. S. O. ch. 132, does not limit the legal effect and operation of that section. *Spahr* v. *Bean*, 70.

2. *Slander — Law of — Slander amendment Act, 1889—52 Vic. ch. 14 (O.)—Words applicable to class of two—Right of action.*]—Where slanderous words were spoken under such circumstances as that the person to whom they were spoken did not know to which of a class of two persons they were intended to be applied.

Held, that either of the two members of the class was entitled to sue, but it was necessary for her to prove that the words were untrue of the other member, otherwise she could not recover. *Albrecht* v. *Burkholder*, 287.

3. *Slander—Charging criminal offence—Charging offence punishable by fine also—Malicious injuries to property—R. S. C. ch. 168, secs. 26, 27, 58, 59.*]—*Held*, on demurrer to a statement of claim in an action of slander, that any defamatory charge referable to wrongdoing under sec. 26, or sec. 58, of the Act relating to malicious injuries to property, R. S. C. ch. 168, is actionable, without proof of special damage; for the punishment of imprisonment, and not merely the infliction of a fine, is imposed in the case of such offences; but it is otherwise in the case of a defamatory charge referable to sec. 27, or sec. 59 of that Act, for such offences are punishable by fine only. *Routley* v. *Harris*, 405.

4. *Libel and slander—Pleading—Confession of plaintiff—Mitigation of damages—Justification.*]—Where in an action for slander and libel, imputing criminal offences, the defendant set up by way of mitigation of damages, that the plaintiff had confessed to a third party that he had done the acts charged against him:—

Held, that evidence of such a confession was only admissible under a plea of justification, unless the defendant added on the record that she had now good cause for discrediting that part of the admission or confession alleged to have been made by the plaintiff, although she honestly believed it to be true at the time she repeated the words complained of.

Held, also, that objection should have been taken to the pleading either by demurrer or by application to strike it out as embarrassing. *Switzer* v. *Laidman*, 420.

DEMURRER.

See DEFAMATION, 1, 4.—LIEN, 2.

DEPOSITIONS.

See LIMITATIONS, STATUTE OF.

DESCRIPTION

Of land.]—*See* ASSESSMENT AND TAXES, 2.

Of property in summary conviction.]—*See* JUSTICE OF THE PEACE, 2.

DETINUE.

See SALE OF GOODS.

DISTRIBUTION.

Period of.]—*See* WILL, 8.

DEVISE.

See WILL.

DISCHARGE

Of mortgage.] — *See* REGISTRY LAWS.

See LIEN, 1—MORTGAGE.

DISTRESS.

See CANADA TEMPERANCE ACT, 1 —LANDLORD AND TENANT, 2.

DISTRICT COURT.

See DIVISION COURTS, 2.

DIVISION COURTS.

1. *Prohibition—Territorial jurisdiction—Where cause of action arose.*] —The plaintiffs resided in the district of Algoma, and the defendant in the county of Wentworth.

The defendant telegraphed from Wentworth an order for a ton of fish to be sent him by the plaintiffs, and the latter shipped the fish from Algoma to Wentworth. The plaintiffs sued for the price of the fish.

Held, on motion for prohibition that the whole cause of action arose in Algoma, and a Division Court there had jurisdiction.

Cowan v. *O'Connor*, 20 Q. B. D. 640, and *Newcombe* v. *De Roos*, 2 E. & E. 271, followed. *Re Noble et al.* v. *Cline*, 33.

2. *Execution — Division Court judgment — Transcript to District Court—Issuing fi. fa. lands without fi. fa. goods — Sale under expired writ — Sale after return of fi. fa. lands under ordinary fi. fa. instead of alias fi. fa.—Estoppel—Payment.*] —Upon a transcript from a Division Court to a District Court, it is not necessary to issue a *fi. fa.* goods from such District Court before a valid sale can take place under *a fi. fa.* lands issued therefrom.

Kehoe v. *Brown*, 13 C. P. 549, observed upon.

Lands were sold under a *fi. fa.* lands after the expiry of the year, and a deed executed to the grantor of the plaintiff by the sheriff which recited that the writ had been duly renewed, but neither the sheriff's nor the district clerk's books shewed any such renewal.

Held, that no renewal was proved, and the sale was invalid.

Subsequently an ordinary writ of *fi. fa.* lands was issued on the judgment, a sale was made, and a deed to the plaintiff executed by the sheriff.

Held, that the fact of an ordinary writ of *fi. fa.* lands being issued instead of an alias *fi. fa.*, and the advertisement being as if the proceedings were initiatory proceedings towards effecting a sale of the defendant's lands, would not of itself invalidate the sale.

In 1866, one of the defendants commenced an action against the present plaintiff and others to set aside the sheriff's first deed, which was dismissed for want of prosecution.

Held, that the said defendant was not thereby estopped from setting up the invalidity of the sheriff's sale.

Held, also, that, under the circumstances, the defendants could not set

up that the proceedings under the expired writ constituted a payment of the execution debt.

Bank of Upper Canada v. *Murphy*, 7 U. C. R. 328, distinguished. *Daby* v. *Gehl*, 132.

3. *Prohibition—Substitutional service of summons—Defendant out of Ontario—R. S. O. ch. 51, sec. 100.*]—At the time of the issue of the summons in a Division Court plaint the defendant was in Ontario, but she left without its having been served upon her, and an order was made after she had left for substitutional service.

In the material upon which she supported a motion for prohibition she did not negative the existence of such facts as would give jurisdiction to make an order for substitutional service, and from her own affidavit it was to be inferred that the summons had come to her knowledge:—

Held, that the Judge in the Division Court had jurisdiction under sec. 100 of R. S. O. ch. 51, as amended by 51 Vic. ch. 10, sec. 1 (O.), to order substitutional service if certain facts were made to appear, and as the defendant was subject to the summons at the time it was issued, it was for the Judge to determine whether the facts necessary to give jurisdiction appeared, and his determination could not be reviewed by the High Court. *Re Hibbitt* v. *Schilbroth: Woods et al, Garnishees*, 399.

DIVISIONAL COURT.

See CRIMINAL LAW, 1.

DONATIO MORTIS CAUSA.

See GIFT.

DOMICILE.

Evidence of.]—*Held*, upon the facts set out in the judgment in this case that although a testator's original domicile was in Ontario, he had changed it to the United States, which was his domicile at the time of his death, and his will therefore must be construed according to the laws of Minnesota, U.S., so far as regards all his personal estate, and his real estate there; according to the laws of Manitoba as regards his lands there; and as to his Ontario lands they devolved on his executors. *McConnell* v. *McConnell*, 36.

DOWER.

Bar of.]—*See* HIRING, 1.

Election.]—*See* WILL, 11.

DRAINAGE.

See MUNICIPAL CORPORATIONS, 8, 9.

DURESS.

See HUSBAND AND WIFE, 1.

DYING DECLARATION.

See CRIMINAL LAW, 2.

ELECTION.

See WILL, 11.

ESTOPPEL.

See DIVISION COURTS, 2—INSURANCE, 1—LANDLORD AND TENANT, 1—PUBLIC SCHOOLS, 3.

EVIDENCE.

Improper reception of.]—*See* ARBITRATION AND AWARD, 2.

Admissibility of.]—*See* CRIMINAL LAW, 2—JUSTICE OF THE PEACE, 1.

Confession.]—*See* DEFAMATION, 4.

See DOMICILE—GIFT—LANDLORD AND TENANT, 1—MUNICIPAL CORPORATIONS, 4, 7.

EXECUTION.

Entry by sheriff of moneys received.]—*See* CREDITORS RELIEF ACT.

Division Court—Transcript to District Court.]—*See* DIVISION COURTS, 2.

Neglect to search for.]—*See* MORTGAGE.

EXECUTORS AND ADMINISTRATORS.

Action upon a judgment—Grant of administration after action begun—Plaintiff not primarily entitled to administer—Right of widow to administer—Renunciation after action—Statute of Limitations, R. S. O. ch. 60, sec. 1—Parties—Joint judgment.]—The rule in equity is, that when a person is entitled to obtain letters of administration he may begin an action as administrator before he has fully clothed himself with that character; but the same doctrine does not apply where the person immediately entitled to obtain administration is not the one who begins the action.

Trice v. *Robinson*, 16 O. R. 433, distinguished.

Where the point is specially raised on the pleadings as to the time when the letters of administration were obtained, it devolves upon the Court to ascertain whether an action was begun in time by a properly constituted plaintiff.

The father of the plaintiff obtained judgment against L. and R. in an action upon a promissory note on the 26th October, 1868, and the plaintiff began this action against L. and R. upon the judgment on the 22nd October, 1888. At that time the plaintiff's father was dead and no personal representative of his estate had been appointed. On the 4th November, 1889, letters of administration to his father's estate were granted to the plaintiff, the widow renouncing probate on the same day. Subsequently to that the statement of claim was delivered, and the action continued against R. alone. R. by his statement of defence put the plaintiff to the proof of his position and title to sue on the judgment, and set up, amongst other defences, the Statute of Limitations, R. S. O. ch. 60, sec. 1.

Held, that the widow was the person primarily entitled to administer, and as she had not renounced when the action was begun, the plaintiff had at that time no status; and as against the Statute of Limitations that no action was rightly begun within the period of twenty years fixed by the statute as that within which an action upon a bond or other specialty shall be commenced; and therefore the action failed.

Semble, also, that an objection raised at the trial that L. was not before the Court was a valid one; for an action on a joint judgment is not different in principle from an action of contract against joint contractors.

Chard v. *Rae*, 371.

EXPROPRIATION.

See MUNICIPAL CORPORATIONS, 10.

FIRE INSURANCE.

See INSURANCE.

FRAUDULENT PREFERENCE.

See BANKRUPTCY AND INSOLVENCY 2, 3.

GAMING.

Selling property by lot or chance—R. S. C. ch. 159, sec. 2—Conviction, form of—R. S. C. ch. 178, sec. 87.]—Section 2 of R. S. C. ch 159 prohibits the sale of "any lot, card, or ticket, or other means or device for * * selling or otherwise disposing of any property, real or personal, by lots, tickets, or any mode of chance whatsoever."

The complainant went to the defendant's place of business, and having been told by defendant that in certain spaces on two shelves there were in cans of tea a gold watch, a diamond ring, or $20 in money, he paid $1 and received a can of tea, which containing an article of small value, he handed the can back, paid an additional 50 cents, and received another can, which also contained an article of small value. He handed this can back also, paid another 50 cents and secured another can, which also contained an article of small value. He then refused to pay any more money, and went away, taking the third can and the article in it with him. On a complaint laid by him before the police magistrate, the defendant was convicted in that he "unlawfully did sell certain packages of tea, being the means of disposing of a gold watch, a diamond ring, $20 in money by a mode of chance, against the form of the statute," &c.:—

Held, that the transaction came within the terms of said sec. 2, so as to make the defendant liable to conviction thereunder:—

Held, also, that "The Summary Convictions Act" applied to cure any defect in the form of the conviction. *Regina* v. *Freeman*, 524.

GIFT.

