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STREET, J. JULY 4TH, 1903.

TRIAL.

McFADDEN v. BRANDON.

Limitation of Actions—Covenant in Mortgage—Acceleration of Time for Payment of Principal—Default of Payment of Interest—Commencement of Statutory Period — Potential Relief from Consequences of Default.

Action to recover the principal and interest payable upon a covenant made by defendant with plaintiff contained in a mortgage of land in Ontario, dated 15th March, 1879. The proviso in the mortgage was that it should be void on payment of $600, with interest at 8 per cent., at the expiration of five years, with interest in the meantime at the same rate, payable yearly on 15th March, in each year, the first payment of interest to be made on 15th March, 1880. The mortgage was expressed to be made in pursuance of the Act respecting short forms of mortgages, and contained the usual statutory covenant for payment of the mortgage money and interest, and the provision "that in default of payment of the interest hereby secured the principal hereby secured shall become payable." The action was begun on 5th May, 1903. No sum had ever been paid upon either the principal or interest secured by the mortgage. Defendant pleaded that the cause of action arose more than 20 years before the action was begun.

E. Meredith, K.C., for plaintiff.

T. H. Purdom, K.C., for defendant.

STREET, J.—The failure of the defendant to pay the instalment of interest which became due on 15th March, 1880, accelerated the payment of the principal, which immediately upon such default became due, etc., as set out in col. 2 of

the Short Forms of Mortgages Act. This provision is to be treated as the contract of the parties, and the party taking advantage of it is not to be treated as claiming a penalty or forfeiture: Wallingford v. Mutual Society, 5 App. Cas. 685; Wilson v. Campbell, 15 P. R. 254; Graham v. Ross, 6 O. R. 384. Plaintiff was entitled to have brought his action to recover both principal and interest on 16th March, 1880, and his cause of action having then arisen, he is barred by sec. 1 of R. S. O. ch. 72. Kemp v. Garland, 4 Q. B. 519, and Reeves v. Butcher, [1891] 2 Q. B. 509, followed. This covenant differs from the contracts in these two cases in this, that it contains a term not found in them, that upon payment before judgment of the arrears of interest and costs, the mortgagor shall be relieved from the effect of his default; but the cause of action for recovery of principal and interest arose upon the default, although the contract permitted defendant to do away with the stipulated consequences of the default, and to restore the original terms of payment, by doing something which has not been done in this case.

Action dismissed with costs.

STREET, J. JULY 4TH, 1903.

TRIAL.

ST. LAWRENCE STEEL AND WIRE CO. v. LEYS.

Guaranty—Construction—Future Liability.

Action upon a guaranty. The Wray Corset Co., a partnership, ordered goods from plaintiff and had been irregular in paying the drafts upon them. They were indebted to plaintiffs for the amount of certain goods which they had received, and had ordered other goods, which plaintiffs objected to sending. On 10th May, 1901, plaintiffs telegraphed to the Wray Corset Co., "Let Mr. Leys wire guaranty for payment of all accounts to us, and everything will be satisfactory." Defendant authorized a telegram to be sent to plaintiffs in the following words: "Will guarantee payment of all accounts for Wray Corset Co. F. B. Leys." Defendant was told that certain goods ordered from plaintiffs were detained until payment should be guaranteed by him. The goods then under order were sent on by plaintiffs on receipt of this telegram, and were afterwards paid for by the Wray Corset Co., who also paid for all the goods for which they owed plaintiffs at the time the guaranty was given; but the Wray Corset Co. continued to deal with plaintiffs until the former stopped payment some months afterwards, when they were indebted to plaintiffs for goods purchased since

the guaranty, the amount of which indebtedness plaintiffs claimed from defendant.

G. H. Watson, K.C., for plaintiffs.

G. C. Gibbons, K.C., for defendant.

STREET, J.—In ascertaining the extent of defendant's engagement, the rule of construction to be applied is, that the language, being that of defendant himself, should be construed rather in favour of the other party because it was the duty of defendant to frame it so as not to mislead the person to whom it was addressed. At the same time defendant's liability must not be extended beyond the limits of he language he employed, but the words are to be read as strongly against him as the sense will admit of: Mason v. Pritchard, 12 East 227; Hargrave v. Smee, 6 Bing. 244, 248; Mayer v. Isaac, 6 M. & W. 605; Wood v. Priestner, L. R. 2 Ex. 66; Blest v. Brown, 4 D. F. & J. 367, 376. . . . So regarding the contract, the plaintiffs were justified in placing upon it the construction they now contend for, and upon which they have acted, viz., that it was a guaranty of payment of all accounts, future as well as past, incurred or to be incurred by the Wray Corset Co. . . .

Judgment for plaintiffs for $556.53, with interest from 18th September, 1902, on $516.37, and costs of the action.

STREET, J. JULY 6TH, 1903.

TRIAL.

WHITNEY v. BRUCE.

Sale of Goods—Conditional Sale—Property not to Pass—Affixing to Freehold—Rights of Owner—Lien Note—Alteration after Execution—Invalidity—Conversion of Goods.

