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HODGINS, MASTER IN ORDINARY. MARCH 3RD, 1905.

MASTER'S OFFICE.

IMPERIAL TRUSTS CO. v. NEW YORK SECURITY CO.

Reference—Scope of—Mortgage Action — Reference back to Readjust Accounts—Change in Computation of Interest——Jurisdiction of Master to Fix a New Day for Redemption.

An order on appeal from the report of the Master in a mortgage action declared that "plaintiffs are not entitled to recover upon their mortgage compound interest upon the principal moneys secured thereby," and directed a reference back "to readjust the accounts between the parties, having regard to the foregoing declaration."

Upon the reference back, W. H. Irving, for defendants the New York Security Co., and J. Nason and J. Douglas, for the other defendants, contended that on readjusting these accounts, the Master should appoint a new day for redemption, 6 months from the date of the new report.

H. C. Fowler, for plaintiffs, contended that the order referring back limited the Master's jurisdiction to a readjustment of the accounts.

THE MASTER:—One of Lord Bacon's Orders of 1618 provides that "no report shall be respected in Court which exceedeth the order of reference:" Beames's Orders, p. 23. And in Jenkins v. Briant, 6 Sim. 603, Sir L. Shadwell, V.-C., referring to this Order, said that "if a Master reports on a matter which is not referred to him, his report, so far as it relates to that matter, is to be treated as a nullity."

In Twyford v. Trail, 3 My. & Cr. 645, where specified exceptions as to certain amounts on a Master's report were allowed, and the report was thereupon referred back to the Master for review, the Court held that the Master was precluded from making any other inquiry than whether anything or a certain sum was due.

And in Re Corkers, 3 Jo. & L. 377, where on a reference to report as to the fortune of a minor, the Master gave his construction of the testator's will, the Court declined to confirm his report.

The decisions of our own Courts are in harmony with the principle of Lord Bacon's Order, and the cases under it. In Williams v. Haun, 10 Gr. 553, where, owing to the Master not having ascertained a particular fact, there was a reference back, and the Master on further evidence altered some of the findings on his original report, VanKoughnet, C., held that he should not have done so, as the report had not been sent back to him for such alterations.

In Morley v. Matthews, 12 Gr. 453, Mowat, V.-C., said: "I apprehend that where the Court does not mean that the Master should take further evidence, the order must contain a direction to that effect,—unless the reference back is expressed to be for a purpose on which further evidence could not be material."

In this case no further evidence is material or necessary; all that the order directs is a readjustment of the accounts by striking out the computations of compound interest.

And Gordon v. Gordon, 12 O. R. 593, shews that a Judge's jurisdiction to alter the findings in a Master's report is limited. In that case Proudfoot, J. (11 O. R. 611), had altered the amount found by the Master, although not appealed from. Boyd, C., said: "I do not think he should have gone further and reduced the amount of their claim as proved before the Master, and not appealed from. That appears to me to be an irregular proceeding, and a manner of giving redress not warranted by the practice. To this extent his order should be modified, and the Master's report in this respect will remain as if not appealed from." Ferguson, J., concurred.

I find therefore that the order in this case limits my jurisdiction to a readjustment of the accounts by disallowing

compound interest. But under Con. Rules 387, 393, and under the jurisdiction in Chambers conferred by Rule 698, a month's further time may be allowed for the redemption of the plaintiffs' mortgage.

SCOTT, LOCAL MASTER AT OTTAWA. APRIL 20TH, 1905.

MASTER'S OFFICE.

HOME BUILDING AND SAVINGS ASSOCIATION v. WILLIAMS.

Mortgage — Building Society — Payment by Monthly Instalments—Loan on Shares—Mortgage as Collateral Security —Rate of Interest—Fines — Rules of Society—Insurance Moneys Received by Mortgagees—Appropriation.

Reference in a mortgage action.

F. A. Magee, Ottawa, for plaintiffs.

O. E. Culbert, Ottawa, for defendant.

THE MASTER:—Plaintiffs were incorporated under R. S. O. 1887 ch. 169. The mortgage sued on is dated 7th April, 1902. It recites that the mortgagor has subscribed for 11 shares in the 24th series of the capital stock of the association, and has requested an advance of $2,200, the equivalent of the shares, which the mortgagees have agreed to make on the terms thereinafter contained. The proviso reads in part as follows:

'Provided this mortgage to be void upon payment of the following sums:—A monthly instalment of $11 on account of the principal sum of $2,200, on the 3rd Friday of each and every month after the date of these presents, and a monthly payment of $13.20 on the said 3rd Friday of each and every month for interest, being at the rate of 7 1-5 per cent. per annum upon the whole amount of principal advanced, the said payments of principal and interest to continue to be paid until the shares so advanced to the mortgagor as aforesaid shall have attained the par value of $200 each, when the mortgagor shall be freed from all further payments of principal and interest and shall be entitled to have this mortgage discharged; . . . and also upon payment of all other charges which shall become due or payable during the

continuance of this security upon the said 11 shares under any of the by-laws of the association . . ."

As the interest was always to be calculated on the full $2,200, although the latter was to be reduced each month by $11, it follows that the rate of interest charged was actually much greater than 7 1-5 per cent. In view of this, it is contended on behalf of defendant that under the provisions of R. S. C. ch. 127, secs. 3 and 4, embodied in R. S. O. 1897 ch. 205, secs. 21 and 22, the interest should be calculated at only 7 1-5 per cent. on the unpaid principal, and that payments already made should be appropriated on that basis; also that certain amounts charged from time to time by way of "fines" on payments not made at the appointed times, should be disallowed.

In Lee v. Canadian Mutual Loan Co., 3 O. L. R. 191, defendants were, as were the plaintiffs in the present case, incorporated under R. S. O. 1887 ch. 169, and Mr. Justice MacMahon held that sec. 57 of that Act took the mortgage there in question out of the provisions of the Usury Act. The judgment was reversed by the Court of Appeal (5 O. L. R. 471, 2 O. W. R. 370), but on grounds which do not affect the present case. The circumstances were, it is true, in some respects different. The mortgagor gave promissory notes for a loan on his stock, and the mortgage was expressed to be given as collateral security only. The present mortgage is nowhere said to be collateral. I am nevertheless of opinion that it is so in fact, in the same sense and to the same extent as the one there in question. The recital, to which I have already referred, indicates the basis of the whole transaction. The mortgagor has subscribed for stock in the company and has asked the mortgagees to advance to him the par value of his shares, "which the mortgagees have agreed to do upon the terms hereinafter contained." The loan is primarily an advance by the company to one of its shareholders of the par value of his stock, and the mortgage, though nowhere expressed so to be, is evidently intended to be merely callateral. This disposes of the objection as regards both the rate of interest and the fines. The latter are imposed under by-law No. 6 of the company's by-laws, which conforms in all respects to sec. 6 of schedule A. to R. S. O. 1897 ch. 205. The mortgagor covenants in the mortgage "to observe and keep the rules and by-laws of the said association which are now and from time to time shall be in force in the said association." They are moreover, apart even from that, clearly binding on him:

Williams v. Dominion Permanent Loan Co., 1 O. L. R. 532, and Lee v. Canadian Mutual Loan Co., already referred to.