Gift inter vivos—Sufficiency of]—The defendant, having in her possession a large sum of money which her husband had given her, went with him to the bank to deposit it, and was about to do so when, on a question arising as to the power of drawing it in case of the wife's illness, the money, at the bank agent's suggestion, was deposited in both their names subject to withdrawal by either of them, and it remained on deposit uninterfered with by the husband up to the time of his death which occurred some months after:

Held, that there was a good gift *inter vivos* to the wife. *Payne* v. *Marshall*, 488.

2[*Donatio mortis causa—Gift inter vivos—Evidence of—Board, nursing and attendance on parent—Right to recover for.*]—A testator who was afflicted with an incurable disease, went to stay with his married daughter, one of the defendants hereto, and was tended and nursed by her, and was afterwards joined by his wife, who remained with him until his death, which took place shortly after. Nearly three months

after he had been at defendant's house, another daughter asked him to give defendant the price of a piano, when he said he would not do that, but, pointing to a box, in which he kept some money and promissory notes, and which he kept locked, retaining the key, said it was defendant's, to do what she liked with, and that there was sufficient for all. No change was made in the possession up to the time of his death, he taking what money he required for his own use and for presents to his wife and daughters, the defendant at his request sometimes taking out money for him for such purposes. The notes were never otherwise alluded to:—

Held, that neither a good *donatio mortis causa* nor gift *inter vivos* to defendant was shewn, but that the testator's intention was that defendant should be paid for her services, and she was accordingly allowed for his board and her attendance on him as well as for the board of his wife. *Brown et al.* v. *Davy*, 559.

GOODS, SALE OF.

See SALE OF GOODS.

HANDCUFFING.

See CRIMINAL LAW, 3.

HAWKERS.

See MUNICIPAL CORPORATIONS, 7.

HEAD OFFICE.

See ASSESSMENT AND TAXES, 1.

HIGH COURT.

Jurisdiction of.]—*See* DIVISION COURTS, 3—HUSBAND AND WIFE, 1.

HIGH SCHOOLS.

See PUBLIC SCHOOLS, 2.

HIRING.

1. *Hire receipt—Lien for engine—Sale without notice—Mortgage—Surplus—Bar of dower—Second mortgage.*]—Certain lands were subject to a first mortgage, a charge registered by an Engine Company in respect to the price of an engine supplied by them, and a mortgage to the plaintiff registered subsequently to the said charge; and the lands having been sold under the power of sale in the first mortgage, a contest arose in this action in respect to the surplus left after satisfaction of the first mortgage.

The Engine Company had resumed possession of the engine, and sold it, and claimed the balance of the price under the charge out of the said surplus in priority to the plaintiff:—

Held, that they were entitled to make that claim, and that having sold the engine without notice to the plaintiff the latter was entitled to impeach that sale by shewing that a greater sum could have been realized, if it had been properly sold after proper notice. But

Held, also, that the plaintiff was alone entitled to the value of the interest of the owner of the equity of redemption in the land as inchoate dowress; inasmuch as she had barred her dower in his favour, whereas she had not done so in connection with the charge of the Engine Company.

In the absence of arrangement, the value of this interest must be ascertained and retained in Court to be paid out to the plaintiff if the right of dower attached by the wife surviving her husband, and to the Engine Company if it did not attach.

Remarks upon the position of holders of hire receipts after resuming possession of the chattels covered thereby. *Discher* v. *Canada Permanent Loan and Savings Co.*, 273.

2. *Hire receipt — Default — Resumption of possession—Right to enter on premises — Practice.*] — Where the machinery was sold upon the terms expressed in a hire receipt that "The title of and right to the possession of the above mentioned property wherever it may be, shall remain vested in the said vendor and subject to his order until paid for in full":—

Held, that the vendor or his assigns had the legal right (the purchase money being in arrear and unpaid) to enter upon the premises where the property was, in order to assume actual possession of the machinery, giving notice and using all care in so doing, but that it would be illegal for him to take possession by force, and an injunction might properly issue to restrain acts of force on behalf of the vendor, but only on the terms that the assignee of the vendee be likewise enjoined from using force in resisting the vendor.

Before taking possession of the machinery the vendor was ordered to give such security as is usual in replevin. *Traders Bank* v. *G. & J. Brown Manufacturing Co.*, 430.

HIGHWAYS.

See MUNICIPAL CORPORATIONS, 5, 11, 12—WAYS.

HUSBAND AND WIFE.

1. *Marriage of infant—Action to have same declared void—Duress—Jurisdiction of High Court—Consent of parents—26 Geo. II. ch. 33, sec. 11.*]—The High Court of Justice in this Province has jurisdiction, where a marriage correct in form is ascertained to be void *de jure* by reason of the absence of some essential preliminary, to declare the same null and void *ab initio*; but nothing short of the most convincing testimony will justify the interposition of the Court.

Where duress is alleged, it must be manifest that force preponderated throughout, so as to disable the one interested from acting as a free agent. Although the plaintiff in this action, in which he sought to have his marriage with the defendant declared void, on the ground that he was forced into it by intimidation and threats, at first protested, by his subsequent conduct he displayed a readiness to assist in the preliminary and final details, and submitted to the proposed method of procedure, and intelligently forwarded its accomplishment:—

Held, on the evidence, that his consent to the marriage was proved:—

Held, also, that sec. 11 of 26 Geo. II ch. 33 (Lord Hardwicke's Act), by which the marriage of a minor by license, without the consent of parent or guardian, was absolutely void, is not in force in this Province. *Lawless* v. *Chamberlain et al.*, 296.

2. *Married woman—Separate business—Separate estate—Debt contracted with reference to—Liability—47 Vic. ch. 19, (O.)—Effect of.*]—The defendant, a married woman, married to her present husband in 1877, or 1878, and carrying on busi-

ness separately from him by farming one of her former husband's farms, in 1883 and 1884, contracted the debt sued on. She was entitled to dower in the lands of her first husband, who died in 1875, which were sold, realizing a large sum, and also to her share in his personal estate, neither of which she had received.

Held, that the Act of 1884, 47 Vic. ch. 19 (O.), had not the effect of repealing the prior Acts, and that it was not necessary to shew that the defendant had married, or had acquired separate estate since the Act of 1884 came into force; that it was sufficiently shewn that she was possessed of separate estate, and that she intended it should be bound.

The plaintiff was, therefore, held entitled to have judgment against it.

R. S. O. ch. 132, sec. 5, sub-sec. 1, makes the earnings of a married woman in a trade or occupation in which her husband has no proprietary interest separate property.—*Robertson* v. *Larocque*, 469.

See DEFAMATION, 1.

INCOME.

See ASSESSMENT AND TAXES, 1.

INCUMBRANCES.

See COVENANTS FOR TITLE.

INDICTMENT.

See CRIMINAL LAW, 3—MUNICIPAL CORPORATIONS, 12.

INFANT.

Lease by for benefit of—Avoidance of during infancy—Costs—Order for payment by infant.]—An infant cannot during infancy avoid a lease by him, reserving rent for his benefit, and possession of the demised premises will be ordered to be given in an action by the lessee for that purpose.

Hartshorn v. *Early*, 19 C. P. 139, and *Slator* v. *Brady*, 14 Ir. C. L. R. 61, 342, followed.

The discretion given by Rule 1170 as to costs authorizes the imposition against the infant of the costs of an action to enforce such lease, including the costs of the official guardian, paid by the plaintiffs. *Lipsett* v. *Perdue*, 575.

Marriage of.]—*See* HUSBAND AND WIFE, 1.

INJUNCTION.

See CORPORATIONS — LANDLORD AND TENANT, 2—MUNICIPAL CORPORATIONS, 6—PUBLIC SCHOOLS, 2.

INSURANCE.

1. *Fire insurance—Further insurance—Notification in writing—R. S. O. (1887), ch. 161, sec. 40—Payment of subsequent assessment—Estoppel—Damages.*]—The plaintiff who was insured against fire with the defendants for $1,000, effected a change of mortgages on the insured property. The mortgagees refused to accept the defendants' policy, and insured the property for the same amount in another company, notifying the plaintiff of the fact, by letter. The plaintiff shewed the letter to the

defendants' secretary-treasurer asking him to bring the matter before the board, and was then informed by him that it would be all right and that there was nothing further to do. Subsequently the plaintiff paid an assessment on defendants' policy, which accrued after the notification of the double insurance, and which was received by defendants and entered in their books. It did not appear that this payment was on account of losses incurred by defendants previous to the double insurance. The plaintiff's property was destroyed by fire the day the "Ontario Insurance Act 1887," came into force.

Held, that the R. S. O. (1877), ch. 161, in force at the time insurance was affected, applied to the policy.

Held, also, that the shewing of the letter to the secretary-treasurer was not a notification in writing as required by R. S. O. (1877) ch. 161, sec. 40, but

Held, that the policy being voidable at the defendants' option the receipts and entry in their books of the assessment after the secretary-treasurer was aware of the double insurance operated as an estoppel upon them.

By by-laws printed on the policy the defendants' liability was limited to two-thirds of the actual loss sustained, and the amount to be taken on one risk was restricted to $2,000. The plaintiff's loss was $2,200, and the other insurance company paid the full amount of their liability, $1,000.

Held, (affirming the judgment of FALCONBRIDGE, J.,) that the plaintiff was entitled to recover as damages, two-thirds of the balance of his loss after deducting the amount of the other insurance. *McIntyre* v. *East Williams Mutual Fire Ins. Co.*, 79.

2. *Fire insurance—Statutory conditions as to terminating risk—Notice of termination — Sufficiency of — Amount of unearned premium—R. S. O. ch. 167, sec. 114.*]—A notice by an insurance company to terminate a fire policy under statutory condition No. 19 of the Ontario Fire Insurance Act, (R. S. O. ch. 167, sec. 114) should be wholly in writing and should inform the assured that the policy will be terminated at the expiration of the prescribed statutory period after the service of the notice; and when on the cash plan a ratable proportion of the premium returned should be calculated from the termination of the notice.

Where therefore a company gave a notice which was in effect an immediate cancellation with a return of the unearned premium from the date of the notice:—

Held, [GALT, C. J., dissenting,] that the policy had not been cancelled. *Bank of Commerce* v. *British America Assurance Co.*, 234.

3. *Fire insurance—R. S. O. ch. 167, sec. 106—Statutory conditions, 12, 13, 22—Mortgage clause—Time within which and person by whom proofs of loss to be made—Default of mortgagor—Subrogation—Premium note—Sec. 131.*]—A mortgagor insured his mill against fire with the defendants, the policy being payable on its face, to the extent of one-half, to the mortgagee.

Attached to the policy was a separate slip called a "mortgagee clause," by which it was provided that the insurance, as to the interest of the mortgagee only therein, should not be invalidated by any act or neglect of the mortgagor; and, also, that whenever the company should pay the mortgagee any sum for loss under the policy, and should claim that, as

to the mortgagor, no liability existed therefor, it should, to the extent of such payment, be subrogated to all the rights of the party to whom such payment should be made.