Action for conversion of chattels. Plaintiff was a tinsmith carrying on business in Woodstock, and had agreed to supply to the Oxford Creamery Co., a corporation of which he was a member, at their creamery in the township of West Oxford, a quantity of machinery and plant and iron piping for use there. The creamery building was erected upon a small parcel of land forming a part of defendant's farm which the company had agreed to buy from him, but which had not been paid for. Plaintiff said he stipulated that the title to the goods should not pass until the money was paid, but this arrangement was not made until immediately before the 19th April, 1899, and then applied to only part of the property. Some 900 feet of iron pipe had been delivered on 20th February, 1899, and been sunk in the ground as soon

as possible afterwards; a water tank had been supplied on 1st February, 1899; three radiators had been delivered in March, 1899; the other things were delivered about 19th April, 1899. A lien note for $473.50 as signed on 19th April, 1899, by the president of the company; but this was refused by plaintiff, and in substitution for it a new lien note was prepared, bearing the same date, and signed by the president for $305.50 only, and was sent by post to the secretary for signature. It did not reach him for some days, and he then signed it and returned it to plaintiff, but not until 30th April or 1st May, when the ten days from date allowed for registering had expired. Thereupon the president, at plaintiff's request, altered that date from 19th April to 22nd April, and it was registered on 1st May. The secretary was not aware of the alteration. The plaintiff claimed upon this lien note as altered and registered. The articles covered by it were 4 vats, a can, a heater, a pair of scales, and 3 radiators, all of which except the can and scales formed part of the fixed plant of the creamery works, and they were fixed to the building by plaintiff's own men. The company never went into operation and never paid defendant for the land, and he resumed possession in May, 1899, and locked up the building which contained the above articles. In 1902 defendant sold the vats and can, and took up and sold or gave away some of the piping.

A. Bicknell, Woodstock, for plaintiff.

H. L. Drayton,, for defendant.

STREET, J.—The lien note for $473.50 can not be taken into account because plaintiff refused to accept it; that for $305.50 was invalid by reason of the improper and unauthorized alteration of its date. The operation of the Conditional Sales Act is, therefore, entirely excluded from consideration. The chattels which were affixed to the freehold became part of it by plaintiff's own act, and the freehold was always defendant's property, subject to the right of the company to acquire it by paying the purchase money. Upon the evidence, there was no intention to retain the property in any of the chattels not mentioned in the lien note for $305.50, so then only the can and the scales are to be considered at all. With regard to these, plaintiff intended to retain the property until payment, and so stipulated; and defendant, not being a subsequent purchaser or mortgagee for value, is not within the protection of the Conditional Sales Act. There was a conversion by him of these two articles. Judgment for plaintiff for $20 and costs on the Division Court scale of the issue as to these two articles;

defendant to have the general costs of defence of the action on the High Court scale, less the costs of the issue on which plaintiff succeeded; these costs to be set off against plaintiff's judgment for $20 and costs, and execution to issue for the balance found due to either party.

STREET, J. JULY 7TH, 1903.

CHAMBERS.

RE ENGLEHARDT.

Administration—Summary Application for Determination of Questions—Domicil of Intestate—Persons Entitled to Share in Estate—Evidence—Certificates of Births, Deaths, and Marriages—Administration Order.

Application under Rule 938 for the determination of the following questions: (1) Whether H. A. Englehardt, deceased, had at the time of his death acquired an Ontario domicil or retained his German domicil of origin, in order that it might be determined by what law his estate of about $10,000 was to be distributed. (2) Who were the persons entitled to share in his estate and in what proportions. The application was made on behalf of the Toronto General Trusts Corporation, administrators of the estate.

R. C. Levesconte, for the applicants and certain creditors.

W. R. Smyth, for the Strumpfler family, residing in Germany.

STREET, J.—As to the first question, there is no evidence beyond the fact that the deceased resided in Toronto for 18 years and probably never became a British subject by naturalization. Upon this evidence the finding would have to be that the deceased was domiciled here. To answer the second question the Judge would have to trace the descendants of "the clothmaker Johanne born Demme," who lived and had a large family and died at Mulhausen, in Germany, in the latter part of the 18th or the early part of the 19th century; also of Heinrich Conrad Tamm and his wife Johanna Juliane Beohstedt, who died at Langensalza, in Germany, between 1830 and 1840, where they had a large family also. The proof offered of the numerous births, deaths, and marriages involved in this inquiry, consists of a series of certificates, some of them purporting to be official, some of them of private persons, but none of them being receivable in evidence in this Province, for sec.

29 of the Evidence Act relates only to public documents kept within the jurisdiction of the Court, because the officer in charge of them is ordered to furnish copies. The estate to be administered is a very considerable one, and the facts upon which its distribution depends are too complicated to be determined upon a summary application of this nature. Sub-section (h) of Rule 938 should only be applied to simple questions of fact, as to which there is little or no room for dispute. Upon the alternative application of the administrators, an order may issue for the administration of the real and personal estate of the deceased, treating the motion as made for that order merely.

FALCONBRIDGE, C.J. JULY 7TH, 1903.

CHAMBERS.

NOEL v. NOEL.

Partition—Dispute as to Title—Summary Application—Leave to Bring Action.

Motion by plaintiff for order for partition or sale of lands.

W. J. Tremeear, for plaintiff.

F. J. Roche, for defendant J. J. Noel.

F. W. Harcourt, for infant defendant.

FALCONBRIDGE, C.J.—Defendant J. J. Noel disputes the right to partition, on the ground that he is the beneficial owner of the land. The burden of proof is on him, the registered title being in the name of his late wife. He may bring an action to establish his claim before 15th September next. Should he not do so, the order for partition will issue on that day.

MACLAREN, J.A. JULY 7TH, 1903.

WEEKLY COURT.

ASSELSTINE v. FRASER.

Waste—Life Tenant—Tenant in Common—Cutting Timber—Account—Statute of Limitations.

Motion by plaintiffs for judgment on the pleadings and admissions. Michael Asselstine, of Ernesttown, died on the 9th October, 1870, seised of about 300 acres of land in that township, which he devised to his two daughters Sarah Ann and Elizabeth as tenants in common. They remained in joint possession until 5th May, 1885, when Sarah Ann died, leaving a will by which she devised her undivided half interest to her mother and her sister for their natural lives,

and directed that after the death of the survivor the lands should be sold and the proceeds divided among her nephews and nieces, now represented by plaintiffs. The mother died, and Elizabeth remained in possession until her death, on 14th September, 1902. Defendants are her executors. In partition proceedings between plaintiffs and defendants the lands were sold on 28th November, 1902, for $5,500. In this action plaintiffs allege that between 1885 and 1902 Elizabeth Asselstine cut and removed from the lands large quantities of wood and timber and parts of the buildings thereon, and that but for these wrongful acts the lands would have sold for $9,000.