Plaintiffs on 17th August, 1904, received $1,325 under a policy of insurance on the property covered by the mortgage. This they did not apply on the mortgage, but retained in their hands as collateral security for the loan. The money has been unproductive, but they charge themselves with 4 per cent. on it. It is quite clear from Edmunds v. Hamilton P. and L. Society, 18 A. R. 347, that plaintiffs are entitled to take the position they do, notwithstanding R. S. O. 1897 ch. 121, sec. 4. Moreover, defendant has never even asked that the money should be appropriated in any way.

It was contended that C. A. Douglas, who was both plaintiffs' manager and local agent of the insurance company, was also agent of the defendant. This, assuming it to be of importance, is not borne out by the evidence.

I therefore find that the account should be taken in the manner contended for by the plaintiffs.

TEETZEL, J. APRIL 22ND, 1905.

CHAMBERS.

WENDOVER v. NICHOLSON.

Fraudulent Conveyance—Summary Application to Set aside —Evidence—Burden of Proof—Local Judge—Jurisdiction —Residence of Solicitors.

Appeal by defendant and Rachel H. Ryan from order of local Judge at Bracebridge, in Chambers, upon an application by plaintiff under Rules 1015-1020, directing a sale of lands transferred by defendant (judgment debtor) to Rachel H. Ryan, to satisfy plaintiff's judgment.

R. D. Gunn, K.C., for appellants.

O. M. Arnold, Bracebridge, for plaintiff.

TEETZEL, J.:—I am of opinion that the order appealed from should not have been made. The affidavits in support of the motion do not contain any evidence that the conveyances sought to be impeached were void as being made to delay, hinder, or defraud plaintiff or other creditors of defendant Edward Nicholson. The affidavits simply prove plaintiff's judgment and the fact that the conveyances in question were made after such judgment and before execution.

The only allegation in any of the papers suggesting that the conveyances are void is contained in the notice of motion. The order recites that defendant and his grantee, Rachel H. Ryan, have not "disputed plaintiff's allegations in the notice of motion contained or shewn cause," etc., and then proceeds to declare the conveyances "null and void as against the plaintiff," etc.

Counsel for defendant and the grantee appeared and objected to the sufficiency of the material, also to the jurisdiction of the local Judge to entertain the application, on the ground that the parties had not agreed to his doing so, and because the solicitor for defendant and grantee did not reside in the district, as provided in Rule 1242.

I am of opinion that both objections are well taken. I am not furnished with any reasons given by the Judge in support of the order, but plaintiff's counsel seems to have taken the view that the onus was upon defendant and the grantee to affirmatively support the conveyances without any evidence being first offered by plaintiff impeaching their validity . . Before the Administration of Justice Act, 1873, which made first provision for summary proceedings to set aside fraudulent conveyances, a suit in Chancery was necessary, in which, as in any other action, plaintiff had to prove his case; and there is nothing in the present Rules which shifts that burden.

Appeal allowed, and order set aside, with costs to be paid by plaintiff.

TEETZEL, J. APRIL 22ND, 1905.

WEEKLY COURT.

RANDALL v. BERLIN SHIRT AND COLLAR CO.

Mortgage—Assignment—Proof of Claim—Affidavit of Assignee—Onus—Discovery of New Evidence.

Appeal by defendant Wade, made a party in the Master's office, in a mortgage action, from report of Master at Berlin, and alternative motion to refer back to the Master to take further evidence.

A. C. McMaster, for defendant Wade.

W. Davidson, for plaintiffs.

Teetzel, J.:—Plaintiffs are assignees of the mortgage in question, and defendant complains that the Master should have required proof before him of the advances actually made by the original mortgagee, who assigned to plaintiffs. The mortgage account was proved by affidavit only of plaintiffs as assignees of the mortgage. Rule 751 expressly provides that the statement of the mortgage account under the oath of the assignee shall be sufficient prima facie evidence of the state of such account. No objection to the account was made before the Master, and I think the report was fully warranted by the evidence.

Defendant has not, in my opinion, upon the material filed, made out a case entitling him to have the report referred back on the ground of discovery of new or important evidence since the date of the report. . . . I have no doubt that the mortgagors received from or on behalf of the mortgagee the full amount of the mortgage moneys. It is also quite clear that plaintiffs paid the full amount of the principal money secured by the mortgage for the assignment.

Appeal and motion dismissed with costs.

Teetzel, J. April 25th, 1905.

WEEKLY COURT.

Re CHANDLER AND HOLMES.

Will—Construction—Devise—Executory Devise over in Certain Events—"Or"—"And"—Estate—Vendor and Purchaser.

Petition by purchaser under the Vendors and Purchasers Act for the determination of a question of title arising under a will.

J. B. O'Brian, for purchaser.

C. A. Moss, for vendor.

Teetzel, J.:—The point involves the construction of the will of the late Alexis Chandler, particularly the 3rd and 4th paragraphs thereof, which read as follows:—

"3. I will and devise all my real estate unto my said two children by the said Eliza McDonald, named Mary Chandler and John Chandler, to have and to hold to them, their heirs and assigns, upon, from, and after the death of the said Eliza McDonald thenceforth forever.

"4. It is my will that if either of my said children shall die during the lifetime of their said mother or without making any will or without any lawful issue, then the share or interest of the child so dying shall pass to and become vested in the child surviving, and that if both my said children shall die before their said mother or without having made any will or without leaving issue lawfully begotten, then and in such case said real estate shall become vested in, pass to, and belong to the said Eliza McDonald, her heirs and assigns forever."

The testator was never married, but had two illegitimate children by . . . Eliza McDonald . . . the children being described in his will as Mary Chandler and John Chandler.

By the 2nd paragraph of his will, he devised the said real estate, being the farm in question, to . . . Eliza McDonald for life; and she is now deceased. The daughter . . . now Mrs. Foraker, is living, and has several children, and she has conveyed her interest in the real estate to her brother, John Chandler, who is still unmarried, and he has agreed to sell the farm to . . . Holmes; and the question is, whether, under the will, he is able to make a title thereto in fee simple.

I think it is manifest that while the testator desired to convey the fee simple in his real estate in remainder to his said two children, it was also manifestly his desire that in no event, owing to their illegitimacy, should there be an escheat to the Crown of either interest, to prevent which he creates an executory devise over to Eliza McDonald, and her heirs, in the event of both the children dying intestate and leaving no issue surviving either of them.

I think it is quite clear that he intended that, if they had issue, the issue should get the benefit of the devise to the parents; and, therefore, I think the word "or" between the words "without having made any will," and the words "without leaving issue," etc., must be construed as "and." It would be, I think, contrary to his intention to hold that in the event of . . . both dying intestate the executory devise over should take effect, notwithstanding issue surviving; and, therefore, I think it is a case in which . . . "or" must be construed as "and."

It has long been settled that in a devise of real estate to A. and his heirs, and in case of his death under 21, or without

issue, over, the word "or" is construed "and," and consequently the estate does not go over to the ulterior devisee, unless both the specified events happen: see Jarman, 6th Am. ed., pp. 506-7, and cases there cited.

In such a case the testator evidently intends that a benefit shall accrue to the issue through the parent, and it would be highly improbable that he should mean that the benefit should depend upon the contingency of the devisee attaining majority. So, in this case, it is highly improbable that the testator should have meant that if the said children should die without making a will, the issue should be deprived of inheritance, and that the estate should go over to others not connected with the testator in blood relationship.