Proofs of loss were not made by the mortgagor and mortgagee until within sixty days of the end of the year after a fire had occurred; and within sixty days after the proofs were delivered an action was commenced by the mortgagor and the representatives of the mortgagee:

Held (affirming the judgment of BOYD, C., at the trial), that the mortgagee was not bound as "the assured" under statutory condition 12, to make proofs of loss, and that here the person assured, the mortgagor, was the person to make them, under conditions 12 and 13:

Held, also, that the neglect of the assured to make the proofs of loss in proper time, so that the sixty days thereafter might expire before the termination of the year after the loss, within which an action had to be brought under condition 22, was a neglect from the consequences of which the mortgagee was relieved by the mortgagee clause, and that, as far as he was concerned, the action was not brought to soon:

Held, also, that the words, "*shall claim* that, as to the mortgagor, no liability exists," in the mortgagee clause, meant "and as to the mortgagor no liability exists," and that, as the policy was valid at the time of the fire, and nothing was shown to have taken place since to render it invalid, there was a liability to the mortgagor; that condition 22 barred the remedy and not the right, and that the defendants were not entitled to subrogation:

Held, also, that the mortgagor was bound to make the proofs in such time, that the sixty days would elapse before the expiration of the year limited for bringing the action and his remedy as to the other half of the policy was barred.

The defendants claimed the right, under R. S. O. ch. 167, sec. 131, to retain the amount of the premium note given to the mortgagor until the time had expired for which the insurance was made to cover any assessments that might be made thereon:

Held, that, as against the mortgagee, they were not entitled to retain the amount. *Anderson et al.* v. *Saugeen Mutual Fire Ins. Co. of Mount Forest*, 355.

See ASSESSMENT AND TAXES, 1.

INTOXICATING LIQUORS.

See CANADA TEMPERANCE ACT.

INVESTMENT.

Of trust funds.]—*See* WILL, 9.

For legacies.]—*See* WILL, 10.

JUDGES.

See CRIMINAL LAW, 1.

JUDGMENT.

Joint.]—*See* EXECUTORS AND ADMINISTRATORS.

JURISDICTION.

Of Justice of the Peace.]—*See* CANADA TEMPERANCE ACT, 1.

Common Pleas Division.] — *See* CRIMINAL LAW, 1.

Of High Court to avoid marriages.] —*See* HUSBAND AND WIFE, 1.

See CONSTABLE.

JURY.

Answers of.]—*See* RAILWAYS AND RAILWAY COMPANIES, 1.

JUSTICE OF THE PEACE.

By-law authorizing imprisonment for six months—validity of—Conviction—Costs of conveying to jail included in—Invalidity of—Evidence of defendant — Admissibility.]— A by-law of the city of Brantford enacted that any person found drunk on any of the public streets, &c., thereof, should be subject to the penalty thereby imposed, namely to a fine not exceeding $50, inclusive of costs, and in default of payment forthwith of the fine and costs, distress, and in default of sufficient distress, imprisonment in the common jail for a term not exceeding six months, &c., unless the fine and costs were sooner paid:—

Held, that under sub-sec., 19 of sec. 479, R. S. O. ch. 184, there was power to authorize imprisonment for the period mentioned.

A conviction under the by-law directed in default of payment forthwith of the fine and costs and of sufficient distress, imprisonment for ten days in the common jail unless the costs and charges, including the costs of conveying to jail, were sooner paid:—

Held, that the conviction was bad as there was no power to include the costs of conveying to jail.

On a trial of an offence under the by-law, the magistrate cannot refuse to receive the defendant's evidence. *Regina* v. *Grant*, 169.

2. *Summary conviction—Malicious Injuries to Property Act, R.S.C. ch. 168, sec. 59 — Uncertainty — Nature of offence and property not particularly described.*]— A summary conviction under R. S. C. ch. 168, sec. 59, alleged, in the words of the statute, that the defendant unlawfully and maliciously committed damage, injury and spoil to and upon the real and personal property of the Long Point Company:—

Held, that this was not sufficient without its being alleged what the particular act was which was done by the defendant which constituted such damage, &c., and what the particular nature and quality of the property, real and personal, was in and upon which such damage, &c., was committed; and the conviction was quashed for uncertainty. *Regina* v. *Spain*, 385.

3. *Conviction — Carts used for hire—Necessity to be licensed under city by-law.*]—The defendant was convicted of a breach of a by-law passed under sec. 436 of R. S. O. ch. 184, which provides that no person should, after the passing thereof, without a license therefor, "keep or use for hire any carriage, truck, cart," etc. The defendant was the owner of waggons and horses which, at the date complained of, were employed in hauling coal and gas pipes for a gas company, for which the defendant was paid by the hour or day. The defendant also engaged carts and horses which he hired out to haul earth, and which were so being used on the day complained of:—

Held, that the defendant came

within the terms of the by-law, and was therefore properly convicted thereunder. *Regina* v. *Boyd*, 485.

See CANADA TEMPERANCE ACT, 1—CONSTABLE.

JUSTIFICATION.

See DEFAMATION, 4.

LACHES.

See BILL OF EXCHANGE AND PROMISSORY NOTES.

LANDLORD AND TENANT.

1. *Ten years' lease by owner of life estate to reversioner in fee—Action by executrix for rent—Covenant in lease—"Heirs and assigns"—Estoppel—Shewing that title of landlord has expired—Reformation of lease — Evidence — Acquiescence.*]—The plaintiff's testatrix, who had a life estate in certain lands, made a lease of them for ten years to one of the defendants, who was entitled to the reversion in fee. The reservation of rent in the lease was to the lessor simply, and the covenant for payment of rent was "with the lessor, her heirs and assigns," for payment to "the said lessor, her heirs and assigns."

The lessor died before the expiration of the ten years, and this action was brought by the executrix of her will to recover *(inter alia)* the instalments of rents which became payable, as it was alleged, upon the lease after her death:

Held, that, as the interest of the lessor was a freehold interest, the plaintiff could not recover either as being entitled to the reversion of a chattel interest, or as being the person designated by the covenant:

Held, also, that there was no estoppel to prevent the lessee from shewing that the title of the lessor had come to an end, and that he himself became the owner upon her death.

The lessee set up an agreement between himself and the lessor that the lease should expire at her death in case she should not live for the full term of ten years, and asked that the lease should be reformed accordingly. The only evidence in support of this was that of the lessee and his wife, and of a relation of theirs, whose memory was shewn to be untrustworthy:

Held, that this evidence was not sufficient, after so many years of acquiescence and after the death of the lessor, to justify the reformation of the lease.—*Thatcher* v. *Bowman et al.*, 265.

2. *Distress—Damages—Debt—50 Vic. ch. 23, sec. 3, (O)—O. J. Act—Counter-claim.*]—The defendant having distrained for rent in arrear, the plaintiff claimed that the defendant was indebted to him in damages for breach of the covenants in the lease to repair, and to lease to plaintiff an adjoining piece of land, and obtained *ex parte* an interim injunction restraining proceedings under the distress which was dissolved on the ground of concealment of facts.

Held, that the damages claimed by the plaintiff were not a "debt" within sec. 3 of 50 Vic. ch. 23 (O.), so as to constitute a set-off against the rent; and although under the O. J. Act they might be the subject of counter-claim they would not justify an injunction as against a

distress levied as here. *Walton* v. *Henry*, 620.

See INFANT.

LAND, SALE OF.

See SALE OF LAND.

LIBEL AND SLANDER.

See DEFAMATION.

LIEN.

1. *Mechanic's lien—Prior conveyance—Notice of lien to purchaser—Validity of lien — Proceedings to realize — Summary application to discharge.*]—S. was the owner of a lot upon which he was building four houses and W. was his plumbing contractor doing the work on all at a specified sum for each house. He commenced his work in September, 1887, and finished about May, 1888. V. was the contractor for the brick-work and as such was on the premises from time to time, as the work was going on, and was not paid by S. V. purchased one of the houses, which was conveyed to him by deed, dated December 1st, 1887, and registered February 20th, 1888. On February 24th, 1888, W. registered his lien on the whole property. Both V. and W. alleged that they knew nothing of the other's transaction.

On an appeal from ROBERTSON, J., who held (affirming the Master in Chambers) that V. had notice of W.'s claim, and that his summary application to have W.'s lien discharged must be dismissed with costs, the Court were evenly divided.

Per PROUDFOOT, J. A lien should be registered against anyone whose rights are acquired during the progress of the work, and, if not so registered it becomes absolutely void, unless proceedings are taken to realize within thirty days: no proceedings were taken within that time by W, and the lien not being registered against the subsequent owner ceased to be a lien at all.

Hynes v. *Smith*, 27 Gr. 150, and *McVean* v. *Tiffin*, 13 A. R. 1, followed.

Per FERGUSON, J. The real question is not whether there was a valid registration of the lien, but whether the judgment of ROBERTSON, J., affirming the refusal of the Master to discharge the lien on a summary application was right. The Master was justified in so refusing.

Wanty v. *Robins*, 15 O. R. 474, referred to. *Re Wallis and Vokes*, 8.

2. *Mechanic's lien—Action by sub-contractor— Necessity of averring that something is due to the contractor.*]—*Held*, upon demurrer to a statement of claim in an action to enforce a mechanic's lien brought by a sub-contractor against the owner of the lands, and the contractor, that it was necessary for the plaintiff to aver that there was something due from the owner to the contractor. *Townsley* v. *Baldwin*, 403.

See ARBITRATION AND AWARD, 1—HIRING, 1.

LIFE ESTATE.

See LANDLORD AND TENANT, 1—WILL, 2, 5.

LIMITATIONS, STATUTE OF.

1. *Defendant maker of note and sole executor of co-maker—Payment*

by defendant on his own account.]—After the death of one maker of a joint and several promissory note signed by two, the deceased being a surety only, a payment upon it out of his own moneys and on his own account was made by the surviving maker who was also the sole executor of his deceased co-maker.

Held, that such payment did not take the debt out of the Statute of Limitations as regards the estate of the latter. *Paxton* v. *Smith*, 178.

2. *Acknowledgment — Depositions in another action—21 Jac. 1, c. 16—R. S. O., c. 123 s. 1.*]—In an action for a debt, to which the defendant pleaded the Statute of Limitations, the plaintiff gave in evidence, as constituting acknowledgments, (1) a letter from the defendant in which he said: "I am of the opinion that it will be impossible for me to pay you anything until my son's estate is wound up;" (2) portions of the examination of the defendant, signed by him and taken in a certain other action brought for the administration of the son's estate, having reference to a claim set up by the defendant against the estate, in which he admitted the receipt of the money for which the present action was brought, and stated that he was responsible to the testator of the present plaintiff, who was an executor, for it. There was evidence, also, that the son's estate was wound up, and that the defendant received more than sufficient to pay the plaintiff's claim.

Held, affirming the decision of FALCONBRIDGE, J., that the letter was a sufficient acknowledgment under the statute, and meant that on the son's estate being wound up, the defendant would pay, and the estate having been wound up, anything conditional in the letter had been ascertained:

Held, also, that the statute was satisfied by an acknowledgment made and signed as in the testimony of the defendant in the administration action.

Smith v. *Poole*, 12 Sim. 17, followed. *Roblin* v. *McMahon*, 219.

