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HON. MR. JUSTICE MIDDLETON. FEBRUARY 6TH, 1914.

DELAP v. CANADIAN PACIFIC RW. CO.

5 O. W. N. 850.

Discovery—Privilege — Solicitor and Client — Attempt to Destroy Privilege—Allegation of Fraudulent Conspiracy between Solicitor and Client—Motion to Amend Statement of Defence — Dismissal of.

MIDDLETON, J., refused to allow a statement of defence to be amended by adding an allegation that the action was brought in pursuance of a fraudulent scheme between plaintiff and his solicitor, the purpose of such amendment being to obtain discovery of communications between solicitor and client otherwise privileged.

Motion for leave to amend by setting up that this action is fraudulently brought, the plaintiff, well knowing that he has no claim, in pursuance of a fraudulent scheme, and for discovery based upon such amendment.

A. M. Stewart, for defendants.

R. McKay, K.C., for plaintiff.

HON. MR. JUSTICE MIDDLETON: — The amendment is in terms vague, but counsel state that what is intended is to charge that the plaintiff and his solicitor have put their heads together and have conspired to bring this action knowing that it has no foundation in fact, relying upon the evidence of the solicitor—an allegation that has no meaning unless it is intended to charge the solicitor upon whose evidence the case must in great part turn with the intention to testify falsely.

Under circumstances referred to in my former judgment the defendant has secured copies of certain letters from the solicitor to the plaintiff, which it is said justify this charge.

The amendment is sought for the purpose of compelling the production of these letters and enabling discovery to be

obtained as to the communication between the solicitor and his client upon the theory that a charge of fraud such as is now made destroys privilege.

I must have expressed myself most unfortunately when the matter was up before, as this motion is made it is said upon a suggestion contained in my judgment on that occasion.

What I meant then to say was that for the purpose of the motion then before me the affidavit properly claiming privilege was conclusive, for there was nothing in the pleadings or the case disclosed by it to destroy privilege, and although the copies of documents might possibly be given in evidence at the trial they could not be given in evidence upon the motion then in hand for the purpose of contradicting the affidavit.

Mr. Stewart was also under some misapprehension as to my position as to these letters. When I reserved judgment upon the question as to whether they could be read on the motion I declined to allow them to be put in or read, and said if I allowed them to be read I should hear counsel further. He seems to think I was to hear further argument if the letters were rejected—but is wrong as to this.

I entertain the widest possible view as to granting amendments generally, but I do not think I should grant an amendment when what is sought is to set up something which is no answer to the action, merely to allow an inquiry as to communications between solicitor and client.

What is charged is not fraud as to the contract. It is denied that there ever was any contract, but fraud in the bringing of an action which the plaintiff knows ought to fail and must fail if the truth is told. What is sought is not discovery of the facts and circumstances surrounding the contract, but of some correspondence between the solicitor and his client years after alleged contract from which it will be shewn or argued that the evidence of the client and of his solicitor is untrue.

All this may, perhaps, be gone into at the trial, but it is an issue that cannot be raised upon the pleadings. The issue in the action is contract or no contract, and not the *bona fides* of the plaintiff in bringing this action.

If this is not the rule in any accident case based on negligence the plaintiff may have production of the confidential reports in the possession of the railway by the simple

device of alleging that the defendant company and its solicitors well know that there was negligence, but fraudulently conspire to plead not guilty and to suppress the evidence in their possession.

This motion should, I think, be dismissed with costs to the plaintiff in any event.

PRIVY COUNCIL.

OCTOBER 17TH, 1913.

MONARCH LIFE ASSURANCE CO. v. EWAN MACKENZIE.

Company—Action to Establish Right as Stockholder—Alleged Settlement of Prior Action — Denial of Consideration—Insurance of Certificate by Officers of Company—Estoppel—Same not Pleaded —No Right to Set up on Appeal—Forgery—Evidence—Findings of Trial Judge.

RIDDELL, J., dismissed an action for a declaration that plaintiff was the holder of 25 paid-up shares of the capital stock of defendant company alleged to have been issued to him as consideration for the settlement of a former action brought by plaintiff against defendant company and others, holding that defendant company had never acceded to such settlement.

ONT. C. A., 23 O. L. R. 342, MAGEE, J.A., *dissenting*, dismissed appeal with costs.

SUP. CT. CAN., DAVIES and IDINGTON, JJ., *dissenting*, allowed appeal and directed judgment to be entered in plaintiffs' favour with costs.

FITZPATRICK, C.J.C., and DUFF, J., *held*, that the defendant company were estopped from denying plaintiffs' claim by reason of a share certificate issued to plaintiff by defendant company's officers.

ANGLIN, J., *held*, that the certificate in question was *primâ facie* evidence that plaintiff was a shareholder, which defendants had not sufficiently rebutted.

PRIVY COUNCIL, *held*, that as the question of estoppel was not raised by the pleadings or at the trial it could not be raised later, and that the findings of the trial Judge that defendants had not been a party to the alleged settlement and that there was no consideration for the alleged issuance of a share certificate to plaintiff were warranted by the evidence.

APPEAL allowed and action dismissed with costs throughout.

Appeal from the judgment of the Supreme Court of Canada, 45 S. C. R. 232, which, DAVIES and IDINGTON, JJ., dissenting, reversed the decision of the Court of Appeal for Ontario, 23 O. L. R. 342, which, MAGEE, J.A., dissenting, affirmed the decision of RIDDELL, J., dismissing plaintiff's action for a declaration that he was the holder

of 25 paid-up shares in defendant company, and for an order compelling defendants to register him on their books as the holder of such shares.

The appeal to the Judicial Committee of the Privy Council was heard by LORD ATKINSON, LORD SHAW, of Dunferm line, LORD MOULTON, and LORD PARKER, of Waddington.

THEIR LORDSHIPS' judgment was delivered by

LORD MOULTON:—This is an appeal in an action brought in the High Court of Justice of Ontario by Ewan Mackenzie, the present respondent, against the appellants, the Monarch Life Assurance Company.

In the statement of claim the plaintiff claimed as the holder of twenty-five shares in the defendant company, "represented by certificate number nineteen, issued by the defendant company." The statement of claim proceeds as follows:—

2. The said shares were issued to the plaintiff in consideration of the settlement of an action brought in this Court by the plaintiff against the said defendants (*i.e.*, the present appellants) in which the plaintiff claimed to be entitled to a large sum of money.

3. It was part of the said settlement that the said shares should be issued to the plaintiff and that it should be thereby witnessed that the said shares were fully paid, and that six hundred and twenty-five (625) dollars had been paid for premium thereon.

It then set out the certificate and alleged that the present officers of the defendant company refused to recognise the plaintiff as a shareholder or to put him on the list of shareholders in respect of the said twenty-five shares, or to issue to him five certificates of five shares each in place of the said certificate for twenty-five shares. It claimed a declaration that the plaintiff was the holder of twenty-five fully paid-up shares in the defendant company, and that the company should be ordered to register him as such and to issue to him five certificates each of five fully paid-up shares.

In the statement of defence the company denied that it issued the certificate in question, and as to the alleged settlement said:—

2. The alleged settlement of an action was a matter between the said Ostrom (*i.e.*, the then managing director of the company) in his private capacity and not as managing director of the defendants, and the defendants did not agree thereto.

It then denied any application for the said shares or any consideration given to the company therefor, or any allotment thereof, and pleaded the provisions of its special Act. In the 5th and last paragraph it set up that the cause of action was local and situated in Manitoba, and that on this ground the action was outside the jurisdiction of the Court of Ontario.

On the issues thus raised the action went to trial before Mr. Justice Riddell, on June 6th, 1910. The facts proved at the trial were substantially as follows: In September, 1905, the plaintiff, Ewan Mackenzie, brought an action against the defendant company and Thomas Marshall Ostrom, its then managing director. It alleged that the plaintiff was, by virtue of an assignment from one George Stevenson, dated March 2nd, 1905, the owner of an undivided quarter interest in the interim copyrights for the Dominion of Canada for certain forms of insurance plans, for which Ostrom had obtained interim copyright some time prior to March 7th, 1904 (at which date he had assigned the said quarter interest to the said George Stevenson), and also in the permanent copyrights for the same which the said Thomas Marshall Ostrom undertook to obtain. The only allegation in the statement of claim relating to the company was as follows:—

5. The defendants, the Monarch Life Assurance Company, have, in their prospectus presented to the public, advertised that they were the exclusive owners of the said copyrighted plans, and have procured all subscriptions to the capital stock of the said company by reason of the alleged advantage of an exclusive ownership of the said copyrighted plans.

The relief prayed was an injunction restraining the defendants from advertising that they possessed an exclusive interest in or using the said insurance plans, or in the alternative judgment for $5,000 in respect of the plaintiff's undivided one quarter interest.

It would be difficult to conceive a more absurd action so far as it relates to the defendant company. The interim

copyrights had expired long before the assignment by George Stevenson to the plaintiff, and had not been followed by the taking out of permanent copyrights if, indeed, the forms could be considered proper subject-matter for copyright. It is, therefore, not necessary to examine here the defence raised by the defendant company, except to say that it traversed all the allegations of fact in the statement of claim in any way referring to it.

Under these circumstances it was to be expected that when efforts were made by the other parties to the action to effect a compromise the defendant company should refuse to take any part therein. It was willing that the action should be dismissed against it without costs, but it would do nothing more. That this was the position that it took up and strictly adhered to was proved beyond the possibility of doubt by the evidence given at the trial of the present action, and more especially by the compromise itself (which was in writing), and the other contemporary documents which were put in. Two of these documents merit being cited here. On the day when the settlement was made the counsel for the company wrote to the solicitors for the plaintiff—

"I understand this matter is being settled, and I am quite willing that it should be dismissed without payment of costs to the defendant company. I take no other part in settlement."

And the actual memorandum of the settlement referred to in the statement of claim in the present action reads as follows:—

This action is settled as follows:—

1. The defendant, T. Marshall Ostrom, delivers to the plaintiff twenty-five fully paid-up shares of stock in the defendant company.

2. The defendant, T. Marshall Ostrom, in addition to the amount already paid, will pay $50 in full of any remaining costs of the plaintiff.

3. Except as above there shall be no costs to either party.

4. The plaintiff will release to the defendant, Ostrom, or to the company as his nominee, any interest which he has under the assignment in question herein from one George Stevenson in the interim copyrights in question herein.

And this memorandum is signed by counsel on behalf of the plaintiff and Ostrom only.

At the trial of the present action the whole efforts of the plaintiff was directed to shew that the settlement was made with the defendant company, and that it undertook to issue the shares in question to the plaintiff. To effect this they sought to shew by parole evidence that a certain Mr. Kerr, who seems to have taken part in the negotiations, was the representative of the defendant company, but this evidence entirely broke down. The learned Judge, therefore, found that the settlement was made with Ostrom alone, and that the defendant company was not a party to nor liable in respect of it, and dismissed the action.

An appeal was brought from this decision to the Court of Appeal in Ontario. Four out of the five Judges constituting the Court agreed substantially with the findings of fact of the Judge at the trial (which are not now disputed), and accordingly gave judgment dismissing the appeal on the ground that the plaintiff was dealing with Ostrom only in making the settlement, and must accordingly look to him alone for any relief in respect of it. But unfortunately Magee, J.A., considered himself entitled to decide in favour of the plaintiff on the ground, substantially, that the certificate for the twenty-five shares being signed by the vice-president of the company, and by Ostrom, the managing director, created an estoppel against the company, and that, by virtue thereof, the company was not entitled to deny that the plaintiff was the owner of twenty-five fully paid-up shares of the company.

Their Lordships are of opinion that it was not open to the learned Judge to decide against the defendants on any such ground. Estoppel was not raised in the statement of claim nor in the conduct of the trial at *nisi prius*. In such a case as this any question of estoppel must involve a special inquiry into the circumstances and the position and knowl edge of the parties, of the necessity for which no warning was given to the defendants either by the pleadings of the plaintiff or the behaviour of his counsel at the trial until after the evidence was concluded. It would work grave injustice if, in such a state of things, a Court of Appeal were to permit a contention of this nature to be raised by the party in default, who in this instance had deliberately chosen to base his case on contentions of fact wholly inconsistent with any such contention.

The case set up by the plaintiff was that the shares were issued by the company to him in consideration of the settlement of an action, and that he received the certificate from the company in performance by it of its own contract. If he succeeded in proving that the agreement of settlement was, in fact, made with the company, estoppel was unnecessary. The company was bound to issue the shares to him if it had not already done so. But if he failed (as, in fact, he did) to shew that any such agreement was made with the company, estoppel could not benefit him. He would be in the position of a man who admits that he has received what purports to be a certificate from an officer of the company for fully paid-up shares issued to him for which he knows that he has given no consideration to the company, and which falsely states that the full amount has been paid up on them. So soon as the pretended contract in supposed fulfilment of which he received the certificate was disproved, he could not take any advantage from the possession of such certificate, but must hand it back to the company.

