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COURT OF APPEAL.

JANUARY 27TH, 1913.

*LESLIE v. HILL.

Contract—Interest in Oil Leases—Oral Agreement—Evidence to Establish—Finding of Fact by Trial Judge—Reversal on Appeal to Divisional Court—Further Appeal—Variation of Judgment—Partnership—Interest in Land—Statute of Frauds.

Appeal by the defendants Hill and Paget from the judgment of a Divisional Court, 25 O.L.R. 144, 3 O.W.N. 303.

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

W. M. Douglas, K.C., for the defendants.

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

MEREDITH, J.A.:—All things about which there can be no dispute as to their truth support the judgment appealed against, and are altogether opposed to the conclusions of the County Court Judge; indeed, the probabilities are so strongly in favour of the plaintiff's claim that it ought to have required a very considerable weight of testimony to turn the scale the other way; but, in truth, the weight of the testimony is more in accord with the probabilities of the case than opposed to them.

The appellants were wholly inexperienced men in the business of gas and oil production and speculation; the plaintiff's husband was not only a man of considerable knowledge of that kind, but was a practical well-digger and had on hand the machinery

*To be reported in the Ontario Law Reports.

required for the work; and was at the time in question engaged in sinking such a well for the appellants on the land of one of them; and, indeed, the enterprise in question seemed to have arisen out of this circumstance. The appellants' inexperience was such that, even in regard to the form of the ordinary gas and oil lease, they admittedly had to seek, and at once accepted, the advice of the respondent's husband. The association in partnership of these two wholly inexperienced men with one who not only had the needed knowledge and practical experience, but also had the machinery needed in the work required in the development of their enterprise, was so desirable a thing as to make that which the respondent contends for at the least very probable. Then the respondent's husband was consulted regarding the conduct of the enterprise, and the form of the intended leases was altered at his instance; and after that the business was done—the leases taken—in the names of the three; the very strongest evidence of the joint interest of all of them, and entirely inconsistent with the appellants' contention that they alone were entitled to them.

And how is this met? By the extremely weak and improbable story that the respondent's name was inserted with a view to securing work for her husband in sinking wells on the leased lands, if the leases should be assigned, though it is not even asserted that there was any contract on the appellants' part to give him such work if the lands were developed by them. How could such a thing bring about such a result, apart from the want of honesty, towards the lessors, in it? And why should the untruth, and the danger of it, be uttered and incurred if they were under no obligation to the respondent? The story seems to me quite too infantile, from business men in a business transaction. The much more probable story is, that, if the leases had not been quickly found to be saleable at a profit, had mining operations gone on, as was at first expected, or had any difficulties arisen, the partnership would have been clung to, and the harder work would have fallen to the experienced man with the machinery and knowledge; but when neither experience nor machinery became necessary, when it was little more than a matter of dividing a handsome profit, the working man and his plant were excluded; but fortunately his wife's name could not be erased from the leases without leaving an indelible mark.

And the bulk of the disinterested testimony supports this view.

There is, of course, no law against reversing the findings of the County Court Judge, if they are wrong. And, with the

fullest appreciation of, and giving the fullest weight to, the many advantages of a trial Judge, who sees and hears the witnesses, over any court of appeal that does not, I cannot but agree in the conclusion of the Divisional Court that the judgment at the trial was wrong and should be reversed.

Without at all differing from the view of the Divisional Court on the question of the Statute of Frauds, I feel bound to say that I do not see how that enactment can be, on any question affecting land, applicable to this case, which is substantially but one for money received by the defendants for the use of the plaintiff.

HODGINS, J.A., for reasons given in writing, agreed in the main with the judgment of the Divisional Court, but was of opinion that it should be varied by confining it to the leases other than those of McNinch, Pettigrew, and McLaren, leaving it to the Local Master to determine whether the $2,200, mentioned as the consideration in the option and in the subsequent assignment, should be reduced, having regard to these three subsequently-acquired leases, and to the state in which negotiations for them were on the 19th April, 1911.

GARROW, MACLAREN, and MAGEE, JJ.A., concurred.

Judgment varied accordingly.

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*RE DINNICK AND McCALLUM.

Municipal Corporations—Buildings "on Residential Streets" of Cities—Limitation of Distance from Line of Street—Consolidated Municipal Act, 1903, *sec.* 541*a*—*By-law—Validity—Application to Building on Corner Lot—"Fronting or Abutting."*

Appeal by W. L. Dinnick from the order of a Divisional Court, 26 O.L.R. 551, 3 O.W.N. 1463, dismissing a motion for a mandamus to the Corporation of the City of Toronto and the City Architect (McCallum) to issue a permit to the appellant for the erection of an apartment house on the north-east corner of Avenue road and St. Clair avenue, in the city of Toronto.

*To be reported in the Ontario Law Reports.

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

W. C. Chisholm, K.C., for the appellant.

G. R. Geary, K.C., for the respondents.

The judgment of the Court was delivered by MEREDITH, J.A.:—It may be that there may be four fronts to a house, or indeed eight, or more or less than eight; but how does that affect the case of a house indubitably intended to have but one, and that front upon the highway on which the lot it is intended to be built upon also fronts—St. Clair avenue?

In this Province, where nearly all lands, and intersecting streets, are laid out in rectangular fashion, and where, almost invariably, lots are laid out fronting upon some concession, or other highway, no one would ever think of saying that any lot fronted upon any highway except that upon which it is numbered; lot 10 in the 10th concession, for instance, would never be said to front upon the side-road between lots 10 and 11; nor would it ever be said that any lot on St. Clair avenue fronted on any other street, although a corner lot abutting upon a side street; nor if the land in question were sold, as such land nearly always is, at so much a foot "frontage," would any one dream of measuring all the four fronts of the lot to make up the price, or of charging more than for the width of the lot on St. Clair avenue; nor would any one, unless very hard driven in argument, seek refuge in an assertion that any lot on St. Clair avenue really fronts on Avenue road, any more than a lot on Avenue road fronts on St. Clair avenue. And all this applies with equal, if not with greater, force, to a building actually fronting, as the land it is built upon does, upon St. Clair avenue; but, if it did not, would still be of vital importance, because, although the legislation deals only with the front of the house, the by-law in question deals, and deals only, with the lot upon which it is built—"No building shall . . . be built . . . on the lots fronting or abutting . . . ." In the argument here it was assumed throughout on all sides that the land in question is a lot on St. Clair avenue, and not, except as to one of its side-lines, on Avenue road; and, if so, how can it be within the by-law except under the word "abutting," which the legislation does not authorise? It would seem from the adding of that word that the municipal council saw that the Act does not include such lots as that in question, and sought in the by-law to extend its effect.

Much of this can be easily learned from a perusal of the statutes of the Province, especially the Surveys Act; which are

much more helpful to me than a case decided in another country, under very different circumstances, involving a different question; indeed, it may possibly be that, if the question in this case, with all its differences of circumstances, were, whether the owner of a building upon the lot in question could be taxed for a sidewalk in front and at the side of his property, the benefit of which he had, equally, in connection with that property, the meaning of the words "in front" might be stretched to include the sidewalk on both sides; but I must say that I would not care to be the first to take such liberty with the words. In that case—Justices of Bedfordshire v. Commissioners for the Improvement of Bedford, 7 Ex. 656, 658—it was said that in England the words "in front," as used in the enactment there in question, were ambiguous—here, under the Surveys Act, and the thoroughly-understood meaning of the words "front," "rear," and "side-lines," of almost all lots of land, it could never be well said that there was any ambiguity in any one of these words as applied to lots of land; in that case, under its special circumstances, the word "fronting" seems to have been treated as if having the same meaning as "abutting," which, of course, could not be here; land abuts upon all adjoining land, whether in front, at the rear, or at the sides, but almost invariably here fronts upon one highway, and residential buildings as a rule are altogether within the limits of the lot, and do not abut upon other lands at all; though, of course, buildings often abut upon one or two highways, and in some cases upon the surrounding lands on all sides. And, while referring to that case, it should be mentioned that in the next following like case—Governors of the Bedford General Infirmary v. Commissioners for the Improvement of Bedford, 7 Ex. 768—between the like parties, considered by the same Court in the next following term, Martin, B., who sat in each, referring to the former case, used these words: "With respect to the other point we are bound by the decision of last term; though I own that, in my opinion, the judgment might have been correct if it had been the other way, for we were called upon to construe an Act of Parliament, with regard to a state of circumstances which the framers never thought of." So that, all things considered, I cannot think either of the cases to be very, if at all, helpful to the respondents.

That either the municipal council or the draftsman of the by-law in question, or perhaps both, was or were well aware of these things, the by-law itself plainly proves; in order to enlarge the scope of the legislation, and possibly bring in such a case as this, the words "or abutting" are added to the word "fronting,"

the latter only being in accord with the statute, as I have already mentioned. . . .

The legislature has plainly permitted interference with the ownership of land, on a residential street, in regard to the distance from such street at which buildings fronting upon it may be erected, but that only. Apply that to this case: the land in question fronts on St. Clair avenue; one of its side-lines only is upon Avenue road; the house intended to be built is to front on St. Clair Avenue only; there is not to be even a way in, of any kind, on Avenue road; the building will be numbered, and known only by its number, on St. Clair avenue; there is not a circumstance that would, in ordinary common sense, warrant the assertion that Avenue road is in front of it; nor can I think that any one, even though those who uphold the judgment in question, would ever dream—outside of Osgoode Hall—of saying that the building is to front on Avenue road, or that Avenue road would be in front of it. . . .

This view of the case is also strengthened by the words "buildings on residential streets," contained in the statute. No one would think of describing the building to be erected—with no means of access to it from Avenue road, but actually and altogether fronting on and having access to St. Clair avenue only—as "on" Avenue road; it would be numbered, named, and invariably described as "on" St. Clair avenue; with the addition perhaps occasionally of, "at the corner of Avenue road." . . .

My conclusion, then, is, that the proposed building is not within the by-law, which relates only to Avenue road, and so can affect only lots fronting upon it.

If St. Clair avenue be a residential street, the by-law might have included it, but does not.

Also, that, if the by-law followed the statute, this case would be within it, because the proposed building is not to front on Avenue road, but is to front on St. Clair avenue, and so could be affected only by a by-law respecting that highway; and, in my opinion, the street in front of a building is, under this enactment, the one really in front of it, not another at the side which no one would ever think of describing as in front of it.

I have not considered whether the legislation can be applied to a part of a street; the point was not raised. The statute expressly provides that the prohibited distance may be different in different parts of the same street, but not that the prohibition may be applied to any part of any street.

The legislation is confiscatory in its character, though, of course, intended to be put in force for the general benefit—in-

cluding the benefit of each owner generally—only; and, although it must be treated as remedial in regard to all that comes within its grasp, it ought to be applied only to cases which plainly are there.

But all these considerations seem to me to be but wasted energy, as far as this case is concerned; because, as I understand it, other legislation and another by-law prevent the erection, at the place in question, of such a building as that in question; and, as the case is one to compel the granting of permission to erect such a building at that place only, no order, such as is sought, should go, if there be the right to refuse the permission by reason of the other, and subsequent I understand, legislation and by-law.

I would, therefore, allow the appeal, but give the plaintiff no other relief than such as the opinions expressed may be; with his costs throughout.

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*HERRON v. TORONTO R.W. CO.

Street Railways—Injury to Person Crossing Track—Collision between Street Car and Carriage—Negligence—Causal Negligence—Ultimate Negligence—Findings of Jury—Uncertainty—New Trial Directed by Divisional Court—Appeal to Court of Appeal—Restoration of Judgment of Trial Judge Dismissing Action.

Appeal by the defendants from the order of a Divisional Court, ante 12, directing a new trial.

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

H. H. Dewart, K.C., for the defendants.

Alexander MacGregor, for the plaintiff.