See EXECUTORS AND ADMINISTRATORS—MUNICIPAL CORPORATIONS, 5.

LIQUORS.

See CANADA TEMPERANCE ACT.

LOCAL IMPROVEMENTS.

See COVENANTS FOR TITLE.

MAGISTRATE.

See JUSTICE OF THE PEACE.

MALICE.

See CORPORATIONS, 2.

MALICIOUS PROSECUTION.

1. *Reasonable and probable cause—Information for assault—Justification of assault—Misdirection—New trial.*]—Where a man has been prosecuted for an assault, and brings an action for malicious prosecution, the finding that there was in fact an assault is not decisive of the question whether there was a reasonable and probable cause for the prosecution; the plaintiff is entitled to have the circumstances relied on as justification for the assault submitted to the jury, and to have their finding as to whether the defendant was

conscious when he laid the information that he had been in the wrong.

A new trial granted on the ground of misdirection.

Hinton v. *Heather*, 14 M. & W. 131, followed.

Sutton v. *Johnstone*, 1 T. R. 493, distinguished. *Routhier* v. *McLaurin*, 112.

2. *Right of defendant to prove plaintiff guilty of the criminal charge laid.*]—In an action for malicious prosecution the claim which was put in issue was that the defendant did on a certain day charge plaintiff with having, on two or three occasions committed wilful perjury.

The learned Judge at the trial ruled that the defendant could not go into evidence to contradict plaintiff on his statement as to the perjury, or to establish the truth of the facts desired to be set up:—

Held, that the ruling without qualification was too broad; for though a defendant in an action for malicious prosecution is not bound to prove the plaintiff's guilt as charged in the criminal proceedings, still he is at liberty to do so if it be necessary to establish reasonable and probable cause.

Quære, as to the onus being on the plaintiff to establish his innocence. *Watt* v. *Clark*, 602.

MANDAMUS.

To raise money.]—*See* MUNICIPAL CORPORATIONS, 3.

Remedy by action.]—*See* MUNICIPAL CORPORATIONS, 1.

See VOTERS LISTS.

MAINTENANCE.

See WILL, 4, 11.

MAP.

See PUBLIC SCHOOLS.

MARRIAGE.

See HUSBAND AND WIFE, 1.

MASTER AND SERVANT.

1. *Damages — Workmen's Compensation for Injuries Act — Lord Campbell's Act—Reasonable expectation of pecuniary or material benefit.*]—The plaintiff's son, who had just come of age, was killed by an accident in the defendants' machine shop, where he had been temporarily employed. For about two years previously he had, while attending school, worked on his father's farm, as farmers' sons usually do, without wages, and it was intended that he should study medicine, at an expense to his father of about $1000, the course lasting three or four years, and in the vacations, while soengaged in acquiring his intended profession, it was expected that he would work at home as usual.

In an action by his father as administrator to recover damages for the death of his son:

Held, that he could have no reasonable expectation of pecuniary or material benefit from the son's life, and a nonsuit was ordered to be entered.

Per PROUDFOOT, J., a notice of action under the Workmen's Compensation for Injuries Act does not require to be signed or to be on behalf

of any one. *Mason* v. *Bertram et al.*, 1.

2. *Workmen's Compensation for Injuries Act—Injury sustained by workman through improper instructions by superintendent—Liability of master.*]—The defendants, an iron works company, used in their business, a pair of shears for cutting up boiler plate and scrap iron prior to its being placed in the furnace to be melted. It was the duty of the plaintiff and another workman to put the iron into the shears. While a large iron gate was, by the superintendent's orders, being put into the shears to be cut up, by reason of the improper instructions given by the superintendent to the plaintiff, the latter, in the course of his duty was injured. The plaintiff, though apprehensive of danger, was not aware of the nature and extent of the risk, and obeyed through fear of dismissal. In an action against defendants under the Workmen's Compensation for Injuries Act for the damage sustained by the plaintiff:

Held, that defendants were liable. *Madden* v. *Hamilton Iron Forging Co.*, 55.

See RAILWAYS AND RAILWAY COMPANIES, 1.

MECHANIC'S LIEN.

See LIEN.

MEETING.

Place of.]—*See* VICTORIA UNIVERSITY.

MINUTE OF CONVICTION.

See CANADA TEMPERANCE ACT, 1.

MISDIRECTION.

See MALICIOUS PROSECUTION.

MISTAKE.

See MORTGAGE.

MORTGAGE.

Payment and discharge of prior mortgages—Execution against mortgagor—Mistake—Subrogation—Neglect to search for executions.]—The plaintiff advanced money to the owner of real estate to pay off existing mortgages thereon, and took and registered a mortgage on the property for the amount, paid off the prior mortgages and registered discharges of them, the defendant having all the time an execution against the lands of the mortgagor in the hands of the sheriff of the county in which the lands were situate, of which the plaintiff was ignorant, his solicitors having neglected to search:

Held, that the plaintiff was entitled to be subrogated to the rights of the original mortgagees, and to priority over the defendant's execution, to the amount paid to discharge the prior mortgages, upon the ground of mistake, he having done so under the belief that he was obtaining a first charge; and that he was not disentitled to relief, because by using ordinary care he might have discovered the mistake, the defendant not having been prejudiced thereby. *Brown* v. *McLean*, 533.

Discharge of, proper registration of.]—*See* REGISTRY LAWS.

See HIRING, 1—INSURANCE, 3—WILL, 6.

MUNICIPAL CORPORATIONS.

1. *Warrants for salary of officer—Refusal of mayor to sign—Application by officer for mandamus—Remedy by action.*]—An officer of a municipal corporation applied for a mandamus to compel the mayor to sign warrants for the applicant's salary, which the mayor had been called upon to do by a resolution of the municipal council.

Held, that the applicant could maintain an action against the corporation for his salary, and, as he had that remedy, a mandamus would not be granted at his instance. *Re Whitaker and Mason*, 63.

2. *By-law for contracting debt—Bonus to manufactory—Debentures not payable within twenty years—Municipal Act, R. S. O. ch. 184, secs. 334, 340, 351, 352—Time for moving to quash.*]—A by-law to raise a sum of money by way of bonus to aid an industry in a village, after being voted on by the electors, was finally passed on 3rd June, 1889, was promulgated on 20th June, and registered on 14th August following.

It stated on its face that it was to come into force on 2nd July, 1889, and provided that the debentures to be issued thereunder should be payable in twenty years from the date of their issue, the 1st of October following.

Held, that, as the period of payment exceeded twenty years from the taking effect of the by-law, it was in contravention of sec. 340, subsec. 2, of the Municipal Act, R. S. O. ch. 184, and should be quashed.

Held, also, that the by-law was not one by which a rate was imposed under sec. 334, requiring an application to quash within three months from promulgation, but was a by-law for contracting a debt under secs. 351 and 352, and that an application to quash within three months of its registration was in time. *Re Cooke and Corporation of Norwich*, 72.

3. *Agreement subject to passing of a by-law not executed by corporation—Work done under it—Mandamus to raise the money.*]—Plaintiff entered into an agreement in writing with defendants to do certain work under a provisional by-law, and which agreement contained this clause. "Notwithstanding anything hereinbefore contained to the contrary, this agreement * * is made subject to the final passing of the said by-law * * and in the event of the said by-law not being passed * * then this agreement shall be null and void * * ."

The by-law was never finally passed, and the agreement was produced at the trial by defendants to prevent the plaintiff recovering as on a *quantum meruit*.

Held, (reversing FERGUSON, J., who retained his opinion), that the defendants were bound by the contract, and that the plaintiff on shewing the approval of the engineer, as provided by the agreement, was entitled to a *mandamus* to the defendants to raise the money.

The stipulation as to the final passing of the by-law should receive a reasonable construction and could only be invoked when the work was not properly performed. *Quaintance* v. *Corporation of Howard*, 95.

4. *Baggage transfer company—Employee going through trains for baggage under agreement with railway company—City by-law against soliciting baggage—Ultra vires.*]—A city by-law prohibited any person licensed thereunder soliciting any person to take or use his express waggon, or employing any runner or other person to assist or act in consert with him in soliciting any passenger or baggage at any of the "stands, railroad stations, steamboat landings, or elsewhere in the said city," but persons wishing to use or engage any such express waggon or other vehicle, should be left to choose without any interference or solicitation. An employee of defendants with the consent of a railway company, and under instructions from his employer, boarded an arriving passenger train at one of the outlying city stations on its way to the Union station, and went through the cars calling out "baggage transferred to all parts of the city," and having in his hands a number of the transfer company's checks. No baggage was taken at the time.

Held, that there was no breach of the by-law, but merely the carrying out of the defendants' agreement with the railroad company; and further that the railroad train did not come within any of the places mentioned in the by-law.

Per ROSE, J.—If the by-law in terms had covered this case, it would have been *ultra vires*.—*Regina* v. *Verral*, 117.

5. *Accident—Want of repair of street—Contract with street railway company to keep in repair—Liability of corporation—Remedy over against street railway company—Evidence of contributory negligence.*]—By 36 Vic. ch. 99, (O.), the London Street Railway Company was incorporated, by sec. 13 of which the city of London were authorized to enter into an agreement for the construction of the railway on such of the streets as might be agreed on, and for the paving, repairing, &c., of the same. By sec. 14 the city was also empowered to pass by-laws to carry such agreement into effect, and containing all necessary provisions, &c., for the conduct of all parties concerned, including the company, and for enforcing obedience thereto. A by-law was passed by the city providing for the repair of certain portions of the streets by the street railway company who were to be liable for all damage occasioned to any person by reason of the construction, repair, or operation of the railway, or any part thereof, or by reason of the default in repairing the said portions of the streets, and that the city should be indemnified by the company for all liability in respect of such damage. An accident having happened to plaintiff by reason of said portions of said streets being out of repair, an action was brought by the plaintiff against the city of London therefor. After action brought, and more than six months after the occurrence of the accident, on the application of the city of London, the street railway company were made party defendants.

Held, that notwithstanding the said legislation, by-law and agreement, the city was liable under sec. 531 of the Municipal Act, R. S O. ch. 184 to the plaintiff for the damage he had sustained; but that they had a remedy over against the street railway company.

Held, also, following *Anderson* v. *Canadian Pacific R. W. Co.*, 17 O. R. 747, that the six months' limitation clause in the Railway Act did

not apply, the right of the city against the street railway company being one of contract.—*Carty* v. *Corporation of London and the London Street R. W. Co.*, *122*.

6. *Sequestration—Invalid by-law—Injunction restraining acting under—Passing valid by-law—Breach*]—A municipal corporation having been enjoined from purchasing a property for municipal purposes under a by-law which was invalid, repealed such by-law and proceeded to purchase the same property under a new by-law valid on its face.

Held, that in purchasing under the new by-law the corporation was not guilty of a breach of the injunction, and a motion for a writ of sequestration was dismissed. *Young* v. *Corporation of Ridgetown*, 140.