C. A. Masten, for plaintiffs.

A. B. Aylesworth, K.C., for defendants.

MACLAREN, J.A.—Elizabeth Asselstine had a right as tenant in common and life tenant to cut down and use wood and timber for firewood and repairs on the lands in question, and also, so far as might be done, in the course of good husbandry, but not otherwise. Defendants are entitled to the benefit of the Statute of Limitations, so that they are only liable for six years. There should be a reference to the Master at Napanee to take the account of such wood, timber, and buildings removed from the lands in question. See Goodenow v. Farquhar, 19 Gr. 614. Plaintiffs will be entitled to one-half the amount so found. Further directions and costs reserved.

BRITTON, J. JULY 7TH, 1903.

TRIAL.

UPTON v. ELIGH.

Sale of Goods — Contract — Correspondence—Breach—Non-delivery—Action against Executors of Vendor—Corroboration.

Action by plaintiff against the executors of the late Hebron Harris for damages for non-delivery of 100,000 railway ties in the fall of 1899 and during the season of navigation of 1900, pursuant to an alleged contract made by correspondence between the plaintiff and Hebron Harris in his lifetime.

G. F. Henderson, Ottawa, for plaintiff.

G. E. Kidd, Ottawa, for defendants.

BRITTON, J.—The plaintiff is a wholesale dealer in lumber, carrying on business at Charlotte, New York. Harris

was a large dealer in ties, and resided at Ottawa. The correspondence commenced by a letter of inquiry from plaintiff to Harris, dated 25th August, 1899, informing him that the plaintiff desired to buy any part of 100,000 No. 1 standard cedar ties for delivery at Buffalo on or before 1st June, 1900, and asking Harris to name a price. On the 1st September, 1899, F. S. Upton, who was and is in the employ of plaintiff, visited Ottawa and had a general conversation with Harris on the subject, but no contract was then made, and, in my opinion, nothing turns on this conversation. The parties fully understood one another as to what was wanted, and in reference to which the correspondence was to continue.

On the 31st August, 1899, Harris wrote to plaintiff, in reply to plaintiff's letter of 25th, as follows: "Will agree to deliver you 100 M. standard cedar ties on dock at Fair Haven, N.Y., at 35 cents a piece, duty to be paid by you. I could probably deliver 25 to 30 M. this week, and the balance as early as they could be got out next spring." Assume that this was "an option," as plaintiff calls it, and open to him until the 15th September, what did plaintiff then do? First, he wired an acceptance of the offer, and second, he qualified that acceptance by a letter to Harris. The letter is as follows: "I have just wired you that I will take the 100,000 standard No. 1 cedar ties that you offered me in your letter on 31st August at 35 cents each, delivered free on dock, Fair Haven, N.Y., duty to be paid by me, all of which I now confirm. You may commence shipping at once, and get in just as many this fall as possible, at least 25 to 30 M., and the balance as early next spring as possible, and not later than 1st August, to be counted and inspected at destination and paid for in 30 days after arrival and inspection. I think they will all go to Fair Haven, N.Y., but may possibly take some at Charlotte, as the writer explained when there." This letter, in fact, as the plaintiff intended, and as Mr. Harris evidently understood, superseded the telegram. This letter was not an acceptance of the offer of Harris. It brought in new terms and conditions. Harris said he could probably deliver 25 to 30 M. that fall. Plaintiff said, you must deliver at least 25 to 30 M. that fall. Plaintiff stipulated that all should be delivered not later than 1st August, 1900. Plaintiff stipulated that the ties were to be counted and inspected at destination, and that they were only to be paid for in 30 days after arrival and inspection. Then, whatever plaintiff intended by it, he said he might possibly take some at Charlotte. Charlotte is a considerable distance farther from the place of shipment than Fair Haven.

This is by no means an acceptance of the offer—the parties were not together. Mr. Harris did not reply to this letter until 23rd September, and then, by letter of that date to the plaintiff, he withdraws his offer of the 100,000. The letter is as follows:—"Referring to your telegrams and letters in connection with delivery of cedar ties to Fair Haven, N.Y., I could not undertake to deliver the quantity of ties specified in your letter, but could *probably* deliver 50 M. standard cedar ties at the price named, 15 M. of which would be delivered this fall, if cullage was satisfactory, and the balance in August, 1900. I cannot say definitely how soon this fall's ties could be delivered, as I would first have to arrange with transportation companies to carry them. If we can do it on the above basis, kindly advise me, and I will arrange at once for the freighting of this fall's delivery."

This letter may be considered in a two-fold aspect. First, it definitely puts an end to the negotiation for the 100,000 ties. I find as a fact that there was no agreement for the delivery of the 100,000 ties. Secondly, this letter contains a new offer, not to deliver 50,000, because Harris puts that number as only a probable number, but he couples with this probability a definite statement that 15,000 would be delivered that fall, conditioned only upon "cullage" being satisfactory. This letter was received by plaintiff on the 26th September, and he immediately wired reply. The telegram was not an acceptance of the new offer, but it was a message holding on to the former offer, and expressing a desire to get the 50,000 as part of the 100,000. On Saturday the plaintiff wrote to Harris, repeating and confirming the telegram, and then accepting what plaintiff assumed to be a new offer of 50,000. Harris, as stated, had not definitely offered 50,000—but I think he did offer the 15,000, and that plaintiff accepted that offer. In fact, plaintiff was then willing to accept any number Harris would agree to deliver.

Further correspondence followed, and Mr. Harris seemed anxious to carry out this last contract—but he found more difficulty in getting transportation than he had expected. Each tried to help the other in that respect but without success. Plaintiff was urgent about getting ties, and on the 25th October Mr. Harris wrote to plaintiff stating that he had been unable to secure transportation for the ties, and that, as the season was so far advanced, he had abandoned the idea of delivering any that fall. Mr. Harris did not in that letter say more. The correspondence was kept up during the fall, and Mr. Harris did not repudiate until 28th March, 1900, when he wrote to plaintiff informing him that, as the price of ties had advanced 8 to 10 cents, he would not

deliver unless plaintiff was prepared to pay a much better price than the figures offered last season.