HODGINS, J.A.:—I am unable to see that there is any real difficulty arising out the answers of the jury. I agree with Riddell, J., that it is not the tentative but the final answers of the jury that are to be considered; and, consequently, that we must, in this case, look to the answers given after the jury returned the second time. But I would add this, that those final

*To be reported in the Ontario Law Reports.

answers must be read in the light of the jury's previous answers, and the discussion which preceded their final deliverance. So treated, the case is narrowed down to this, that both the plaintiff and the motorman were guilty of negligence—the plaintiff "in not seeing he had sufficient time to cross to the north side of the tracks in safety" (Q. 4), and the motorman "by not applying the brakes when he first noticed the plaintiff heading across the tracks" (Q. 2); that the plaintiff could, by the exercise of reasonable care, have avoided the accident (Q. 3). The answers to the other questions were struck out by the jury themselves before delivering their final answers. This was after they had told the trial Judge that, "according to the evidence, he (the motorman) had not a chance to do anything but what he did."

The remark of the foreman to the trial Judge, after handing in the last answers, seems also to me to put it beyond doubt. The trial Judge, after reading the answers, says: "The only change is taking out the answer to 7. What you say in effect is, that both these people were to blame, and that the motorman, after he saw the plaintiff was in danger, could not have stopped the car. That is the effect of it?" And the foreman answered "Yes."

From the above it is clear that there was no negligence at or just before the impact, and that the jury had distinguished between the time when the motorman saw the plaintiff heading across the track, when he could have applied the brakes, and the time when, as they say, he hadn't a chance to do anything but what he did.

The trial Judge had in his charge asked them specifically: "Did the motorman see the plaintiff in time to have stopped his car and prevented the accident? Did he delay and was he negligent, if he did delay, in sounding his gong or in applying his brakes and trying to stop the car the moment he saw the plaintiff about to cross?" And later he said: "Assuming you find the motorman was negligent . . . then after he saw, or ought to have seen, that the plaintiff was crossing the track, and that there would be a collision unless one or other of them stopped, was the motorman guilty of negligence in not doing what it was in his power to do, if there was anything in his power to do, to have stopped the car and prevented the collision?"

To my mind, the effect of the answers of the jury was to hold the motorman guilty of the negligence mentioned in the

earlier part of the charge, and to absolve him of that mentioned in the latter part.

Counsel for the plaintiff suggested that the jury should have been asked whether the motorman was negligent when he saw or ought to have seen the plaintiff; and the Divisional Court speak of the possible negligence of the motorman in not applying the brakes at an earlier stage, when he might have stopped the car.

I think both those points are well covered by the charge and by the answers actually given by the jury, and I cannot bring myself to hold that any question of "ultimate negligence" is raised. If it can, it must only be of the kind suggested by Mr. Justice Anglin in Brenner v. Toronto R.W. Co. (1907), 13 O.L.R. at p. 428: "Assuming that the degree of momentum which the motorman found himself unable to overcome should be ascribed to his failure to shut off power at an earlier point of time, and that such omission should be deemed negligence, can that omission, which occurred before the plaintiff's danger manifested itself, though its operation and effect continued up to the very moment of the injury, be deemed negligence which renders the defendants liable, notwithstanding the plaintiff's contributory negligence, because in the result the former might, but for this continuing though anterior negligence, have avoided the mischief?"

Upon this point I prefer the views on the subject of ultimate negligence and contributory negligence expressed by Mr. Justice Duff in the Brenner case when before the Supreme Court of Canada (1908), 40 S.C.R. at p. 556: "The principle is too firmly settled to admit in this Court any controversy upon it, that in an action of negligence, a plaintiff whose want of care was a direct and effective contributory cause of the injury complained of, cannot recover, however clearly it may be established that, but for the defendants' earlier or concurrent negligence, this mishap in which the injury was received would not have occurred."

This is the same view, as it appears to me, as is expressed in more concrete form in Sim v. City of Port Arthur (1911), 2 O. W.N. 864, by Mr. Justice Middleton. See also Jones v. Toronto and York Radial R.W. Co. (1911), 23 O.L.R. 331, 25 O.L.R. 158; Rice v. Toronto R.W. Co. (1910), 22 O.L.R. 446.

My conclusion is, that the negligence of the motorman as found and that of the plaintiff were "concurrent and simultaneous negligences of signal character by both parties," and that the jury have negatived any new negligent act of the defendants in addition to their first act of negligence.

I think the appeal should be allowed and the action dismissed with costs.

MEREDITH and MAGEE, JJ.A., reached the same result, each giving written reasons.

GARROW and MACLAREN, JJ.A., also concurred.

Appeal allowed.

JANUARY 27TH, 1913.

REYNOLDS v. FOSTER.

Vendor and Purchaser—Contract for Sale of Land—Statute of Frauds — Incomplete Agreement — Description of Land — Knowledge of Purchaser—Extrinsic Evidence to Identify Land—Terms of Mortgage to be Given by Purchaser—Manner and Time of Payment of Principal.

Appeal by the plaintiff from the judgment of TEETZEL, J., 3 O.W.N. 983, dismissing an action for specific performance of an alleged contract for the sale and purchase of land.

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

C. A. Moss and T. Moss, for the plaintiff.

Wallace Nesbitt, K.C., and E. E. Wallace, for the defendant.

MEREDITH, J.A.:—The conclusion of the trial Judge, that there never was any concluded agreement between the parties as to the time for payment of the balance of the purchase-money—$4,000—the payment of which was to be secured by a mortgage upon the land in question, seems to me to be quite in accord with the evidence, and so ought to be accepted as the fact; and, that being so, there never was, expressly at all events, a completed agreement between the parties for the sale and purchase of the property. If one substantial part of an agreement be wanting—one link missing—the contract is incomplete, and there is nothing binding, however well the parties may have been agreed in all other respects; that is, of course, where there is but one contract, and it is incomplete in an essential part.

But it is contended that the law supplies the missing part of this contract. That the law does sometimes make that certain which the words of the parties has not covered, is unquestionable. In many cases of contract, in which no time has been expressed, the law implies a reasonable time. But such an implication could hardly arise in such a case as this, in which the time ought to have been specified and set out in the mortgage; the mortgage would be quite incomplete without it; and, in any case, who could say what is a reasonable time in such a case; with what measure is it to be ascertained? But, indeed, this was not contended for in this case upon the argument here. That which was urged was, that, no time having been agreed upon, the mortgagor was at liberty to fix the time or times for payment as he chose—to elect, as it was said.

But I am quite unable to see how there could be any such right in such a case as this; and, if there could, it is quite clear, upon the whole evidence, that the parties never intended that there should, or even thought that there could, be; that it was intended by each to be entirely a matter of agreement between them; as it plainly was a matter upon which they could subsequently easily agree if they still remained of the same mind, one anxious to sell and the other to buy; the difficulty arose entirely from its being an exceptional case, one in which the purchaser rued, and consequently has adopted every means in his power to be rid of, the purchase.

It does, indeed, seem from the case of McDonald v. Murray, 2 O.R. 573, at p. 581, and in appeal, 11 A.R. 101, at p. 122, that Wilson, C.J., and Patterson, J.A., thought that there was such a right, in a case not unlike this in this respect; but that case went off, in each Court, on grounds which made it unnecessary to give effect to that view.

The ancient rule of law that where there be a condition, without a limitation of the time within which it is to be performed, he who has the benefit of it may do it at such time as he pleases, was doubtless the basis of the views of these learned Judges; but is it applicable to such a case as this? Even assuming that, if a mortgage were given, in these days, without any limitation as to the time in which it should be paid off, and without any agreement on the subject, the rule might be applied, that is very far from giving any warrant for considering that in such a case as this any Court would decree specific performance, in which the vendor would be obliged to accept a mortgage which might be paid off whenever the purchaser chose in his lifetime. To do so would be to enforce upon the parties that

which they not only never agreed upon, but also something they never would have agreed upon, and something that every business man would consider absurd. In this case no one seems to have ever thought of a longer time than five years; it would seem that the vendor would have made it not more than three years, whilst the purchaser would have been content with five; but it is not proven that either or any other term was actually agreed upon.

The trial Judge was, therefore, I think, right in his ruling upon this point, though it is really a broader one than one merely resting—as he seems to have put it—upon the Statute of Frauds; it is a question of contract or no contract in fact; and also adding to, by parol, a written formal document; as well as of a violation of the provisions of that statute; and, in my opinion, a judgment in the plaintiff's favour would be contrary to legal right in all these respects.

So, too, I think that, without reformation of the writing, the action fails, on the latter two grounds, in another respect.

The land described in the agreement is not that which was really sold; that is admitted on all hands, and is shewn in the deed which the vendor prepared and intended to deliver. The particular description does not cover the whole of the property; a quite substantial part is not included in it; nor can I think that the general description, "the premises situate on the north side of Bloor street west, known as King George Apartments, known as No. 568 and 570 Bloor street west, plan No. as registered in the registry office of the city of Toronto," is, in the entire absence of evidence as to any such plan, and as to what was known as the "King George Apartments" or as "No. 568 and 570," can be held to supply the omitted part and rights. It would, of course, have been a very different case if the words were, "all the vendor's property known as and used in connection with the King George Apartments," for the omitted parts are a part of and rights used in connection with the land upon which the apartments are built; but there is no evidence to identify them with the apartments, which are the buildings, nor with Nos. 568 and 570, which are only, as far as appears in evidence, the street numbers.

The vendor has resold the property, and so specific performance and equitable rules are out of the question; the parties are upon their strict legal rights in that which is now an action for damages for breach of contract only.

I would dismiss the appeal.

JANUARY 27TH, 1913.

STEVENS v. CANADIAN PACIFIC R.W. CO.

Railway—Injury to Person Crossing Track at Highway Crossing—Foot Caught between Rail and Plank—Negligence—Findings of Jury at Second Trial—Appeal—Refusal to Direct Third Trial.

Appeal by the defendants from the judgment of CLUTE, J., at the second trial of the action, upon the findings of a jury, in favour of the plaintiff.

The action was brought to recover damages for injury sustained by the plaintiff, viz., having his foot cut off by the locomotive of a train of the defendants, at a highway crossing, by reason, as the plaintiff alleged, of the negligence of the defendants or their servants, in leaving an unnecessarily wide space between the planking and the inside of the north rail of their track, whereby the plaintiff had his foot caught in the space, and was unable to extricate it. See the judgment of the Court of Appeal, after the first trial, directing a new trial: 3 O.W.N. 221.

The appeal was heard by GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

I. F. Hellmuth, K.C., and W. L. Scott, for the defendants.

J. A. Macintosh, for the plaintiff.

GARROW, J.A.:—This case has been twice tried, and I am unable to agree that there are circumstances which would justify another trial. The issues are essentially upon questions of fact, vitally involving the question of the credit to be given to the depositions at the trial of the plaintiff himself. For, as carefully pointed out to the jury by Clute, J., in his charge, unless the plaintiff is believed, the case utterly fails. We may doubt the plaintiff's story, or even go farther and say we do not believe him, but we have no right to substitute ourselves for the jury or our opinion for theirs upon such a question.

There is some confusion in the findings of the jury; but, upon the whole, I take it to be reasonably clear that it is found as a fact that the opening between the rail and the plank exceeded two inches, and was, therefore, wider than necessary. On this there was, I think, some evidence to support the finding.

I would dismiss the appeal with costs.

MAGEE, J.A.:—Two trials have now been had in this action, in which the plaintiff charged that the defendants negligently left an unnecessarily wide space between the planking and the inside of the north rail of their track, at a highway crossing, whereby, while he was walking along the highway at night, he got his foot caught in the space, and, he being unable to extricate it in time, it was cut off by the locomotive of a train. The jury at each trial have accepted the plaintiff's version of his misfortune, and have rejected the theory of the defendants that he was injured while intoxicated, not at the plank crossing, but some distance east of it.