I am of the opinion that under this will if both Mary Chandler and John Chandler should die without either of them making a will and without either of them leaving children, the executory devise would take effect, but, if either of them should leave a will or leave children, the executory devise to Eliza McDonald's heirs will not take effect; and, subject only to both of these events not happening, I think John Chandler can make a good title in fee simple to the property.

MACMAHON, J. APRIL 25TH, 1905.

WEEKLY COURT.

RE HARRIS, CAMPBELL, AND BOYDEN FURNITURE CO. OF OTTAWA.

DOUGLAS'S CASE.

Company — Winding-up — Contributory — Shares Issued as Paid up—Jurisdiction of Master to Inquire as to Actual Payment.

Appeal by C. A. Douglas from report of local Master at Ottawa (reasons, ante 514) whereby the appellant was held to be a contributory to the company in winding-up proceedings in the sum of $2,000 on account of 30 shares of the capital stock of the company of the par value of $100 per share.

G. F. Henderson, Ottawa, for appellant.

M. J. Gorman, K.C., for the liquidator.

MacMahon, J. (after setting out the facts at length):—The winding-up order is dated 4th April, 1904, two years after the certificates for the 30 shares of paid up stock were issued to the appellant, who accepted the stock as being fully paid up; and where certificates are issued for fully paid up stock, as said by Sir Henry Strong in Re Hess Manufacturing Co., 23 S. C. R. at p. 653, the Master under the winding-up order has no jurisdiction to entertain the question of liability, that question being one which could only be properly litigated in an action in due form instituted by the liquidator on behalf of the company.

Appeal allowed with costs.

MacMahon, J. April 25th, 1905.

TRIAL.

MORAN v. WOODSTOCK WIND MOTOR CO.

Sale of Goods—Warranty—Breach—Damages—Costs.

Action to recover damages for breach by defendants of a warranty given by them in connection with a windmill sold to plaintiffs.

E. M. Young, Picton, for plaintiff.

J. G. Wallace, Woodstock, for defendants.

MacMahon, J.:—On 11th February, 1904, plaintiff gave to defendants an order for a steel wind-motor which was to be erected on plaintiff's farm. . . .

On the back of the order the following warranty was indorsed by defendants: "We warrant the steel wind-motor when properly erected to be self-regulating, easy running, and the most durable machine made. We also agree that should the tower blow down or the mill leave the tower within one year after erection by storms from which no other windmills in the vicinity suffered, we will re-erect or replace it with another mill, free of charge. Should any of its parts be found defective on account of poor material or poor workmanship, we agree to furnish such part f.o.b. cars Woodstock, on the defective parts being shewn to us. We guarantee outfit against frost."

The price of the mill was $250, of which $100 was paid in cash, and plaintiff gave his promissory notes for $100 and $50 for the balance.

When the order was given, the system to be adopted was what is called the suction system, and . . . a change was effected from that to what is known as the triangular system. . . .

The whole of the work, including the digging of the well, which was necessitated by the adoption of the triangular system, was performed by defendant company. . . .

Between 25th September and 25th October the mill, according to plaintiff's evidence, worked fairly well, and it was while the mill and machinery were so working that plaintiff paid the $100 in cash and gave his notes for the balance of the price. . . . Plaintiff said the mill failed to work and broke down entirely about the middle of December. . . .

All the breakages could be made good and all the defects remedied by a competent workman in a few days, for which $50 will more than compensate.

There will be judgment for $50 . . . with costs on Division Court scale, and without the right to defendants to set off High Court costs.

TEETZEL, J. APRIL 25TH, 1905.

CHAMBERS.

TOWNSHIP OF ELMSLEY v. MILLER.

Discovery — Production of Documents—Privilege—Evidence Produced in Contemplation of Litigation.

Appeal by plaintiffs from order of local Judge at Perth requiring plaintiffs to file a further and better affidavit on production.

C. A. Moss, for plaintiffs.

Grayson Smith, for defendants.

TEETZEL, J.:—Defendants are owners of land through which a roadway runs, and the question to be determined in the action is whether such roadway is a public highway or not.

The defendants allege that it is not a public highway, but that it is their own property, and in assertion of their rights have placed obstructions upon it.

On 10th June last, some two or three months before the commencement of the action, a number of persons interested in having the road maintained as a public highway, and the defendants, appeared at a meeting of the council of the plaintiff corporation, and, after some discussion, a resolution was passed by the council under which Messrs. Sparham and McCue, solicitors, were authorized and empowered to thoroughly investigate the right of the township to use the road as surveyed and set out in a certain by-law passed in 1852, or the present travelled road, being the road in question, and to secure all possible evidence and make all searches they may think necessary and to report the result of their investigations to council, and to give their opinion, and if they felt doubtful on any vital question, to obtain advice from a Toronto counsel and report.

Pursuant to this resolution, the solicitors proceeded to obtain information, and secured a number of statutory declarations from different persons respecting the road in question, and upon such information the solicitors, on the 29th October, reported to the council that the road in question, in their opinion, is a public highway, and that the council had jurisdiction over it.

Shortly afterwards this action was commenced against the defendants, in consequence of their resisting the user of the road as a public highway, and the question involved in the appeal is whether these statutory declarations, for which in the affidavit on production a claim of privilege is made as "being part of the plaintiffs' case and prepared for the instruction of counsel and prepared specially for this litigation and in contemplation thereof, and contain the names of plaintiffs' witnesses and the evidence which such witnesses may give at the trial of this action," should be produced.

There was some evidence of conversations at and after date of said meeting between the reeve and the township solicitors, on the one hand, and defendants and their solicitors on the other, indicating a willingness at the time for the defendants to join in getting information, and that any information obtained would be open to all interested parties. Before the action was commenced, it does not appear that the defendants availed themselves of the privilege either of

taking part in getting the information or in inspecting it, and the question now is, whether, after action, the defendants are entitled to production and inspection of the written information or evidence obtained before the action by the solicitors for plaintiffs.

I am of opinion that defendants are not entitled to such production and inspection. While the information was not obtained for the purpose of supporting an action expressly contemplated at the time the instructions were given to the solicitors, it must have been contemplated that if the report of the solicitors was that a highway existed, an action would be brought against the defendants for obstructing it, if they persisted in disputing that it was a highway, in which event the information obtained by the solicitors would be necessary to assist them in prosecuting such action.

I do not think it is necessary that at the time the resolution was passed an action should have been actually decided upon in order to disentitle defendants to claim the privilege now set up.

The immediate purpose of the information was to aid the solicitors in forming an opinion as to the legal rights of plaintiffs in reference to the road, and I think also such information obtained by the solicitors for that purpose is privileged from production in an action brought as the result of the opinion formed by the solicitors. . . .

[Reference to Southwark v. Quick, 3 Q. B. D. 315; Leroyd v. Halifax, [1895] 1 Ch. 686.]

The appeal will, therefore, be allowed, with costs to the successful party in the action.

MAGEE, J. APRIL 26TH, 1905.

WEEKLY COURT.

RE DILLON AND TOWNSHIP OF CARDINAL.