The estoppel relied on by Magee, J.A., relates to a case never set up by the plaintiff, and doubtless for very good reasons. He treats it as though the shares were not to be issued by the company to the plaintiff, but to be transferred to him by Ostrom in fulfilment of a contract with Ostrom. But this is absolutely inconsistent with everything contended for by the plaintiff at the trial, and it would have exposed the plaintiff's case to serious dangers of another kind. For instance, he must have admitted that he was aware that no transfer had been executed. Moreover, difficulties might have arisen under sec. 25 of the general Act, whereby it is provided:—

25. No transfer of stock . . . shall be valid for any purpose whatsoever until entry thereof has been duly made in such book or books, except for the purpose of exhibiting the rights of the parties thereto towards each other and of rendering the transferee liable in the meantime, jointly and severally, with the transferor to the company and its creditors.

as well as under other provisions of the general and special Acts. But it is not necessary to inquire into these matters. The plaintiff pinned his case to this being, and being understood by him to be, an issue of shares to him in fulfilment

of an agreement made by him with the company, and he cannot be heard to say on appeal that he thought it was something else, and that, therefore, the company must not prove that the statements in the alleged certificate are not true and that the certificate does not bind them. To establish an estoppel it must be shewn that the party relying upon it was deceived by the conduct of the other party, and by reason thereof altered his position to his own detriment. But in considering whether this is so it is essential to ascertain what he thought at the time, and for this purpose the allegations put forward in the statement of claim as the basis of his action undoubtedly bind him.

An appeal was brought from the decision of the Court of Appeal to the Supreme Court of Canada. The Judges were divided. Two agreed with the decision of the Judge at the trial and of the majority in the Court of Appeal. Two decided in favour of the plaintiff on the ground of estoppel, and one, Anglin, J., while declining to decide on the ground of estoppel, held that the certificate was *primâ facie* evidence that the plaintiff was a shareholder, and that the defendants had neglected to call sufficient evidence to displace his *primâ facie* title. This illustrates the dangers of travelling out of the case made on the pleadings and at the trial. A defendant cannot be blamed for not meeting a case of which he has had no warning. But their Lordships are of opinion that the point relied upon by Anglin, J., does not arise. The plaintiff having proved on his own case that he had no title to hold the certificate (even if a genuine one), nothing more was needed to displace his right to sue upon it.

Their Lordships are, therefore, of opinion that this appeal can be decided on the simple ground that the case made by the plaintiff at the trial was entirely disproved, and that it was not open to him afterwards to set up a case inconsistent with it, and the answer to which would have necessitated further evidence. This being so, their Lordships hold it unnecessary to consier the numerous other points raised by the appellants, or to decide whether or not the certificate was, in fact, a forgery, and whether its issue ought to be regarded as being in any way an act of the defendant company so as to make them liable in respect of it. On all these points they pronounce no opinion.

It was attempted to shew that estoppel was raised on the pleadings because, in a reply which was filed but not served on the defendant company, it was pleaded to the defence of no jurisdiction raised by paragraph 5 of the defence. The appellants relied in connection with this upon an order made by the Judge of first instance after judgment, directing that this reply should be served upon the defendant company *nunc pro tunc*. Their Lordships are of opinion that such an order could only have been made in view of the fact that the plea in paragraph 5 of the defence was not relied on at the trial, and must have been taken to have been abandoned, so that no harm would, therefore, be done by allowing the special reply to it to appear on the record. It would not be within the power of a Judge after judgment to make any order which would substantially affect the rights of the parties on appeal, as would be done by such an order if it were to have the effect of making estoppel appear to have been an issue between the parties during the taking of the evidence when in fact it was not so.

Their Lordships will, therefore, himbly advise His Majesty that this appeal should be allowed, and the action dismissed with costs in all the Courts. The respondent will pay the costs of this appeal.

HON. MR. JUSTICE SUTHERLAND. FEBRUARY 4TH, 1914.

GOULET v. VINCENT.

5 O. W. N. 839.

Private International Law—Ante-Nuptial Contract between Resident of Quebec and Resident of Ontario—Contract made in Quebec—Binding by Quebec Law—Marital Domicil of Parties Ontario—Will—Declaration that same Invalid as against Contract—Costs.

SUTHERLAND, J., *held*, that an ante-nuptial contract entered into in Quebec between a resident of Quebec and a resident of Ontario and valid by the law of Quebec is binding in Ontario where the parties had their subsequent domicil and takes precedence over the terms of a will.

Taillifer v. *Taillifer*, 21 O. R. 337, followed.

Caron, for plaintiff.

C. A. Seguin, for defendant.

HON. MR. JUSTICE SUTHERLAND:—On the 15th October, 1877, Cyrille Goulet, a resident of Ottawa, Ontario, and Sophrainie Lemieux, a resident of the parish of St. Gervais, in the province of Quebec, entered into a marriage contract. The document is in French and a written translation was put in at the trial. It contains the following stipulations and agreements:—

"There will be community between the said future husband and wife of all the real property and hereditaments now in possession or that may be acquired, which said real property is hereby converted into personal property for the purpose of getting them as part of the said community.

There will be no dower either '*prefixe*' or '*coutumier*' to which dower the said future wife expressly renounces as well for herself as for the children who may be born of the future marriage. . . .

And in testimony of the good friendship and affection that the said future husband and wife have for one another and to give each other as evident proof of it, they are making to each other by these presents a gift *inter vivos* each one to the survivor of them, and the said survivor accepting the same, of all the property whatsoever that the predeceasing may leave at the time of his or her death for the absolute use and right to dispose by the surviving one as his or her own property forever, notwithstanding the surviving of children born of the said marriage. So it has been agreed and stipulated by the said future husband and wife by common and mutual consent."

The contracting parties, after their marriage, immediately went to reside and continued to reside in the province of Ontario until the death of the said Cyrille Goulet, which occurred at the city of Ottawa, on or about the 9th of April, 1913.

The deceased husband left real and personal property in Ontario at the time of his death, some of which he had acquired subsequent to the marriage. Before his death, on or about the 9th March, 1907, he made his last will and testament, and letters probate thereof duly issued on the 23rd of May, 1913, out of the Surrogate Court of the county of Carleton to Oscar Leclaire and Joseph Ulric Vincent, the executors named therein.

It was said by counsel at the trial that on an originating notice a motion was made in weekly Court, at Ottawa, before

Middleton, J., for the purpose of obtaining a judicial opinion as to whether the said marriage contract prevailed as against the will and the plaintiff herein took the entire estate of her deceased husband, thereunder, subject only to the payment of debts.

It was also said that Middleton, J., declined to pass upon the matter on such a motion and suggested that an action should be brought. Accordingly the plaintiff herein, the widow, issued a writ on the 27th of October, 1913, against the executors of the estate. In her statement of claim, after setting out some of the facts already referred to, she claims to be "entitled to the whole of the estate of her late husband, Cyrille Goulet, after payment of his just debts, funeral and testamentary expenses and that the defendants should be ordered to deliver to her possession of the whole of the said estate after payment of his just debts, funeral and testamentary expenses."

The defendants in their statement of defence, after admitting the various allegations of fact contained in the statement of claim, "deny the conclusion thereof and maintain that the estate of the said Cyrille Goulet should be distributed as directed by the will of said Cyrille Goulet, deceased."

The said will provides as follows:—

"I direct all my just debts, funeral and testamentary expenses to be paid and satisfied by executors hereinafter named as soon as conveniently may be after my decease.

I give and bequeath all my real and personal estate of which I may die possessed in the manner following, that is to say:—I give and bequeath unto my executors and trustees hereinafter named, the sum of $8,000 in trust to apply the revenues thereof subject as hereinbelow stated unto and to the use of my beloved wife Sophranie Goulet for life, and after her death in trust to apply the revenue unto and to the use of my beloved son, Joseph, for life, it he be living at her death.

I give and bequeath unto my said executors and trustees the sum of $6,000 in trust, to apply the revenue thereof subject as hereinbelow stated unto and to the use of my said beloved son, Joseph, for life, and after his death if he should predecease my said beloved wife, then unto and to the use of my said beloved wife Sophranie Goulet. But out of said revenues to be paid to my said wife and to my said son, my

said trustees shall first pay to my brother Jean, the sum of $50 as long as he lives, and after his death the sum of $25 to his wife for life.

After the death of the one who dies last, be it my said beloved wife or my said beloved son, I give and devise the above-mentioned $14,000 unto the children of my said beloved son, Joseph Goulet, to be divided equally amongst them; should my said son die without leaving any children I give and bequeath the sum of $7,000 unto my said executors and trustees in trust to apply the revenue thereof unto and to the use of my said beloved son's wife, should he have been married at his decease and dies without leaving children, for life or until she should remarry.

If my said beloved son should not be married at his decease, or at the death of his wife, or at her re-marriage, I give and bequeath the said sum of $7,000 to be divided equally amongst my brothers, sisters, brothers-in-law and sister-in-law or their children *per stirpes,* share and share alike.

At the death of my said beloved son as hereinbefore mentioned the other $7,000 shall be distributed as follows:— $200 to the St. Vincent de Paul Society, St. Jean Baptiste parish section and the balance, that is to say, $6,800, shall be divided amongst my brothers, sisters, brothers-in-law and sister-in-law or their children *per stirpes,* share and share alike.

I give and bequeath the sum of $100 to the Dominican Fathers of Ottawa for low masses to be celebrated for the repose of my soul of which 30 shall be Gregorian masses.

All the residue of my estate not hereinbefore disposed of I give, devise and bequeath unto my beloved wife, Sophranie Goulet."

At the trial, Mr. Auguste Lemieux, an advocate of the province of Quebec, was called on behalf of the plaintiff and testified that he had read and examined the marriage contract in question, and was of opinion that the covenants contained therein, under the Civil Code of Quebec, were "perfectly legal" and that "the will of one of the consorts could not affect it." His testimony was also to the effect that it would bind after-acquired property if its terms were wide enough. He referred particularly to the following sections of the Code:—

Quebec Civil Code. Art. 1257: "All kinds of agreements, may be lawfully made in contracts of marriage, even those which, in any other act *inter vivos*, would be void; such as the renunciation of successions which have not yet devolved, the gift of future property, the conventional appointment of an heir, and other dispositions in contemplation of death."

Art. 1260: "If no covenants have been made, or if the contrary have not been stipulated, the consorts are presumed to have intended to subject themselves to the general laws and customs of the country, and particularly to the legal community of property, and to the customary or legal dower in favour of the wife and of the children to be born of their marriage.

From the moment of the celebration of marriage, these presumed agreements become irrevocably the law between the parties, and can no longer be revoked or altered."

Art. 1264: "All marriage covenants must be made in notarial form, and before the solemnising of marriage, upon which they are conditional.

Art. 1265: "After marriage, the marriage covenants contained in the contract cannot be altered, (even by the donation of usufruct, which is abolished), nor can the consorts in any other manner confer benefits *inter vivos* upon each other, except in conformity with the provisions of law, under which a husband may, subject to certain conditions and restrictions, insure his life for his wife and children."

The marriage contract in question was drawn by and executed before a notary public in the province of Quebec. The said advocate also testified that "a marriage contract passed before a notary public in Quebec makes proof by itself *ipso facto*, and that notaries in that province were considered as judicial officers whose documents bear the stamp of authenticity."

The case of *Taillifer* v. *Taillifer*, 21 O. R. 337, is in point: In it "the plaintiff's husband entered into an antenuptial contract in the province of Quebec with her concerning their rights and property present and future. He subsequently moved to this province and died there intestate:

Held, that this contract must govern all his property movable and immovable, though situate in this province, provided that the laws of this province relating to real property had been complied with; and that it made no dif-

ference whether the matrimonial domicil of the parties at the time of the contract and marriage was in Ontario or Quebec."

In view of the terms of the contract and the law applicable thereto, as found in the sections of the Code already referred to, and as testified to at the trial, it is, I think, clear that the pre-nuptial contract in question must be held to be, a valid and enforceable one, and the plaintiff entitled, as against those claiming under the will to the whole of the testator's estate, subject to the payment of debts.