Apart from the probable uselessness of a third trial, I see no ground for disturbing the result of the second one. When the case was before this Court after the first trial the facts were more fully referred to. Some details then in evidence have been left out at the second trial and some additional ones proved. It was strongly urged before this Court that the plaintiff's story was incredible, and that his foot could not have been cut off as he stated without some injury being caused to the boot; but the jury had before them what the defendants put forward as a fair reproduction of the track and planks and engine, and would be able to judge of the credibility or the reverse of the plaintiff's evidence; and the cross-examination of the plaintiff does not read as if the defendants had much hope of convincing the jury that it would be impossible for the boot to get down so far that the top would not be pressed between the wheel and the rail.

The plaintiff swears that, in his struggles before the train reached him, he threw himself so hard that his ankle went out of joint, and that, when he did so, he screamed with the pain. This was brought out on cross-examination, and is a circumstance not mentioned at the former trial, and would more readily account for the occurrence happening as the plaintiff says it did; and the jury may well have considered that the plaintiff's account given to the doctor immediately after the accident was not likely to have been manufactured.

The two physicians who attended to the plaintiff that same evening were called by the defendants, but not a question was asked them or any other witness as to even the improbability of the injuries being received as he states or the insufficiency of the space to receive the boot if crushed down. His statement is undisputed that the wheel cut off the foot an inch or two above the ankle joint.

The evidence for the defendants shews that 1¾ or 2 inches is all the width of space necessary to be left between the plank

and the rail for the wheel flange. As to the actual width of the space the jury may very well have discounted the evidence of the section foreman, practically the only witness, as to its measurement, and they may well have preferred the plaintiff's statement that his heel, 2½ inches wide, had gone into it, as the best proof of the width, since the planks had been taken up and a new rail put down in the interval. The defendants' own witnesses, including the two physicians, say that the plaintiff was sober.

The answers of the jury, as ultimately brought in by them, find the defendant company negligent in not having the crossing in proper order, or the accident would not have happened, because there was space enough for the plaintiff's foot to get caught between the rail and the plank, and that the plaintiff could not, by the exercise of reasonable care, have avoided the accident.

These answers are not inconsistent with answers previously made or the jurors' statements in Court. They were fully instructed; and I do not think the judgment for the plaintiff upon their answers should be disturbed.

MACLAREN and HODGINS, JJ.A., concurred.

Appeal dismissed.

APPELLATE DIVISION.

JANUARY 27TH, 1913.

CHAPMAN v. McWHINNEY.

Principal and Agent—Agent's Commission on Sale of Land—Quantum—Evidence.

Appeal by the defendant from the judgment of LENNOX, J., ante 417.

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

Gordon Waldron, for the defendant.

A. F. Lobb, K.C., for the plaintiff.

THE COURT varied the judgment below by reducing the amount to be recovered by the plaintiff for commission from $6,675 to $5,675. In other respects judgment below affirmed. No costs of appeal.

HIGH COURT DIVISION.

DIVISIONAL COURT. JANUARY 27TH, 1913.

AUTOMOBILE SALES LIMITED v. MOORE.

Promissory Note—Action on—Defence—Part Failure of Consideration—Unascertained Amount—Sale of Motor Car not in Running Order — Counterclaim — Damages — Sum Required to Place Car in Order.

Appeal by the plaintiffs from the judgment of MORGAN, Junior Judge of the County Court of the County of York, upon the findings of a jury, in favour of the defendants, in an action upon a promissory note and a counterclaim for the return of $100 paid by the defendants to the plaintiffs.

The appeal was heard by MIDDLETON, LENNOX, and LEITCH, JJ.

R. J. McLaughlin, K.C., and R. D. Moorhead, for the plaintiffs.

G. N. Shaver, for the defendants.

The judgment of the Court was delivered by MIDDLETON, J.:—The note was given in part payment for an automobile purchased by the defendant Ida Moore, under a written contract dated the 18th April, 1912, which called for the payment of $600 cash upon the delivery of the car.

When the note matured on the 3rd May, Ida Moore gave her cheque for the amount. Payment of this cheque was stopped.

The contract is in the words following: "I hereby place my order for one Guy car as seen . . . car to be put in good running order. Price, $1,000. Deposit, $100. Date of delivery, when ready. Terms: $600 on delivery of car; balance, note for three months, 6%."

When the car was delivered, the note was given in lieu of the cash payment. Complaint was made that the car had not been placed in good running order; and upon the evidence it appears that this complaint is well-founded. The experts called for the defence place the amount necessary to make the car satisfactory, at various sums, the highest being $200.

The trial was allowed to proceed without any discussion of the law applicable; and apparently the case went to the jury as though the sole issue was, whether the car had been placed in good running order.

The learned Judge said at the close of his charge: "If you find as a fact that the machine was defective when it was delivered to the Moores, and that they are, therefore, not bound to take it, then you will find a verdict for the defendants; and you will also find a verdict for them for the $100 they had paid. On the other hand, if you find that the machine was in good condition, and you think the plaintiff ought to recover, yon will give a verdict for $615."

On this, the jury found for the defendants; and judgment has been entered dismissing the action and for the recovery by the defendants of the $100 paid.

We do not think that this can stand. The rule is stated in Chalmers, 6th ed., p. 99, thus: "Partial failure of consideration is a defence pro tanto against an immediate party when the failure is an ascertained and liquidated amount. but not otherwise."

This is in accordance with the law laid down in our own Courts in many cases. See, for example, Georgian Bay Lumber Co. v. Thompson, 35 U.C.R. 64. In that case the declaration was upon a promissory note; plea, that the note was given on the purchase of a timber license, and that the contract was based upon the fraudulent assertion on the part of the vendors that they had the right to cut the hardwood timber. Upon demurrer the plea was held bad, as it shewed "only a partial failure of consideration and not of any definite sum." Sir Adam Wilson exhaustively reviews the earlier cases.

Goldie v. Harper, 31 O.R. 284, is also in point. Meredith, C.J., says: "It appears to be clear at law that, unless there is a total failure of consideration or unless there is a partial failure as to something that is ascertained and liquidated, the partial failure of consideration is no answer to an action upon the note."

We think justice can best be done in this case by directing that the plaintiff recover upon the note and cheque in question, with costs as of an undefended action upon a promissory note, and that the defendants be awarded $200, the maximum sum named by the witnesses called, as damages upon the counterclaim, with the costs incident to the issue as to the defective condition of the machine, including therein the costs of the trial; and that there should be no costs of this appeal.

BRITTON, J. JANUARY 27TH, 1913.

RE ERSKINE.

Will—Construction—Annuity to Widow—From what Part of Estate Payable.

Motion by the Union Trust Company Limited, the executors and trustees under the will of John Erskine, deceased, for an order, under Con. Rule 938, determining certain questions arising upon the construction of the will.

The will was dated the 22nd December, 1905; and the testator died on the 18th June, 1906.

The testator directed that all his just debts and funeral and testamentary expenses should be paid by his executors as soon as convenient after his decease; he appointed the trust company executors and trustees, and then proceeded:—

"I give devise and bequeath all my real and personal estate of which I may die possessed in the manner following that is to say.

"To my wife Isabella Erskine I give devise and bequeath during the term of her natural life the premises known as house number 14 Saint Vincent street in the city of Toronto aforesaid free from taxes together with the contents of same also the sum of four hundred dollars ($400) yearly to be paid to her in monthly instalments so long as my estate will pay the same.

"To my son John Alexander Erskine I give devise and bequeath the sum of one hundred dollars ($100) and the south half of lot number five (5) concession five (5) in the township of Bryce in the district of Algoma and Province aforesaid.

"To my sisters Anne Hill and Agnes Erskine I give devise and bequeath the sum of one hundred and fifty dollars ($150) each.

"I direct my executors to pay off the existing mortgage on my above-mentioned Saint Vincent street property out of the proceeds of my life insurance.

"At the decease of my said wife I direct that the proceeds of the residue and remainder of my estate both real and personal including my said house and contents be divided equally between my said sisters Annie Hill and Agnes Erskine and my said son John Alexander Erskine share and share alike or the survivors or survivor thereof.

"I hereby empower my executors in their discretion to sell and dispose of any or all of my real estate and to execute conveyances thereof."

The legacies to John Alexander Erskine, Annie Hill, and Agnes Erskine had been paid.

All the debts, including the mortgage on the residence number 14 Saint Vincent street, had been paid.

The widow had remained in possession, and was now, by herself or her tenant, in possession, of the residence. The estate had been administered, leaving the widow in possesion of the residence and furniture, and John Alexander in possession of what was called the farm, which was the land allotted upon a veteran land grant, 100 acres, with no buildings upon it, and not under cultivation. The widow had been paid the annuity down to August, 1909; and the estate was actually indebted to the executors in the sum of $45.66, or thereabouts.

The executors, being in doubt, asked the assistance of the Court, submitting the following questions:—

"(1) Whether, upon the true intent and meaning of the will, the annuity of $400 to the widow was payable out of the corpus of the whole of the estate or only out of that part of the estate which came into the hands of the executors as cash.

"(2) Whether the executors could raise the annuity by way of mortgage of the premises number 14 Saint Vincent street, Toronto, and of the lands devised to John Alexander Erskine, in the township of Bryce, in the will mentioned.

"(3) Whether these properties should, as between them, bear the annuity in proportion to their respective values."

D. C. Ross, for the applicants.

George Wilkie, for the widow.

B. N. Davis, for the other beneficiaries.

BRITTON, J. (after setting out the facts as above):—The will must be construed as a whole. From the words used, what is the real meaning?

The testator intended to dispose of his whole estate. His words are: "I give devise and bequeath all my real and personal estate of which I may die possessed in the manner following . . . ." To his wife during her natural life he gave the residence, together with the contents of the same; also the yearly sum of $400, payable monthly, as long as his estate could pay the same—not for life—for the estate might not be able to continue the payment during her entire life. The house and contents the widow would have for life. She might not have it for life if sold or mortgaged to raise money out of which to pay the $400 for life; and, even if mortgaged or sold, there might not be

sufficient to pay the $400 for life. The widow is now only 68 years old. She may live quite long enough to exhaust, at the rate of $400 a year, all that the residence would realise, so that before death she would have neither residence nor yearly allowance. That was not within the contemplation of the testator. I am of the opinion that the words "my estate," in the clause providing for his wife, mean the estate of the testator not otherwise devised or dealt with by his will.

The general words "remainder of my estate both real and personal" cannot be held to include the farm devised to John Alexander, nor can it include the money legacies paid to Annie Hill and Agnes Erskine. The words are general words, and would include, of course, other property of the testator, if any, obtained by him subsequent to the making of the will, or owned by him at time of his death.

The last clause of the will, simply empowering the executors to sell, is the general one, and in this case neither adds to nor detracts from the will—nor does it assist in the interpretation of the will.

My answer to the first question is, that the annuity is payable only out of that part of the estate which the executors had in hand, exclusive of the residence and farm.

My answer to the second question is, "No."

The third question is covered by my answers to the first and second.

As the executors will continue to act and deal with the estate after the death of the widow, it will be no hardship to them to make their costs payable out of the estate. No costs to the other parties.

KELLY, J. JANUARY 28TH, 1913.

GRAYDON v. GORRIE.

Vendor and Purchaser—Contract for Sale of Land—Mortgage to be Given for Part of Purchase-money—Term of Mortgage—Dispute as to—Alteration of Agreement after Signature—Waiver of Objection—Specific Performance.

Action for specific performance of an agreement for the sale of land by the defendant to the plaintiff.

W. Proudfoot, K.C., for the plaintiff.

J. A. Rowland, for the defendant.

KELLY, J.:—The only point in dispute is as to the length of the term of the mortgage which was to be given to the vendor for part of the purchase-money; and, by reason of this, the defendant contends, a valid contract was not entered into.