Municipal Corporations—By-law—Local Option—Voting on By-law—Irregularities — Publication of By-law — Designation of Newspaper by Council—Appointment of Agents or Scrutineers—Persons not Entitled to Vote—Compartments for Voters—Secrecy of Ballot—Presence of Strangers in Polling Place—Duties of Returning Officer at Close of Poll.

Application by two voters and hotelkeepers in the village of Cardinal to quash a "local option by-law" passed by

the village council for prohibiting the sale by retail of intoxicating liquors within the village.

G. H. Watson, K.C., and P. K. Halpin, Prescott, for applicants.

W. E. Middleton, for village corporation.

MAGEE, J.:—Such by-laws in incorporated villages are authorized by sec. 141 of the Liquor License Act, R. S. O. 1897 ch. 245, but that section requires that before being finally passed they shall be duly approved of by the electors in the manner provided by the sections in that behalf of the Municipal Act.

Sections 338 to 374 of the latter Act prescribe certain proceedings for ascertaining the assent of the electors to by-laws for which it is a requisite, and of these sec. 351 directs that the proceedings at the poll and for and incidental thereto shall be the same, as nearly as may be, as at municipal elections, and makes secs. 138 to 178 and 180 to 206 applicable except in so far as otherwise provided.

This by-law was submitted to the electors on 2nd January, 1905, at the same time as the annual municipal elections, and was declared by the clerk to have been carried by a vote of 123 against 114, which figures, however, on a scrutiny of the ballots before the County Court Judge, were changed to 124 and 117 respectively, leaving a majority of only 7 in its favour. It was finally passed by the council on 9th January, 1905.

The applicants complain that the requirements of the Municipal Act were not complied with. They state 20 grounds. . . . Those urged may be classed under 8 heads:—

1. That no newspaper was designated by the council, as the Act requires, wherein the by-law should be published.

2. Non-appointment of one person to attend the polling on behalf of those interested on each side.

3. Persons being allowed to vote who were not so entitled.

4. Absence of a compartment wherein a voter could mark his ballot screened from observation.

5. Presence of other persons in the compartment with the voter.

6. Allowing other persons to be in a position to see how the voter marked his ballot.

7. Allowing persons to be in the polling place who were not entitled to be there.

8. Non-performance by the returning officer of various duties required of him at and after the close of the poll.

Let us take these in their order.

First: sub-sec. 2 of sec. 338 of the Municipal Act is relied on as requiring that the council shall by resolution designate the newspaper in which the by-law with notice of the polling is to be published, and Mr. W. H. Dillon, a member of the council, makes affidavit that the council did not do so. It is shewn, however, that in March, 1904, a resolution had been passed awarding to the proprietor of the St. Lawrence "News," published in the neighbouring village of Iroquois, for a fixed sum, all general printing and advertising of the village for the year 1904, and that Iroquois is the nearest municipality wherein a newspaper is published, and the by-law and notice were published in that paper accordingly. The reeve also makes affidavit that he inserted the name of the newspaper in the notice at the council board. It is not clear that the Act requires the particular newspaper to be designated, or more than the locality of its publication. However, I am of opinion that the previous standing resolution was sufficient. Even if it were not, the statute has been substantially complied with. . . . See In re Salter and Township of Beckwith, 4 O. L. R. 51, 1 O. W. R. 266; Re Pickett and Township of Wainfleet, 28 O. R. 464; Re Fenton and County of Simcoe, 10 O. R. 27; In re Lake and County of Prince Edward, 26 C. P. 173.

Next: as to appointment of agents or scrutineers under sec. 342. It is shewn that the reeve did appoint not only one agent for each side to attend the polling, but two. This ground, therefore, fails, whatever effect the presence of the additional agent in the polling place may have under the 5th class of objections.

Third: as to persons being allowed to vote who were not entitled. The applicants read affidavits of 10 persons who say their names were on the list and they voted. They assert either that they were not qualified to vote or state facts from which it is argued that they were not. These 10 persons are W. Bearsford, E. Shaver, M. L. Connolly, R. Van Camp, E.

Galbraith (an alien), J. T. Moore, John Whalen, W. J. Woodland, B. Tyo, and P. McLean. . . . The persons entitled to vote on this by-law were those entitled to vote at municipal elections: see Re Croft and Town of Peterborough, 17 A. R. 21. The sections material here as to qualification are secs. 86, 89, 116, and the forms of oaths to be taken by the four classes of voters when required under secs. 112 to 115. Under sec. 86 freeholders need not be residents, but other voters must; and by sec. 116 the voter may select which form of oath he will take. Reading the affidavits in the light of these sections, E. Shaver and P. McLean were duly qualified, and both make subsequent affidavits for the respondents shewing that they were so. B. Tyo does the same, and adds that he voted against the by-law. This leaves only 7 votes alleged to be bad, and of these R. Van Camp makes a subsequent affidavit for respondents stating that he was asked by both applicants to vote against the by-law, and did so, and was assured by one of them that he was duly qualified. If matters so rested, there would be one bad vote against the by-law and 6 bad votes as to which there would be no evidence to shew on which side they were cast. The fact that these 6 persons are most willing to assist in quashing the by-law by making affidavits of their own illegal acts hardly induces one to infer that they voted for it; but it is shewn that two of them, Moore and Galbraith, were driven to or toward the poll by one applicant and the son of the other. Bearsford's affidavit is qualified in a way which does not make it clear he was not entitled to vote. Even if all 6 had no right, and if it were possible that they voted for the by-law, the striking off that number would still leave a majority of 2.

Besides these 10 affidavits, the applicants read another made by Matthew Sim that his son was on the list and voted, and was under 21 years of age. He does not give any information as to how he knew that his son voted, and his affidavit is therefore of no value, but he makes a subsequent affidavit for respondents, repeating that his son voted, and adding that he has reason to believe that his son voted against the by-law. If his belief is in accordance with fact, the majority would be increased by one. The inference one is strongly tempted to draw is, that the by-law was carried by 15 instead of 7. Be that as it may, the objections of this class fall to the ground on the facts. It was urged for the respondents that there could not be an inquiry into the val-

idity of votes cast on either side, and that no instance of one is reported, and that sec. 89 makes the voters' list final, and sec. 200 protects a voter from having to disclose how he marked his ballot, and that the only protection is to require the voter to be sworn at the poll. Whether it be that such an inquiry has not been actually necessary in any case, Mr. Justice Britton in In re Salter and Township of Beckwith, 4 O. L. R. 51, 1 O. W. R. 266, found that the objections to certain voters on a local option by-law based on non-qualification were not well founded in fact. In In re Coe and Township of Pickering, 24 U. C. R. 439, where a by-law under the Temperance Act of 1864 was in question, the possibility of the Court in banco having to enter upon such a scrutiny was not viewed with equanimity. A majority obtained by illegal votes does not present itself as not being an illegality such as the statute contemplates as a ground for quashing.

Fourth: as to the absence of a screened compartment. This is disproved in fact. It is shewn, indeed, that there were two compartments in either of which a voter could mark his ballot in secrecy. It was then argued for the applicants that there was no right to have more than one, and that the presence of two voters at once in the polling place was irregular, but this comes under the 7th class.