I think there was a contract for the delivery of 15,000 ties, and that the plaintiff should recover damages for the breach of that contract. The contract may fairly be collected from the whole terms of the correspondence. See Bruce v. Tolton, 4 A. R. 144; Hussey v. Horne Payne, 4 App. Cas. 311; Thomson v. Mathieson, 30 S. C. R. 357. Upon the whole case see Fulton v. U. C. Furniture Co., 9 A.R. 211.

Mr. Harris was sick in the early part of the season of 1900, and died on the 24th day of June of that year. If he had not died, probably the claim would have been adjusted. The action being against the executors, it was objected that there was no corroboration of F. S. Upton's evidence. F. S. Upton is not a party to the record, but the liability, if any, is made from the correspondence, about which there is no dispute. I think the estate is liable for non-delivery of the minimum quantity as shewn by the correspondence. The deceased failed to deliver any during the fall of 1899, and by his letter of 28th March, 1900, he refused to deliver during 1900, except at a considerably higher price. That letter would warrant an assessment of damages of 8 cents each tie, but the witness for the plaintiff puts the loss at less. He says the difference in price between what these ties would have cost, and those purchased by him at Fair Haven, after duty was paid, was about 7 cents each tie. I assess the damages at $1,000, which is a little less than 7 cents each for 15,000.

Plaintiff sued upon a contract for 100,000. He may amend, if necessary, so as to entitle him to recover on contract as found. Judgment for plaintiff for $1,000. Defendants must pay costs. Thirty days' stay.

BRITTON, J. JULY 7TH, 1903.

TRIAL.

GARROCH v. PURVIS.

Sale of Goods—Contract — Correspondence — Ship — Bill of Sale — Action for Price—Property Vesting—Action for Damages for not Accepting—Delay.

Action for not accepting and paying for the steam tug "Island Belle," $150 in pursuance of an alleged contract of sale, made by correspondence between the parties.

Tried at Parry Sound, 19th May, 1903, before BRITTON, J., without a jury.

W. J. Hanna, Sarnia, for plaintiff.

R. R. McKessock, Gore Bay, for defendant.

BRITTON, J.—The plaintiff, a merchant residing at Sarnia, is the owner of the tug in question. The defendant, during the season of 1902, was the keeper of the light house on Duck Island, Lake Huron. His usual place of residence was Gore Bay, Manitoulin. This steam tug was, during the season of 1901, in charge of one John S. Nesbitt, a relative of the plaintiff. Nesbitt left the boat on the beach at Gore Bay in 1901, and she was there when the negotiations now under consideration took place. Nesbitt had made a sale of this boat to one La Rue Smith, or to Smith & Henderson, and a bill of sale, signed by plaintiff, was on the 17th May, 1902, sent by Nesbitt to Little Current for delivery to Smith, on payment of the purchase price. On the 24th May, 1902, plaintiff had been informed that Smith would not carry out his purchase, but the bill of sale had not then been returned, and in fact was only returned to Nesbitt, by letter from Little Current, dated the 5th June, 1902. On the 24th May plaintiff wrote an unsigned letter to the defendant. It was suggested at the trial that the letter was purposely left unsigned—because Nesbitt had been up to this time conducting all the business in reference to this tug, and, as the sale to Smith was pending, Nesbitt or the plaintiff or both thought it better to have another string to the bow, and see what could be done with the defendant. I think not signing the letter was mere inadvertence. The letter was on the plaintiff's letter paper—with his name and business at the top—and is as follows:—

"Sarnia, May 24th, 1902.

Jno. Purvis, Esq.,
Duck Island, Ont.,
via Wiarton.

Dear Sir,—I received a letter from Capt. Wm. Glass saying you would pay $550 cash for the "Island Belle," as she is, at Gore Bay. I accept the offer and will forward a bill of sale to any place you may name. How would it be to send it to Traders Bank at Wiarton, to be handed to you on receipt of the money? There are no debts against her, but if you want a bond to that effect, I will forward you one.

Yours truly."

The defendant received this letter in due course, treated it as coming from plaintiff, and replied to it on the 4th June, as follows:—

"Duck Island, Ont., June 4th, 1902.

Mr. John Garroch,
Sarnia, Ont.

Dear Sir,—I received your letter re "Island Belle" a few days ago. I will pay you $550 cash for the tug, as she is,

and you may send the bill of sale to Hurst & Burke's bank, at Gore Bay, Ont.

I would prefer it to Wiarton, as I can be there personally. If it is convenient, I would like you to send a bond shewing that there are no claims, &c., on the tug. Will you kindly make the bill of sale out in my wife's name, Sara A. Purvis, if it is convenient? Otherwise do not bother.

Yours very truly,

John Purvis."

To this letter plaintiff replied:—

"Sarnia, Ont., June 10th, 1902.

John Purvis, Esq.,
Duck Island, Ont.

Dear Sir,—I have your favour of the 4th, and will forward papers in your wife's name as requested to the Union Bank at Wiarton as soon as I can have them made out.

Yours truly,

John Garroch."