The plaintiff signed, and delivered to the agents with whom the property had been listed for sale, an offer to the defendant to purchase; and McLaren, a clerk from the agents' office, submitted it to the defendant, who returned it on the following day and gave instructions for changes in the price, the amount of cash payment, the amount of the mortgage, and as to making the instalments of principal and interest payable yearly instead of half-yearly.

These alterations were made by McLaren, and the offer was again taken by him to the plaintiff, who initialled the alterations. All this took place about the 26th and 27th April. The plaintiff and McLaren both say that the defendant signed the acceptance after these changes were made, and before they were initialled by the plaintiff, and McLaren adds that the defendant initialled them at the time he signed the acceptance. The plaintiff also says that, when the offer was brought back to him to have the alterations initialled, they had been initialled by the defendant. The defendant, on the other hand, says that he did not sign the acceptance until after the plaintiff had initialled the alterations; and that, just before signing, he himself further altered the offer by making the term of the mortgage three years instead of five years.

His contention now is, that at no time did he agree to a five-year term; and that, not having signed the acceptance until after he made the alteration from five years to three years, which alteration, he maintained, was made after the plaintiff had initialled the other changes, he and the plaintiff were never agreed upon that term.

In this I think he is mistaken. My view is, that the change from five to three was made after both parties had signed. It may be that the defendant afterwards wished to have a three-year term, and he may have made the alteration in that respect with a view to having the plaintiff agree to it; but that, under the circumstances, could not have assisted him, for the alteration was so indistinctly made as to render it almost, if not altogether, impossible for any one, on the closest examination of the document, to determine whether in its present condition it reads five or three years—it can as readily be read one way as the other.

But, whatever question there may have been of the defendant's right to object on the ground of want of agreement on the

term of the mortgage, that was set at rest by what followed the signing.

About the 30th April, the defendant called at the agents' office and stated that a copy of the original offer, supplied to his solicitor, drew his attention to the five-year term, to which he objected; and, later on, he again referred to this and expressed his unwillingness to complete the sale with that term. By that time he appears to have come to the conclusion that the property was worth more than he had sold it for, and he was anxious to be released from the contract. The plaintiff then offered to make the term of the mortgage three years, but the defendant refused. I have some doubt as to whether he had much faith in his objection; for, notwithstanding that he did so object, the usual procedure for completing the transaction was gone on with by the solicitors for both parties. Requisitions on title were delivered by the plaintiff's solicitors, and correspondence passed between them and the defendant's solicitor about these requisitions and the inspection of the defendant's title deeds. A draft deed was prepared by the defendant's solicitor and submitted to the plaintiff's solicitors for approval; it was approved and returned, and was then engrossed and signed by the defendant and his wife. A draft mortgage was also prepared by the plaintiff's solicitors and sent to the defendant's solicitor for approval. The deed was made to the plaintiff's wife, and the mortgage was drawn as from her. This would indicate that something must have passed between the solicitors by which this change in the parties was brought about, and that there was then no question of not carrying out the agreement. The draft mortgage was returned to the plaintiff's solicitors on Saturday the 11th May, with the statement that it was neither approved nor disapproved. At the time of its return, a clerk from the office of the defendant's solicitor tendered the deed to the plaintiff's solicitors; and, the mortgage being immediately engrossed and executed, and the plaintiff's solicitors having with them the mortgage and the money to make the cash payment, again met the defendant's representative. Again something was said about the term of the mortgage, the defendant's representative saying that his instructions were to close the transaction only on the mortgage being made to mature at three years instead of five. The plaintiff's solicitors then offered to make the term three years if the original contract so stated it, and they and the defendant's representative and the defendant went to the registry office to examine the original. It was then agreed to defer completing the transaction until the following Monday, and there was no ques-

tion of its not then being carried out; but, when that time arrived, the defendant's solicitor refused to complete it.

My view is, that the contract is enforceable and that it should be enforced; but, as the purchaser, both on the day on which the deed was tendered and before that date and also at the close of the trial, offered to make the term of the mortgage three years, that, instead of five years, will be its term if the defendant now so desires it.

Judgment will be that the contract be so enforced, with costs payable by the defendant.

If any question arise as to the adjustment or settling the details, it can be referred to the Master in Ordinary; the costs of any such reference being reserved until after the Master has made his report.

FALCONBRIDGE, C.J.K.B. JANUARY 28TH, 1913.

SNELL v. BRICKLES.

Vendor and Purchaser—Contract for Sale of Land—Time of Essence of Contract—Failure of Purchaser to Close in Time—Duty of Vendor as to Tender of Conveyance—Construction of Contract—Specific Performance—Death of Plaintiff between Hearing and Judgment—Entry of Judgment as of Date of Hearing—Practice.

An action for specific performance of a contract for the sale of land by the defendant to the plaintiff.

The action was tried before FALCONBRIDGE, C.J.K.B., without a jury, at Toronto, on the 26th November, 1912.

W. Proudfoot, K.C., for the plaintiff.

J. E. Jones, for the defendant.

FALCONBRIDGE, C.J.:—I am informed that since the argument in this case the defendant has departed this life. I have not yet been notified of probate of will or order or revivor; but it appears that in such a case no order to continue proceedings is necessary to enable the Court to give judgment, and the judgment may be pronounced and entered as of the date on which the argument took place: Con. Rule 394; notes in Holmested and Langton's Jud. Act, 3rd ed. p. 603, and cases there cited.

It is an action for specific performance, the defence being that time was of the essence of the contract, and that the plaintiff neglected to close the transaction on the proper date, whereupon the defendant assumed to rescind the contract.

The transaction was not closed on account of the illness of the plaintiff's solicitor and his consequent absence from his office on the date of closing and the day preceding.

The plaintiff replies that he accepted the title to the lands, and that it was the duty of the defendant, on or prior to the 15th March, to tender to the plaintiff a properly executed conveyance thereof, with a mortgage, drawn on the defendant's solicitors' usual form, or, at any rate, to have supplied such form as required in and by the terms of the said agreement.

The clause of the contract is as follows:—

". . . for the price or sum of seven thousand five hundred dollars.....	$7,500 500
"payable as follows: five hundred dollars.....	
"paid to G. W. Ormerod as deposit accompanying this offer, to be returned to me if offer not accepted, two thousand dollars	2,000
"to be paid upon the acceptance of title and delivery of deed, and give you back a first mortgage on the property for the remainder, repayable in 5 years from the date of closing	5,000
	$7,500

"with interest from date of closing at 6 per cent. per annum, payable half-yearly, said mortgage to be drawn on the vendor's solicitors' usual form."

The general rule, in the absence of other provision, is, that the purchaser prepares the conveyance at his own expense: Foster v. Anderson (1907), 15 O.L.R. 362, at p. 371; Stevenson v. Davis (1893), 23 S.C.R. 629, 633. But I think that, here, the reading of the whole clause is, that it was the duty of the defendant to prepare and tender to the plaintiff the conveyance. And I think the defendant's solicitors recognised that duty, because on the 21st February they wrote to the plaintiff's solicitors enclosing a draft deed for approval, and on the following day they wrote enclosing a corrected description of the lands to be conveyed.

I am of the opinion, therefore, that the plaintiff is not in default so as to entitle the defendant to invoke against him the clause in question.

The result is, that the usual judgment for specific performance will be directed, with costs of action, and a reference to the Master to settle the conveyance, if the parties cannot agree. There will be three months' stay from the date of the argument (26th November, 1912).

MIDDLETON, J. JANUARY 29TH, 1913.

FALCONER v. JONES.

Master and Servant—Injury to and Death of Servant— Negligence—Contributory Negligence—Findings of Jury—Dangerous Machinery in Factory—Cause of Injury—Acceptance of Theory of Defence—Liability—Grounds of Negligence—Amendment—Motion for Nonsuit.

Action for damages for the death of William Falconer, while engaged at the defendants' factory in operating a machine called a "shaver," by reason, as alleged, of the negligence of the defendants.

The action was tried before Middleton, J., with a jury, at Toronto, on the 13th and 14th January, 1913.

John Jennings, for the plaintiff.

H. H. Dewart, K.C., and B. H. Ardagh, for the defendants.

MIDDLETON, J.:—Most of the facts are not in issue. William Falconer was engaged at the defendants' factory in operating a shaver. This shaver was driven by a belt running from a wooden pulley upon a counter-shaft. The counter-shaft was driven by a belt running from a large pulley upon the main shaft in the basement, and passing through holes in the floor to a small pulley fixed upon the shaft above. When it was not desired to operate the machine, this belt was shifted by a "shifter" on to a free pulley upon the counter-shaft between the small fixed pulley and the large wooden pulley. The entire counter-shaft, with its pulleys, was covered by a box or case, so that when in operation there was no danger to any one arising from accidental contact with the rapidly revolving pulleys and belts.

On the 26th January, 1912, the belt connecting the main shaft and counter-shaft parted and fell to the basement.

Falconer went to the basement, procured the belt, and took it to Werlich, the millwright having general charge of the machinery in the mill, for the purpose of having the belt repaired and replaced. Werlich went to the machine and took the cover off the box or casing which enclosed the counter-shaft; the belt could not be replaced without his so doing. He then passed the belt over the counter-shaft and down through the openings, and went to the basement to lace it. Falconer assisted him in uncovering the counter-shaft and in passing the belt through.

When the belt was laced, Werlich came upstairs again, placed the belt upon the loose pulley, and went below again in order to put the belt upon the revolving pulley on the main shaft. Werlich states that at this time he told Falconer to stand clear, as it was his intention to start the belt. The jury have found—and I agree in their finding—that no such statement was made. When Werlich reached the basement, he immediately placed the belt upon the pulley; and there was no eye-witness of what next happened. By some means, something was violently thrown, and struck Falconer upon the breast, breaking three ribs and driving them into his heart, instantly killing him.

The theory put forward by the defendants was, that Falconer had taken a piece of wood—produced at the trial—with the view of holding the belt upon the free pulley while it was being placed on the moving pulley below, and that, when the belt commenced to move, this piece of wood was jerked from his hand and thrown against him with violence.

The piece of wood produced was found immediately after the accident, broken as if it had received some severe impact; and the sides of the box were broken where they had been hit by some such object as the stick produced.

The jury deliberately reject this theory of the accident, and adopt, instead of it, a theory propounded by the plaintiff's counsel and not founded upon any evidence. It was shewn that a band-saw was operated at no great distance from the counter-shaft. What is suggested is, that the man operating the band-saw may have thrown a piece of waste wood over on to the moving belts, and that this may have been thrown in such a way as to bring about the injury.

If this finding were essential to the plaintiff's recovering, I should be much inclined to nonsuit; but I think that the defendants cannot complain if the theory propounded by them is accepted; and upon that there is liability.

The negligence found by the jury is, that the shifter was in-

sufficiently locked, and that it allowed the belt to travel on to the fixed pulley, thereby putting the whole of the counter-shaft in motion at high speed; that the engine should have been slowed down during the operation; and that Werlich was negligent in leaving the cover off the counter-shaft while the shafting was in motion and putting the belt on the wrong side of the drive-wheel. Contributory negligence is negatived.

Accepting the theory propounded by the defendants, all these grounds of negligence are relevant, and are justified by the evidence. On the other hand, if the theory propounded by the plaintiff and accepted by the jury is correct, the only negligence which is applicable is that relating to leaving the cover off the machine by Werlich until he had ascertained that the machine was gong to operate properly. Even in that view of the case, I think I should accept the findings of the jury, leaving it to an appellate Court to interfere.

The defendants' counsel pressed strenuously for a nonsuit, upon the ground that the only fair inference from the evidence was, that the accident was occasioned by Falconer's own conduct in endeavouring to hold the belt in place upon the free pulley while it was being replaced by Werlich upon the moving pulley below.