Fifth: as to the presence of other persons with the voter in the compartment. This is negatived in fact. The only instance alleged was, that the son of a Mr. Crawford, a voter who was partly crippled, went with him into the compartment while he marked his ballot. Mr. Crawford makes affidavit that his son only assisted him to the compartment, but stepped back and did not enter it and did not see him mark his ballot. The presence of the son in the polling place comes under the 7th class.

Sixth: allowing other persons to be in a position to see how the voter marked his ballot. There is no proof of this, and it is negatived. The only basis for it other than Mr. Crawford's case is that a number of persons were allowed in the further end of the hall in which the polling took place. They were about 39 feet distant from the nearer of the two compartments, and, although they could see a voter going in, they could not see how he marked his ballot.

Seventh: allowing persons to be in the polling place who were not entitled to be there. The polling was held in the

municipal hall of the village. . . . The hall . . . is about 32 feet in width and 68 feet in length. . . . The end opposite the entrance door is occupied by a raised stage or platform taking up about 18 feet of the length. The seats in the body of the hall in front of this stage were on polling day moved close together, leaving a clear space 20 feet wide all across the hall in front of the stage between it and the seats. This clear space was used as the polling place. An aisle or passage led down the middle of the hall from it towards the door for the voters to come and go. The seats when put close together took up about 22 feet more of the length, leaving another clear space about 8 feet wide, and all across the hall next the entrance door. It is said that sometimes as many as 30 persons altogether would be in the hall, but it is not shewn that, except in these instances, any one other than the officers and agents, constable, and voters actually engaged in voting, were ever nearer the polling place than this 8-foot space, in which there was a stove. The constable was instructed to keep all others back, and all but the returning officer and agents were put out of the hall when the ballots were being counted. These arrangements at the polling place have been usual for years at all elections in Cardinal. There would be nothing to prevent persons in the 8-foot space from seeing the voters going forward to the returning officer's table, 25 or 30 feet distant, and what took place there might be seen, but could not ordinarily be heard. It is said that on several occasions there were as many as 3 voters at once in the polling place itself, one in each compartment marking his ballot, and a third at the table applying for one. The 3 instances referred to of others being allowed in this space are those of young Crawford while assisting his father; one Baker, who on one occasion went forward and spoke to the returning officer; and one Feeder. It is not alleged that any voter was in the polling place while Baker was there. Feeder, it is alleged, sat about 14 feet from the ballot box, and on the side of the front lines of seats, and checked off the voters with a voters' list as they polled their votes, and left that seat and went to other parts (not stated) of the hall, and returned at intervals during the greater part of the polling. . . . There is no hint that any one but the returning officer objected to Feeder's presence, so it would seem hardly probable that he was there long.

It is said that the presence of so many persons is contrary to the Act and destroys the secrecy of the ballot, and that there should be only one compartment for ballot marking, one voter, and one agent on each side, present at one time, besides the returning officer and poll clerk, who with the agents are sworn to secrecy.

As to the persons in the space at the entrance door, I would hold that they were not in fact in the polling place, which was the space 22 feet distant and separated from them by the rows of seats.

As to the presence of more than one voter at a time, a word may be necessary. Section 145 requires that every polling place shall be furnished with a compartment in which the voters can mark their votes secure from observation. Taken literally sec. 145 does not exclude the idea of several voters at once in the one compartment if it is large enough or so constructed as to permit of secrecy for each. . . . As polling time is only 8 hours, and voters come at some hours in greater numbers than at others, and at some municipal elections there are several and sometimes complicated ballots to be marked, it might be impracticable to take the vote if only one at a time were admitted.

The object of subdivisions was to prevent crowding. I do not think the necessity of providing one excludes the idea of providing more, if deemed necessary for convenience and dispatch.

Then it is said that the Act contemplates not only secrecy as to how a man votes, but as to whether he has voted, and therefore no one unpledged to secrecy should be allowed to know whether a voter asks for or deposits a ballot paper, and for this the form of declaration of secrecy, schedule I., prescribed by sec. 199, is referred to as containing a promise not to disclose the name of any person "who has voted," nor how he has voted. Looking at secs. 162, 198, and 367, it would be questionable whether voting meant anything but the actual marking of the ballot, and in Re Canada Temperance Act and City of St. Thomas, 9 O. R. 154, Mr. Justice Rose considers a vote the expression of a choice, and a rejected ballot apparently not a vote. It is as important to keep secret whether a man has improperly marked or left unmarked his ballot as how he marked it. It is not important to know whether he applied for or deposited one. If the Act were read so as to forbid that, it would in practice be futile, and if it could be made effective it would be harm-

ful, as it would tend to aid and shield persons improperly voting more than once. Apart from the form in schedule I., there is nothing in the sections referring to secrecy (secs. 198 and 367), or elsewhere in the Act to indicate that secrecy upon the subject of depositing a ballot is required. Now schedule I. does not apply and would not be suitable to voting on by-laws. For them the form in schedule M. is provided, and sec. 351, in making secs. 180 to 206 applicable to by-law voting, expressly says "except in so far as herein otherwise provided." The form of declaration in schedule M. makes no promise of secrecy as to whether the elector has voted. So that there is no objection on that score to any one seeing the requisition for or deposit of a ballot paper as to a by-law, and the presence in the polling place of other electors who are voting would seem unobjectionable.

As to the number of agents or scrutineers, sec. 342, relating to voting on by-laws, provides for the appointment by the reeve of "one person to attend at each polling place" on behalf of those interested on each side, and by sec. 345, in the absence of such person, an elector may take his place, and sec. 346, like sec. 173, provides that no person shall be entitled or admitted to be present in any polling place other than the officers, clerks, and persons or electors authorized to attend as aforesaid.

Why only one agent on each side is mentioned it would be difficult to say. Two are allowed at the comparatively less important function of summing up the votes. Section 175 allows two agents for each candidate at municipal elections. The like number are allowed at Provincial and Dominion elections. It was doubtless this which led to the mistake in this instance. In the practical working out of a municipal election it frequently occurs that an elector wishes to or can vote as to only one, or less than all, of the several offices, by-laws, or questions before the people. If he asks for only one of several ballots, there may be a dozen or more agents surrounding him who are not interested in the ballot he asks for, and these will also see the ballots after the close of the poll. The restriction as to number of agents present is manifestly one of convenience, combined with protection of all interests and of the principle of secrecy as to the actual marking of the ballots.

In Regina ex rel. Preston v. Touchburn, 6 P. R. 344, the objections raised were much the same as here, except as to the number of agents, and Chief Justice Harrison refused to

avoid the election, as he saw no ground for thinking that the result would have been different if the irregularities complained of had not occurred. As he says, "the thing to be obtained is a fair election, substantially according to law, and if this appear to have taken place, resulting in a majority to some one or more of the candidates, that result should not be disturbed merely because some officer or person has disregarded or neglected some direction of the statute deemed necessary by the legislature to secure a proper election." And again: "Officers and others who violate the directions of such an Act are liable to be punished in the manner the Act prescribes, but in the absence of some express declaration, it would be manifestly inconvenient and unjust to set aside the election for the mere irregularity or misconduct of the officers or others than the candidates concerned in the election." In numerous other cases similar remarks have been made by Courts and Judges. In Re Pickett and Township of Wainfleet, 28 O. R. 464, Mr. Justice Osler says (p. 468): "Everything was conducted in the loosest way and with a disregard of the plain directions of the Act which is surprising. Had there been nothing else, it is possible that the election might have been upheld under sec. 175" (corresponding to sec. 204 of the present Act), "even as against those I have noted." In that case he set aside a by-law repealing a local option by-law, but apparently only on the ground of absence of proper notices to the public. In this present case there is the presence of the two extra agents at the counting of the ballots. They had made the declaration as to secrecy. There is no suggestion of anything having occurred which in any way affected the result, and I see no reason to interfere with the actual decision of the election previously given, merely because these two persons were present at its ascertainment.