7. *Conviction for carrying on "petty trade"—Evidence of—R.S.O. ch. 184, sec. 495, sub-sec. 3 (a) (b).*—The defendant a wholesale and retail dealer in teas in the county of W., where he resided, went to the county of H., and sold teas by sample to private persons there, taking their orders therefor, which were forwarded by him to county of W., and the packages of teas subsequently delivered. All the packages were sent in one parcel to H. county, and there distributed. The defendant was convicted under a by-law passed under statutes, which are now R.S.O. ch. 184, sec. 495, sub-sec. 3, par. (*a*) and (*b*), for carrying on a petty trade without the necessary license therefor.

Held, that the conviction could not be sustained, and must be quashed. *Regina* v. *Henderson*, 144.

8. *Drainage through private lands in adjacent municipality—Arbitration—"Territory"—R. S. O. ch. 184, sec. 492, sub-sec. 2.*]—One municipality cannot construct a sewer through an adjacent municipality against the will of the latter without first settling the terms by arbitration, even although a purchase has been made from the private owners of the land through which the sewer is to be constructed.

The word "territory" in sec. 492, sub-sec. 2, R. S. O. ch. 184, is not used to signify land belonging to the corporation as owners, but land within their territorial ambit in which they have municipal jurisdiction. *Corporation of Barton* v. *Corporation of Hamilton*, 199.

9. *Drainage by-law—R. S. O. ch. 184, secs. 571, 572—Motion to quash—Notice of intention to move must be given by actual applicant.*]—*Held*, that a municipal drainage by-law, whether for the construction of an original work or the improvement of an old one, and whether the proceedings are taken under sec. 583, 585, or 586 of the Municipal Act, R. S. O. ch. 184, is subject to the provisions of secs. 571 and 572 requiring notice in writing to be given within ten days by any one intending to apply to have the by-law quashed, of his intention to so apply.

And where such notice was given by a solicitor and signed by him as solicitor for two named persons, stating that the application would be made on behalf of them and "others," and an application to quash was afterwards made to the Court by persons other than those named:

Held, That the application was not made to the Court by any person who had given the notice required by secs. 571 and 572: that another ratepayer could not take advantage of the notice by adopting it as his

own; and, the application of which notice had been given not having been made, the by-law became a valid one at the expiration of six weeks from its final passing; and the motion to quash it was dismissed with costs. *Re McCormick and Corporation of Howard*, 260.

10. *Compensation — Expropriation — Arbitration and award.*]—Where the land itself upon which a trade is carried on, is expropriated, damage to the goodwill may be a proper subject of compensation.

Ricket's Case, L. R. 2 H. L. 175, distinguished. *Re McCauley and Corporation of Toronto*, 416.

11. *Highway carried over railway —Liability of municipal corporation —Liability of railway company— R. S. O. ch. 184, sec. 531.*]—Notwithstanding any liability which may be cast by statute upon a railway company to maintain and repair a bridge and its approaches by means of which a highway is carried over their railway, such highway is still a public highway, and as such comes within the provisions of the Municipal Act, R. S. O. ch. 184, sec. 531, requiring every public road, street, bridge, and highway to be kept in repair by the municipal corporation, who are not absolved from liability for default by the liability, if any, of the railway company. *Mead* v. *Corporation of Etobicoke and Grand Trunk R. W. Co.*, 438.

12. *Action to compel maintenance of road—Assumption of road by corporation—Statute labour done with consent of municipal officers—Remedy by indictment.*]—In an action to compel a municipal corporation to maintain and repair a street laid out by private persons, it appeared that such street was not established as a highway by by-law nor assumed for public user by any corporate act of the municipal corporation; but it was contended that the performance of statute labour thereon with the consent of the councillor for the ward and of the reeve, was evidence that it was otherwise assumed for public user:—

Held, that the acts required to work such an assumption must be corporate acts, clear and unequivocal, and such as clearly and unequivocally indicate the intention of the corporation to assume the road; and the acts relied upon in this case could not bind the corporation nor work such an assumption:—

Held, also, following *Hislop* v. *McGillivray*, 15 A. R. 687, that even if the street had been assumed for public user, the plaintiff's only remedy was by indictment, and the action was not maintainable. *Hubert et al.* v. *Corporation of Yarmouth*, 458.

See COVENANTS FOR TITLE.

MURDER.

See CRIMINAL LAW, 2.

NEGLIGENCE.

See MUNICIPAL CORPORATIONS, 5 —RAILWAYS AND RAILWAY COMPANIES, 1.

NEW TRIAL.

See MALICIOUS PROSECUTION, 1.

NOTICE.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.—INSURANCE, 1, 2.—LIEN, 1.

NOTICE OF ACTION.

See MASTER AND SERVANT.

PARENT AND CHILD.

See GIFT, 2—HUSBAND AND WIFE, 1.—MASTER AND SERVANT, 1.—SPECIFIC PERFORMANCE.

PARTIES.

Joinder of.]—*See* DEFAMATION, 1.

See EXECUTORS AND ADMINISTRATORS.—SALE OF GOODS.

PARTNERSHIP.

See ARBITRATION AND AWARD, 1.

PAYMENT.

See DIVISION COURTS, 2.—LIMITATIONS, STATUTE OF, 1.

PEDLERS.

See MUNICIPAL CORPORATIONS, 7.

PETTY TRADE.

See MUNICIPAL CORPORATIONS, 7.

PLEADING.

Defence of contributory negligence —Not guilty.]—In an action against a railway company for damages sustained by the plaintiff by the death of his father, by reason, as alleged, of the defendants' negligence in omitting to give the necessary warnings of the approach of their train at a railway crossing, the defendants pleaded "not guilty," and referred to the statutes incorporating the company and to the C. S. C. ch. 66, secs. 1 to 83 inclusive, and sec. 131:—

Held, that the plea was not a compliance with Rule 418; and also that the defence of contributory negligence could not be set up under it, but must be specially pleaded. *Doan* v. *Michigan Central R. W. Co.*, 482.

See DEFAMATION, 4.—LIEN, 2.—RAILWAYS AND RAILWAY COMPANIES, 1.

POSSESSION.

See HIRING, 2.

PRACTICE.

See HIRING, 2.

PREFERENCE.

See BANKRUPTCY AND INSOLVENCY, 2, 3.

PRINCIPAL AND SURETY.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

PROHIBITION.

See DIVISION COURTS, 1, 3.

PROMISSORY NOTES.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

PUBLIC SCHOOLS.

1. *Formation of school sections—Map of—Evidence of—Land belonging to one school section assessed to another section—R. S. O. ch. 225, sec. 11—Rolls finally passed—R. S. O. ch. 180, sec. 57.*]—As evidence of the formation of school sections in a township by the municipal council thereof a rough sketch or map designated "school section map township of B," but without signature, seal, or date, having the appearance of being very old and there being no other map to be found, was produced from the proper custody. In 1888, before this action was commenced, but after the beginning of the agitation which gave rise thereto, the municipal council passed a by-law "to make alterations in school section map," and authorized the clerk to correct the map, etc.; and that when any difficulty arose as to boundaries of school sections recourse was had, at least in some instances, to this map:—

Held, that the map must be assumed to be drawn in pursuance of section 11 of the "Public School Act," and therefore afforded evidence of the original division of the township into school sections by the township council.

Plaintiffs complained that for the years 1883 to 1887 certain lots which formed part of their section had not been so assessed, but had been assessed as school section 23, and the taxes thereon levied and paid over to section 23, and that plaintiffs were entitled to be paid these taxes either by the township or by section 23. In each of these years, so far as regards this matter, the rolls were finally passed by the Court of Revision and certified by the clerk, etc.:—

Held, that the plaintiffs could not now maintain such claim, for they were bound by section 57 of R.S.O. ch. 180 (1877), under which the rolls as finally passed by the Court of Revision, etc., were valid and binding on "all parties concerned," the plaintiffs coming within that designation, but apparently they were not entitled to the notice provided for by section 41 of that Act. *Trustees for School Section No. 24 of Burford* v. *Corporation of Burford and Trustees for School Section No. 23 of Burford*, 546.

2. *High schools — Incorporated town in judicial district — Right to appoint high school board, and erect school—Necessity of appointment by by-law—Proof of ownership of land—Appropriation of money.*]—On a motion to continue an injunction to restrain the corporation of a town in a judicial district from paying over to the high school board of said town, and the said board from receiving, the sum of $15,000 raised by by-law of said town, for acquiring a site and erecting a high school thereon:—

Held, that under the provisions of secs. 4 and 10 of R. S. O. ch. 226, taken in connection with sec. 1 of 50 Vic ch. 64 (O.), incorporating the said town, the corporation were authorized to appoint a high school board therefor, and to pass the by-law for the erection of said school;

and that the consent of the Lieutenant-Governor, provided for by sec. 8, was not required as this was not an additional high school:—

Held, also, that the appointment of the board must be by by-law; but a by-law therefor passed after the motion was made, but before the hearing thereof, was sufficient.

The Court refused to entertain an objection that the board were about to build the school on land not acquired by them, for it could not be assumed that the money would be spent until the title to the land had been acquired; and also it was not necessary to shew that specific portions of the $15,000 had been appropriated to the purchase of the land and to erection of the building. *Dawson* v. *Corporation of Sault Ste. Marie et al*, 556.

3. *Separate schools—R. S. O. (1887) ch. 225, sec. 120, sub-sec. 2—ib., ch. 227, sec. 40.*]—*Held*, that if the assessor is satisfied with the *primâ facie* evidence of the statements made by or on behalf of any ratepayer, that he is a Roman Catholic pursuant to R. S. O. (1887) ch. 225, sec. 120, sub-sec. 2, and thereupon (asking and having no other information) places such person upon the assessment roll as a separate school supporter, this ratepayer, though he may not, by himself or his agent, give notice in writing pursuant to R. S. O. (1887) ch. 227, sec. 40, may be entitled to exemption from the payment of rates for public school purposes, he being in the case supposed assessed as a supporter to Roman Catholic separate schools.

Held, also, that the Court of Revision has jurisdiction, under R. S. O. (1887), ch. 225, sub-sec. 3, on application of the person assessed, or of any municipal elector (or ratepayer, as under R. S. O. (1887), ch. 227, sec. 48, sub-sec. 3), to hear and determine complaints, (*a*) in regard to the religion of the person placed on the roll as Protestant or Roman Catholic; and (*b*) as to whether such person is or is not a supporter of public or separate schools within the meaning of the provisions of law in that behalf; and (*c*), which appears to be involved in (*b*), where such person has been placed in the wrong column of the assessment roll for the purposes of the school tax.

It is also competent for the Court of Revision to determine whether the claim of any person wrongfully omitted from the proper column of the assessment roll, should be inserted therein upon the complaint of the person himself, or of any elector (or ratepayer).

Held, also, that the assessor is not bound to accept the statements of, or made on behalf of, any ratepayer under R. S. O. (1887), ch. 225, sec. 120, sub-sec. 2, in case he is made aware, or ascertains before completing his roll, that such ratepayer is not a Roman Catholic, or has not given the notice required by sec. 40 of R. S. O. (1887), ch. 227, or is for any reason not entitled to exemption from public school rates.