Accepting the principle laid down in Sims v. Grand Trunk R.W. Co., 10 O.L.R. 330, and in Jones v. Toronto and York Radial R.W. Co., 21 O.L.R. 421, this case cannot be said to fall within any of the exceptions to the general rule that the question of contributory negligence is one for the jury.

For the benefit of any Court dealing with the matter, I may say that the impression made upon my mind as to what really happened was this. Falconer probably took the stick produced, and held the belt upon the free pulley. As Werlich had passed the belt down on the wrong side of the moving pulley below, as soon as he placed it upon the moving pulley it would immediately pass over on to the fixed pulley above. The effect of this was to cause the wooden pulley to rotate instead of remaining stationary. This wooden pulley then struck the stick, jerked it out of Falconer's hands, threw it violently upon the box, and it then rebounded and struck Falconer. Falconer would be standing in such a position that the stick, when jerked from his hands, would be thrown away, and would only reach him upon a rebound; and the break in the walls of the cover indicated that there had been such a rebound.

I allow an amendment by permitting the plaintiff to set up the negligent placing of the belt on the wrong side of the

pulley upon the main shaft; as, while this was not set up in the pleadings or particulars, it was developed in the course of the evidence of the defendants' employees and witnesses.

Judgment will, therefore, go for the amount awarded, $1,650 (apportioned $500 to the infant son, which amount must be paid into Court, and $1,150 to the widow), and costs.

MEREDITH, C.J.C.P. JANUARY 30TH, 1913.

CURRY v. PENNOCK.

Landlord and Tenant—Lease—Covenant not to Sublet—Power to Relieve from Consequences of Breach—Importance of Personality of Occupiers—"Interest in or Use of any Part of the Property"—Construction of Agreement between Tenants and Stranger—Power of Assignee of Reversion to Evict—Landlord and Tenant Act, 1 *Geo. V. ch.* 31, *secs.* 4, 5—*Other Breaches of Provisions in Lease—Evidence—Judgment for Possession.*

Action to recover possession of demised premises, for an injunction, and other relief.

T. J. W. O'Connor, for the plaintiff.
J. R. L. Starr, K.C., for the defendants.

MEREDITH, C.J.C.P.:—If this Court had power to relieve the defendants from the effect of their conduct, which, over their own signatures and seals, they have plainly provided shall be a loss of their rights in the property in question, I would be in favour of giving them another chance to live up to the terms of their agreement, because nothing that they have done, beyond their rights, has been proved to have injuriously affected the plaintiff in any way; but there is no such power; the plaintiff has a right to exact that which the agreement in question provides shall be the effect of a breach of its provisions.

The statute-law has given to the Courts much power to relieve against a right of re-entry or forfeiture for breach of a condition or covenant between landlord and tenant, but has expressly excluded a condition or covenant against under-letting or parting with the possession of the leased land; and this case is one, in substance, to which such exception is especially appli-

cable. The personality of the occupiers of the property in question, under the writing in question, was and is necessarily a matter of much concern to the plaintiff, as well as to any one else in his position. Though the defendants may well be persons who might confidently be intrusted with the rights conferred upon them by the writing in question, those to whom they might transfer their rights, in whole or in part, even in good faith, might not be—and might very injuriously affect the plaintiff's rights and interest in the land. It was and is essentially a case in which the interests of Wolf and of those claiming through him required and require that he and they should have reasonable control over the power of the defendants to substitute for themselves any one else in the exercise of the substantial rights conferred upon them in the writing in question; and so, by agreement between the parties to it, expressly and plainly set out in it, it is provided that the defendants should have no power to sublet, or to permit any person to have any interest in, or to use, any part of the property in question, for any purpose whatever, without the consent in writing of the other party to it; and that the defendants' rights under it should continue only so long as they strictly observed, complied with, and performed the terms of the writing.

In the autumn of the year 1911, the defendants entered into an agreement with one Brooker, which plainly provided for a breach of the terms of the writing in question. That which was provided for in that agreement was, substantially, a subletting of their rights, under the writing in question, for a rental of $1,500. It was, in no substantial sense, the mere appointment of a manager for them. All the profits were to be Brooker's, and a fixed sum was to be paid to them. Brooker was to have possession, and the plaintiffs were to be out of possession of the property and profits, except an oversight of the property and business, which a landlord, under such circumstances, might well, and indeed ought to, have, to protect his own interests as landlord; and this agreement was carried out accordingly during the year 1912; and an agreement for the continuance of it during the present year has been entered into; and $300 has been paid on this year's rent.

All this is quite in the teeth of the plain words of the writing in question against permitting any one to have any interest in or use of any part of the property; as well as, substantially, against subletting it; and no attempt to procure the consent of any one concerned was made; and it was all done with the knowledge that the plaintiff would take advantage of any and every

opportunity he could grasp to turn the defendants out—being now able to obtain a much higher rent than they have contracted to pay.

I am unable to perceive anything, of any weight, in the contention made in the defendants' behalf, that the plaintiff is not entitled to evict because the writing in question was not made with him as a party to it, but only with one through whom he claims. The condition broken, the defendants' right of possession ended, and the person entitled to the property, subject to their rights, may assuredly re-enter; see 1 Geo. V. ch. 37, secs. 4 and 5.

The minor points involved in the action were disposed of during the argument, judgment on the main point being withheld at the request of counsel for the purpose of enabling them to refer to some cases which were not accessible to them then; that has now been done, without, however, throwing any obscurity upon that which seems to me to be a very plain case.

Those minor points were dealt with thus:—

The defendants had no right to erect the brick verandah wall without the plaintiff's consent. They might have repaired the wooden verandah; and could have done so without violating the by-law against erections and alterations without the permission of the municipality. But no substantial, or even appreciable, damage was caused to the plaintiff by this wrong; and it would at most be a case for merely establishing the plaintiff's right, and nominal damages.

There was no exceeding the defendant's rights in serving refreshments on the verandah; it was part of the house; refreshments had always been served there, and could not be satisfactorily served in any other part of the cottage. And there was no evidence that the sale of peanuts was not within the business of the keeper of a restaurant or "lunch-counter."

There was no breach of any of the terms of the writing in question in the defendants permitting some of their servants employed in the restaurant or at the lunch-counter to occupy rooms in the cottage, while so employed, nor in deducting from their wages an agreed amount for such occupancy; it was tantamount to paying so much less wages because they were lodged by the master.

The occupation by the Wolfs and a partner of Wolf, of some of such rooms, before Wolf assigned to the plaintiff, gave no right of action to Wolf, who was a party to it; and, consequently, the plaintiff can have no such right.

Some testimony given in contradiction of the writing, or perhaps with a view to proving consent by Wolf not in writing, I gave no credence to; and so would give no effect to it if it could be considered admissible in any manner or for any purpose.

The Landlord and Tenant Act, 1 Geo. V. ch. 37, was not relied upon or referred to on either side. Section 23 is obviously, for more than one reason, inapplicable.

Judgment for the plaintiff for posession of the land in question with costs, will, substantially, give the plaintiff all that he is entitled to, and no more than that; there will be judgment accordingly; but with a stay of proceedings for thirty days, if either party desires it.

MEREDITH, C.J.C.P. JANUARY 30TH, 1913.

GERTZBEIN v. BELL.

Vendor and Purchaser—Contract for Sale of Land—Interpretation of Document—Specific Performance.

Action for specific performance of a contract for the sale and purchase of land.

E. V. O'Sullivan, for the plaintiff.
J. Bicknell, K.C., and M. L. Gordon, for the defendant.

MEREDITH, C.J.C.P.:—The plaintiff may have judgment for specific performance of the writing in question according to the defendant's interpretation of it, that is, price $7,000, $2,000 before deed given, with a mortgage for $5,000, payable as provided in the writing, without costs. Otherwise the action will be dismissed without costs.

I am unable to give any credence to the story that the writing was to be subject to changes to suit the defendant; but, on the other hand, it was prepared by the plaintiff, and prepared in such a manner as to leave room for want of understanding by the defendant and her son of the meaning which the plaintiff asserts it was meant to convey; and is, at least, not expressly definite on the important subject of a first mortgage.

I am quite sure that it was never intended by either party that the first mortgage might be such as the plaintiff might choose and be able to put upon the property; nor, on the other hand, that all that should be at the election of the defendant.

Very plainly, payment of the $2,000 before deed, and payment off of the mortgage now on the land, are provided for; the provisions as to a second mortgage for the rest of the purchase-money—$5,000—and for the right to create a first mortgage, are by no means so clear.

The case is, therefore, one in which the Court may properly refuse to compel specific performance, whatever the very strict rights of the parties under the words of the agreement might be: see Bullen v. Wilkinson, 2 O.W.N. 1202, 3 O.W.N. 229, 859.

FALCONBRIDGE, C.J.K.B. JANUARY 30TH, 1913.

BADENACH v. INGLIS.

Will—Testamentary Capacity—General Paretic Insanity—Lucid Intervals—Evidence.

Action for revocation of letters probate of a document dated the 10th June, 1909, alleged to be the last will and testament of Edgar A. Badenach, deceased, and for a declaration that neither that document nor a former testamentary document was the true will of the deceased, because, when he signed the documents, he was not of testamentary capacity.

C. H. Porter, for the plaintiff.
A. F. Lobb, for the defendant Inglis.

FALCONBRIDGE, C.J.:—The plaintiff is a brother of Edgar A. Badenach, deceased. The defendant Inglis, formerly Badenach, is the widow, and the defendant Sarah Badenach is the mother, of the said Edgar Badenach.

Two alleged wills of the said Edgar A. Badenach were prepared. The first one was signed on the 24th August, 1908. It provided for the converting of the estate into money and the investment of the same, paying one-fourth of the income to the mother during her lifetime, and the balance to the wife during her life, with provisions in case of the mother predeceasing the wife, or vice versa, and for the support and maintenance of children, if any.

The second will was signed on the 10th June, 1909. It revoked all former wills and gave everything to his wife and constituted her his sole executrix.

The plaintiff alleges that, at the times the alleged wills were executed, the said Edgar A. Badenach was not of testamentary capacity.

Edgar A. Badenach died on or about the 5th February, 1910.

On or about the 28th September, 1910, letters probate were granted by a Surrogate Court to the defendant Annetta Blanche Badenach, now Annetta Blanche Inglis, of the last will and testament which was signed on the 10th June, 1909.

It is alleged that the deceased suffered from general paretic insanity, commonly known in the profession as G.P.I. The evidence, both of experts and laymen, is, as usual in such cases, contradictory and conflicting.

Without giving any close analysis of the same, I have come to the conclusion that the plaintiff has failed to satisfy the burden of proof which admittedly lies upon him. The great contest between the different sets of medical witnesses is as to the possibility in this disease of a period of remission or what is commonly known as a lucid interval.

A medical witness for the defence, whose experience as an alienist is probably greater than that of almost any person in the Province, testified that there might exist all the symptoms which the testator is said to have displayed—difficulty of walking, want of concentration, want of control of the sphincter of the bladder, and illusions of grandeur—and still there might be capacity to make a will; that there might be remarkable periods of remission when the mental irregularities would be quite in abeyance. In this statement he is strongly corroborated by the opinion of Dr. Mercier, of London, England, which was admitted without objection, and an extract from which here follows:—

"Lastly, the validity of a will made by a general paralytic may be in dispute. It is, of course, well established that a lunatic may make a will which will be upheld by the Court. The question in every case is, whether the testator was, at the time the will was made, of disposing mind; and the mere fact that he was then the subject of general paralysis will no more invalidate the will than the fact that he was suffering from any other form of insanity. There are general paralytics in whom the prominence of delusions, and the confusion of mind, are so continuous, that at no time in the course of the disease are they of disposing mind; but such cases are by no means the rule. Apart from the relatively prolonged periods of remittence and intermittence, during which the testator may be without ques-

tion competent to make a will, the disease is, as has been described, a fluctuating one; and there may be, in the course even of the second stage, days on which he is quite capable of appreciating the amount and nature of his property, the claims of those whom he may or may not benefit by his will, and the nature of the business that he is transacting."