The 8th and last class of objections covers several acts of omission and commission by the returning officer. They mostly are sought to be made out by the poll clerk, who has made 3 affidavits for the applicants to prove breaches of the law to which he was himself a party. He light-heartedly swears that the voting was conducted in a loose, irregular, improper, and illegal manner, and that the returning officer at the close of the poll did not perform the duties required of him, but he does not hint that he or any one else suggested anything better. If, before assuming the duties of poll clerk, he had taken a small part of the pains which

presumably he must since have been at to acquire the knowledge to enable him to swear that what he and the returning officer had done was illegal, he might have saved the village this litigation. It appears that at the close of the poll the ballots were counted in the regular way in presence of the agents for both parties, and the result announced to them by the returning officer as 123 for and 114 against the by-law, and 9 rejected ballots. The agents seem to have been satisfied, for they left the returning officer and poll clerk to finish their duties without waiting to have a statement drawn up or signed under sec. 359, or to seal the packets of ballots, etc., under sec. 361. By the time these ballots were counted and the result announced, it was 6 o'clock, and there were other ballots to count for the municipal election, and the hall had to be made ready for some public entertainment on that evening, and apparently considering that the more important part of the work had been done, and being left alone, it was decided to complete the other necessary formalities at the returning officer's house. So the returning officer put the ballots in the ballot box, and he and the poll clerk went to their respective homes for supper. The poll clerk joined him at about 7.20 p.m., and they went on with their work, adding up the poll book and making out the statement, etc., and after about an hour and a half the poll clerk left the house, accompanied by the returning officer. He says the latter put the spoiled ballots and rejected ballots together in one envelope, and when they went out the returning officer left the spoiled and rejected ballots, poll book, and "other forms" (which I would not take to include ballots) on his table in the house, and none of these were sealed or fastened in a package, and that the returning officer's wife and daughter and Mr. James Saver were then at the house. It does not appear how long the returning officer was absent, or that any of these three persons had access to or were ever in the room in which the papers were left. With regard to the spoiled ballots, there is no other reference to the fact that there were any, and I would conclude from the papers that what the poll clerk calls the spoiled ballots was a single ballot which the County Judge certifies he found with the rejected ballots, and was shewn to him to be a ballot given to a person not on the list and which had not been counted. The poll clerk himself speaks of such a ballot and says it had not been put in the ballot box. The returning officer may not unreasonably have thought it should not be put in the

category of spoiled ballots, though not strictly a rejected one. Mr. Halpin, the applicants' solicitor, who attended on the scrutiny before the County Judge, makes affidavit of the condition of the books and papers when produced there, and the only deficiencies he mentions are that the packets containing the ballots were not sealed with wax, and the poll book was not in a sealed packet, but wrapped in a newspaper, and the ballot box was not sealed. Nowhere does the Act require wax nor the sealing of the box, and, though sec. 377 requires the poll book, in the case of by-laws, to be in a packet with other papers, it is to be noticed that at elections sec. 177 only requires it to be delivered to the clerk, and makes it open to inspection by any elector. Here the clerk was returning officer and deputy returning officer combined. The poll clerk also says that the returning officer "did not take a note of the objections made to the four ballots objected to and not counted, nor did he number said objections or ballots." There is no explanation of what four ballots are referred to or what objections. The returning officer says there were no objections to his course. For all that appears no one objected to any of the ballots but the returning officer himself. The County Judge rejected four ballots less than the returning officer. There is no assertion that the rejected ballots were not marked "rejected," or that there was any difficulty whatever on the scrutiny. As the poll clerk seems willing to disclose all the faults of the day, it may be assumed that the separate packets of ballot papers required by sec. 361 were made up at the polling place, though not there marked as to their contents or sealed with the returning officer's seal. Withal there is not a suggestion of any tampering with ballots or results, or of any injury being done, or of the irregularities complained of having in any way affected the result. The returning officer explains that this was his first experience, he having been appointed clerk only in March, 1904, and says that everything was done in good faith, and he did all he could to conduct the election fairly and without fear, favour, affection, or hope of reward from either side. Manifestly the agents on each side were satisfied, for no objections to anything is heard of from any of them. In Regina ex rel. Preston v. Touchburn, the conduct of the returning officer was more objectionable than here. In the cases cited for the applicants there was the reasonable probability that the result might have been affected by reason of the public not having proper notice. Here there is

not. The majority is narrow, but the legislature has given the bare majority the right to pass such measures, and sec. 204 prevents irregularities from rendering elections invalid, if it appears that the election was conducted in accordance with the principles laid down in the Act, and that such irregularity did not affect the result. The voting was, I think, conducted by the returning officer, not loosely, but in a reasonably careful manner and in accordance with those principles. As said by Chief Justice Hagarty in In re Huson and Township of South Norwich, 19 A. R. 343, "where a rural population is intrusted with limited power to pass local laws, we must not be hypercritical as to exactitude of procedure."

In view of the cases already referred to, and Re Young and Township of Binbrook, 31 O. R. 108, and In re Wycott and Township of Ernestown, 38 U. C. R. 533, I do not think I should grant this application. The motion is dismissed with costs.

STREET, J. APRIL 27TH, 1905.

TRIAL.

SIMS v. GRAND TRUNK R. W. CO.

Railway—Injury to Person Crossing Track—Negligence—Contributory Negligence—Findings of Jury—Nonsuit.

Action to recover damages for personal injuries sustained by plaintiff Alexander Sims, an infant, by an engine of defendants, owing to negligence of defendants, as alleged, and expenses incurred by his father and co-plaintiff in consequence of these injuries.

John MacGregor, for plaintiff.

W. R. Riddell, K.C., and J. P. Mabee, K.C., for defendants.

STREET, J.:—Plaintiff Alexander Sims was between 18 and 19 years of age, and was employed as a cabinet-maker; he was injured at a highway crossing within the limits of the city of Toronto by a train of defendants. . . . He was riding a bicycle in an easterly direction along the south side of Bloor street west on 23rd July, 1903, at about 6 o'clock in the evening. He had been along the same road several times; he knew that defendants' track crossed Bloor

street at the point in question, and knew that he was approaching the track, and that trains frequently passed up and down upon it. The crossing itself is visible for a considerable distance, being somewhat above the level of the highway and being marked at the sides by white-washed fences and crossing boards. When he reached a point 137 feet distant from the nearest rail he had an unobstructed view of the track to the north of the crossing for the distance of 1,000 feet, and, had he looked, might have seen for the whole of that distance the approach of a freight train coming south. He did not look either to the right or to the left, and he says that he was struck by the engine as the front wheel of his bicycle was crossing the westerly rail of the track, and that until the instant before he was struck he did not see the engine at all. He says that if he had seen the engine when he was within 10 feet of the track, he could have saved himself by turning his bicycle, as he was not going fast at the time.