Held, also, that a ratepayer, not a Roman Catholic, being wrongfully assessed as a Roman Catholic and supporter of separate schools, who through inadvertence or other cause does not appeal therefrom, is not estopped (nor are other ratepayers) from claiming with reference to the assessment of the following or future years, that he is not a Roman Catholic.

Held, lastly, that a ratepayer, being a Roman Catholic, and appearing in the assessment roll as such and as a supporter of separate schools, who

has not given the notice required by R. S. O. (1887), ch. 227, sec. 40, is not (nor are other ratepayers) estopped from claiming, in the following or future year, that he should not be placed as a supporter of separate schools with reference to the assessment of such year, although he has not given notice of withdrawal mentioned in R. S. O. (1887), ch. 277, sec. 47. *Re Roman Catholic Separate Schools*, 606.

QUIET ENJOYMENT.

See COVENANTS FOR TITLE.

RAILWAYS AND RAILWAY COMPANIES.

1. *Master and servant—Dominion Railway Act—Negligence—Unpacked frog—"Person injured thereby"—Answers of jury—Pleading—"Volenti non fit injuria."*]—Section 262, sub-sec. 3, of 51 Vic. ch. 29 (D.) provides that "the spaces behind and in front of every railway frog or crossing, and between the fixed rails of every switch, where such spaces are less than five inches in width, shall be filled with packing up to the under side of the head of the rail," and section 289 of the same Act provides that "every company, * * causing or permitting to be done, any matter, act, or thing contrary to the provisions of this Act or the special Act * * or omitting to do any matter, act, or thing required to be done on the part of any such company, * * is liable to any person injured thereby for the full amount of damages sustained by such act or omission," etc.

The plaintiff, who had been for some months employed at the place where the accident happened, as a switch foreman, while in the course of his duty in the act of uncoupling cars, had his foot caught in an unpacked frog, where it was crushed by the wheels of the cars:—

Held, that, although a servant of the defendants, he was a "person injured" within the meaning of the statute, and entitled to maintain an action for negligence.

The jury having found that the frog was not packed, in reply to a question whether the plaintiff had "notice or knowledge, or ought he to have had notice or knowledge that the frog was not packed," answered: "We believe he did not have notice, and should have had notice," and in answer to another question they negatived contributory negligence on the plaintiff's part:—

Held, even assuming that the meaning of the answer was to impute notice of the danger to the plaintiff, it would not prevent his recovering so long as he himself was not negligent, there being no finding or evidence to sustain a finding that the plaintiff, freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it.

Quære, per FERGUSON, J., whether it is not necessary, under the present system of pleading, to set up specially a defence arising from the maxim, "*Volenti non fit injuria. Le May* v. *Canadian Pacific R. W. Co.*, 314.

2. *Bonds—Debentures—Charge on the "undertaking"—Earnings of road—44 Vic. ch. 73, sec. 35.*]—Certain execution creditors of a railway company sought to attach a bank deposit of moneys collected from the earnings of the road, which was resisted by bondholders of the

company, who claimed a charge upon such moneys. The company's Act of incorporation, 44 Vic. ch. 73, sec. 35 (O.), enacted that the bonds in question were "to be taken and considered to be the first and preferential claims and charges upon the undertaking."

Held, that the bondholders were entitled to a preferential charge upon the deposit.

In railway parlance the "undertaking" has been defined to mean the complete work from which returns of moneys or earning arise, and a charge upon the undertaking means that these earnings are liable for the satisfaction of the charge. *Phelps & Co.* v. *St. Catharines and Niagara Central R. W. Co.*, 581.

(Reversed by the Divisional Court.)

See MUNICIPAL CORPORATIONS, 11—PLEADING.

RAPE.

See CRIMINAL LAW, 2.

REASONABLE AND PROBABLE CAUSE.

See CORPORATIONS, 2—MALICIOUS PROSECUTION.

REFORMATION.

Of lease.]—*See* LANDLORD AND TENANT, 1.

See REGISTRY LAWS.

REGISTRY LAWS.

Registry Act—Numbers—Letters Discharge of mortgage—Synonymous names of parties—Uncertainty of grantee.]—A discharge of mortgage referred to the mortgage as 5764, whereas it was registered as 5764 C. W. :—

Held, that it was nevertheless a valid discharge properly registered.

The Registry Act, though requiring every instrument to be numbered, says nothing about adding letters, which appear to be only arbitrary marks adopted by the official for convenience of reference.

A discharge of mortgage was signed by "Eliza" Switzer, whereas the mortgage purporting to be discharged was made to "Elizabeth" Switzer :—

Held, on a vendor and purchaser application, that there was no valid objection to the discharge, for the identity of the person signing was established by affidavit to the satisfaction of the registrar, and as a matter of family usage the names are synonymous and interchangeable.

In one of the conveyances in the chain of title the grant was to the party of the third part, whereas there were only two parties to the conveyance, and the party of the second part did not execute it :—

Held, that this was a valid objection, though the instrument would be at once corrected or reformed as against the grantors; or could be cured by another conveyance drawn with proper certainty. *Clarke* v. *Chamberlain*, 270.

RELEASE.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

RENUNCIATION.

See EXECUTORS AND ADMINISTRATORS.

REPAIR.

See MUNICIPAL CORPORATIONS, 4.

RES GESTÆ.

See CRIMINAL LAW, 2.

SALARY

Action for — Mandamus.]—*See* MUNICIPAL CORPORATIONS, 1.

SALE OF GOODS.

Payment by instalments—Property remaining in vendor—Transfer by vendor of his interest—Removal of goods by third party—Conversion—Trover—Detinue—Parties.]—One of the defendants was the purchaser of a piano, which she had partly paid for, under a conditional sale by which until fully paid for it was to remain the property of the vendor, but, before paying the balance due on it, she allowed the other defendant, who had acted as the vendor's agent in the sale to her, secretly to remove and take possession of it, he paying her the cash payment she had made.

After this transaction between the defendants the plaintiff purchased from the vendor the notes given for the purchase money of the instrument, and took an assignment under seal of the property in it.

In an action against the defendants for the recovery of the piano, in which no demand was proved upon the defendant in possession of the instrument, it was objected by him that neither detinue nor trover would lie:—

Held, that the plaintiff was entitled to recover damages against him for the conversion of the piano; for it was not necessary to impute the conversion to any particular period of time, and the said defendant's denial after action of the plaintiff's right to the piano could be treated under the circumstances as evidence of a conversion before action by the said defendant of the plaintiff's interest in it; and as against technical objections raised by a wrong doer the benefit of all possible presumptions should be allowed.

Held, also, that it was not necessary that the vendor should be added as a party in order to entitle the plaintiff to succeed. *Blackley* v. *Dooley et al.*, 381.

See HIRING.

SALE OF LAND.

Time the essence of a contract—Offer to sell land—Acceptance—Net price—Reasonable time to pay money.]—Time may be of the essence of a contract even without any express stipulation if it appears that such was the intention.

Defendant wrote his agent on March 25th: "If O. (plaintiff) still wants the farm * * * he can have it for $350 net, provided it can be arranged at once. Kindly advise me * * if he accepts, and when he will pay the money over." On 6th April, the agent telegraphed defendant "O. will take the farm, will pay the money in two weeks;" and on April 11th the defendant telegraphed "your offer of 6th comes too late:"—

Held, that an arrangement between defendant and his agent as to the latter's commission would not affect the net price as between plaintiff and defendant:—

Held, also, that the enquiry "when he will pay over the money" shewed an intention to give a reasonable time for such purpose, and that under the circumstances two weeks was not an unreasonable time. But

Held, also, that the acceptance of defendant's offer was not in time. *Oldfield* v. *Dickson*, 188.

SCHOOLS.

See PUBLIC SCHOOLS.

SEDUCTION.

See BANKRUPTCY AND INSOLVENCY, 2, 3.

SENATE.

Place of meeting of.]—*See* VICTORIA UNIVERSITY.

SEPARATE SCHOOLS.

See PUBLIC SCHOOLS, 3.

SEPARATE ESTATE.

See HUSBAND AND WIFE, 2.

SEQUESTRATION.

See MUNICIPAL CORPORATIONS, 6.

SERVANT.

See MASTER AND SERVANT.

SERVICE.

Substitutional.] — *See* DIVISION COURTS, 3.

SEWERS.

See MUNICIPAL CORPORATIONS, 8, 9.

SHAREHOLDERS.

See CORPORATIONS.

SHELLEY'S CASE.

See WILL, 2, 5.

SHERIFF.

See BANKRUPTCY AND INSOLVENCY, 2—CREDITORS' RELIEF ACT.

SLANDER.

See DEFAMATION.

SOLICITOR.

See CONTEMPT OF COURT.

SPECIFIC PERFORMANCE.

Contract to make provision by will for granddaughter—Action against executors—Uncertainty of promise and consideration—Services rendered to testator—Remuneration for.]—Where a contract on the part of a testator, founded upon a valuable and sufficient consideration, that he will leave by his will to the other contracting party a sum of money as a legacy, is clearly made out, the representatives of the testator may be compelled to make good his obligation.

But where the testator, the grandfather of the plaintiff, promising to

make the same provision for her by will as he should make for his own daughters, took her from the home of her parents at the age of twelve, adopted her, and maintained her, while she worked for him, for nine years, but, although he made his daughters residuary devisees, left the plaintiff nothing by his will, and paid her nothing for her services, and she sued his executors for specific performance of the contract or promise and in the alternative for wages.

Held, that the case did not fall within the rule; the promise made and the consideration for it being both of too uncertain a character to entitle the plaintiff to come to the Court for specific performance; but that the circumstances gave rise to an implied contract for the payment of wages, and took the case out of the ordinary rule that children are not to look for wages from their parents, or those in *loco parentis*, in the absence of special contract, whilst they form part of the household.

Decision of PROUDFOOT, J., varied. *Walker* v. *Boughner, et al.*, 448.

STATUTE LABOUR.

See MUNICIPAL CORPORATIONS, 12.

STATUTES.

21 Jas. 1 ch. 16.]—*See* LIMITATIONS, STATUTE OF, 2.

26 Geo. III. ch. 33 sec. 33, sec. 11.]—*See* HUSBAND AND WIFE, 1.

C. S. U. C. ch. 10 sec. 5.]—*See* CRIMINAL LAW, 1.

C. S. C. ch. 66, secs. 1-83.]—*See* PLEADING.

36 Vic. ch. 99 (O.)]—*See* MUNICIPAL CORPORATIONS, 5.

38 Vic. ch. 79 (O.)]—*See* VICTORIA UNIVERSITY.

R. S. O. (1877), ch. 161, sec. 40.]—*See* INSURANCE, 1.

R. S. O. (1877), 217, secs. 6, 27.]—*See* CRIMINAL LAW, 3.

44 Vic. ch. 73, sec 35 (O.)]—*See* RAILWAYS AND RAILWAY COMPANIES, 2.

47 Vic. ch. 19 (O.)]—*See* HUSBAND AND WIFE, 2.

47 Vic. ch. 93 (O.)]—*See* VICTORIA UNIVERSITY.

48 Vic. ch. 26 (O.)]—*See* ASSESSMENT AND TAXES, 2.

R. S. C. ch. 159, sec. 2]—*See* GAMING.

R. S. C. ch. 168, secs. 26, 27, 58, 59.]—*See* DEFAMATION, 3—JUSTICE OF THE PEACE, 2.

R. S. C. ch. 173, sec. 25.]—*See* CRIMINAL LAW 3.

R. S. C. ch. 178, sec. 87.]—*See* GAMING.

50 Vic. ch 23, sec. 3 (O.)]—*See* LANDLORD AND TENANT, 2.

50 Vic. ch. 64, sec. 1, (O.)]—*See* PUBLIC SCHOOLS, 2.

R S. O. (1887), ch. 51, sec. 100.]—*See* DIVISION COURTS, 3.