The letter of plaintiff of the 24th May may be considered as an offer to sell for $550. There had been no offer at that time from defendant to plaintiff to buy. The letter of June 4th from the defendant to plaintiff was an acceptance of plaintiff's offer—subject to plaintiff's sending the bill of sale of the boat to Hurst & Burke's bank, at Gore Bay. The boat was there; she was to be paid for there; the bill of sale and the boat were to be delivered there. The plaintiff misunderstood the defendant's letter. He says he understood that the defendant would prefer to have the bill of sale go to Wiarton. The letter I think plain enough, that defendant would prefer Gore Bay to Wiarton; and it is difficult to see how plaintiff could misunderstand it, as he says, and as I believe, he did. Wiarton is 200 miles from Duck Island; Gore Bay is only 60 miles, and, as the boat was at Gore Bay, the defendant was entitled to make the condition that the bill of sale was to be delivered at Gore Bay. The steam tug was a registered vessel. Defendant was offering for her as such, and was entitled to have the formal bill of sale before he could be asked to accept delivery of the boat, or to pay his money. The plaintiff was treating the matter in precisely the same way. He was selling the boat and her belongings as she was on the 24th May, but plaintiff was not offering any delivery of the boat until defendant would get the bill of sale, and pay over the money. The bill of sale was to be handed to the defendant on receipt of the money.

But assume that there was no question about the place where the bill of sale was to be sent, what is the position of

the matter? Plaintiff's letter of the 10th June was an acceptance of the defendant's offer. The plaintiff undertook to forward, using his own language, "papers in your wife's name as soon as I can have them made out." This must be interpreted, within a reasonable time, and reasonable time would depend upon circumstances. It was in the season when the boat was required and when every day would or might mean a loss. It is in evidence that the defendant chartered a boat named "Edna Ivan," that defendant had work to do, and that June is about the most busy month. The bill of sale was not sent until 2nd July; that was 22 days after plaintiff had promised it would be done, "as soon as the papers could be made out." I do not think the bill of sale was sent within a reasonable time. That a little delay may occasion loss, is shewn by what took place in reference to the steam tug. Very likely the value of the articles removed from the tug was less than defendant contended for at the trial—but I must find upon the evidence that some articles, and of value, were removed from the boat between the 4th June, the date of the defendant's offer, and the date of the plaintiff's acceptance. The plaintiff was not in a position to deliver on the 2nd July what plaintiff intended to sell and what defendant intended to buy. I do not think there was a completed agreement between the parties. There never was an adoption by the defendant of the plaintiff's place of delivery of the bill of sale. There never was an assent by the defendant to the change which plaintiff made differing from plaintiff's letter of the 4th June. It was the clear intention of the parties that the property in the steam tug should not pass to or vest in the defendant until he had accepted the bill of sale and paid the $550. If there was any contract between the parties, it was executory only. This difficulty, which has resulted in an expensive litigation, has no doubt arisen from the fact of plaintiff and defendant living so far apart, and the boat being so far from each. If plaintiff had agreed to let defendant have possession of the boat at once, and had undertaken, giving security if necessary, to make a good title, very likely that would have been very satisfactory to the defendant. It is not, however, for me to speculate upon what might have been. I would be glad if I could see my way upon the evidence to give the plaintiff some redress, as the boat has no doubt deteriorated pending this litigation, but it is not a case, in the view I have taken of it, for attempting to do equity by compelling defendant to take the steamer after an abatement of the purchase money to the extent of articles removed from the boat, and by allowing damages occasioned to defendant by delay.

I think the action should be dismissed with costs, and that the counterclaim should be dismissed with costs.

Bill of sale to be handed back to plaintiff and to be cancelled.

If case goes further, and if it shall be held that plaintiff is entitled to the purchase money by reason of the property having vested in the defendant, I think defendant should be allowed $50 for articles removed from steamer, and $100 damages by reason of delay on part of plaintiff in sending bill of sale, and in that case the title to be made a perfect registered title of the boat.

If it should be held that plaintiff is entitled to damages for non-acceptance of the steamer, I am of opinion that the damages should be $200; in that case the plaintiff to retain the boat.

Action dismissed with costs.

BRITTON, J. JULY 8TH, 1903.

CHAMBERS.

GAULT v. PENTECOST.

Judgment Debtor—Examination— Unsatisfactory Answers—Unsatisfactory Disposition of Property—Actions Pending with Regard to—Continuation of Examination—Explanations.

Application by plaintiffs under Rule 907 to commit defendant for unsatisfactory answers upon his examination as a judgment debtor. The examination was begun at Toronto on the 19th February, 1903, and continued on the 4th March. On that day plaintiffs desired an adjournment, and a further examination with production of books and papers. The examiner granted an adjournment until 25th March, but defendant did not attend, and refused to accept $3.25 as conduct money from Hamilton, where he lived.

Joseph Montgomery, for plaintiffs.

Hamilton Cassels, K.C., for defendant.

BRITTON, J.—Defendant has answered freely and fully except to a few questions, and his answers were apparently, in the main, truthful, but they certainly disclosed an extraordinary course of dealing. The answers complained of as unsatisfactory may be grouped under the following heads: (1) Want of knowledge of defendant's own books and assignment of them to his brother. (2) Inability to explain his most disastrous failure. (3) His brother unexpectedly appearing as a creditor for a large amount. (4) Selling goods otherwise than in the ordinary course of business and to per-

sons not in the trade. (5) Fraudulent disposal of goods and preferring creditors. (6) Selling out the business under the circumstances appearing, taking notes, and handing them to a preferred creditor. It cannot be determined on this application whether defendant had or had not a right as against plaintiff to make an assignment of debts and hand over the books to his brother. In a sense the answers to some questions on the examination are unsatisfactory, but all the facts do not appear, and it does not appear that plaintiffs have instituted proceedings against defendant and others in reference to the transactions, about which he was questioned. If defendant had the right to do what he did, he ought not to be committed merely for telling about it. If defendant had not the right, plaintiffs should get redress in the action they have begun. . . . Application to commit dismissed with costs.

If plaintiffs desire to continue the examination for purposes intended when the adjournment took place, they are entitled to an order that defendant attend at his own expense and submit to be further examined, and he may on such examination give any explanation of matters as to which he has already answered. See Foster v. Vanwormer, 12 P. R. 597. The assignee and the brother of defendant should facilitate reference to all books and vouchers. This order to be without prejudice to any future or other application which plaintiffs may desire to make in regard to the examination as a whole. No examination in vacation unless parties consent.