There was some evidence that the usual statutory signals were not given.

Defendants' counsel moved for a nonsuit at the close of plaintiffs' case, and I reserved my decision upon the motion, allowing the case to go to the jury in the meantime.

The jury found in answer to questions submitted to them:

1. That the statutory signals were not given.

2. That the engine struck plaintiff, and that he did not run into the engine.

3. That there was no obstacle to prevent plaintiff's view of the track for the distance of a quarter of a mile after he had passed the greenhouse.

4. That plaintiff could not by using reasonable care have avoided the accident.

5. That the cause of the accident was the want of proper warning.

6. That the train was travelling at the rate of 15 to 20 miles an hour.

7. That this was an excessive rate of speed.

8. They assessed the damages to the plaintiff who was injured at $2,200, and to his father at $300.

The greenhouse mentioned in the answer to the 3rd question was so placed that after passing it there was an unobstructed view for a quarter of a mile up the track during the progress of plaintiff for 137 feet along Bloor street before he reached the track. . . .

According to the latest authorities, I should have been wrong in withdrawing the case from the jury. The defence that plaintiff should have looked out for the train is one of contributory negligence, and this defence, it is now said, must be left to the jury: Morrow v. Canadian Pacific R. W. Co., 21 A. R. 149; Vallée v. Grand Trunk R. W. Co., 1 O. L. R. 224.

The motion for nonsuit must, therefore, be refused, and judgment should be entered for plaintiff in accordance with the findings of the jury with costs.

BRITTON, J. APRIL 28TH, 1905.

TRIAL.

QUEEN'S COLLEGE v. JAYNE.

Vendor and Purchaser—Contract for Purchase of Land—Specific Performance—Incomplete Contract—Disagreement as to Terms.

Action by vendors to compel specific performance of a contract by defendant for the purchase of a farm.

Plaintiffs were mortgagees in possession of the farm in question. On 28th November, 1903, plaintiffs leased the farm to defendant for 3 years from 2nd March, 1904, at a yearly rental of $500. On 26th December, 1903, plaintiffs' solicitor wrote to defendant offering to sell him the farm for $13,000, and saying that the terms of payment would be made very easy. On 29th December, 1903, defendant wrote to plaintiffs' solicitor, "I have concluded to purchase the farm at your price, $13,000." The solicitor replied, "I accept your offer of $13,000 for the Blanchard farm."

On 4th February, 1904, defendant was in Kingston and met plaintiffs' solicitor, when terms of payment were discussed, and the solicitor wrote the following as the result of their conversation: "Jayne proposes to turn over to us the cheques from the cheese factory for his milk money, beginning with June next, to be applied in payment of purchase money on his purchase of Blanchard farm. He will pay $200 this year, $300 in 1905, and $500 a year after that; he to have the privilege of paying any amount on account of his purchase money at any time; interest on amount so paid to cease on day of payment." This paper was signed by defendant.

The solicitor then drew up, on a printed form, a full agreement embodying all terms, and making terms of payment as follows: $200 on or before 1st November next; $300 on or before 1st November, 1905; and the remainder in annual payments of $500 each, with interest at 4½ per cent. from 4th February, 1904, payable half-yearly on 15th days of November and May in each year, with privilege to pay any sum on account of principal at any time; interest to cease on payments so made.

Defendant did not sign this agreement. He declined to do so, and the solicitor told defendant to take it home and consider it, and this defendant did, and then followed a correspondence. Defendant finally declined to carry out his proposed purchase, and asserted his right to hold the property under the lease of 28th November.

J. M. Farrell, Kingston, for plaintiffs.

J. L. Whiting, K.C., for defendant.

Britton, J.:—It was shewn that in this case plaintiffs did not expect that defendant would pay cash. It was known that defendant was not able to pay cash, and would require time, and that terms of payment would have to be agreed upon. The paper signed by defendant on 4th February, 1904, did not fully state these terms; the rate of interest was omitted, although orally 4½ per cent. per annum was agreed. Plaintiffs shew that the agreement was not complete by stipulating for the further terms embodied in the formal document drawn. The case in this respect seems to be governed by Bristol v. Maggs, 44 Ch. D. 616, and Hussey v. Horne-Payne, 4 App. Cas. 311. If the Court has to find the contract from the correspondence, "the whole of that which passed must be taken into consideration," and, taking all that passed, I arrive at the conclusion that negotiation never ripened into contract.

Defendant's first letter is hardly an unconditional offer to purchase. He says, "I have concluded to purchase the farm at your price." That, I think, in view of all that took place both before and after that letter was written, was simply a statement that defendant would go up to $13,000 as the price, if they could agree upon terms. Although plaintiffs' solicitor treated the letter as an offer, and at once accepted it, he then fairly and properly expected that terms would have to be embodied in a formal agreement before negotiations ended. . . .

Upon all that passed, I think that no complete contract has been established, and that the action must be dismissed with costs.

MACMAHON, J. APRIL 29TH, 1905.

CHAMBERS.

RE DYER AND TOWN OF BRAMPTON.

Municipal Corporations—Waterworks—Conveyance of Water through Private Lands—Compensation—Special Statute—Claim Made after 20 Years—Statute of Limitations—Interruption—Repairing Water Pipes—Fresh Entry—Assignment of Claim for Compensation—Champerty.

Motion by Robert H. Dyer for a mandamus to the municipal corporation of the town of Brampton to appoint an arbitrator on their behalf as one of a board of arbitrators to ascertain the compensation to be paid to the applicant for lands entered upon by the corporation and used for the construction of waterworks, pursuant to 41 Vict. ch. 26 (O.)

W. E. Middleton, for the applicant.

E. D. Armour, K.C., for the corporation.

MACMAHON, J.:—By 41 Vict. ch. 26, sec. 1 (O.), the corporation of the town of Brampton were given, through the agency of commissioners, power to construct waterworks in the town and parts adjacent.

Section 5 empowered the commissioners to enter the lands of any person in the town or within 6 miles thereof, and to survey and set out such parts thereof as might be requisite for the waterworks, and also to divert and appropriate any lake, pond, or stream of water, and to contract with the owners of the lands and those having the right to water for the purchase of the power, and in case of disagreement as to the value of the power or as to the damages such appropriations should cause to the owners, the same is to be decided by 3 arbitrators, one to be appointed by the commissioners, and the owner or owners to appoint another, and such two arbitrators to appoint a third . . . and where an award is made, the sum awarded is to be paid within 3 months from the date thereof, and in default of payment the proprietor may resume possession of his property, and all his rights shall thereon revive.

By sec. 6, the lands, privileges, and water, which shall be appropriated by the commissioners, shall thereafter be vested in the corporation of the town, with power to construct, erect, and maintain in and upon such lands all such reservoirs, waterworks, and machines requisite for the undertaking, and to convey the water thereto and therefrom in, upon, or through any of the grounds and lands lying intermediate between the reservoirs and waterworks and the lake or pond where the same are procured by the town by one or more lines of pipes, with power to enter upon the lands and to cut and dig up the same, and to lay down the pipes, or for taking up, removing, or repairing, or altering the same and in and upon the highways within 6 miles of the town.