R. S. O. (1887), ch. 60, sec. 1.]—*See* EXECUTORS AND ADMINISTRATORS.

R. S. O. (1887), ch. 65, sec. 4.]—*See* CREDITORS' RELIEF ACT.

R. S. O. (1887), ch. 123, sec. 1.]—*See* LIMITATIONS, STATUTE OF, 2.

R. S. O. (1887), ch. 124.]—*See* BANKRUPTCY AND INSOLVENCY, 2.

R. S. O. (1887), ch. 132, sec. 3 (2.)]—*See* DEFAMATION, 1.

R. S. O. (1887), ch. 132, sec. 5.]—*See* HUSBAND AND WIFE, 2.

R. S. O. (1887), ch. 167, secs. 106, 114, 131.]—*See* INSURANCE, 2, 3.

R. S. O. (1887), ch. 180, sec. 57.]—*See* PUBLIC SCHOOLS, 1.

R. S. O. (1887), ch. 184, secs. 334, 340, 351, 352, 492, sub-sec. 2, 495, sub.sec. 3 (*a*) (*b*), 521, 571, 572.]—*See* MUNICIPAL CORPORATIONS, 2, 5, 7, 8, 9, 11.

R. S. O. (1887), ch. 193, secs. 61, 68, 188, 189.]—*See* ASSESSMENT AND TAXES, 2—VOTERS LISTS.

R. S. O. (1887), ch. 225, sec. 11, sec. 120, sub-secs. 2,3.]—*See* PUBLIC SCHOOLS, 1, 3.

R. S. O. (1887), ch. 226, secs. 4, 10.]—*See* PUBLIC SCHOOLS, 2.

R. S. O. (1887), ch. 227 secs. 40, 47, 48, sub-sec. 3.]—*See* PUBLIC SCHOOLS, 3.

51. Vic. ch. 4 sec. 13, sub-sec. 1 (O.)—*See* VOTERS LISTS.

52 Vic. ch. 14 (O.)—*See* DEFAMATION, 2.

STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

STREET RAILWAY.

See MUNICIPAL CORPORATIONS, 5.

SUBROGATION.

See INSURANCE, 3—MORTGAGE.

SUMMARY CONVICTIONS ACT.

See GAMING — JUSTICE OF THE PEACE, 2.

SUMMONS.

Substitutional service.]—*See* DIVISION COURTS, 3.

TEMPERANCE.

See CANADA TEMPERANCE ACT.

TENANT.

See LANDLORD AND TENANT.

TITLE.

See COVENANTS FOR TITLE.

TRADE.

Compensation for—Expropriation of lands.]—*See* MUNICIPAL CORPORATIONS, 10.

TRADE MARK.

Trade-name—"Belleville Business College"—Action to restrain use of designation—Non-appropriation of name by plaintiffs—User by public in relation to plaintiffs—Requisite that name should be specific, and not merely descriptive — Costs.] — The plaintiffs, proprietors for about twenty years of a commercial school, sought to restrain the defendant, also a proprietor of a similar institution, lately established in the same place, from using the name "Belleville Business College," which, although generally used by the public in describing the plaintiffs' establishment, was not its registered name, and had never been adopted or appropriated by the plaintiffs themselves, who had carried on their business under different names, one of which was registered. After the defendant's advent some confusion arose in the post office as to letters addressed "Belleville Business Col-

lege," but it did not appear that any students were lost to the plaintiffs by reason of the defendant's conduct:—

Held, that, as there had been no actual user by the plaintiffs of the name claimed, user by the public was not sufficient to attach the designation to the business so as to make it equivalent to the plaintiffs' personal user thereof:—

Held, also, that the name in controversy being merely descriptive of the nature of the business and the locality of its operations, in the absence of evidence of user of the name by the plaintiffs, or that the name of the locality was so inseparably connected with their establishment that a secondary meaning was attributable to it, there was no ground for protecting the name.

Thompson v. *Montgomery*, 41 Ch. D. 35, distinguished.

No costs were given to the defendant, as he had sought by the use of the name to advantage himself in an unmeritorious way. *Robinson* v. *Bogle*, 387.

TRESPASS.

See CRIMINAL LAW, 3—DAMAGES.

TROVER.

See SALE OF GOODS.

TRUSTS AND TRUSTEES.

Moneys in Court—Application to pay out to trustees—Trustee company—Party entitled to income—Retention in Court—Remainderman.]—On an application by a Trustee Company, and a party who was entitled for life to the income of a fund in Court, which was the proceeds of the sale of certain settled estates, for the payment out of the fund for the purpose of investment by the company as trustees, (they having been appointed the trustees under the will which devised the settled estates), which application was opposed by the official guardian on behalf of the remainderman:—

Held, that the practice and current of authority were against what was asked by the petitioners, and that they were not entitled to it as a matter of right, and that the application must be dismissed. *Re J. T. Smith's Trusts, No. 2*, 327.

See WILL, 3, 7, 9.

ULTRA VIRES.

See MUNICIPAL CORPORATIONS.

UNIVERSITY.

See VICTORIA UNIVERSITY.

USER.

See WAYS.

VENDOR AND PURCHASERS ACT.

See REGISTRY LAWS—WILL, 5.

VICTORIA UNIVERSITY.

Place of Meeting of Senate—Seat of University—38 Vic. ch. 79, (O.)—47 Vic. ch. 93 (O.)]—*Held*, that under the Acts incorporating Victoria Uni-

versity, and the statutes thereof, set out in the judgment, the Chancellor has no power to call a meeting of the Senate elsewhere than at Cobourg the present seat of the University. *Corporation of Cobourg* v. *Victoria University*, 165.

VILLAGE.

See CANADA TEMPERANCE ACT, 1.

VOTERS LISTS.

Mandamus — Compelling Court of Revision to hear voters' lists appeals —Specific remedy by appeal to County Judge—51 Vic. ch. 4, sec. 13, sub-sec. (1) (O)—R. S. O. ch. 193, secs. 61, 68.]—By sec. 13, sub-sec. (1), of "The Manhood Suffrage Act," 51 Vic. ch. 4 (O.), it is provided that complaints of persons not having been entered on the roll as qualified to be voters who should have been so entered, may, by any person entitled to be a voter or to be entered on the voters' list, be made to the Court of Revision as in the case of assessments, or the complaints may be made to the County Judge under the Voters' Lists Act.

By sec. 61 of the Assessment Act, R. S. O. ch. 193, it is provided that the Court of Revision of each municipality shall meet and try all complaints in regard to persons wrongfully omitted from the roll; and by sec. 68, sub-sec. (1), that an appeal to the County Judge shall lie, not only against a decision of the Court of Revision on an appeal to that Court, but also against the omission, neglect, or refusal of said Court to hear or decide an appeal.

The Court of Revision of a municipality refused to hear or adjudicate upon a complaint made by M. under sec. 13 of "The Manhood Suffrage Act," that the names of certain persons had been wrongfully omitted from the assessment roll:—

Held, that it was the duty of the Court of Revision under sec 61, to try the complaint made by M.; and that if no other complete, appropriate and convenient remedy had existed, M. would have been entitled to a mandamus to compel the Court to perform its duty; but as the Legislature by sec. 68 had given a specific remedy for this very breach of duty, by appeal to the County Judge, M. was not entitled to a mandamus.

The right which M. was seeking to enforce was to have the names of certain persons placed on the assessment roll; not, as was contended, to have his complaint disposed of by the Court of Revision; the complaint to the Court of Revision was a means of enforcing his right, not the right itself.

Decision of MACMAHON, J., reversed.—*Re Marter and the Court of Revision of Gravenhurst*, 243.

WAGES.

See GIFT—SPECIFIC PERFORMANCE.

WARRANT.

See CONSTABLE.

WAYS.

Road along lake shore—User and dedication—Evidence of—Break in road.]—Uninterrupted user by the public, for seventy years, of a roadway along the edge of an un-

occupied and uninclosed farm bordering on a lake, upon a sandy beach formed there by the waters of the lake, and the course of which roadway was slightly varied from time to time by the rise and fall of the waters of the lake, is sufficient evidence of dedication of a right of way, and the breaking through of a small inland lake by which the road was cut across and a navigable channel created, was held not to deprive it of its character of a highway.—*Frank* v. *Corporation of Harwich*, 344.

See MUNICIPAL CORPORATIONS, 5, 11, 12.

WIDOW.

Right to administration.]—*See* EXECUTORS AND ADMINISTRATORS.

WIFE.

See HUSBAND AND WIFE.

WILL.

1. *Devise — Legacies charged on real estate.*]—A testator after devising certain pecuniary legacies and a home to two of his children until they came of age, provided as follows: "And I will and bequeath unto my daughter C. J., all my real estate and the remainder of my personal estate after the above legacies are paid."

Held, [affirming ROBERTSON, J.], that the legacies were charged upon the real estate. *Johnston* v. *Denman et al.*, 66.

2. *Construction—Life estate—Remainder to sons—Rule in Shelley's case.*]—A will contained the following clause: "To my son, G. W., I give and bequeath during his life time, the south-east quarter of said lot 4 before mentioned, and at his death to go to and be vested in his son W. C., or in case other sons should be born to my son G. W., then to be equally divided between all the boys."

Held, that G. W. took a life estate only, and that there was a vested remainder in fee in his sons, as a class, which would let in all born before his death. *Re Chandler*, 105.

3. *Construction — Devise — Restraint on alienation — Trust.*]—After a devise to his son C., his heirs and assigns for ever, of certain lands, a testator added that his devise to C. was subject to this express condition, that he should not sell or mortgage the land during his life, but with power to devise the same to his children as he might think fit in such way as he might desire.

Held, that the case was governed by *Re Winstanley*, 6 O. R. 315, and that the property was not clothed with a trust in favour of the children, but the devisee took it in fee simple, with, however, a valid prohibition against selling and mortgaging it during his life. *Re Northcote*, 107.

4. *Construction—Specific bequest—Home— Maintenance.*]—A testator bequeathed to his daughter "a home as long as she may remain single" in his dwelling house.

Held, that though in the case of an infant "home" would probably include maintenance, yet that the legatee in this case being of age, and there being no express words giving her maintenance after minority, she was not entitled to maintenance under the above bequest.

The testator also bequeathed to his wife "the full control of all my real and personal estate, stock and implements, during her lifetime," and willed that at his wife's decease "all the stock, of whatever kind, with the farming implements on the farm at my wife's decease shall be equally divided between my sons."