Reference also to *DeNicols* v. *Curlier,* [1900] A. C. 21; *Raser* v. *McQuade* (1904), 11 B. C. R. 161; *Cadieux* v. *Rouleau* (1907), 10 O. W. R. 1103; *O'Reilly* v. *O'Reilly* (1910), 21 O. L. R. 201 (affirmed in 44 S. C. R. 197). Quebec Civil Code Art. 1264, 49 Can. L. J. 653.

The plaintiff in this action makes a claim for the whole of the estate and the defendants in resisting are representing all defendants antagonistic to such a claim. I think, therefore, that under Con. Rule 74, they sufficiently represent all parties interested.

The judgment will therefore be that the plaintiff is entitled to the whole of the estate of her late husband, after payment of his just debts, funeral and testamentary expenses. The executors were justified in defending the action, and the costs of all parties will be out of the estate.

PRIVY COUNCIL.

OCTOBER 21ST, 1913.

EASTERN CONSTRUCTION COMPANY, LIMITED v. (1) THE NATIONAL TRUST COMPANY, LIMITED, AND OTHERS; AND (2) THERESE SCHMIDT AND OTHERS, AND THE ATTORNEY-GENERAL FOR THE PROVINCE OF ONTARIO (INTERVENANT).

Timber—Mining Act—Grants of Mining Land—Reservation of Pine Timber—Right of Grantee to Cut for Special Purposes—Trespass—Cutting of Pine—Right to Bring Action—Transfer by Crown to Trespasser—Jus Tertii—Possession—Independent Contractor—Act of—Ratification—Essentials—Crown Agent—Authority of—Evidence—Appeal—Costs.

Action by holders of mining locations for damages for trespass on their mining lands and for cutting of pine and tamarack timber thereon. The Ontario Mining Act, R. S. O. (1897), c. 36, as amended by 62 Vict. c. 10, s. 10, provides in s. 39, s.-s. 1, that "the patents for all Crown lands sold or granted as mining lands shall contain a reservation of all pine trees standing or being on the lands, which pine trees shall continue to be the property of Her Majesty, and any person holding a license to cut timber or saw logs on such lands may at all times, during the continuance of the license, enter upon the lands and cut and remove such trees and make all necessary roads for that purpose." By the other provisions of the section the patentee may cut and use pine necessary for building, fencing and fuel, and remove and dispose of what is required to clear the land for cultivation and for any cut for other purposes he shall pay Crown dues. The trespass of defendants Dickson and Miller upon the lands of plaintiffs was clearly proven but they claimed that subsequently the Crown conferred upon them the title to the timber so taken from plaintiffs' lands.

CLUTE, J., gave judgment for plaintiffs for $3,157 and $1,053 respectively with costs, finding that the timber upon the mining locations in question while not sufficient for mining needs was more valuable to plaintiffs for this purpose than for the purpose of railroad ties.

ONT. C. A., 19 O. W. R. 38, reversed above judgment and directed judgment to be entered for defendants.

SUP. CT. CAN., IDINGTON and DUFF, JJ., *dissenting* (46 S. C. R. 45) *held*, that a patentee of mining land has, notwithstanding the reservation of pine trees in the patent, such possession thereof or interest therein as would enable him to maintain an action against a trespasser cutting and removing them from the land.

Judgment of Court of Appeal for Ontario reversed and judgment of CLUTE, J., restored.

PRIVY COUNCIL, *held*, that the property in the pine timber remained in the Crown, and while plaintiffs as possessors or bailees for the Crown might possibly have brought an action for its value against defendants prior to the transfer of the ownership in the same from the Crown to the defendants, they could not do so thereafter.

The Winkfield, [1902] p. 42; *Greenwood Lumber Co.* v. *Phillips*, [1904] A. C. 405, referred to.

That it is essential to constitute an agency by ratification, that the agent in doing the act to be ratified shall not be acting for him-

self but should intend to bind a principal actually named or ascertainable.

Keighley Maxted & Co. v. *Durant*, [1901] A. C. 240 and *Wilson* v. *Barker*, 4 B. and Ad. 614, referred to.

Appeal allowed with costs and actions dismissed.

Appeal by defendants, the Eastern Construction Company Limited, from a judgment of the Supreme Court of Canada, 46 S. C. R. 45, which, IDDINGTON and DUFF, JJ., dissenting, allowed the appeal of the plaintiffs from a decision of the Court of Appeal for Ontario, (19 O. W. R. 38), which reversed a judgment of HON. MR. JUSTICE CLUTE in favour of plaintiffs for damages for trespass and the cutting of certain pine and tamarack timber upon the lands of defendants, patentees and lessees of certain mining lands.

The appeal to the Judicial Committee of the Privy Council was heard by LORD ATKINSON, LORD MOULTON, and LORD PARKER, of Waddington.

THEIR LORDSHIPS' judgment was delivered by

LORD ATKINSON: — The respondent company, the National Trust Company, for the convenience styled the National Company, brought jointly with John Shilton and William Hollaway Wallbridge, on the 26th June, 1909, an action against the appellant company, the Eastern Construction Company, for convenience styled the Construction Company, William Miller and William Dimmie Dickson, to recover damages for trespassing on their land, cutting down and carrying away certain pine and tamarack trees growing thereon, and injuring the land. The precise relief claimed was (1) damages for the trespasses and wrongs complained of; (2) the costs of the action; (3) an injunction restraining the defendants from a repetition of the acts complained of; and (4) further relief. The respondents, Therese Schmidt and John Shilton, brought a similar action against the same defendants to recover damages for similar trespasses and wrongful acts alleged to have been committed on their lands, claiming similar relief. A third party action was instituted by notice by Miller and Dickson against the construction company, claiming to be indemnified. Before the trial a notice was served by the plaintiffs in both of the two main actions to the effect that an application would be made at the

trial to the presiding Judge to amend the statements of claim by alleging that the defendants after felling this timber manufactured it into ties or railway sleepers, and wrongfully converted those ties to their own use. Some discussion took place at the commencement of the trial as to the propriety of making this amendment. No serious objection appears to have been taken to it by the defendants, but the matter was deferred, and no such amendment was, in fact, ever made.

The actions were tried before Mr. Justice Clute without a jury on the pleadings as they stood, and as the evidence in the two main actions was practically identical, and the relief prayed for in the third party action, in a great degree, consequential upon the findings in the others, all three were tried together, and resulted in judgment being recovered in the first action against the defendants for the sum of $3,157, and in the second for the sum of $1,053, with costs in each case, and in the third action being dismissed; but it having appeared during the course of the proceedings that the Construction Company were indebted to Miller and Dickson in two sums of $1,259.28 and $629.65, it was directed that the first of these sums should be paid into Court in the first action, and the second in the second action in satisfaction *pro tanto* of the sums recovered in these actions respectively.

The trial Judge found on other issues of fact to be hereafter referred to.

The defendants appealed in both cases to the Court of Appeal of Ontario. Dickson and Miller did not appeal. That Court, by its judgment and order dated the 1st of April, 1911, reversed, with some modifications to be hereafter mentioned, the judgments and orders made by the trial Judge in both cases. On appeal by the plaintiffs in both suits to the Supreme Court of Canada, that Court, by its orders of the 21st of March, 1912, reversed the decision of the Court of Appeal of Ontario, and held that the two sets of defendants, the Construction Company and Miller and Dickson, were equally liable to the respective plaintiffs for the sums awarded against them by the trial Judge in each case for damages, not, however, on the statement of claim as it originally stood, nor yet as it was proposed to be amended, but in detinue in respect of certain pine and tamarack timber cut and removed by Miller and Dickson from

the mining locations of the respective plaintiffs. From these two judgments, the two appeals, now consolidated, have by special leave been brought to this Board. The facts so far as material for the decision of this case are as follows:

By patent No. 3212, dated 2nd July, 1907, the Crown granted to Herbert Carlyle Hammond, William Hollaway Wallbridge and John Shilton, all of the city of Toronto, the fee simple of a certain parcel of land, described as mining locations, situated south of Vermilion River, and north of Minnietakie Lake, in the Rainy River district, to hold to them in undivided thirds, subject, however, amongst other things, "to all the reservations, provisions, and conditions of the Mines Act," R. S O. 1897, ch. 36, and saving and excepting the reservations and exceptions contained in sec. 39 of the said statute, namely, all pine trees standing or being on the said lands as by said section provided.

By a lease from the Crown bearing date the 11th of May, 1903, styled a mining lease, certain tracts of land therein described, composed of four so-called mining locations, each containing 40 acres, situate south of the same river and north of the Minnietakie Lake, were demised to one Carl Schmidt, his executors and assigns, to hold for a period of ten years, with all mines and minerals, on or under the same, together with all casements, advantages and appurtenances, for the purpose of mining upon and under the said lands, at the yearly rent thereby reserved. The lease containel several covenants, conditions and reservations which, with one exception, are immaterial for the purpose of these appeals. That exception was to the effect that the lease was subject to all the provisions of the Mines Act and any amendments thereof which have been or should be made, and that all pine trees standing or being on the lands were, as provided by secs. 39 and 40 of the Mines Act, reserved to the Crown.

No mines have ever been sunk on the lands granted or demised, and no portion of them has been cleared for cultivation. Enough work has simply been done in each location to save the grant and lease respectively from forfeiture.

The lessee, Carl Schmidt, died, and the plaintiffs, Therese Schmidt and John Shilton are his administratrix and ad ministrator respectively.

Herbert Hammond also died and the National Company is his executor.

Sections 39 and 40 of the Mines Act, R. S. O. 1897, ch. 36, run as follows:—

"39.—(1) The patents for all Crown lands sold or granted as mining lands shall contain a reservation of all pine trees standing or being on the lands, which pine trees shall continue to be the property of Her Majesty, and any person holding a license to cut timber or sawlogs on such lands may at all times during the continuance of the license enter upon the lands and cut and remove such trees and make all necessary roads for that purpose.

(2) The patentees or those claiming under them (except patentees of mining rights hereinafter mentioned) may cut and use such trees as may be necessary for the purpose of building, fencing, and fuel, on the land so patented, or for any other purpose essential to the working of the mines thereon, and may also cut and dispose of all trees required to be removed in actually clearing the land for cultivation.

40. The preceding section shall apply to all leases issued under this Act, other than leases of mining rights hereinafter mentioned, with the following limitations and variations, that is to say:—

(1). No pine trees shall be used for fuel other than dry pine trees, and (except for domestic or household purposes) only after the sanction of the timber licensee or the Department of Crown Lands is obtained.

The Crown, by permit dated the 12th of October, 1908, granted permission to the Construction Company to cut from thence to the 30th April, 1909, subject to withdrawal if deemed expedient, 200,000 ties or timber railway sleepers on certain lands therein described lying to the north of the Vermilion River, and also permission to remove them when cut, paying to the Crown therefor dues or charges at the rate of 10ct. per tie, with a proviso that no timber below 8 inches in diameter was to be cut.

On the 31st December, 1908, the Construction Company entered into a contract with Miller and Dickson who carry on, in partnership, in the town of Port Arthur, the business of cutters and manufacturers of railway ties, to cut from off a certain defined area, portion of the lands described in this permit, timber to be manufactured into railway ties. A copy of this contract is printed at page 165 of the Record.

Previous to making this contract the Construction Company had entered into a contract with the firm of O'Brien,

Fowler, and McDougal Brothers, railway contractors, to supply them at a commission with ties to be so manufactured.

Under the company's permit, Miller and Dickson commenced early in January, 1909, to fell and manufacture into ties timber of the size specified, grown on the land mentioned in their contract, and when manufactured to haul them off the land. They continued to do this up to the beginning of the following month. They then, on their own initiative, and without the authority or knowledge of the Construction Company, crossed over to the south of the Vermilion River, and from thence till the 24th of that month felled upon certain Crown lands, and also upon the lands of both the plaintiffs, certain pine and tamarack trees, manufactured them where they fell into ties, and hauled the ties when manufactured from out of the wood or forest where they were lying. Only a few remained on the lands of the plaintiffs after the 24th February 1909. When hauled out the ties were delivered, on behalf of the Construction Company, to the railway contractors by the side of the portion or branch of the transcontinental railway the latter were in the course of constructing. The ties were then counted and stamped by the employees of the railway, and piled up with others brought from elsewhere. On that day, the 24th of February, 1909, Messrs. Shilton, Wallbridge & Co., the legal advisers of the plaintiffs, wrote to Dickson and Miller a letter complaining of these undoubted trespasses on the land of their clients.

On the same day, one, J. D. C. Smith, Crown Timber Ranger, acting under the instructions of Mr. William Margach, Crown Timber Agent for the Rainy River District, wrote to Messrs. Dickson and Miller a letter informing them that the permit issued to the Construction Company did not authorize the cutting of timber south or east of the Vermilion River, and required them to desist from cutting it.