Immediately after the passing of the Act in 1878 the corporation entered upon the lands hereinafter referred to, and proceeded with the construction of a system of waterworks, bringing their supply of water from "Snell's Lake," which is within 6 miles of the town. The pipes were put down in a northerly direction from the town across the east half of lot 14 in the 2nd concession, and for a short distance through the east 66½ acres of lot 15 . . . until the pipes entered Snell's Lake, the waters of which covered nearly the whole of the 66½ acres, and also about 2 acres of lot 16 owned by the applicant.

Robert Gardner was at the time of his death in 1870 the owner of lot 14 and of the 66½ acres of lot 15. By his will, dated in October, 1870, he devised these two parcels (together with other lands) to his wife for life, and after her death to be equally divided between the children of his brothers Luke and Joseph Gardner, and of his sister Catherine Watkins, and the children of his deceased sister Sarah A. Hutchinson. Thomas Holtby, Joseph Gardner, and Marietta Gardner were appointed executors and executrix, and given power to dispose of all the property if they thought proper.

At one point of the line the pipes were improperly laid in the trench, creating a ridge, called a "hog's back," in the pipe line, thus impeding the flow of water from the lake to the turn. To remedy this, the commissioners . . . in 1891 opened up the trench and lowered the pipes to the same level at that point . . .

Marietta Gardner died on 1st January, 1902. On 10th March, 1902, Thomas Holtby, the surviving executor of . . . Robert Gardner, deceased, was removed from his

executorship, and Frederick A. Gardner and Wesley R. Wright were appointed trustees of the will.

On 1st November, 1902, Frederick A. Gardner and Wesley R. Wright, the trustees, in consideration of $800, conveyed to the applicant, Robert H. Dyer, the west 66½ acres of the east half of lot 15 . . . subject "to the interest (if any) that the municipal corporation of the town of Brampton have acquired in the said lands under and by virtue of . . . Ontario statute 41 Vict. ch. 26."

On 20th July, 1904, . . . the executors of the will of Marietta Gardner, the life tenant, made an assignment to the applicant, which is expressed to be "for valuable consideration now moving from the said assignee to the said assignors and for other valuable considerations." . . . of "all the right, title, interest, claim, and demand, of whatsoever nature or kind, which the said Marietta Gardner in her lifetime had and which the said assignors now have as her executors for compensation for any and all the acts done by the corporation of Brampton in connection with the said lands during the continuance of the lifetime of the said Marietta Gardner, deceased."

The applicant on 9th August, 1904, served on the corporation of Brampton a notice claiming compensation for entering and laying pipes on part of lot 16 in the 2nd concession, of which he was in 1878 and now is the owner, and also for laying down such pipes on parts of said lots 14 and 15, as the assignee of all the rights of Marietta Gardner as tenant of the life estate in said lands to 1st January, 1902, the date of her death.

During the lifetime of Marietta Gardner no claim for compensation was made; and the claim above referred to is the only one ever made by Dyer.

On 24th September, 1904, Dyer appointed Nicholas Harrison, of Castlemore, his arbitrator, under the said Act. And on 27th September, 1904, he gave the corporation notice of such appointment, and also . . . that unless the corporation appointed an arbitrator, as provided by the Act, within 2 weeks, he would move. . . .

What was done by the corporation in taking possession of the lands was in the lawful exercise of their statutory powers, and gave a claim of right to compensation under the Act, and was, therefore, capable of assignment (Dawson v. Great Northern and Western R. W. Co., [1895] 1 Q. B. 260), if not barred by the Statute of Limitations. . . .

[Reference to the Railway Act, R. S. C. ch. 109, sec. 8, sub-sec. 19, and Ross v. Grand Trunk R. W. Co., 10 O. R. 447.]

Although there is no such provision in the special Act 41 Vict. ch. 26, as is contained in the Railway Act, sec. 8, yet any claim by the land owner for compensation must be founded on the special Act, and could be enforced by the owner of the land at any time within 20 years.

Nearly 23 years had elapsed between the time the town of Brampton took possession of the lands mentioned and the death of Mrs. Gardner, and neither she nor the applicant had in that time made any claim for compensation. . . . The claim of the applicant to compensation in regard to lot 16, and of the Gardner estate to compensation in respect of lots 14 and 15, were each barred on 1st January, 1899.

Had Marietta Gardner recovered compensation, she would have had only a life interest in the compensation money, and those entitled to the inheritance in the land would have been entitled to the remainder in fee in the compensation money: Young v. Midland R. W. Co., 16 O. R. 738, 19 A. R. 265.

Then, as to the point that the assignment from the executors of Marietta Gardner has a champertous taint.

What the applicant received from the executors of Marietta Gardner was the mere right to litigate a claim which he himself desired to set up, but which Marietta Gardner, up to the time it was barred by the statute, considered to be of such an insignificant character that she refused even to put it forward, much less to litigate the claim.

The solicitor for the applicant in his affidavit states that when he first approached Mr. Duggan, one of the executors of Marietta Gardner, with the object of obtaining an assignment, he told Duggan that the estate would be put to no costs and would get 50 per cent. of what was received by the applicant. This statement, the solicitor says, was made before he had consulted counsel, but after consulting counsel he concluded that the assignment would require to be absolute in every respect, and without any agreement to compensate the Marietta Gardner estate in any way out of what might be recovered from the town of Brampton. The solicitor thereupon drew the assignment, and again saw Mr. Duggan and explained to him that the applicant could not make

any agreement as to payment, and that the assignment must be absolute. . . . "At that time I gave him (Duggan) to understand it would have to be left to the applicant, after he received what might come to him from the town of Brampton, to give the M. Gardner estate what would be considered fair out of the proceeds . . . but I clearly gave him to understand that it would have to be just the same as a voluntary gift. I further said that the applicant was, as he knew, an honourable man, and I thought the M. Gardner estate had nothing to lose and perhaps something to gain in the transaction." . . .

It is evident that these executors never contemplated making a claim against the town of Brampton, but apparently were willing that what Dyer regarded as a claim might be litigated at his own expense, and Mr. Duggan certainly expected that, as the solicitor for the applicant was also solicitor to the M. Gardner estate, that estate would, in the event of the applicant succeeding, get a share of what was recovered. . . .

[Reference to Prosser v. Edmonds, 1 Y. & C. Ex. 481; Keogh v. McGrath, 5 L. R. Ir. 478, 515-6; De Hoghton v. Money, L. R. 2 Ch. 164, 169.]

The evidence in the present case clearly makes the assignment champertous, as champerty is defined in the language of the Chief Baron in Prosser v. Edmonds.

It is asserted by the applicant that the town corporation entered the lands in question in 1891 for the purpose of lowering some of the pipes, as I have already pointed out; and also that in 1903 the corporation entered on lot 15 and established a pumping station. . . . As to the alleged trespass in 1903 the facts . . . are that some repairs were required to be made in the pipes, and the corporation put a small pump on the land, and temporarily placed a threshing engine there for the purpose of operating such pump so as to fill the pipes with water, which was the only use made of the pumping station and pump. . . .

The corporation had the right, under sec. 6 of the Act, to enter upon the lands appropriated by the commissioners and which had become vested in the corporation, for the purpose of "taking up, removing, or repairing or altering the pipes."

The motion for a mandamus must be dismissed with costs.