The legal practitioners who drew and witnessed the wills are men of good standing in their profession, and men who are very well able to determine whether a man making a will appears to be of sufficient mental capacity. The solicitor who drew the first will was also well acquainted with the testator.

It is to be remarked also that the second will is a remarkably simple one. Nor is the first one at all complicated in its character. Neither of them is in any sense inofficious. It would not avail the plaintiff at all to destroy the second will and set up the first, because the defendant Inglis has effected a settlement with the mother of the testator, and so Mrs. Inglis would be in as good a position as she is with the probate of the second will. Both are attacked, but there is, of course, less question about the first than the second will.

The action must, therefore, be dismissed; but, under all the circumstances, without costs. I cannot possibly see my way to saddling the successful party with the plaintiff's costs.

LENNOX, J., IN CHAMBERS. JANUARY 31ST, 1913.

SCARLETT v. CANADIAN PACIFIC R.W. CO.

Damages—Apportionment—Fatal Accidents Act, 1 Geo. V. ch. 33, secs. 4, 9—Widow and Mother of Deceased—Separation of Husband and Wife—Basis of Apportionment—Costs and Expenses.

Application by the plaintiff, the widow and administratrix of the estate of George Scarlett, deceased, for apportionment, under secs. 4 and 9 of the Fatal Accidents Act, 1 Geo. V. ch. 33, between her and Jane Scarlett, the mother of the deceased, of the sum of $1,000, the amount paid by the defendants as damages for the death of the deceased.

The widow and mother were the only persons entitled to share. The action was settled out of Court, before being set down for trial; the defendants paying $1,000 for damages and $100 on account of costs.

H. R. Frost, for the plaintiff.
W. A. Henderson, for Jane Scarlett.

LENNOX, J.:—There are expenses in connection with obtaining letters of administration and the funeral. I am not informed as to whether the deceased left any estate. For three years or more before her husband's death the plaintiff was living apart from him and supporting herself. The husband, during this time, lived with his mother, Jane Scarlett, and paid her $10 a week. The plaintiff did not release her husband from liability for her support.

The total damages recoverable in the action are to be "proportioned to the injury resulting from the death" to the persons entitled: sec. 4; and the appointment, when it comes to be made, is not to be upon any analogy to the Statute of Distributions, as was done in Sanderson v. Sanderson (1877), 36 L.T. N.S. 847, but in proportion to the damages sustained by each person entitled to a share: Bulmer v. Bulmer (1883), 25 Ch. D. 409, at p. 413; Burkholder v. Grand Trunk R.W. Co. (1903), 5 O.L.R. 428.

The fact that the widow was separated from her husband does not appear to prevent recovery or shift the basis of apportionment, according to American cases cited in Sedgwick on Damages, 9th ed., p. 1121; nor would it appear, on principle, to affect the question, so long as he continued liable for her support. And, so long as the wife continued entitled, the husband could contribute to his mother's support only out of the surplus of his wages or other income after supporting and maintaining his wife. The question is not so much what was being paid to the mother as what the wife and mother would relatively have had a right to expect if the deceased had continued to live. It is not made very clear why the husband and wife were separated. Primâ facie, the wife has the strongest legal claim.

The order will provide that the plaintiff's costs of the action, as between solicitor and client, over and above the $100 received on account of costs, and the costs of both parties of this application, shall be a first charge upon the $1,000; and that, after providing for these sums, the balance of the said $1,000 shall be equally divided between the plaintiff and the said Jane Scarlett.

As at present advised, I do not see that the expenses above referred to affect this fund; but, if the plaintiff has had to bear these expenses personally, I should be spoken to before the order issues.

LENNOX, J. JANUARY 31ST, 1913.

RE BEAIRD.

Executor—Absence from Jurisdiction—Refusal to Account before Surrogate Court—Protection of Interests of Infant—Appointment of Receiver—Ex Parte Order—Right to Move against, Reserved to Executor.

Motion by Annie Regan, a beneficiary under the will of William Beaird, deceased, for an order appointing the Union Trust Company receiver of the moneys and property of the estate, for the reason that the executor lived out of the jurisdiction and had refused to account.

W. J. Elliott, for the applicant.

LENNOX, J.:—I think the beneficiary Annie Regan has made out a case for the appointment of a receiver in this matter.

A receiver will be appointed where the executor has been guilty of misconduct, or has improperly managed the estate, or has been guilty of a breach of duty: Middleton v. Dodswell, 13 Ves. 266; Gawthorpe v. Gawthorpe, [1878] W.N. 91; Evans v. Coventry, 5 D.M. & G. 918.

The time which has elapsed without accounting and without information, and the executor's disregard of the proceedings in the Surrogate Court, clearly bring him within these rules and principles.

So, too, a receiver should be appointed where it appears, as it does in this case, to be necessary in order to protect the interests of an infant: Kerr on Receivers, 6th ed., p. 15; and where a sole executor resides beyond the jurisdiction of the Court: Noad v. Backhouse, 2 Y. & C. Ch. 529; Westby v. Westby, 2 Coop. C.C. 210; and particularly if the beneficiaries are unable to get an account from the persons left in charge of the estate: Dickens v. Harris, [1866] W.N. 93, 14 L.T. 98.

Here the case is stronger, for there is no one left in charge, and the executor wholly ignores the Surrogate Court when called upon to account.

Generally speaking, however, the order should not be made ex parte, but it may be where the property is in danger: Rawson v. Rawson, 11 L.T. 595; and upon the ground of absence from the jurisdiction and other causes above-stated.

I have not found in the papers filed anything to shew that Albert E. Knox renounced or is dead. Before the order issues, there must be an affidavit filed shewing that John Beaird is, and how he became, sole executor.

The order shall reserve the right to the executor to make application to be reinstated within twenty days after service upon him of the order.

KELLY, J.

JANUARY 31ST, 1913.

MAPLE LEAF PORTLAND CEMENT CO. v. OWEN SOUND IRON WORKS CO.

Contract—Sale of Goods—Liability of Vendors or of Agent for Breach—Contract Made through Agent—Correspondence—Conduct—Passivity—Estoppel.

Action for damages for breach of a contract for the sale and delivery by the defendants to the plaintiffs of an Emerick pulverizer and an Emerick separator, for use in the plaintiffs' cement business at Atwood, Ontario, and for a return of the money paid and a promissory note given by the plaintiffs.

The defence of the defendant company was, that there was no contract between it and the plaintiffs; that the plaintiffs' dealings were with the defendant Moyer only, who, the defendant company alleged, had a contract with the defendant company to do certain work upon such machines as were sold to wards purchased, and of which, as he stated, the defendant company's agent.

The defendant Moyer's defence (as delivered) was, in effect, that the contract for the sale and delivery of the machines had been fulfilled. Moyer was not represented at the trial.

W. G. Thurston, K.C., for the plaintiffs.

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

KELLY, J.:—Moyer, who held himself out as representing the defendant company, had several interviews with the plaintiff Pearson, president of the plaintiff company, with a view to inducing that company to purchase machines such as were afterwards purchased, and of which, as he stated, the defendant company was the maker.

On the 16th December, 1910, he made a written proposal to Pearson to supply these machines for $3,000; the machines to be shipped on the 1st March, 1911; payment to be made by promissory note for $1,000 at sixty days from the 1st January, 1911; and a further note for $2,000 to be dated on the date of the delivery of the machines, and to be payable on the 20th May, 1911.

Three copies of the proposal were made, one of which was signed by Moyer for himself and the defendant company, and the others by the name of Moyer only. All these were accepted in writing by Pearson, "subject to confirmation by the Owen Sound Iron Works Company Limited." Pearson then gave to Moyer his promissory note, dated the 1st January, 1911, for $1,000, payable to the order of the defendant company at sixty days on which was written, "On account of one Emerick grinder to be delivered 1st March, 1911." Moyer took the three copies of the acceptance to have them confirmed by the defendant company.

On the 15th March, the $1,000 note not having been paid, the defendant company drew on Pearson for the amount, and he, on the 23rd March, accepted the draft. That draft not having been paid, the defendant company, on the 27th March, again drew on him at thirty days. He did not accept this draft. On the 11th April, the machinery about that time having been delivered at the plaintiffs' works (but not installed), Moyer went to Pearson and received from him a cheque payable to the defendant company for $1,000, expressed on the face to be "account Maple Leaf Portland Cement Company, Emerick coal grinder," in payment of his note of the 1st January, and his acceptance of the 23rd March. Pearson also then gave to Moyer his promissory note to the defendant company for $2,000, representing the balance of the purchase-money.

Delay having occurred in the delivery of the machinery to the plaintiffs, Pearson, on the 6th April, wrote to the defendant company complaining that there was delay, and stating that "according to our arrangement" the time for delivery had passed, threatening to cancel the contract immediately if delivery was not made, and adding, "If you are not going to deliver the one you agreed to, just say so immediately." The reply of the defendant company, dated the 7th April, was this: "We have yours of the 6th inst. . . . and in reply would say that we are shipping your pulverizer together with the separator on Monday 10th inst. . . . "

Letters were sent by Pearson to the defendant company on

the 21st April, 29th April, and 10th May, to none of which was any reply made. In the letter of the 21st April, he again complained of the delay in delivery, and drew attention to the serious loss the plaintiff company would sustain through not being able to fill their customers' orders, for which loss he declared his intention of holding the defendant company liable, and he referred to a statement made by "your Mr. Moyer when selling the mill." . . .

About this time (10th May), the machinery was installed; and, its operation being unsatisfactory, Pearson, on the 27th May, again wrote the defendant company, referring to this and to the damage he asserted that the plaintiffs were sustaining, and adding: "I think your conduct in refusing to send me back one copy of the agreement is reprehensible," etc. This brought from the defendant company a letter of the 25th May (the first communication of any kind from them to the plaintiffs from the 7th April), in which they, in effect, repudiated any liability to the plaintiffs, on the ground that they were working under a contract with Moyer to supply him with cement grinders and separators and had nothing to do with the sale or installation of machinery, and assumed no responsibility for its operation to any one but Moyer.

The offer and acceptance by Pearson were not returned to him until after the 27th May, when they were brought to him by Moyer. The other copies were left with the defendant company by Moyer about the end of December, 1910, and remained in their possession until the time of the trial. The managing director of the company admits that they were left with the company for the purpose of their being confirmed by the company, and that no notice was sent to the plaintiffs of the neglect or refusal to confirm.

The machines which were delivered were second-hand, and not manufactured by the defendants; they were not such as the contract called for, and were unfit for the purposes for which they were intended; they were useless in the plaintiffs' business; and, for that reason, they were discarded after having been subjected to a test of several weeks . . . The evidence . . . establishes that it was impossible for any one to make them work properly. It became necessary for the plaintiffs to replace them by others. . . .

I am unable to see how the defendant company can escape liability, in view of the combination of circumstances which is found in these dealings. When it is considered that that company from December, 1910, until after the machines were de-

livered and installed, had in their possession Pearson's acceptance of the proposal to sell, which was stated to be subject to confirmation by the company; that the company, at the time they received the proposal and acceptance, also received Pearson's $1,000 note, payable to their order, and bearing on its face the statement that it was on account of machinery agreed to be purchased; that the draft for $1,000 was made upon Pearson by the defendant company; that the $1,000 payment made by Pearson was by cheque payable to them; that the $2,000 note also was made payable to them; that the several letters clearly intimated that the plaintiffs believed that they were dealing with the defendant company; and that there was no repudiation of contractual relationship, or even a reply to many of these letters, until it became apparent that the machinery was not satisfactory—no other conclusion can be reached but that the defendant company must have known, and did know, that the plaintiffs were dealing on the understanding and in the belief that they were contracting with the defendant company . . .

On these facts, the defendant company is, in my opinion, liable. . . .