On the same day, also, Dickson and Miller sent to Mr. Margach an application for a permit to make 15,000 ties on territory lying east of Vermilion River and on the G. T. P. Block No. 9, south of Pelican Lake. This application was ultimately refused. Mr. Margach visited the lands, in company with Smith, and, as it clearly appears from his cross-examination at R. pp. 150, 151, was on the 26th of February, fully informed that Dickson and Mil-

ler had not only cut timber on the Crown lands, but had also cut it on the locations of the plaintiffs. He wrote to the Construction Company the following letter: —

"Kenora, 6th March, 1909.

Eastern Construction Co., Fort William, Ont.

"Dear Sirs: Your contractors, Dickson and Miller, applied for a permit to cut timber south of Vermilion River, being territory lying to the south of your permit. Dickson and Miller cut quite a quantity of jack-pine and tamarack, and when I visited their camp I stopped them cutting; they then made application for a permit, but the Department has refused the permit. You will please see that they do no more cutting. They are at liberty to remove what they have cut and make a separate return of it.

Yours truly,

Wm. Margach."

He stated in his evidence that the Government made no claim against Miller and Dickson in respect of the timber cut either on the Crown lands or on the locations, but that the Government did make a claim against the Construction Company for the ordinary dues in respect of all the timber so cut.

At page 149 of the Record he said he made the return to the Government of the amount of timber cut by Dickson and Miller, both on the Crown lands and on the mining locations, that upon this return the accounts against the Construction Company were made up in Toronto and sent to him for collection, and that the ordinary dues alone were demanded.

This letter of the 6th of March was the first intimation the Construction Company received of the trespasses committed by Miller and Dixon, and it is, in their Lordships' view, perfectly clear that the Crown by that letter consented to the appropriation by the company for their own purposes of all the ties so cut and manufactured on the two mining locations of the plaintiffs.

The statement of claim contained a paragraph to the effect that it was the intention of each of the plaintiffs to open, work, and develop mines on these locations, that the timber cut was necessary for use in these mining operations, and that by the cutting and removing of it the locations were depreciated in value.

In reference to this paragraph, the learned trial Judge found as a fact, that the timber growing on each of the mining locations of the plaintiffs before the trespasses complained of were committed, would not have been sufficient for the requirements of any mines, properly so called, which might thereafter be made and worked upon the respective locations, and that the timber would be more valuable for the purposes of the mines than for ties. The loss alleged to be thus sustained by the plaintiffs was apparently taken into account in measuring the damages awarded for trespass.

The learned Judge stated the grounds upon which he held the Construction Company liable for these damages in the following passage of his judgment:—

"I think Miller and Dickson crossed the line and cut those ties, and that that cutting was afterwards brought to the attention of the Eastern Construction Company, and they deliberately received and accepted those ties from their contractors, and paid part upon them, and sold them and received the payment therefor, and I can draw no distinction between their liability therefor and the liability of Miller and Dickson for the trespasses that have been committed."

The construction he put upon the 39th and 40th sections of the Mines Act, coupled with the contents of the patent grant and lease is stated in the following passage of his judgment:—

"The meaning of the statute is that, while the property remained in the Crown, so that if this timber was in fact required for mining purposes, or for building purposes, or for other uses to which the patentee or lessee had a right to apply the timber, that then the Crown, in case the timber were taken off the place, either under a permit by the Crown or sold by the authority of the patentee, would have no difficulty in recovering the proper dues for the timber."

Mr. Ewart, who appeared for the respondents, did not defend the judgment appealed from as a judgment in detinue. He urged that the decision was right but the grounds on which it was based were erroneous, and contended that it was open to him to insist that the decision of the trial Judge was right and should have been upheld by the Supreme Court of Canada, either on the pleadings as they stood, or as amended in the way proposed in the notice of the 17th of June already referred to, and should

now be upheld by their Lordships. It is better for the purpose of this Appeal to assume that the pleadings were amended in the manner proposed.

Under these circumstances the primary question for consideration appears to their Lordships to be the nature and extent of the right of the Crown to the pine trees growing, or to grow on the mining locations of the plaintiffs under the patent and lease respectively granted to them. When one turns to the 39th and 40th sections of the Mines Act, one finds that by sub-sec. 1 of the first section, made applicable to leases by the second section, it is expressly enacted that patents for all Crown lands sold or granted shall contain a reservation of all pine trees standing or being thereon, and that these pine trees shall continue to be the property of Her Majesty. Mr. Justice Duff, in his able and convincing judgment, cited the three following cases, namely, *Herlakenden's Case,* (4 Coke, 62), in which it was held that if trees be excepted in a feoffment to a man and his heirs, the trees in property are divided from the land, though in fact they remain annexed to it, and that if one should cut them down and carry them away it would not be felony. Secondly, *Liford's Case,* (11 Coke, 46b), in which it was decided, amongst other things, that where a lease is made of land for a term of years, the lessee has but a special interest in the trees, as to "have the mast and fruit of the trees and shade for his cattle," &c., but that the inheritance of the trees was in the lessor; and thirdly, *Raymond* v. *Fitch,* (2 C. M. & R. 588), in which it was decided that a covenant by the lessee not to cut timber excepted from the demise was collateral and did not run with the land, no more than would a covenant not to cut trees on land of the lessor other than that demised.

It appears to their Lordships that according to the only construction of which these instruments are reasonably susceptible, the property in the pine trees growing on these locations remained in the Crown. Indeed, this point was scarcely contested by Mr. Ewart. He did contend, however, that the proprietary right of the Crown was limited in two directions, first, by the provisions of sec. 2 of the Crown Timber Act, R. S. O. 1897, ch. 32, passed in the same session of Parliament as the Mines Act; and, secondly, by the provisions of the latter Act itself conferring as they

do on the patentee and lessee respectively the right to cut timber for mines, &c., and amounting when coupled with the finding of the trial Judge as to the bare sufficiency of the supply for these last-named purposes, to a prohibition against the giving by the Crown of any license or authority to cut for other purposes any of the pine trees growing on these locations. As to the first point, this section of the Timber Act plainly applies only to licenses about to be granted to cut timber on land which are not at that time the subject of a grant to anyone, but which are in the possession of the Crown. As to the second, it may well be that, having regard to the finding of the learned trial Judge, if licenses were granted by the Crown to cut this timber, the patentee or lessee, as the case might be, might have a right to recover by petition of right from the Crown damages in the respect of the injury thus done to their respective mining locations. It is not necessary in this case to decide that point. But even if the effect on the rights and powers of the Crown were such as it is contended for, it is a wholly different proposition that the property in the pine trees when felled even by a trespasser would not belong to the Crown. In the opinion of their Lordships it is perfectly clear that the pine trees when felled were, in this case, the property of the Crown. It may well be doubted if in truth and fact the timber felled ever passed out of the possession of the servants of Miller and Dickson into that of the plaintiffs. Taking the view, however, of the facts most favourable to the plaintiffs, namely, that it did so pass, the plaintiffs could only have had possession of it as the bailees of the Crown. No doubt in that position of things, if nothing more had occurred, they would have been entitled to have recovered from Miller and Dickson, and possibly from the Construction Company, the full value of the timber felled, as well as any special damage they might themselves have sustained by reason of being deprived of the possession of the felled trees, not because they had in truth and fact any proprietary right in, or title to the property in the trees or in the ties into which they were manufactured, but because to use the words of Lord Campbell in *Jeffries* v. *Great Western Rw. Co.*, 5 E. & B. 802, p. 806, as "against a wrong-doer possession is title." That is no new doctrine. It was decided in 1796 in *Armory* v. *Delamirie Strange*,

505. "That the finder of a jewell though he does not by such finding acquire an absolute property or ownership yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover." That principle was affirmed as applicable to a bailee by the case of *The Winkfield*, [1902] P., 42. Both this case and the case of *Jeffries* v. *Great Western Rw. Co.*, were approved of by Lord Davey in giving the judgment of the Judicial Committee of the Privy Council in *Greenwood Lumber Co.*, v. *Phillips*, [1904] A. C. 405-410, and it must be now taken as conclusively established. But it would be against all notions of justice that the bailee who recovers the full value of the goods wrongfully taken out of his possession, should be able to retain it for himself. The goods were not his, they belonged to the bailor. The money recovered under the judgment represents, and is substituted for the goods themselves. To allow the bailee to keep it for himself would be to compensate him in damages for a loss he has never suffered; and accordingly it was decided in *Turner* v. *Hardcastle*, 11 C. B. N. S. 683, and approved of in the judgment in the *Winkfield Case*, that the bailee who in such circumstances recovers the full value of the goods must account to the bailor for the sum recovered. In *Nicholls* v. *Bastard*, 2 C. M. & R., at p. 660, Parke, B., said no doubt the bailor may recover as well as the bailee, "and whichever first obtains damages is a full satisfaction." These being the rights and obligations of the bailee it is obvious that if, before action brought by him against the wrongdoer, the bailor has clothed that wrongdoer with the ownership of the goods, the bailee cannot recover from the wrongdoer, thus converted into the true owner, the full value of the goods, no more than he could recover their full value from the bailor himself. In such an action the defendant would not be setting up a *jus tertii*, but, as donee or assignee of the *tertius*, *a jus sui*. Lord Collins, the Master of the Rolls, as he then was, was careful to point out this qualification of the bailee's rights in his judgment in the *Winkfield Case*. At p. 54 he says: "It seems to me that the position that possession is good against a wrongdoer, and that the latter cannot set up a *jus tertii* unless he claims under it is well established in our law," but the appellants in the present case contend that they claim under the *jus tertii*. If

that contention be sustained there is an end to the plaintiffs' right to recover in trover or detinue. It was insisted by Mr. Ewart that this point is not raised in the defence. This is a strange objection to make since the statement of claim as it stood at the trial did not contain any claim in trover or detinue. It was framed solely in trespass, to which a plea that the plaintiffs were only bailees of the felled timber, and that before action brought the Construction Company had acquired from the bailor, by donation or assignment, the full ownership of and property in the timber would have been no answer whatever. The proper time to put in such a defence was when the statement of claim was amended by the addition of a claim in trover or detinue. The matter was fully dealt with at the trial. A large body of evidence was given on the very point, necessarily on the assumption that the statement of claim had been amended as required by the notice of the 7th of June, 1910. It seems rather unreasonable upon the part of respondents, while they contend that the statement of claim should be taken as amended in the manner proposed, to insist that the statement of defence should not be taken as having been amended, by the insertion of a plea to new cause of action, to which in effect, at the trial, much of the evidence was directed. Their Lordships do not think there is anything in this point.

Next it is contended that the letter of the 6th of March, 1909, from Mr. Margach to the Construction Company upon which this question turns, did not refer to the timber cut on the plaintiffs' location, further, that Margach had no authority to write it, and, lastly, that his action was not adopted by the officers of State acting on behalf of the Crown whose agent the writer was, and on behalf of whom he obviously professed to act. The writer was examined at the trial and deposed that he was and had for 21 years been in the employ of the Government of Ontario as Crown timber agent for the Rainy River District, then called the Kenora District; that his duties were to exercise a general supervision over "lumbering" operations throughout his district; that on instructions from the department, *i.e.*, the government department, he issues permits; that he first heard of the trespass complained of on the 22nd of February, 1909; that he was going on a tour of inspection with a Crown timber ranger named James

Smith; that he came upon the ground and saw the men of Dickson and Miller cutting on the south side of the river; that he advised Smith that on his return from his beat (they were going eastward at the time) he should inform the person in charge of the works that they had no right to cut timber where they were cutting it; but might remove what they had cut; that a very short time after (fixed on cross-examination as the 26th of February) he knew that Miller and Dicksons' men had cut timber on plaintiffs' locations; that he communicated by letter with his department on the subject; that his duty is to make the returns to the department in Toronto of the timber cut; that the accounts in respect of the dues are prepared by the department on this return and forwarded to him for collection; and that he had nothing to do with the question whether the Construction Company should be charged, as in fact they were, only 10 cents per tie for the ties cut, the ordinary rate, and that he made no recommendation to that effect. He produced the accounts received from the department dealing with this matter, in which the number of ties cut on the mining locations of the plaintiffs is specifically set out and charged for, and payment for which, by cheque payable to the Hon. Treasurer of the Province of Ontario is, by his letter dated the 13th November, 1909, addressed from the Ontario Crown Timber Agency, Kenora, specifically demanded.