BRITTON, J. JULY 8TH, 1903.

WEEKLY COURT.

RE MACDONALD AND VILLAGE OF ALEXANDRIA.

Municipal Corporations—Drainage — Petition — Alteration of Route by Engineer—Adoption by By-law—Quashing By-law—Costs.

Motion to quash by-law 243 of the village, passed on 2nd September, 1902, to provide money, by the issue of debentures, secured by a special rate, to pay for the construction of a drain on Main street in the village from a point 33 feet north of the northerly side of St. George street to the north side of Catharine street, thence easterly along Catharine street to a point opposite to lot A., then southerly through said lot to the river Garry. The by-law recited that a petition was presented by the owners of real property to be benefited to the council for the constructitn of a drain on

Main street from Kincardine street to the river Garry. The total cost of the drain was $3,644.

M. Wilson, K.C., for applicants.

J. Leitch, K.C., for the village corporation.

BRITTON, J.— . . . The engineer had no authority to alter the route in the manner he did, substantially making a new work and one not asked for. The council should not have accepted the new route without a new petition, unless they were prepared to enter upon it and proceed under sec. 669 of the Municipal Act. The distinction between local assessments, or assessments for local improvements, and those for general revenue purposes, must be recognized. The statute giving the power of local taxation must be strictly followed: McCullough v. Township of Caledonia, 25 A. R. 417. The council acted in good faith. Although the cost is larger than estimated, the amount is not oppressive. Upon the evidence, the work is a beneficial one to the village. Therefore, the costs should be limited. Order made quashing the by-law, with costs fixed at $80.

JULY 8TH, 1903.

DIVISIONAL COURT.

SOUTHAMPTON LUMBER CO. v. AUSTIN.

Contract—Unascertained Goods—Appropriation—Passing of Property—Acceptance and Part Payment.

Appeal by defendant from judgment of LOUNT, J. (1 O. W. R. 548), which was partly in favour of plaintiffs, for the recovery of $700 in an action for a balance alleged to be due on a contract for a supply of railway ties, posts, and pavements, and dismissing defendant's counterclaim.

J. H. Rodd, Windsor, for defendant.

C. A. Masten, for plaintiffs.

FALCONBRIDGE, C.J. — There was no cross-appeal by plaintiffs as to the ties, in respect of which the judgment was in defendant's favour. The only question was as to the posts. The trial Judge found that the request by defendant to peel posts was an acceptance of all the posts, and a waiver of the right to inspect. Plaintiffs have eseablished satisfactorily the peeling (and payment therefor) of only 9,212 posts, and to this extent only has there been an acceptance and passing of the property. In no view of the evidence was there any acceptance or appropriation so as to pass the property in the

whole quantity provided for by the contract. Judgment reduced to $410.60. No costs of appeal.

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

JULY 8TH, 1903.

DIVISIONAL COURT.

SISTY v. LARKIN.

Water and Watercourses—Government Ditch—Government Contractors—Damming back Water on Plaintiff's Land—Justification—Orders of Government—Negligent Execution of.

Appeal by defendants from judgment in favour of plaintiff for $75, pronounced by the Judge of the County Court of Stormont, Dundas, and Glengarry, upon the answers of the jury, in an action to recover damages for injury done to vegetables growing in plaintiff's garden by water dammed back by defendants.

J. Leitch, K.C., for defendants.

D. B. Maclennan, K.C., for plaintiff.

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

STREET, J.—The ditch in which the drain was placed was a Government ditch, extending for a considerable distance above plaintiff's land. The persons whose lands lay along the ditch had for 30 years been in the habit of draining the surface water from their lands into it. The ditch collected the drainage from the upper lands and brought it past the land occupied by plaintiff. Defendants have built a drain across it below plaintiff's land. The jury found that the result of the dam was to flood and damage plaintiff's land. These facts make a prima facie case for plaintiff. Defendants answered that what they did was upon Government land. The reply to that is, that they had no right to go upon Government land and wrongfully block up a ditch to the damage of plaintiff. Defendants next say that what they did was done for and under the direct order of the Government, and that the Government alone was liable. . . . All that was shewn was that defendants undertook to do certain work for the Government which involved the building of a flume to carry off the water usually flowing along the drain; that this flume was not built of sufficient size to carry off the water; and that the result was the damage to plaintiff. The work which defendants were doing for the Government was, therefore,

done by them so negligently as to cause the damage, and they are responsible to plaintiff. It was not because of the work required by Government, but because it was negligently done by defendants, that plaintiff suffered damage. The Government seems to have permitted the upper landowners to drain into the ditch for a sufficient period to give them the right to do so: R. S. O. chfl 133, sec. 35; McGee v. The King, 7 Ex. C. R. 309. Appeal dismissed with costs.

FERGUSON, J. JULY 9TH, 1903.

TRIAL.

JARVIS v. GARDNER.

Contract—Sale of Land—Fraud Alleged by Vendor—Action for Cancellation—Evidence as to Coercion—Fair Value—No Improvidence—Counterclaim by Purchaser for Specific Performance—Contract not Signed by Purchaser—Want of Mutuality—Adoption by Counterclaim—Statute of Frauds.

Action brought for the purpose of having a certain document signed by the plaintiff declared to be void and of no effect and to have the same delivered up to be cancelled.

G. F. Shepley, K.C., J. Leitch, K.C., and J. F. Orde, Ottawa, for plaintiff.

G. H. Watson, K.C., and J. Dingwall, Cornwall, for defendant.

FERGUSON, J.—The plaintiff was the owner of a valuable farm lying near the town of Cornwall which had been conveyed to her by her late father, Mr. Sheriff McIntyre, in his lifetime. This farm she had rented to the defendant, who was in possession of it and paying rent. He had paid the rent in advance to the first day of April, 1903.