[Reference to Keen v. Priest, 1 F. & F. 314, 315; British Linen Co. v. Cowan, 8 F. 704, 710; Wiedemann v. Walpole, [1891] 2 Q.B. 534, 541; Freeman v. Cooke, 2 Ex. 653, 663; Carr v. London and North Western R.W. Co., L.R. 10 C.P. 307, 316, 317.]

In the present case there was much more than mere passivity; there were positive acts of the defendant company which have estopped them from denying liability.

The manager of the defendant company stated that he turned over to Moyer all communications which were received from the plaintiffs; Moyer did not in any way communicate this to the plaintiffs, and did nothing to remove any impression they had that they were contracting with the defendant company. I think I am not going too far in holding Moyer liable, as well as his co-defendants.

There will, therefore, be judgment in favour of the plaintiffs for re-payment of the $1,000 paid by Pearson to the defendant company, and interest thereon from the date of such payment; for a return of the $2,000 promissory note made to the defendant company, with costs of the action to the present time; and a reference to the Master in Ordinary to ascertain the damages sustained by the plaintiffs. Further directions and further costs are reserved until the Master shall have made his report.

BRITTON, J., IN CHAMBERS. FEBRUARY 1ST, 1913.

RE MITCHELL v. DOYLE.

Division Courts—Territorial Jurisdiction—Notice Disputing Jurisdiction—Duty to Apply for Transfer of Plaint to another Court—Changes in Statute—Division Courts Act, 10 Edw. VII. ch. 32, secs. 72, 78, 79—Prohibition—Laches—Discretion—Affidavits—Merits—Costs.

Motion by the defendant for prohibition to prevent further proceedings in the 9th Division Court in the United Counties of Northumberland and Durham, and also in the 2nd Division Court in the County of Bruce.

G. H. Kilmer, for the defendant.
A. B. Colville, for the plaintiffs.

BRITTON, J.:—The facts are as follows. On the 2nd March, 1910, the plaintiffs left their claim for suit with the clerk of the 9th Division Court in the United Counties of Northumberland and Durham.

The claim was:—

May, 1910.	
I yearling heifer	$100
By paid	60
	$40
Interest for 21 mos. 5%	3.50
	$43.50

On the same day, a summons issued, which was served, on the 14th March, upon the defendant, who then resided and now resides in the county of Bruce. On the 15th March, the defendant instructed his solicitor to file a dispute-notice, and on the 18th March the clerk of the said Court received the notice disputing the plaintiffs' claim and also disputing the jurisdiction. The defendant did not file any affidavit, nor did he apply to the County Court Judge to have the case transferred, nor did he attend the trial. At the trial, one of the plaintiffs gave evidence of the debt, but gave no particulars as to where the cause of action arose. The learned Judge, on the 14th May, 1912, gave judgment for the plaintiffs for $35 debt and $3.50 interest, and for costs.

On the 7th November, 1912, a transcript of judgment was sent to the 2nd Division Court in the County of Bruce, and an execution was issued thereon against the defendant. On application by the defendant to the Judge of the County Court of the County of Bruce, this execution and transcript were set aside; and that matter is not before me, other than as part of the history of the proceedings. The order of the Judge of the County Court of the County of Bruce was made on the 2nd December, 1912; and on the 10th December the notice of motion for prohibition was served upon the plaintiffs.

The defendant's only excuse for delay in moving is, that he thought his attendance unnecessary, and that the action had been withdrawn or dismissed. Why he was not informed by his own solicitors that the case should be looked after, does not appear. The defendant states where his residence is and has been, and states with full particularity what the plaintiffs' cause of action is, if any. Upon that statement, if true, there was no jurisdiction to bring this case in the 9th Division Court in the United Counties of Northumberland and Durham. The defendant also states his defence; and, if what he says is true, he has a good defence upon the merits. The plaintiff Edwin Mitchell made an affidavit, used upon this motion, and he does not deny anything stated by the defendant material to be considered. This plaintiff says that he thought he had done everything that possibly could be done. I shall refer to his affidavit later.

The proceedings are governed by 10 Edw. VII. ch. 32 (1910). Upon the facts before me, the plaintiffs had no right, under sec. 72 (subject to what is provided by secs. 78 and 79), to enter the suit or have the case tried in the 9th Division Court in the United Counties of Northumberland and Durham. The defendant gave the notice required by sec. 78, and that notice was transmitted to and received by the plaintiffs. Notwithstanding that, and with the knowledge the plaintiffs had of how the cause of action arose, they gave no information of it to the trial Judge. By sub-sec. 1 of sec. 79, there is power to transfer if it appears to the Judge that the action should have been entered in some other Court of the same or some other county. Apparently it did not so appear, and no order to transfer was made or asked for.

The changes made in the law as it was in ch. 60, R.S.O. 1897, by the new Act of 1910, are very important. Section 91 of ch. 60, R.S.O., required that the party making application for transfer should satisfy the Judge by affidavit of the alleged

want of jurisdiction. Section 205 of the same Act provided that prohibition would not be granted when notice disputing the jurisdiction had not been given. That section (205) is in part contained in sec. 78 of ch. 32 of 1910, but the affidavit is not required to support the objection to the jurisdiction—and the words in regard to prohibtion are omitted. It is is not lex scripta that a defendant must apply to the Judge of a Division Court for transfer before applying for prohibition.

Then the question is, has the defendant been guilty of such laches that, as a matter of discretion, I should not make the order?

The cases Mayor, etc., of London v. Cox, L.R. 2 H.L. 238, 283, and Broad v. Perkins, 21 Q.B.D. 533, cited by my brother Middleton in Re Canadian Oil Companies and McConnell, 4 O.W.N. 542, shew when discretion should be exercised against an applicant.

Has the defendant shewn what amounts to a sufficient excuse for his delay in satisfying the Judge that the action was not one within his jurisdiction?

Assuming that it was the defendant's duty, it was not so explained to the defendant. He thought he had nothing more to do unless further notified, and he received no notice. He had disputed the jurisdiction, and he had disputed the plaintiffs' claim; and, because he did not think it necessary, he did not attend Court. On the other hand, one of the plaintiffs did attend Court. He knew all about the transaction, but gave no information to the Judge as to how the sale of the heifer was made. He simply spoke of it as if the sale was upon his own premises.

The Judge was not bound to cross-examine the plaintiff; and the facts as stated in the defendant's affidavit, and not denied by the plaintiffs, did not come out. The judgment was recovered on the 14th May. No notice of it was given to the defendant, and he did not in fact know of it until the 16th November, 1912, when the execution was issued in the county of Bruce.

As to the merits, the plaintiffs, as I have said, do not contradict the defendant upon anything material. Some of the statements, not of fact but of opinion, in the affidavit sworn by Edwin Mitchell, one of the plaintiffs, are grossly improper. He probably did not appreciate or understand the true meaning of part of this affidavit. The blame for it should fall upon the plaintiffs' solicitor. I feel quite sure that, upon the attention of the solicitor being called to the 12th paragraph of that affidavit, he will express his regret for its insertion.

The order will go prohibiting any further proceedings in this action in the 9th Division Court in the United Counties of Northumberland and Durham.

If the plaintiffs desire to bring suit in the 2nd Division Court in the County of Bruce, they can do so.

The order will be with costs to the amount of $15, payable by the plaintiffs to the defendant, at which amount I fix these costs.

BROWN v. COLEMAN DEVELOPMENT CO. AND GILLIES—MASTER IN CHAMBERS—JAN. 27.

Judgment—Default of Statement of Defence—Writ of Summons not Specially Endorsed—Sufficiency of Statement of Claim—Con. Rule 587—Regularity of Judgment—Leave to Defend—Terms—Security—Costs—Practice.]—The writ of summons was issued on the 13th July, 1909, and an appearance was duly entered. Nothing further was done until the 20th November, 1912, when the plaintiff obtained, on notice to the defendants, an extension of time for delivery of the statement of claim until the 26th November, which was acted on. For some reason not disclosed on the present motion, no statement of defence was delivered, and judgment was signed by the plaintiff for default of defence under Con. Rule 587, and execution issued against the defendant Gillies, as well as against the defendant company. The defendants moved to set aside the judgment and execution and for leave to defend the action. The Master said that the only point of importance or interest was, whether the judgment was properly signed under Con. Rule 587. The writ of summons had the following endorsement only: "The plaintiff's claim is for work done and services performed by the plaintiff for and at the request of the defendants." The writ was on what is called the "general" form, and did not comply with Con. Rule 139, so that the plaintiff could not have availed himself of Con. Rule 575, if no appearance had been entered, nor of Con. Rule 603 after appearance. The statement of claim gave all necessary details of the plaintiff's claim, and could not be considered a violation of Con. Rule 288. The Master referred to Holmested and Langton's Judicature Act, 3rd ed., p. 779, where it is said: "Judgment can be properly signed under Con. Rule 587 only in respect of claims which can be *and are* specially endorsed on the writ of summons: Star Life Assurance Society v. Southgate, 18 P.R. 151;" and said that, if the words "and are" were within

that decision, then the judgment now in question was irregular. But, on reading the case referred to, he had not discovered any such dictum. The case before the Court of Appeal was one which, it was held, could not be the subject of a special endorsement. Con. Rule 587 itself does not mention the writ at all. It seems to contemplate a case such as the present, where the statement of claim "is for a debt or liquidated demand." The writ, no doubt, was not so endorsed, and gave no intimation of the amount or details of the plaintiff's claim, so that the defendants were not affected by Con. Rule 575 or 603. But, when they allowed the further time for delivery of defence to elapse, there was no reason why the plaintiff could not avail himself of Con. Rule 587 as he did; and the Master felt bound to hold the judgment regular. This being so, the defendants could be let in to defend only on the usual terms, that is, the judgment and execution should stand as security for whatever the plaintiff might ultimately recover, but were not to be enforced without the leave of the Court. The costs of the motion to be to the plaintiff in the cause; and the defendants to consent to facilitate a speedy trial at the Toronto non-jury sittings, where the plaintiff probably wished to have the trial, though no venue was stated in the statement of claim, which must, therefore, be amended, for which reason the costs were disposed of as above; and the plaintiff should issue the order. H. S. White, for the defendants. S. W. McKeown, for the plaintiff.

BANK OF HAMILTON v. BALDWIN—MASTER IN CHAMBERS—JAN. 28.

Writ of Summons—Issue in Name of Former Sovereign — Mistake—Amendment by ex Parte Order—Nullity—Con. Rule 1124—Costs.]—This action was begun on the 4th December, 1912, by a writ of summons issued (by mistake in using an old form) in the name of the late King Edward VII. The action was upon a judgment recovered on the 5th December, 1892, and was thus brought barely in time to save the bar of the Statute of Limitations. On the 14th January, 1913, after service of the writ of summons in its original form, but before the time for appearance had expired, the plaintiffs obtained from a Local Judge an ex parte order to amend the writ by substituting the words "George the Fifth" for "Edward the Seventh." The writ having been amended and served with the order on the defendant, he moved to set aside the writ as a nullity and the order as having

been made ex parte. Upon the motion it was conceded that unless the writ was a nullity, nothing would be gained by setting aside the order to amend. The Master said that Drury v. Davenport (1837), 6 Dowl. 162, would not be followed at the present day; and he was bound by his own decision in Biggar v. Kemp (1908), 12 O.W.R. 863, to hold that the amendment was properly made, and the writ not a nullity. The concluding words of Con. Rule 1224 shewed that this motion could not succeed unless the variance from the fact was "matter of substance." These mistakes are not to be condoned always and as a matter of course, but it would be a sufficient penalty if the plaintiffs were left to bear their own costs. Motion refused without costs. S. H. Bradford, K.C., for the defendant. M. L. Gordon, for the plaintiffs.

AIKINS v. MCGUIRE—FALCONBRIDGE, C.J.K.B.—JAN. 29.