Smith, the timber ranger, was also examined. He proved that he was in the employ of the Ontario Government; that his duties were to visit all operations in the timber land throughout his district; to advise as to anything done without permission, and put a stop to it; that he visited the mining locations on the 24th of February, 1909; saw timber there that had been cut, and was being cut by Dickson and Miller's men; saw Mr. Dickson, told him that the permit given to the Construction Company did not extend to this territory, that he had no right to cut there, and would have to stop doing so, and gave to him the written notice marked exhibit 10. That in the following September he, accompanied by a Mr. McKenzie, visited these mining locations; took down in his book the particulars of the timber cut on them, as best he could; compiled from this and forwarded to his department a return of the timber ties cut, and which he believed to be accurate.

A copy of this return was received in evidence and marked No. 11. It shewed in detail that the amounts cut on J. Shilton's location were in all 9,020, and, on Schmidt's location, 3,009.

This return was obviously used by the department in Ontario in framing the account, the payment of which was demanded from the construction company by Margach in his letter of the 13th of November, 1909. It appears to their Lordships that, upon this evidence, it is clear to demonstration that Margach's letter of the 6th of March, 1909, referred to the timber cut on the plaintiffs' locations, and that the proper department of the Ontario Government, charged, on behalf of the Crown, with the duty of the granting of permits, the exercise of lumber rights under them, and the general supervision and administration of such affairs, either expressly authorised beforehand the writing of this letter by their accredited officer purporting to act in his official capacity on their behalf, or adopted and acted upon it in every respect. The legal result is this, that no demand having been made by the plaintiffs for a return of the timber, there necessarily was no refusal by the defendants to return it—(an important matter, *Clayton* v. *Leroy* (1911), 2 K.B. 1031)—the conversion must, therefore, necessarily have taken place, if it took place at all, when the timber was taken from the location in its manufactured state, and immediately after if not before it took place, the Crown, the bailor, had consented to the Construction Company's retaining the timber as their own, and appropriating it, as its owner, to their own purposes.

The plaintiffs' claim for damages in trover or detinue cannot, in their Lordships' opinion, be sustained.

The guarded letter of Mr. Aubrey White, Deputy Minister, dated the 18th of March, 1909, addressed to Messrs. Shilton, Wallbridge & Co. in no way conflicts with this conclusion.

Then there remains the question as to the adoption by the Construction Company of the action of Miller and Dickson in trespassing on the plaintiffs' location. There are many answers to the plaintiffs' contention on this point. In the first place, Miller and Dickson were not the servants or agents of the Construction Company. They were independent contractors. That point was relied upon in the letter of the Construction Company to the solicitors of the plain-

tiffs, dated the 11th June, 1909, and it is quite clear from the terms of the agreement in writing entered into between the Construction Company and these gentlemen, that this was the true relation between them. Next, it is essential to constitute an agency by ratification, that the agent in doing the act to be ratified shall not be acting for himself, but should intend to bind a principal actually named or ascertainable, *Keighley, Maxted & Co.* v. *Durant* (1901), A. C. 240. In *Wilson* v. *Barker and Mitchell,* 4 B. and Ad. 614, it was held by Littledale, Parke, and Patterson, JJ., in effect, that if A wrongfully seizes a chattel for his own use B. cannot ratify the act: No doubt, ultimately, the severed timber, when manufactured and delivered by Miller and Dickson for the use of the Construction Company, would come to the company as a consequence of the tortious acts of the former, but they would be entitled to hold it, not by virtue of those tortious acts, but by virtue of the assignment or donation of the Crown. The doing of the acts furnished no doubt the occasion for the exercise by the Crown of its bounty, but in the absence of evidence to the contrary, it is not to be presumed that in using this timber as their own, the company were taking advantage of these tortious acts rather than taking advantage of the bounty of the Crown, or, in other words, that they had elected to rely on a wrongful rather than a rightful title. Again, ratification, must be evidenced by clear adoptive acts, which must be accompanied by full knowledge of all the essential facts. It is quite clear from the correspondence that, down to the 11th of June, 1909, the Construction Company had not full knowledge of the precise place where these logs were cut, or of the details of the alleged trespasses. And upon that date, as already pointed out, they informed the plaintiffs that Miller and Dickson were sub-contractors for whose actions they were in no way responsible. Their Lordships are, therefore, of opinion that there was no evidence before the trial Judge upon which it could be reasonably or justly held that the Construction Company had adopted the trespasses which Miller and Dickson are alleged to have committed, or were in any way responsible for them. There is some difficulty about the tamarack trees. Those felled upon the patentees' locations were not reserved to the Crown, and on severance did not become the property of the Crown, and in respect of these the Construction Company would be answerable in

trover. With those felled upon the lessees' location it may be different, but it is not easy to distinguish the one case from the other. The money paid into Court is, however, ample to meet the claim in respect of these trees. Their Lordships are of opinion that the decision appealed from, and the judgment and order of the trial Judge are both erroneous, and, save as to the tamarack trees, should be reversed, and this appeal should be allowed with costs. They think, however, that, having regard to what took place on the motion for special leave to appeal, the plaintiffs should pay the defendants' costs of the appeal to the Court of Appeal of Ontario, but should be declared to be entitled to recover the costs of the trial on the terms that they do not make any further claim against the Construction Company in reference to the tamarack trees, and they will humbly advise His Majesty accordingly.

HON. MR. JUSTICE MIDDLETON. FEBRUARY 6TH, 1914.

SNIDER v. CARLTON.

CENTRAL TRUST & SAFE DEPOSIT CO. v. SNIDER.

5 O. W. N. 852.

Will—Construction—Election — Legacy to Niece—General Devise—Lands of Testator in which Legatee had Half Interest—No Election—Intention—Evidence—Foreign Executor—Partition—Costs.

MIDDLETON, J., *held*, that to raise a case of election under a will it must be clearly shewn that the testator has attempted to dispose of property over which he had no disposing power, and that such intention must appear from the will itself.

Actions for a declaration that the defendant Mabel Carlton had no interest in certain lands in the city of Toronto at the time of the execution by her of a mortgage thereon to defendant Hillock; that the mortgage was a cloud on the title which should be removed, and that the interest of the defendant Mabel Carlton had passed to Thos. A. Snider, now deceased.

Consolidated actions tried at Toronto on January 26th, 1914.

C. J. Holman, and F. C. Snider, for Snider.

W. J. Elliott, for Central Trusts and Malsbary, and for the residuary legatees.

E. D. Armour, K.C., and B. N. Davis, for Mrs. Carlton and for Hillock.

HON. MR. JUSTICE MIDDLETON:—The late Hannah Snider in her lifetime was the owner of the lands in question in this action, namely, a valuable piece of land situated on Bay street. She died on the 21st July, 1887, having first made her will, by which she devised her property to her husband, the late Martin Edward Snider.

Martin Edward Snider died on the 8th day of December, 1888, intestate, leaving him surviving as his sole heirs his children, Mabel Carr Snider, now Mrs. Carlton, and her brother Thomas. Mrs. Carlton was then about 12 years old and her brother about 4 years old. The brother and sister were taken to live with their uncle, T. A. Snider, in Cincinnati, and Mrs. Carlton lived with him until his death on the 17th June, 1912; the family consisting of Snider, his nephew and niece, and a niece of his deceased wife.

The brother did not turn out well, and, after having received advances from his uncle to the extent of about $800, ultimately—on the 4th September, 1899—conveyed to him his half-interest in the Bay street property for a further advance of $500. This transaction was never attacked during the lifetime of Thomas, and there was probably nothing in any way unfair about it, as the Bay street property was not then regarded by any of the parties as of any great value. Thomas E. Snider died some years ago; and upon the pleadings the sister, claiming to be his sole next of kin, attacked the conveyance; but at the trial this attack appeared to be hopeless and was abandoned.

At the time the uncle obtained the conveyance of the half-interest in this property there was erected upon it an old and dilapidated building, and the outgoings for repairs and taxes consumed the entire income. Mr. Snider came to Toronto to see if matters could not be put upon a more satisfactory footing. He consulted Mr. H. E. Irwin, and as the result of the consultation a letter was written by Mr. Irwin to the niece on May 9th, 1900. After outlining the situation, Mr. Irwin proceeded:—

"It had therefore become clear that the only way to realise the most out of the property was by the erection of a warehouse building suitable for the locality, and your uncle with great generosity, has had erected a substantial building at a cost of about $10,000. It has been leased for a term of 10 years at a rental which, after payment of insurance, will, I understand, yield about $80 per month.

You will further remember that your brother Thomas Edward Snider some time ago conveyed his interest in this property to your uncle, who, therefore, at the present time owns the building and a one-half interest in the land, while you are entitled to the other half-interest in the land.

From a legal point of view this is a very unsatisfactory condition in which to have the property. If anything happened to your uncle his estate might insist upon paying off your interest on the basis of the mere value of the land and premises as it stood before the erection of the new building, and this would be a comparatively insignificant amount.

After carefully considering the matter with your uncle and Mr. Hillock, your uncle stated that it was his intention and desire that you should have the benefit of a one-half interest in the property as it now stands with the new building and all as soon as the property could be put in satisfactory shape.

I suggested and it was agreed by all three of us that the best way would be for you to make a conveyance at once of your interest in the land to your uncle. This will enable him to complete the lease and have everything with regard to the property finally settled. When this is done, the arrangement is that Mr. Hillock will continue to look after the property and will, as the rents are paid, transmit to you monthly one-half thereof, less any disbursements that have to be made from time to time. This will yield you an income of between $39 and $40 per month from this time forth as long as you live. This we have made secure to you by the execution of a will on the part of your uncle who devises the property to trustees in trust to continue the payment of one-half of the rents to you for your life and at your decease to convey a one-half interest in the property absolutely to your heirs.

The will is so drawn that nothing that can happen will, during your lifetime, interfere with the payment to you of

one-half of the rents of the property. The will has been executed and left with Mr. Hillock.

This means for you that the property which has not been yielding $40 a year will yield hereafter $40 per month to you, and it is certainly an exceedingly generous and kind arrangement on the part of your uncle Mr. T. A. Snider.

I have prepared a conveyance of your interest to your uncle, and have forwarded it to him at Cincinnati. The several matters here are waiting for the return of this, and as soon as it is received the whole matter will be closed up and settled for, I trust, a great many years to come."

This letter and the deeds were taken by Mr. T. A. Snider to Cincinnati and his niece then executed them there. The conveyance was a quit claim deed in consideration of one dollar.

The building then erected was destroyed by fire in 1904, and a new building was erected in 1905. Mr. T. A. Snider mortgaged the property to the Toronto Trusts Co., to secure an advance of $20,000 to permit the erection of this building. This mortgage is still outstanding against this property.

In pursuance of the arrangements embodied in the letter of May 9th, 1900, Mr. T. A. Snider made his will, by which he gave the Bay street property in trust for the benefit of his niece and his nephew during the period of the natural life of the survivor, and upon the death of the survivor to the issue of the niece as to one-half, the issue of the nephew as to the other half, and, in default of issue of either, to his American executors.

This will was followed by a series of wills, each revoking the prior testament; and, speaking generally, until the last will each will cut down the provision for the niece. By the last will, dated 6th June, 1912, the niece was given $20,000 absolutely, and a Canadian executor is appointed, who is directed to realize upon the testator's Canadian estate and to transmit the proceeds to the American executor.

This will differs from some of the preceding wills, which specifically disposed of the Bay street property, and which makes the legacy of the niece dependent upon her abandoning all claim to any interest in the Bay street property.

It is said that in 1909 a new arrangement was made by which the niece abandoned all claim to a beneficial interest in the Bay street property. It will be remembered that the letter of 1900 refers to a conversation with Mr. Frank Hil-

lock. Mr. Hillock is also an uncle of Mrs. Carlton, presumably on the mother's side. He took an active interest in her welfare, and in addition took charge of the Toronto property for Mr. T. A. Snider.

On the 10th May, 1909, Mr. Hillock had an interview with Mr. Snider at Toronto, resulting in another letter to the niece, as follows:—

"In conversation with uncle T. A. this afternoon he gave me to understand that he, on account of Ed. having died, he is going to make a new will. You will remember that he purchased Ed. half share in 78 Bay street, and got you to sign over your right to the other half so that he might put his money in a new warehouse, so as to get a return out of the property. The building when completed was leased for ten years to Mr. Westwood, at $244.25 per quarter, and after paying the insurance, one-half 122.12 per quarter, less your share of the insurance was paid to you. When the fire occurred a new arrangement was made with Mr. Westwood, and you were paid $600 per year. He is paying six per cent. for ten years on the land which was figured at 24 feet at $700 per foot, 16,800 at 6 $1,008. Your half share being 504. He is going to pay you as at present $600 per year, and, in consideration of your giving up your claim to your half interest in the land, he will insert in his new will to his executors to pay you at his decease $1,200 per year during your life, and at your decease to your children, $20,000. Should you die without children, the $20,000 will go back to his estate for other heirs. He is willing, as well as having it in his will, to sign an agreement to that effect. He says he will be back in Toronto about the middle of June."