Notwithstanding the many assertions of the plaintiff in her evidence that she never did sell or endeavour to sell this farm, I cannot but find, upon the evidence, that, after more than one conversation between her and the defendant regarding the purchase and sale, they met at the plaintiff's place some time early in the month of March last and agreed upon the price and mode of payment of it; the plaintiff, however, saying that she would not conclude a bargain till after consulting with Mr. Smart.

Mr. Smart is a gentleman who had been deputy sheriff under the plaintiff's father for a long series of years and who was very intimate and friendly with the plaintiff and her mother, who survives the late sheriff and is far advanced in

life. He is one of the executors under the will of the plaintiff's father and has taken an active part in the management of the estate, and out of it provided money for the maintenance of the family, who were entitled to it. In this way there were long years of intimacy between Mr. Smart and the plaintiff and her mother. This appears to have been the reason that the plaintiff wanted to consult with Mr. Smart before concluding the bargain for the sale of the farm to the defendant. Mr. Smart is also deputy sheriff still under the successor in office of the plaintiff's father.

After the interview between the plaintiff and the defendant above mentioned at which they had agreed upon the price of the farm, the plaintiff sent for Mr. Smart. She told him how the matter stood; that she was to get $7,000 for the farm, $4,000 in cash and $3,000 left upon a mortgage upon the farm for five years at 4 per cent. interest. He, as it appears, advised her to take in ready money a less sum, $3,500 and to have $3,500 on the mortgage, and that he thought she should have 5 per cent. interest upon the mortgage money. She (the plaintiff) then instructed Smart to see the defendant and if he would agree to these terms to conclude the contract, leaving him at liberty to conclude it even if he could not get the 5 per cent., and it was then stated that Mr. Dingwall should draw the documents or act as the solicitor for the plaintiff in the conveyancing. In other words, the plaintiff chose Mr. Dingwall to draw the papers. Mr. Smart saw the defendant, who, after discussion and some hesitation, agreed to the proposals. The defendant also selected Mr. Dingwall as his solicitor in the conveyancing. Mr. Smart and the defendant then went to Mr. Dingwall's office and gave him instructions to draw a deed of the farm and the mortgage back securing the half of the purchase money. Mr. Dingwall said that he had not time that day to draw the deed and mortgage, and further said that a sum of money might be paid and a receipt taken for it, he being, as it appears, of the opinion that this would preserve matters in statu quo until the formal conveyancing could be done, and while drawing the receipt he, Mr. Dingwall, remarked that it would be well to insert in it a note or memorandum of the agreement, which he did, and when he had it ready he handed it to Mr. Smart, telling him to get it signed by the plaintiff, giving him, Smart, also a cheque for $100 to be handed to the plaintiff. This document is as follows:—

"100. Cornwall, March 6, 1903.

Received from James Gardner the sum of one hundred dollars on account of his purchase from me of east half lot 3 in the front or first concession of the township of Cornwall;

the whole price is to be $7,000, $3,400 more to be paid in cash on April 1, 1903. For the balance of $3,500 a mortgage is to be given by Mr. Gardner at 5 per cent., the principal to be paid on April 1, 1908, the interest from April 1, 1903, is to be paid yearly. Mr. Gardner may pay $500 or more of the principal on said mortgage at any sooner time or times. He is to insure the property for $1,000. Deed and mortgage are to be executed as soon as ready or prepared. I give or pay for deed and Mr. Gardner pays for all else, including registering deed."

Mr. Smart went to plaintiff's residence in the forenoon of the 6th April, taking with him this paper in blank and the cheque for $100. He says that when he got into the house he waited for the plaintiff to come downstairs, that he told her he had brought the document and that he read it over to her, that she said her mother objected and that it was hard to get her mother to understand, that she went upstairs to her mother and came down, that he then asked her if he should tear up the paper, and she said no, that she would sign it; that the plaintiff then read over the paper and said she fully understood it, and that he then shewed her where to sign and she signed it, after which he signed as a witness. In his evidence Mr. Smart says that both he and the plaintiff read over the paper alone and she seemed fully to understand it before she signed it, and that she said so. He says that he left the cheque but took the document away with him and gave it to Mr. Dingwall.

The plaintiff in her evidence says that on this occasion Smart was angry and violent and forced or coerced her into signing the document, and that just before she signed it she became unconscious, that Smart used the words "sign it." "sign it," "sign it." He, Smart, says that he was not angry or violent, and that he did not force or coerce the plaintiff into signing the paper or endeavour so to do, and that the statement of her being unconscious is quite wrong. He says the plaintiff appeared to be as clear and bright that day as he had seen her for many years. He says emphatically that there was no scheme or design at all in regard to the signing of this paper and that his only object was to serve the plaintiff, and that he acted as her agent and friend throughout and that he did not act for the defendant at all.

The plaintiff, as appears from the evidence, had for a prolonged period been suffering from nervous prostration, what the doctors call neurasthenia, and medical gentlemen were called with a view of ascertaining what her mental powers and condition were on this 6th March when she signed the document. This evidence is rather long, and I

can only take what I consider the effect of it. Dr. Alguire, who had been her attendant physician for many years, said: "I think, under ordinary circumstances, with due deliberation, if she had reasonable time, that she ought to be able to conduct any ordinary business." He says further that he has always found her an intelligent person, and it is manifest that she is a lady of good education. I think these expressions of Dr. Alguire furnish the keynote of his opinion so far as it bears on the question here. Sir James Grant does not entirely agree in this with Dr. Alguire. He seems, however, to pay much respect to the opinion of Dr. Alguire. Sir James was not an attendant physician and saw and examined the plaintiff only once (the day before giving her testimony). No doubt a very learned and experienced witness, yet his evidence must have been purely theoretical. The testimony of Dr. Burgess does not cast much more light upon her condition. According to the professional evidence, especially that of Sir James Grant, her memory was the part of her mind that would be most defective.