Vendor and Purchaser—Contract for Sale of Land—Revocation—Onus — Failure to Satisfy — Specific Performance.]—Action by vendor for specific performance of a contract for the sale and purchase of land. The defendant's solicitor asserted and John Percy (one of the plaintiff's cestuis que trust) denied that he (Percy) offered to "call the deal off," and that the solicitor assented to that proposition. Each one had a different recollection of a heated conversation. The learned Chief Justice said that the onus was distinctly on the defendant to prove the revocation of the contract; and it must be held to be not proven in fact. The plaintiff was trustee for and co-owner with John Percy and two others; and, even if the Chief Justice had come to a different conclusion on the above question of fact, the defendant might have to encounter serious questions of law. Poucher (another co-owner and cestui que trust) swore (and so did John Percy) that he (Poucher) never consented to revoke nor gave John Percy authority to do so. Judgment for the plaintiff for specific performance, in the usual form, with a reference to the Master as to title, etc., with costs. W. M. Douglas, K.C., for the plaintiff. W. N. Ferguson, K.C., for the defendant.

ST. CLAIR v. STAIR—MASTER IN CHAMBERS—JAN. 30.

Security for Costs—Libel and Slander Act, 9 Edw. VII. ch. 40, sec. 12—Affidavit—Cross-examination on—Insolvent Plaintiff—Defence on the Merits—Good Faith—Two Actions by same Plaintiff against Different Defendants—Consolidation—Stay.] —Motion by the defendants (other than the defendant Stair) for an order, under the Libel and Slander Act, 9 Edw. VII. ch. 40, sec. 12, requiring the plaintiff to give security for the applicants' costs of the action, which was for libel. The fact that the plaintiff was not possessed of property sufficient to answer costs, if unsuccessful, was not denied; and the Master said that it remained to consider whether the defendants had shewn, at least primâ facie, that they had a good defence on the merits, and that the statements complained of were published in good faith. The affidavit of the defendant Rogers, on which the motion was based, was insufficient under the decisions in Greenhow v. Wesley, 1 O.W.N. 1001, and Duval v. O'Beirne, 3 O.W.N. 513; but the defendant Rogers was cross-examined at great length, under subsec. 3 of sec. 12, upon his affidavit: see ante 645; and the plaintiff contended that the cross-examination shewed that the defendants had not a good defence on the merits, that the publication was not in good faith, and that the statements complained of might imply a criminal charge against the plaintiff. The Master referred to Odgers on Libel and Slander, 5th ed., pp. 7, 455, 665; The Queen v. Holland, 4 Q.B.D. at p. 46; Smyth v. Stephenson, 17 P.R. 374, 376; and said that the motion must be dismissed; costs to be costs in the cause, as the merits were not now properly in question.—The plaintiff, having brought another action for acts alleged to have been committed since those complained of in the first action, moved to have the first action stayed until after the second should have been disposed of, or to have the two actions consolidated, and to be allowed to use in the second action the depositions taken in the first action. The Master said that, as there were not the same defendants in both actions, it was plain that none of these courses could be taken against the will of any of the defendants; and they did not consent. As to a stay of the first action, the plaintiff, if so advised, could let it rest, and leave the defendants to move to expedite it if aggrieved. If both actions proceeded in the usual course, the plaintiff could set them down together for trial, and make application to the trial Judge to try them together or give directions to save expense and time. Motion dismissed, with costs to the defendants in the cause. M. H. Ludwig, K.C., and A. R. Hassard, for the defendants. W. E. Raney, K.C., for the plaintiff.

CAULFEILD v. NATIONAL SANITARIUM ASSOCIATION—BRITTON, J., IN CHAMBERS—JAN. 30.

Pleading—Statement of Claim—Wrongful Dismissal—Other Causes of Action—Prolixity—Irrelevancy—Embarrassment.]—Appeal by the defendants from an order of the Master in Chambers, ante 592, refusing to strike out certain paragraphs of the statement of claim, objected to as tending to embarrass the defendant and to prejudice him in a fair trial of the action. BRITTON, J., said that, in view of Millington v. Loring, 6 Q.B.D. 190, this case presented some difficulty. He was restricted to the consideration of the paragraphs objected to being embarrassing or prejudicial to the defendants. It might well be that some of these statements, instead of being embarrassing, were in the defendants' favour as shewing all that the plaintiff could hope to bring forward in support of his action. The action was for the alleged breach by the defendants of a definite contract. The plaintiff sought to bring before the Court the matters introduced into the statement of claim, for a double purpose: first, to assist the Court in interpreting the contract; and, second, as the basis of a claim for special damages if he was entitled to recover at all. The action was peculiar in this, that, although the defendants had the right to dismiss, and the plaintiff had the right to leave after the expiration of six months, there was no right, even by payment of six months' salary, to compel him to leave before. Having regard to that, many of the statements were not embarrassing or prejudicial. With great respect for the Master's opinion, the learned Judge thought that paragraphs 5, 6, 9, 14, and 15 should be struck out. The appeal should be allowed as to these. Even if there might be something immaterial or irrelevant in paragraphs 3, 7, 8, 10, 11, 13, 16, 17, and 19, they were not embarrassing or prejudicial to the defendants. Paragraphs 4, 12, and 18 were not objected to. Subject to the above, the plaintiff might amend the statement of claim, if he desired to do so, within five days. Costs to be costs in the cause. R. McKay, K.C., for the defendants. D. L. McCarthy, K.C., for the plaintiff.

MCDONALD THRESHER CO. v. STEVENSON—BRITTON, J., IN CHAMBERS—JAN. 30.

Division Courts—Territorial Jurisdiction—Action for Sum in Excess of $100*—Place of Payment—Division Courts Act,* 10 *Edw. VII. ch.* 32, *sec.* 77(1)*—New Trial—Inspection of Document—Motion for Prohibition—Costs.*]—Motion by the defend-

ant for prohibition to the 1st Division Court in the County of Perth. The action was brought to recover a balance of over $100 upon a promissory note made by the defendant for $200, with interest at 7 per cent. until due and 10 per cent. after maturity until paid. The note was made payable at the Bank of Montreal, Stratford. BRITTON, J., said that sec. 77(1) of the Division Courts Act, 10 Edw. VII. ch. 32, applied, and the defendant's motion failed—the action having been brought in the Court of the division in which the place of payment is situate. —The learned Judge added that he had reserved his decision supposing that the parties had arrived at an understanding that, if the defendant would produce, for inspection by the plaintiffs' solicitor, the note sued upon, which the defendant said he had paid, he, the plaintiffs' solicitor, would consent to a new trial, either at Stratford or at the Division Court for the division where the defendant resided. The defendant did produce from his own possession the note sued upon, and it was inspected by the plaintiffs' solicitor, but the plaintiffs' solicitor then said that he was misunderstood—that his consent was only in case the note, when produced, did not bear a certain number by which, according to the affidavits filed, the note could be traced. The learned Judge accepted the solicitor's statement; and, therefore, could not consider further the affidavits, except in regard to the costs of the motion. As the defendant was not entitled to prohibition, there was no power to order a new trial in the Court below. Motion dismissed without costs. K. Lennox, for the defendant. R. S. Robertson, for the plaintiffs.

WIDGERY v. DUDLEY—MASTER IN CHAMBERS—JAN. 31.

Pleading—Statement of Claim—Action of Deceit—False Representations Inducing Plaintiff to Live with a Married Man as his Wife—Damages—Birth of Child—Cause of Action—Embarrassment.]—In the first four paragraphs of the statement of claim, the plaintiff alleged that in October, 1909, she was married, as she supposed, to the defendant, though he had told her that he, while under the age of fourteen, had gone through the form of marriage with a woman, with whom, as he said, he had never lived, and that several lawyers whom he had consulted had advised him that he was free to marry; that she, relying on such representations, had consented to the marriage; and that afterwards she found out that the defendant had lived with his

first wife, who had borne him a child; and that the defendant had, therefore, wilfully deceived the plaintiff. By paragraph 5, she alleged that in April, 1911, the defendant was arrested on a charge of bigamy for his marriage with the plaintiff; that she thereupon refused to live any longer with him; but that, again relying on representations made by him, that proceedings were being taken to set aside the first marriage, and that an eminent counsel had advised him that these proceedings would undoubtedly succeed speedily, she resumed marital relations with him and bore him a child. Then, in paragraph 6, she alleged that the representations set out in the preceding paragraph were untrue; and she, therefore, claimed: (1) damages for false and fraudulent misrepresentations; (2) further and other relief; (3) costs. The defendant moved to strike out paragraphs 5 and 6 as shewing no cause of action and being embarrassing. The Master referred to Anon., Skinner 119; Millington v. Loring, 6 Q.B.D. 190; and said that the plaintiff's claim was not and could not be for breach of promise of marriage or for seduction or for anything else than for false representations which she believed and was induced to act on, in consequence of which she gave birth to a child. And this was perfectly well pleaded, for the reasons given in Millington v. Loring. See also 20 Cyc. 14. Motion dismissed with costs to the plaintiff in the cause. T. N. Phelan, for the defendant. H. E. Irwin, K.C., for the plaintiff.

RE YEO—KELLY, J.—JAN. 31.

Lunatic—Petition—Evidence.] — Petition by James and John Yeo for an order declaring William Yeo to be of unsound mind and incapable of managing his affairs, and for the appointment of a committee of his person and estate. KELLY, J., said that a very careful consideration of the matter had convinced him that the application should not have been made. Petition dismissed with costs. Featherston Aylesworth, for the applicants. J. G. Wallace, K.C., for William Yeo.

SMITH v. BENOR—KELLY, J.—JAN. 31.

Trust—Conveyance of Land—Consideration — Establishment of Trust—Oral Evidence—Statute of Frauds—Finding of Fact—Setting aside Conveyance.]—Action to set aside a conveyance of land and other property made by the plaintiff to the

defendant on the 23rd March, 1912. The consideration mentioned was $500; and the defendant paid that sum to the plaintiff. The property conveyed was of much greater value. The plaintiff alleged that the conveyance was made for a particular purpose, with reference to a scheme or business venture which was never carried out, and that, by the agreement and understanding between the plaintiff and defendant, the defendant was to reconvey the property to the plaintiff. This the defendant refused to do, contending that the conveyance was intended to carry out an actual bonâ fide sale for the consideration of $500. The learned Judge, in a written opinion, reviewed the evidence, and stated his conclusion that the conveyance was given for the purpose stated by the plaintiff; that the defendant deliberately evaded giving a letter, which the plaintiff asked for, declaring in effect that the defendant was only a trustee for the plaintiff; and that the defendant was improperly withholding the property from the plaintiff.—At the opening of the trial, an application was made by the defendant for leave to amend the statement of defence by pleading the Statute of Frauds; and that application was granted. But, the learned Judge said, the defendant could not protect himself behind that statute: Rochefoucauld v. Boustead, [1897] 1 Ch. 196; McMillan v. Barton, 20 S.C.R. 404.—Judgment for the plaintiff declaring the conveyance void and directing that it be delivered up to be cancelled; that the registration thereof be vacated; that the defendant reconvey to the plaintiff the property and assets transferred; and that the plaintiff recover from the defendant $5 as damages for his refusal to reconvey. As the plaintiff was willing to compensate the defendant to the extent of $200 for any services he performed, the defendant should now be paid that sum by the plaintiff. Costs of the action to be paid by the defendant. If the parties cannot agree as to whether the sum of $500 paid to the plaintiff is now in his hands, or whether it or any part of it was returned to and retained by the defendant, there will be a reference to the Local Master at Belleville to ascertain and report what the fact is; and the defendant will be entitled to such part of it as may be found not to have been so returned and retained; the amount so found, if any, and the $200, to be set off pro tanto against the plaintiff's costs. Costs of the reference reserved until after the report. McGregor Young, K.C., for the plaintiff. W. C. Chisholm, K.C., for the defendant.