To this the niece replied on the 20th May, 1909, as follows:—

"Your first letter forwarded to me from Chicago in regards to the lots. I am perfectly satisfied with anything you may do with them, as I know you know more about them than I do. I made no arrangement whatever concerning them when in Toronto. (This refers to some other property).

"Now the second one regarding uncle T. A.'s will is quite all right, but the present arrangements I do not think are quite right, according to the original agreement.

"I have Mr. Irwin's letter before me now, and, according to the original agreement, if I signed over my share I was

to get one-half the proceeds, which as you say in your last letter, I did receive one-half of $244.25 per quarter. Now there was a new agreement with Mr. Westwood after the fire, but no different arrangement with me, and, as uncle T. A. has not paid any more money up—the original agreement holds good that I receive one-half the proceeds, which is one-half the rents, minus insurance, interest on mortgage, etc., and, according to that, I do not think the present arrangement is quite right. I have lived up to my side of the agreement, and I feel uncle T. A. should live up to his, and I am still entitled to one-half the proceeds.

"You say uncle T. A. will continue to give me $600 as at present, well, at present, and since the fire, I have only been getting $560, so he cannot continue to give $600 when it has only been $560.

"Because the property has increased in value, I am most assuredly entitled to the benefit of that increase as well as uncle T. A. I only ask justice. I am alone in the world now, and have to look after my rights, and nobody knows how lonely I am and how I long for a home.

"Since the fire I have still been entitled to the one-half, and I have not received it, so I wish you to put this before uncle T. A. I have consulted a lawyer, and he says I am right, as I have not signed any other agreement the original one holds.

"I am sorry to bother you uncle Frank, for you have already done so much for me, but I have no one else to look to, and know you are just and see the justice in what I say.

"Poor Ed.—I am really happier to think he is gone, for I know now, and when he was living I never knew what to expect. Of course, it is hard to think he had none of his own with him. If I had only seen him before he died.

"My love to all the folks. I am writing Bertha to-day."

This letter it is now sought to treat as an abandonment of the interest in the Bay street property in consideration of the provisions suggested by the letter of Mr. Hillock.

I do not think this is the true meaning of the letter. It was not so understood by Mr. Hillock, according to his testimony at the trial, nor was any formal agreement or conveyance drawn up. Moreover, the will executed by Mr. T. A. Snider, on the 2nd July, 1909, makes the legacy to the niece conditional upon her making no claim against his estate in respect of any property of her father, whether in

respect of No. 78 Bay street or otherwise. In the event of any claim being made, she is to forfeit all interest, even though the claim is unsuccessful. This indicates that at that time Mr. Snider did not regard his niece's claim as extinguished.

Two issues were raised at the trial: First, as to the interest of Mrs. Carlton in the Bay street property; secondly, whether, upon the construction of the will, she is put to her election.

On the first issue, I think Mr. Irwin's letter of 1900 governs. Mrs. Carlton is entitled to a half-interest in the Bay street property, subject to one-half of the amount due upon the trust company's mortgage. The letter indicates an intention of the uncle to give her then a half interest in the property as it then stood, and not to make any claim against her for reimbursement for the improvement the uncle had then made.

There is some question as to accounting, as Mrs. Carlton claims not to have received the entire half of the income. The accounts have been well and accurately kept by Mr. Hillock, and this matter can be adjusted before the judgment issues. If there is any difficulty I may be spoken to about it.

The question of election must, I think, be determined from the will itself. I do not think that former wills can be looked at to aid in the interpretation, nor if looked at, do I think they would in any way forward the contention of the executors and residuary legatees. The testator has deliberately omitted the express provision putting the niece to her election, and instead of referring to the Bay street property specifically he refers merely in general terms to such property as he owns in Ontario.

The will itself is not, I think, sufficient to put the niece to her election, as the only clause in any way relating to the Bay street property is item 7 of the will. By this Mr. Harvey G. Snider is appointed special executor "to settle any and all business matters that I may have on hand at the time of my death in the city of Toronto." To him is given "absolutely and in fee simple . . . any real estate, lands and premises that I may own at the time of my death in the province of Toronto (*sic*) Canada," in trust to sell and remit the proceeds to the general executor.

I have read, among others, the cases referred to by counsel, and I find the law so clearly and accurately stated in

Halsbury, vol. 13, that it is not necessary to refer to the cases in detail:—

"To raise a case of election under a will upon the ground that the testator has attempted to dispose of property over which he had no disposing power, it must be clearly shewn that the testator intended to dispose of the particular property, and this intention must appear on the face of the will, either by express words or by necessary conclusion from the circumstances disclosed by the will. The presumption is that a testator intends to dispose only of his own property, and general words will not be construed so as to include other property, nor will parol evidence be admitted to shew that the testator believed such other property to be his own so as to allow it to be comprised in general words. Similarly, where the testator has a limited interest in property, and purports to dispose of the property itself, the presumption is that he intends to dispose only of his limited interest; and if it is sought to carry the disposition further it must be shewn that he intended to dispose of more than that interest."

Reliance is placed upon the fact that the testator speaks of giving property to his executor in fee simple, and authorises the execution of deeds to convey to the purchaser the absolute fee simple, and directs the payment of incumbrances out of the proceeds. All this, I think quite insufficient to rebut the presumption that the testator is dealing with his own share in the property.

If one were at liberty to look outside of the will, there is nothing in the surrounding circumstances to indicate that the testator did not intend to make a somewhat liberal provision for his niece, who had become practically an adopted daughter.

In the result, the title of Mrs. Carlton to one-half interest in the property should be declared, and it should be declared that the will does not put her to her election. The accounts should be adjusted; and if some arrangement cannot be made which is satisfactory to the parties, I may be spoken to as to the provisions which may be proper to secure payment to Mrs. Carlton of her legacy, as the proceeds of the testator's share of the Bay street property ought not to be transmitted to the foreign executor until the legacy is paid. It may also be thought desirable that a judgment in the nature of partition should now be pronounced, though

I trust the parties may be able to agree upon some method of realisation without the assistance of the Court.

The costs of all parties in both actions may be paid out of the estate. These costs, however, must not include (so far as Mrs. Carlton is concerned) any costs solely occasioned by her unsuccessful attack upon the conveyance by the brother of his share.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. FEBRUARY 5TH, 1914.

PASKWAN v. TORONTO POWER CO. LIMITED.

5 O. W. N 823.

Negligence—Master and Servant—Death of Workman—Common Law Liability—Findings of Jury—Non-user of Alleged Safety Device—Denial of Efficiency—Evidence—Appeal.

SUP. CT. ONT. (2nd App. Div.) *held*, that whether or not a safety device for certain machinery was effective the defendants denying the efficiency of the same, was a proper question for the jury and the latter having found that the non-user of such device by the defendants constituted negligence on their part, such finding could not be disturbed.

Judgment of KELLY, J., affirmed.

Appeal by defendants from a judgment of HON. MR. JUSTICE KELLY, dated October 22nd, 1913, upon the findings of a jury in an action by the widow of John Paskwan, who was killed while in the employ of the defendants at their power-house, to recover damages for his death.

The appeal to the Supreme Court of Ontario (Second Appellate Division) was heard by HON. SIR JOHN BOYD, C., HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE MIDDLETON, and HON. MR. JUSTICE LEITCH, on the 21st January, 1914.

D. L. McCarthy, K.C., for defendants, appellants.

T. N. Phelan and O. H. King, for plaintiff, respondent.

HON. MR. JUSTICE MIDDLETON:—The action was brought by the widow of the late John Paskwan, who was killed at the power-house of the defendant company on the 8th February, 1913, to recover damages at common law, and, in the alternative, under the Workmen's Compensation Act, for his death.

Although the appeal as launched covers wider ground, upon the argument it was confined to the discussion of the question whether liability at common law had been shewn.

Paskwan was employed as a rigger in the house over the forebay of the power company's works at Niagara Falls. A travelling crane is there erected. This crane travels from end to end of the house. The hoisting apparatus travels across the house at right angles. From the crane are suspended two hooks, the larger of which is capable of lifting fifty tons and moves comparatively slowly; the smaller is capable of raising ten tons, and moves with greater rapidity. These hooks are hoisted by steel cables wound upon drums.

On the day of the accident in question Paskwan was working at some stop-logs placed at the entrance to the penstocks in the forebay. He and other men had placed cables around these stop-logs, when the crane was signalled, and came from the other end of the premises for the purpose of hoisting them. The foreman signalled his desire to use the larger hook. This was accordingly lowered, and the smaller hook was hoisted so as to get it out of the way. The crane was operated by a man in a cage suspended below it, where he would have a clear and untrammelled view, not only of the crane itself, but of the operations being carried on. The hoisting apparatus was some thirty-five feet from the floor of the building.

Owing to the negligence of the man in charge, he failed to stop the winding-up of the cable raising the smaller hook, with the result that it was carried up to the drum, and, being unable to pass through, such strain was placed upon the cable that it broke, and the hook fell, striking Paskwan on the head and killing him instantly.

The jury, in answer to question submitted, has found, in addition to negligence on the part of the man in charge of the crane, negligence on the part of the company, as the master mechanic had failed to instal proper safety appliances They assess the damages under the Workmen's Compensation Act at $3,000, and at common law at $6,000.

Having regard to the evidence given at the trial, the meaning of this answer is plain. It was contended that a safety device could readily have been installed which would have stopped the rotation of the hoisting drum before the hook reached such a position as to place an undue strain upon the cable. The drum was operated by an electric current, and the

device suggested was a cut-out mechanism by which the circuit would be broken as soon as the cable was wound upon the drum to the extent necessary to bring the hook to the desired height; thus automatically bringing the machinery to rest in precisely the same way as it would have been stopped by the man in the cage by the operation of the controller under his charge. The controller, it must be borne in mind, is nothing more nor less than a circuit-breaker operated by hand.

In answer to this the company alleges that some two years ago a precisely similar accident happened. Its engineers were then instructed to look into the desirability of the suggested safety device. It was stated that extensive investigation was then made, and in the result it was found that the device suggested was uncertain in its operation, and undesirable, as it removed from the operator the sense of responsibility which rested upon him when there was no such device in use, and that with the device accidents would more frequently happen than when the machinery was not so equipped.

Upon the hearing of the appeal I was very much impressed by Mr. McCarthy's argument; but a perusal of the evidence has satisfied me that even assuming the legal validity of the contention the facts upon which it is based are not so clearly established as to justify taking the case from the jury. I may even go further, as a very careful perusal of the evidence has satisfied me that the jury came to the right conclusion when they thought, as they evidently did, that this defence was not made out on the evidence as there is no difficulty in adopting a simple mechanical device by which the circuit must inevitably be broken when the hook reaches a certain height.

It was said on argument that this would not bring the hoisting drum to rest, but that it might spin on and by its own momentum bring about the disaster attempted to be guarded against. But when it appears, as it does here, that the machine is operated by a controller which, as already stated, is nothing but a circuit breaker, and that upon the opening of the circuit the brakes are applied, it is quite obvious that the contention is nothing but a subterfuge. One of the witnesses suggests that the device would be dangerous, because when once open it would need to be closed by hand, and this might not be done, thus destroying the protection.

But any one having merely an elementary knowledge of mechanics can see that it would be perfectly simple to have a device which would be automatically made ready for action as soon as the hook was again lowered.

It was shewn, and not contradicted, that devices of this kind have been successfully installed and are in use upon precisely similar hoists in precisely similar buildings. All this shews that the case could not have been taken from the jury, and we cannot interfere with the jury's findings.

The appeal must be dismissed with costs.

HON. SIR JOHN BOYD, C., and HON. MR. JUSTICE LEITCH, agreed.

HON. MR. JUSTICE RIDDELL: — This is not the case of employers in view of an accident having taken reasonable care to investigate the proper means to prevent the recurrence of another; and being informed by authority, apparently competent, that the existing system was the best which could be installed.

Nor is it the case of witnesses called for the plaintiff admitting that opinions might well differ as to the scheme suggested by them being better than that adopted by the defendants.

Nor is it the case of machinery being bought of a reputable firm and used without any notice or knowledge of defect.

There is nothing more in this case, as I view it, than a defective piece of machinery which certain witnesses swear may be perfected and rendered safe by a simple and easily understood device; and the defendants' witnesses disputing the efficiency of such device. I see nothing that a jury should not be allowed to pass upon.