Now, I have endeavoured to gather in the effect of all the evidence regarding the mental condition of the plaintiff at the time the paper was signed. I have read throughout her examination for discovery in this action—a large part of which had little or no relevancy to the case—for the purpose of understanding what were her mental powers; and I paid, as I think, strict attention to her demeanour and her answers in the witness box at the trial, all with the view of forming a correct opinion of my own upon the subjects, or an opinion as nearly correct as may be. I think the evidence of Mr. Smart, who had known the plaintiff, as he puts it, "all his life," who had done business with and for her, and who was present on the occasion in question, very important. The evidence of the attendant physician, who had known her 15 or 16 years, is also very important. I think the evidence of Mr. Smart as to what took place on the 6th March when this document was signed is to be preferred, and I find that there was not coercion or pressure brought to bear upon the plaintiff to cause her to sign the document. She was not taken by surprise. The subject was not new to her. She had considered the matter of selling her farm before, and the price that she should get for it. There was not what has been so often called "improvidence." I find upon the evidence that the price she was getting, $7,000, was the full value of the farm, and the price she was ready and willing to take for it before there was in existence this document or any talk about it.

The plaintiff does not accuse the defendant personally of any fraud. I find that Mr. Smart was not his agent at all. Both the Messrs. Dingwall have been acquitted of all charges of fraud by the statements of plaintiff's counsel in open Court. I do not, as I understand the evidence, perceive any ground upon which I can or should set aside the document sought to be impeached, and I think it should be permitted to stand as a good document.

The defendant claims specific performance of the agreement. He does not plead this in the form of a counterclaim, but, no matter how it is stated, when it is in reality a counterclaim, it must, I think, be so considered, and looking at it in this way, it is in effect another action, in which the defendant is the plaintiff and the plaintiff the defendant.

The sole argument against specific performonce was that there is a want of mutuality, and a setting up of the provisions of the Statute of Frauds.

The memorandum is signed by Mrs. Jarvis, the party to be charged, but not by Gardner, who uses for the specific performance. He is, I think, to be considered to be in the same position as of he had under the former practice filed his bill for specific performance.

The position of the parties in such a case is stated in the fourth edition of Fry on Specific Performance, at p. 209, where it is said that the plaintiff by instituting proceedings has waived the original want of mutuality and rendered the remedy mutual. The authorities referred to in Fry seem to make the matter plain. In Flight v. Bolland, 4 Russ. at 301, which was the case of an infant, the Master of the Rolls said: "The plaintiff's counsel principally rely upon a supposed analogy afforded by cases under the Statute of Frauds, where the plaintiff may obtain a decree for specific performance of a contract signed by the defendant, although not signed by the plaintiff. It must be admitted that such now is the settled rule of the Court, though seriously questioned by Lord Redesdale upon the ground of want of mutuality. But these cases are supported first because the Statute of Frauds only requires the agreement to be signed by the party to be charged; and next it is said that the plaintiff by the act of filing the bill has made the remedy mutual." And then the learned Judge adds: "Neither of these reasons applies to the case of an infant."

See also Martin v. Mitchell, 2 J. & W. at p. 427; also Western v. Russell, 3 V. & B. at p. 192. See also Ottway v. Braithwaite, Finch 405, where a contract contained in a deed poll was enforced, notwithstanding that an objection

founded on the unilateral nature of the instrument was taken and insisted upon.

I am of the opinion that this defendant Gardner, standing, as I think, in the position of a plaintiff quoad his claim for specific performance, is entitled to the order that he asks in this resgard.

The plaintiff's action to set aside the document and to have it delivered up to be cancelled will be dismissed with costs, and the defendant will have the order or judgment for specific performance asked by him. This should also be with costs. But it is apprehended that the costs of the action have not been very seriously increased by this claim being made.

Judgment accordingly.

JULY 11TH, 1903.

DIVISIONAL COURT.

WAECHTER v. PINKERTON.

Assessment and Taxes—Distress for Taxes—Tender of Part—Divisibility of Amount—Statute Labour—Illegal Assessment—Gross Charge in Lieu of Apportionment by Lots—Imperative Provision of Statute—Costs—Set-off—Solicitor's Lien.

Appeal by defendants from judgment of County Court of Bruce in favour of plaintiff in action by Andrew Waechter against Thomas Pinkerton, the collector of taxes for the township of Greenock, for 1901, and Ezra Briggs, the collector's bailiff, for illegal seizure of plaintiff's chattels as a distress for taxes, and for a return of the goods.

G. F. Shepley, K.C., for defendants.

J. Idington, K.C., for plaintiff.

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

BRITTON, J.—The trial Judge found that there was a tender of all taxes except those for statute labour. Defendants contended that tender of part was no valid tender. Tender of part of one entire demand or entire contract debt or liability is ineffective: Dixon v. Clark, 5 C. B. 365; but, if a tender is specifically made as to one distinct item in an account fairly divisible into items or parts, it is a good tender as to that item. Whether there was specific appropriation by plaintiff when making the tender is a question of fact, and the Judge has found the fact in plaintiff's favour: Hardingham v. Allen, 5 C. B. 793. This leaves but the one ques-

tion to be disposed of: Can there be distress for statute labour commutation, when the amount for which several lots are liable is put down in gross against them all, instead of being rated and charged against every separate lot and parcel, as required under sec. 109 of the Assessment Act? The provision of sec. 109 as to special apportionment of the statute labour tax is imperative, and not merely directory. In the case of resident and non-resident, the words of the section are: "The statute labour shall be rated and charged against every separate lot or parcel, according to its assessed value." Love v. Webster, 26 O. R. 453, followed. In the event of there being no distress upon any of plaintiff's lots, a sale of them, or any of them, could not be validly made for this unapportioned tax, or for any part of it where not apportioned on the roll.

If the taxes which plaintiff admits to be due, for which he tendered $68.40, have not been paid, the township should not lose them, and, as the township has indemnified the collector, this amount should be set off, if defendants wish it, against plaintiff's costs. If there should be any difficulty about the lien for costs of plaintiff's solicitor, an application may be made.

Appeal dismissed with costs.