Held, that the bequest to the widow of the stock and farm implements was specific, and therefore exempt from the payment of the pecuniary legacies. *Augustine* v. *Schrier*, 192.

5. *Construction—Vendor and purchaser petition—Devise to one for life, then to issue in fee simple—Shelley's case.*]—A testator devised lands to his daughter: "to her own use for the full term of her natural life, and from and after her decease to the lawful issue of my said daughter to hold in fee simple," and in default of such issue over.

The daughter contracted to convey in fee to a purchaser; and the question whether she took a life estate or an estate tail was brought up on a vendor and purchaser petition.

The Court refrained from making any order on the petition, for the law on this head seemed to be in a state of uncertainty, if not of transition, and any experiment could better be made in a contested case when all parties interested were represented.

Semble, however, that the direction that the issue should hold the property in fee simple appeared incompatible with an estate tail in the mother, and that "issue" must be construed "children," and the mother took an estate for life only. *Re Hamilton*, 195.

6. *Life estate—Annuity—Costs—Consolidation of Mortgagees.*]—The testator by his will made a provision for his wife as follows: "I give and devise to my beloved wife, &c., 'all household goods,' &c., 'for the term of her natural life;' and I give and devise to her one bedroom, and one parlor of her own choice in the dwelling house wherein I now dwell,' &c., 'also the use of kitchen, yard, garden; also, I give and devise to my said wife her life in the said lot heretofore mentioned; also an annuity of $20 yearly.'" He then subject to the above and to the payment of $1,000 to his eldest son D., and other legacies, devised the lot to his second son J.

After the testator's death the plaintiff, the widow, and J., lived on the lot, arranging between them as to her maintenance In order to raise money to pay D.'s legacy, the plaintiff and J. mortgaged the lot to a loan company, and on default, proceedings were taken under the power of sale to compel payment. The plaintiff set about making arrangements to pay off the mortgage, but the company refused to accept payment unless the amount of two other mortgages made by J., alone, were also paid. No tender was made by plaintiff, nor was any demand made by her for arrears of annuity or dower. An action was brought by plaintiff to establish the will, and to have the rights of the loan company declared:—

Held, that the proper construction of the will was, that the widow was to have a life estate in the bed-room and parlour she should select, and also in the kitchen, yard, garden, and also the annuity of $20; and that the loan company could not claim to have the mortgages consolidated, and that as the plaintiff

had not made any tender to the loan company she could not claim her costs, but it was directed in lieu of her paying costs the arrears of annuity and dower should be wiped out. *Smith* v. *Smith*, 205.

7. *Devise—"Wish and desire"—Precatory trust—Estate in fee.*]—A testator, by his will, made an absolute gift of all his property to his wife, subject to the payment of debts, legacies, funeral and testamentary expenses, and by a subsequent clause provided as follows: "And it is my wish and desire, after my decease, that my said wife shall make a will dividing the real and personal estate and effects hereby devised and bequeathed to her among my said children, in such manner as she shall deem just and equitable:"

Held, affirming the decision of FERGUSON, J., reported in 17 O. R. 548, (ROBERTSON, J., *dubitante*), that this did not create a precatory trust, and that the wife took the property absolutely.

Per BOYD, C.—If the entire interest in the subject of the gift is given with superadded words expressing the motive of the gift, or a confident expectation that the subject will be applied for the benefit of particular persons, but without in terms cutting down the interest before given, it will not now be held, without more, that a trust has been thereby created.

Re Adams and Kensington Vestry, 27 Ch. D. 394, and *Re Diggles, Gregory* v. *Edmondson*, 39 Ch. D. 253, specially referred to and followed.—*Bank of Montreal* v. *Bower et al.*, 226.

8. *Devise—Period of distribution—Duration of annuity—"To be equally divided," meaning of—Vested interest.*]—A testator, by his will, provided as follows: "I give and devise to my four daughters" (naming them), "an annuity of $120 per year each, to be paid one year after my decease, and to be for the period of their natural lives. Also to my two grand-daughters" (children of a deceased daughter), "an annuity of $60 each, to be paid annually, * * * which annuity will expire at the death of my last daughter. In the event of the death of any of my daughters, the annuity which she received during life to be equally divided amongst her children until the deceased of my last daughter, share and share alike. In the event of the death of my last surviving daughter, the annuities are immediately to cease, and the amount of real and personal estate in the hands of the executors is to be equally divided amongst my grandchildren, provided they are not lazy, spendthrifts, drunkards, worthless characters, or guilty of any act of immorality."

One of the granddaughters named married and died, leaving an infant child, and her husband was appointed administrator of her estate.

Held, that each annuity given was to continue to the death of the last surviving daughter, and that the annuity of the deceased granddaughter from the time of the last payment to her until the death of the last surviving daughter was payable to her proper personal representative for the benefit of those who were, according to law, entitled to her estate.

Held, also, that the words "to be equally divided," were equivalent to a direction to "pay and divide," and that the interest taken by the deceased grand-daughter, in the property to be divided by the executors,

was a vested interest subject to be divested by the clause as to lazy spendthrifts, &c., which clause was not a condition precedent but rather in the nature of a condition subsequent, and that her personal representative became entitled to her share. *Woodhill et al.* v. *Thomas et al.*, 277.

9. *Construction—Continuing business—Investment of trust funds—"Security"—Conversion of testator's business into a joint stock company—Reserve fund of surplus profits—Capital or income—Tenant for life and remainderman—Breach of trust.*] A testator, by his will, devised all his property to trustees upon trust, after providing for certain annuities, to accumulate the income of the residue for ten years, and then to hold the estate for the benefit of his sons and daughters as therein mentioned, or in the case of a son or daughter who might be dead, to hold the share of such son or daughter according to the provisions of his or her will, and in default of any such will, for any children, him or her surviving, and if no such child, then over. He also empowered his trustees to make advances to his sons and daughters, or any children of his sons and daughters' as they might deem advisable, out of the income of the share of such son or daughter or child, and authorized them to invest the moneys of the estate in such securities as they should think proper, and to continue any business he might be engaged in at the time of his decease, for one year after his death.

At the time of his decease the testator was a partner in a firm of distillers. A few months after his death, the surviving partner and the representatives of his estate turned the business into a joint stock company, the testator's share of the assets of the partnership, with the assent of all his children, being valued and put in as so much stock. According to the fundamental agreement entered into by the corporators, a large share of the profits of the company were annually accumulated as a reserve fund. After a period of seven years, the interest of the estate of the testator in the company was bought out by the surviving partner at a large advance, based upon the amount of profits so accumulated in the reserve fund, with an allowance for the prospective amount of such profits in future years:—

Held, that the above employment of the funds of the estate was technically a breach of trust, and an improper investment under the terms of the will.

"Investment" is not a proper term as to moneys in trade; and "security" means such security as binds lands or something to be answerable for it:—

Held, however, that the reserve of profits derived from the user and increase of the capital, was, properly regarded, income, out of which, or out of that part of the purchase money which represented the same, advances might be made by the trustees under the will.

Distinction between this case, and one between tenants for life and remaindermen, pointed out. *Worts* v. *Worts*, 232.

10. *Devise—Investments for legacies—"Paying out"—What time intended—Division of residue.*]—A testator gave two legacies to become due and payable in three and four years respectively from his decease, and instructed his executors to invest the same and pay the

interest to the beneficiaries, and directed the investment of two separate sums for the benefit of two other devisees (one of whom was his sister) with a direction to pay them the interest for their lives, and proceeded, "and should there be a residue or surplus after paying out the foregoing bequests, I will that the same be equally divided between my sisters and S. J. B., or the survivors of them at the time of winding up the affairs :"

Held, that the time for the division of the residue was, when sufficient funds were invested to produce the legacies and fulfil the directions of the will, and that it was not postponed until the legacies were paid over or to any subsequent time.—*Macklin et al.* v. *Daniel et al.*, 434.

11. *Construction—"Family now at home" — Subsequent departure from "home"—"Family"—Dower—Election—Maintenance—Duration—Bequest of maintenance devolving upon personal representatives.*] — Where a testator provided by his will "that the farm be kept till the youngest surviving child comes of age, at which time I would desire the property to be sold and the proceeds to be divided equally between all my children, and my wife. * * My will is, that I would like the farm rented to some good tenant, on the best terms possible, the rent to be used in the support and maintenance of the family now at home." The farm referred to was the only real property possessed by the testator either at the time of making his will or at his death. One of the testator's children, though living on the farm at the time of the testator's death, afterwards left it, and went to reside elsewhere :—

Held, *per* FERGUSON, J., that the words "now at home" were *designatio personarum* and that the child in question did not forfeit her vested right to share in the rents by afterwards leaving the home.

She afterwards died intestate, before the testator's youngest surviving child came of age :—

Held, *per* BOYD, C., that her share of the rents devolved on her personal representatives.

Where a provision is made for maintenance, the duration of which is defined by the testator, it will go on for the prescribed period notwithstanding the death of the beneficiary, because to avoid an intestacy the Court will adjudge it to the representatives of the deceased :—

Held, also, *per* FERGUSON, J., that the widow was intended to be included in the word "family" :—

Held, also, *per* FERGUSON, J., that the widow was put to her election as to dower, since owing to the direction to lease the farm, all the provisions of the will could not be carried into effect consistently with the dower being set apart. *Dawson* v. *Fraser*, 496.

See SPECIFIC PERFORMANCE.

WORDS.

"*Branch*" *or* "*place of business.*"]—*See* ASSESSMENT AND TAXES, 1.

"*Children.*"—*See* WILL, 8.

"*Fairly conducted.*"]—*See* ASSESSMENT AND TAXES, 2.

"*Family now at home.*"]—*See* WILL, 11.

"*Forthwith.*"]—*See* CREDITORS' RELIEF ACT."

"*Heirs and Assigns.*"] — *See* LANDLORD AND TENANT, 1.

"*Investment.*"]—*See* WILL, 9.

"*Issue.*"]—*See* WILL, 8.

"*Mistake, defect or imperfection.*"]—*See* BANKRUPTCY AND INSOLVENCY, 1.

"*Person injured thereby.*"]—*See* RAILWAYS AND RAILWAY COMPANIES, 1.

"*Security.*"]—*See* WILL, 9.

"*Shall claim that as to the mortgagor no liability exists.*"] — *See* INSURANCE, 3.

"*Territory.*"] — *See* MUNICIPAL CORPORATIONS, 8.

"*To be equally divided.*"]—*See* WILL, 8.

"*Undertaking.*"]—*See* RAILWAYS AND RAILWAY COMPANIES, 2.

"*Volenti non fit injuria.*"]—*See* RAILWAYS AND RAILWAY COMPANIES, 1.

"*Wish and desire.*"]—*See* WILL, 7.

"*Within a reasonable time.*"]—*See* CREDITORS' RELIEF ACT.

"*Without any delay.*"]—*See* CREDITORS' RELIEF ACT.

WORK AND LABOUR.

See MUNICIPAL CORPORATIONS, 3—SPECIFIC PERFORMANCE.

WORKMEN'S COMPENSATION FOR INJURIES ACT.

See MASTER AND SERVANT.