I agree that the appeal should be dismissed, and with costs.

HON. MR. JUSTICE KELLY. FEBRUARY 6TH, 1914.

HEIMBACH v. GRAUEL ET AL.

5 O. W. N. 859.

Fraud and Misrepresentation — Exchange of Property for Western Lands—Misstatements as to Character of—Reliance on—Acquiescence—Evidence—Damages.

KELLY, J., gave judgment for plaintiff for damages in an action for fraud and deceit in connection with the sale of certain western lands.

"A person by his conduct may forfeit his right to rescind and yet retain his right to sue for damages."

Peek v. *Derry*, 37 Ch. D. 576, referred to.

R. McKay, K.C., and A. B. McBride, for plaintiff.

DuVernet, K.C., and J. A. Scellen, for defendant.

Action for deceit by defendants in a sale of lands in the province of Alberta.

HON. MR. JUSTICE KELLY:—The plaintiff is a widow residing in Berlin, where, also the defendants, who are real estate dealers, reside. Her husband, who died in 1910, conducted a cigar and tobacco business in Berlin, and she cotinued it after his death. It was placed for sale in the hands of Schulte and Reiner, a firm of real estate agents of which the defendant Reiner was a member; and he in August, 1910, called at plaintiff's house and made a proposition involving the exchange of her business for the land now in question, of which he said defendant Grauel was the owner. Re represented the land as being free from sloughs, scrub and trees, and that it was a "steam-plough proposition." The price he then quoted for these Alberta lands was $26 per acre. She declined to entertain the proposition.

In the following December he again called on her and submitted for consideration other lands, but nothing came of this. Soon afterwards he returned and again spoke of Grauel's land, and informed her that the price had now gone up to $32 per acre, and on her objecting to this as being too high he went away, and soon returned and stated that Grauel would accept $30.50 per acre. She says that he (Reiner) then suggested that she leave it to him and he would see she was not charged too much, that it was number

one land and without scrubs or sloughs. Her evidence as to this is corroborated by members of her family. She said she would consider it, and two days afterwards defendants both came to her house, when Reiner, in Grauel's presence, repeated substantially what he had already told her with regard to the land, adding that it was black loam with clay subsoil, and again stating that Grauel was the owner of it. This was on January 14th, 1911, and Grauel then signed and delivered to her an instrument by which he agreed to exchange these lands (the south half and the north-west quarter of section 29, township 39, range 20 west of the 4th meridian, comprising 480 acres more or less) for $14,700 taking in exchange her cigar store, tobaccos, bowling alleys, together with all appurtenances, as follows:—

Bowling alleys	$3,000
Store fixtures	1,500
Furnace	200

Stock at invoice prices.

Plaintiff assumed payment of all the moneys still unpaid to the Government on the lands, and the balance was to be paid in cash. The agreement was made subject to plaintiff granting a lease of the tobacco store, etc., to Reiner at $82.50 per month and taxes. The instrument also contained this term: "I also agree the land to be as follows: soil, a black loam with a clay subsoil, in fact, a steam-plough proposition."

Stock-taking took place immediately afterwards, plaintiff's son being present and on her behalf helping in the operation. She says Reiner also represented her in the stock-taking, but the evidence for the defence is that he was there on behalf of Grauel. The exchange was carried out on January 16th, 1911, at the office of defendants' solicitor. Plaintiff was then and up to that time had been unrepresented by a solicitor; she had, however, gone to the solicitor for the lessor of the store, who prepared an assignment from her to Reiner of the lease of the store. After delivery of the papers and payment by her of the cash payment, which was made by her cheque payable to Grauel, she instructed defendants' solicitor to have the documents recorded in the Department at Ottawa.

By cheque of January 17th, 1911, she paid Reiner $50 "for services rendered in disposing of business." In the stock-taking the value of the stock was placed at $3,148.94.

In the interval between Reiner's first submitting the property to plaintiff in August, 1910, and the making of the bargain, plaintiff's son had some communication with a party in the vicinity of the property, and it is contended that as a result plaintiff learned for herself, and independently of defendants, the value of the lands. This is not altogether borne out by the evidence. On the part of both plaintiff and defendants it is in evidence that defendants, or one of them, stated to plaintiff before the transaction was entered into that the price quoted by defendants was the "top price" or the "top notch price."

But what are the other facts? Defendants purchased this land at $16 per acre in April or May, 1910, only a short time before Reiner made his first effort to turn it over to the plaintiff. During all the time that Reiner was in negotiation with plaintiff trying to dispose of the lands to her he was her agent for the sale of her business, and at the same time and without her knowledge had a one-half interest in the lands. Grauel knew of the relationship of principal and agent existing between plaintiff and Reiner. The defendants studiously concealed from the plaintiff the fact that Reiner, her agent, was a part owner. Defendants had both seen the land, and they admit they knew its value; and the evidence at the trial establishes conclusively that on January 14th, 1911, the land was not worth more than $16 per acre, if, indeed, it was then worth so much. The whole evidence satisfies me that the representations made to plaintiff as to the character and value of the land were in several respects not borne out by the facts, and I entertain no doubt that there was a deliberate design and intention on defendants' part to draw plaintiff into the transaction by creating in her mind a false impression as to the character and value of the land. I believe, too, and so find, that she relied upon and was influenced by what defendants represented to her. An area of land such as this, having on it some scrub, some sloughs, the soil alkali in places, a considerable portion of it swampy and not such as could be steam-ploughed in wet seasons, and smaller parts of it not capable of being steam-ploughed even in the most favourable seasons, cannot properly be characterized as a steam-plough proposition as that term is defined in the evidence by persons competent to speak. Quite enough has been shewn to establish such deliberate misrepresentation by defendants, with the intent of deceiving plaintiff, as renders them liable.

In reaching that conclusion I have not left out of consideration the circumstance of plaintiff's son having, months before the exchange, sought information as to the value of the land. The son's somewhat flippant manner of giving his evidence did not help to strengthen belief in what he said, and it was not made clear just what was the result of his enquiries or how far the plaintiff thus obtained knowledge. I am confident that the plaintiff still relied on defendants' statements, and trusted her agent Reiner to protect her interests, and she was thereby led into the transaction.

By way of explanation of the price of the land as charged against plaintiff in the exchange being in excess of what the evidence shews was then its real value, defendants have contended that the price placed upon what plaintiff gave in exchange was also inflated. If there was any such inflation it could only have been in respect of the bowling alleys, store fixtures and furnace, which were put in at $4,700. The remaining asset—the stock in trade—was taken at invoice prices, and this was arrived at in a stock-taking at which both parties were represented; but even if the prices placed on the bowling alleys, store fixtures and furnace were substantially in excess of their true value, that would still not account for the great difference between $30.50 per acre and the real value of the lands at that time. Eliminating the whole price of these articles, $4,700, would not account for that great difference.

There remains to be considered the defence that plaintiff, after she learned the true state of facts, acquiesced in and approved of the transaction and so debarred herself from the right now to successfully object. The acquiescence which is necessary to shew a determination not to impeach a transaction is acquiescence under such circumstances that assent may be reasonably inferred from it—or a condition of being content not to oppose. Kerr on Frauds, 4th ed. 332. Time alone is no bar to the right to attack though length of time is evidence of acquiescence and strengthens the presumption that a transaction is legal and honest. It is of importance to bear in mind that this is an action, not for rescission, but for deceit, and that a person may by his conduct forfeit his right to rescind, and yet retain his right to sue for damages: *Peek* v. *Derry*, 37 Ch. D. 576. It is not always an easy matter to determine from conduct alone, in the absence of express declarations, whether one has so acquiesced

in a transaction, otherwise open to attack, as to lose all right against the other party. Going on after acquiring knowledge of the real facts is not always a confirmation of a contract. One may, under certain circumstances, confirm a contract and yet sue the party who by fraud has induced him to enter into it. If at the time this transaction was being carried through plaintiff became aware that Reiner was part owner of the property—it is in evidence that the papers were then read to her—she does not appear to have appreciated the situation until she examined them some considerable time later on. Her suspicions were then aroused, and in the following summer she had her son and a friend examine the property, and, as a result, she made complaint more than once to Reiner, who persisted in maintaining the high character of the land. Something did occur between them as to re-selling the property, and defendants say she asked them to sell it, and that she also sought to sell it through others. They maintain that when speaking to them of re-selling, she was treating the property as her own and was simply employing them as her agents for sale. Against this there is the evidence both of the plaintiff and her son indicating that her understanding of the position of matters was that she expected them to make good to her the loss which she believed she would sustain by reason of the lands not being what they were represented to her to be, and that one part of the procedure to that end was that defendants should be given the opportunity of selling the land. Defendants do not view the matter in that light, and they point to the fact that it was not until May, 1913, that she demanded in writing that they make good to her her loss, and hinted at legal action being taken if they refused to entertain a proposition she then made to them.

There may be room for doubt on the question of whether plaintiff really intended to confirm the exchange after she acquired knowledge of the true condition of things, but in view of Reiner's relationship of agent and Grauel's knowledge of this, the overstating of the character and quality of the land, and the price charged being grossly in excess of its true value—of which defendants were well aware—it is not conceivable that plaintiff, a woman of intelligence and ability, would agree either in words or by conduct to ratify a transaction involving the loss to her of thousands of dollars. Unless her subsequent conduct indicates clearly an acquiescence —a confirmation of the transaction—and it does not so indi-

cate—I am not prepared to find that she did acquiesce or confirm or intend that her actions should have the effect of relieving defendants from the consequences of their conduct towards her in the transaction. My belief is that she was willing to do whatever was in her power to aid them in re-selling the lands, but without abandoning her right to claim against them for her loss.

Then as to the amount of damages. The contract price of the lands was $14,700. The evidence of defendants themselves on the question of the value of the cigar business taken in exchange is not definite; Grauel says the stock was in poor condition, and that they added to it considerably before re-selling it. Plaintiff had placed this business in the hands of Schulte and Reiner for sale at $8,000; Reiner says he knew it was not worth what plaintiff wanted for it, but admits that while it was in his hands for sale an offer of $6,500 was made to him for it, he says by two young boys; she says Reiner told her it was by a man from Galt, and that she refused to accept that sum as being too low. Defendants submitted in evidence a statement made up long after they had parted with the business intended to shew that the price allowed plaintiff for it was excessive; that statement, however, was prepared partly from memory, and does not take into account the returns from sales during the time they carried on the business. A witness was called who gave it as his opinion that at the time of the exchange the business was worth from $4,000 to $5,000. He was not associated with the business at that time nor until February 1st, 1911, but his opinion is entitled to some weight. As against this is the fact, mentioned above, of the stock having been valued in the usual way, indicating clearly that, so far as that asset is concerned, it can be assumed the value placed upon it was not overstated.

Putting the land at what in round figures was its actual value at the time of the exchange and based on the evidence of witnesses competent to speak thereof, I think it safe to place that value then at $7,360. The best solution I can make, on the evidence, of the value of plaintiff's business is to place it at $6,500, a reduction of $1,348.94 on the value placed on it in the exchange. The result is that I find the damages sustained by plaintiff, with which defendants are chargeable, to be $5,991.06 with interest from January 16th, 1911. For this and the costs of the action there will be judgment in plaintiff's favour.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. FEBRUARY 6TH, 1914.

DURIE v. TORONTO RW. CO.

5 O. W. N. 829.

Negligence—Street Railway — Collision with Cart — Contributory Negligence—Ultimate Negligence—Findings of Jury—Excessive Speed—Insufficient Warning—Infant Suing without Next Friend —Amendment at Trial—Practice—Mere Irregularity.

SUP. CT. ONT. (2nd App. Div.) *held*, that upon the findings of the jury plaintiff was entitled to recover in an action brought for damages for injuries sustained by being thrown from his cart owing to a collision with defendants' street car.

Appeal from a judgment of HON. R. M. MEREDITH, C.J. C.P., who, upon the answers of the jury to the questions submitted to them, directed judgment to be entered for the plaintiff for $1,500 and costs.

The action was commenced on the 13th day of June, 1913, to recover damages for injuries sustained by being thrown from the waggon he was driving, by the defendants' car colliding with it.

The appeal to the Supreme Court of Ontario (Second Appellate Division) was heard by HON. SIR WM. MULOCK, C.J.EX., HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE LEITCH.

D. L. McCarthyy, K.C., for defendants, appellant.

D. O. Cameron, for plaintiff, respondent.

HON. MR. JUSTICE LEITCH:—The plaintiff's solicitor in his statement of claim says that the defendants were guilty of the following acts of negligence:—

(1) In not driving the car prudently and carefully.

(2) In not keeping the same under proper control.

(3) In driving the same at an excessive rate of speed.

(4) In not keeping a proper lookout.

(5) In not using the appliances for stopping the car in time to prevent the injuries to the plaintiff.

(6) In not having the appliances for stopping the car in good order.

(7) In not having the best appliances for stopping the car.

(8) In the motorman not giving proper warning of the approach of the car.

The accident took place a few minutes past five o'clock in the evening of the third day of June, 1912, on the east side of Bathurst street, 125 feet north of Robinson street. The plaintiff was driving up Bathurst street at a slow trot. While turning out to pass a rig that was standing on the street close to the kerb on the permanent pavement, his attention was attracted for a moment—three or four seconds—by a boy on roller skates trying to get on the back of his wagon. It was the plaintiff's duty to see that the boy was not hurt by getting on the wagon. While looking back to keep the boy from the back of his waggon, the plaintiff's horse and waggon got over on the car track. As soon as he turned his head and saw where he was, the plaintiff at once pulled his horse to the east to get off the car track away from the car. The car was then from 180 to 225 feet—four or five car lengths—up Bathurst street. There was nothing to prevent the motorman from seeing the plaintiff the whole of that distance. The evidence is that he must have seen him. The car was running down grade at a rate of fifteen or twenty miles an hour. The motorman never slackened speed, the car came right on and ran three or four car lengths after it struck the plaintiff's waggon. The gong was not sounded. The car struck the hind wheels of the waggon, smashed it and threw the plaintiff about thirty feet. He received two scalp wounds and a compound fracture of the leg.

The learned trial Judge submitted the following questions to the jury, who returned the following answers:—

"(1) Q. Was any negligence on the part of the defendants the proximate cause of the plaintiff's injury? A. Yes.

(2) Q. Or was any negligence of the plaintiff the proximate cause of it? A. No.

(3) Q. Or was it caused by an accident for which neither party was blameable?

(4) Q. If caused by the negligence of either party, what was the negligence, state fully; and if more than one thing, state fully? A. Not sufficient warning; the high rate of speed.

(5) Q. If by the negligence of the defendants, then might the plaintiff by the exercise of ordinary care have avoided it? A. No, the company could have avoided it.

(6) Q. If so how, state fully; and if in more than one way state all fully? A. There was no sufficient warning.

(7) Q. If the plaintiff could by the exercise of reasonable or ordinary care have avoided his injury, could the defendants also, after becoming aware of his danger, have prevented the accident by exercising ordinary care? A. Motorman could have avoided the accident but the driver could not.

(8) Q. If so state fully? A. By not ringing the gong in time.

(9) Q. If the defendants are liable to the plaintiff in damages for the injuries which he sustained, what sum of money would be reasonable compensation under all the circumstances of the case to be paid by them to him for the injuries which he sustained? A. Fifteen hundred dollars damages."

On the jury's answers to the questions the learned Judge directed judgment to be entered for the plaintiff for $1,500 damages with costs. The charge to the jury, which was very lucid, was not objected to. The jury expressly found negligence on the part of the defendants, and no contributory negligence on the part of the plaintiff. The negligence attributed to the defendants was, not giving sufficient warning by ringing the gong, and running at a high rate of speed. They further found that the defendants by the exercise of reasonable care could have avoided the accident, but that the plaintiff could not. There was ample and undoubted evidence to justify the findings of the jury.

There is no law under the circumstances of this case that absolves the defendants. The street car has no right paramount to the ordinary vehicle. Both must travel on the street and each must exercise its right to use the street with due regard to the rights of the other. The company should keep in mind the possibility of accident incident to vehicular traffic on a crowded street. While the vehicle has no right to unreasonably curtail or interfere with the operation of the cars in the streets, yet we know that vehicles drawn by horses or operated by other motive power meet with accidents, get on the tracks and obstruct the cars. It is the duty of the company to run their cars under such control, and at such a rate of speed, giving such warning,

that when an emergency does arise they will be enabled to do everything that reasonable men should do to avoid the accident.

During the trial, whilst the cross-examination of the plaintiff was in progress, it was learned that the plaintiff was under the age of 21 years. Application was made by the plaintiff's counsel to amend by adding the plaintiff's mother a party, as next friend. The mother appeared in Court, and, by a writing duly signed, consented. The learned trial Judge allowed the amendment and the trial proceeded.

It was urged on this appeal that the action was improperly constituted, that it should be dismissed and that the plaintiff should commence *de novo*. We cannot give effect to such a contention. We think the learned trial Judge pursued the proper practice. The bringing the action without a next friend in view of the circumstances was a mere irregularity. The plaintiff had a good cause of action when the writ was issued. He brought it within the time the law allowed. The proceedings went on without question. The plaintiff's age was not made an issue, was not submitted to the jury. It came out incidentally that he was under 21. The irregularity was cured at the trial, rightfully, we think. *Flight* v. *Boland*, 4 Russ. 298; *Re Brocklebank*, 6 Ch. D. 358.

We think this appeal should be dismissed with costs.

HON. SIR. WM. MULOCK, C.J.EX., HON. MR. JUSTICE RIDDELL, and HON. MR. JUSTICE SUTHERLAND, agreed.

HON. MR JUSTICE SUTHERLAND. FEBRUARY 4TH, 1914.

LAFONTAINE v. BRISSON.

5 O. W. N. 858.

Vendor and Purchaser—Specific Performance — Agreement for Sale and Exchange of Lands—Mortgage—Dispute as to Terms of—Evidence—Part Performance—Application to Postpone Trial—Absence of Defendant—Costs.

SUTHERLAND, J., gave judgment for plaintiff for specific performance of an agreement for the sale of certain lands, where the only point in dispute was as to the terms of the mortgage to be given to secure part of the purchase-money.

An action for specific performance.

A. E. Lussier, for plaintiff.

C. A. Seguin, for defendant.

HON. MR. JUSTICE SUTHERLAND:—In the month of February, 1913, the plaintiff was the owner of the south half of the north half and the north half of the south half of lot No. 7 in the 9th concession of the township of Clarence, in the county of Russell, in the province of Ontario, containing 100 acres more or less, together with the farm implements and cattle thereon, and the defendant was the owner of a parcel of real estate in the town of Hull, in the province of Quebec.

The parties are agreed that in the said month an agreement was entered into between them, only one term of which is now in dispute.

The following written admissions were put in at the trial:

(1) "It is admitted an agreement for sale and purchase was made between the plaintiff and defendant by parol in regard to the lands as described in the plaintiff's statement of claim, wherein the price for the lands and farm machinery was fixed at $4,350 of which $1,250 was to be cash (which cash payment was made by defendant and accepted by plaintiff by the transfer of a property in Hull from the defendant to the plaintiff); balance of principal with interest yearly at 5 per cent. per annum from the 1st February, 1913, to be secured by mortgage, interest to be paid on 1st February, in each year along with the $100 on the principal the first payment to be made on the 1st February, 1914. The number of years in which the principal should be repaid is in dispute.

(2) It is admitted that there was part performance by the plaintiff by the exclusive and unequivocal delivery on or about the 29th day of January, 1913, by the plaintiff of possession given of said lands and farm machinery to the defendant and accepted by him referable to the said agreement alone and to nothing else so as to take the case out of the Statute of Frauds (which has not been pleaded by the defendant.)"

The plaintiff and his wife testified that the bargain was that the defendant was to execute in favour of the plaintiff on the Clarence property a mortgage for $3,100 to be payable as follows: $100 a year for 14 years and the balance at the end of the 15th year. Counsel for the defendant contended at the trial that the said $3,100 was to be payable at

the rate of $100 a year for 31 years. It was admitted that this was the sole point in dispute.

The plaintiff and his wife gave evidence at the trial that having arranged verbally all the terms of the contract previously, they at his request went on the 28th of February, 1913, to the office of a conveyancer, named Lagois, to have the deed and mortgage of the Clarence property executed and delivered. They say that after they had executed the deed in favour of the defendant the latter then for the first time made the contention, through a friend of his named Lefebvre whom he had brought with him to Lagois' office, that the mortgage was to be payable at the rate of $100 a year for 31 years and refused to execute one in any other terms.

The defendant was not at the trial and no evidence was given on his behalf.

I have no doubt, from the evidence offered on behalf of the plaintiff that the mortgage was to be payable as testified to by them and not as contended for on behalf of the defendant. I think it more than likely that if the defendant had been unaccompanied by his friend Lefebvre he would probably have executed the mortgage in the terms of the bargain. His officious friend appears to have endeavoured to get for him better terms than those agreed upon and instead brought about this litigation.

All the acts done by both parties are plainly referable to the bargain in question and there has been such acts of part performance on the part of the defendant as to entitle the plaintiff to succeed in this action. The plaintiff on his part has been ready and willing to do everything that he was called upon to do. His deed to the defendant of the property in Clarence has been executed and a delivery thereof tendered. The only reason that the bargain has not been completely carried out is on account of the refusal of the defendant to execute the mortgage payable in the terms agreed upon.

There must be judgment, therefore, for the plaintiff for specific performance of the agreement as asked. The defendant must execute a valid mortgage in favour of the plaintiff upon the lands in the township of Clarence for the sum of $3,100 payable as already indicated and until such time as he does the plaintiff will have a lien upon such lands for the purchase money.

The plaintiff will have the costs of the action against the defendant. The latter has acted in a very extraordinary way. Notwithstanding his knowledge of the commencement of this litigation he has gone away somewhere and his solicitor alleges that he is unable to ascertain his present whereabouts. The writ was issued on the 31st of May, 1913, and the pleadings apparently closed on or about the 18th October, 1913. The action came on for trial on the 4th November, 1913, before Meredith, C.J.C.P., and "on the defendant's application on grounds of absence of material witness" the trial was postponed until the next sittings of the Court; the costs of the application and of the day being given to the plaintiff in any event. The witness then absent was the defendant. A further application was made to me at Ottawa to postpone the trial, but I was unable to see my way to grant it, and I dismissed it with costs.

There will be a stay for 30 days.

HON. MR. JUSTICE MIDDLETON, IN CHRS. FEB. 6TH, 1914.

TRUSTS & GUARANTEE CO. v. GRAND VALLEY RW. CO.

5 O. W. N. 848.

Mortgage—Street Railway—Receiver under Second Mortgage—Rights of First Mortgagee—Means of Asserting—Motion to Remove on Ground of Partiality — Leave to Appeal — Postponement of Motion.

MIDDLETON, J., *held*, that a receiver in possession of a property under a second mortgage is responsible to the mortgagor and the second mortgagee, but not to the first mortgagee, and if the latter desires his removal some other steps than a motion for removal on the ground of lack of impartiality must be taken.

Motion for leave to appeal from the judgment of HON. MR. JUSTICE LATCHFORD, appointing the manager of the plaintiff company receiver of the defendant company under the plaintiff's mortgage.

J. A. Paterson, K.C., for the National Trust Company.

W. T. Henderson, K.C., for the Corporation of the City of Brantford.

G. H. Watson, K.C., for the Brantford Street Railway Company, the Grand Valley Railway Company, and the receiver.

HON. MR. JUSTICE MIDDLETON:—The appointment is attacked as improper because the receiver is not impartial and it is said is operating the line in the interest of the plaintiff and not adequately protecting the interest of the applicants, the prior mortgagees and the city.

Assuming this to be the case—the motion is misconceived. A receiver under a second mortgage is appointed to protect the mortgagee and those who hold the debentures for which this mortgage is security and so long as the mortgagor and second mortgagee are satisfied with his conduct the first mortgagee and the city cannot complain.

If either the first mortgagee or the city have any rights which they desire to assert they can take the proper proceedings to enforce such rights. The receiver, though in some sense an officer of the Court, is really a mortgagee's bailiff and his possession is in truth the possession of the second mortgagee. So long as the first mortgagee remains satisfied to leave the second mortgagee in possession or so long as the first mortgagee has not the right to take possession it cannot complain that the second mortgagee is making the most of its brief harvest time.

If any leave is necessary for any proceedings that either the first mortgagee or the city may desire to take, looking to the displacing of the second mortgagee and its receiver that leave is now given, and I hold these motions for the present so that if any order that may be made on any such motion is taken to an appeal leave may then be granted to take the order in question before the Appellate Court so that it may have an absolutely free hand in the premises.

I suggested to the parties the wisdom of consenting to a receiver being appointed to protect the interests of all concerned who would be impartial and would act on the advice of a committee on which all interests would be represented—subject to an appeal if any party dissented from the majority—or some similar arrangement—but this course is not assented to.