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COURT OF APPEAL.

DECEMBER 14TH, 1909.

REX v. SPINELLI.

Criminal Law—Murder—Refusal of Trial Judge to State Case for Court of Appeal—Motion for Leave to Appeal—Objections to Evidence—Leading Questions, not Objected to—Judge's Charge — Provocation — Intoxication — Manslaughter — Refusal to Postpone Trial.

Motion by the prisoner for leave to appeal to the Court of Appeal from the refusal of RIDDELL, J., the trial Judge, to reserve a case after a conviction for murder: see ante 187.

The motion was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

A. R. Hassard, for the prisoner.

J. R. Cartwright, K.C., for the Crown.

Judgment refusing the application was pronounced on the 22nd November, 1909, and reasons in writing were afterwards given.

OSLER, J.A.:—The motion for leave to appeal from the refusal of the learned trial Judge to reserve a case was supported by some 15 objections to the evidence and the charge and the procedure at the trial, very ingeniously taken and earnestly argued by the prisoner's counsel. Those relating to the evidence seem to resolve themselves into the complaint that leading questions were occasionally (and without objection) put to a witness by the counsel for the Crown, some of them involving a statement or statements of fact said not to have been proved or previously made by the witness. Evidence elicited by a leading question, not objected to at the time or overruled by the Judge, cannot be said to be wrongfully received or not to be admissible. Its value or weight is for the jury, but an examination of the evidence satisfies me that the prisoner has no ground of complaint in this particular,

and as regards the one or two questions put in the form of a summary or partial summary of what had been previously stated, I do not find that there was in fact any inaccuracy or misstatement of what had not been actually in the same or substantially the same words previously said by the witness.

As to the charge of the learned Judge, it appears to me that, where it dealt with the evidence, it did so in a way quite free from objection, and not in any way calculated to confuse or mislead the jury, either by inaccurate recapitulation or otherwise. Where the learned Judge indicated his view, he was careful to reiterate and impress upon the jury that it was, nevertheless, for them to form their own opinion and conclusion upon the facts. He withdrew nothing from them, and what he said as to the question of the prisoner having had a meal at the restaurant which he had not paid for, and the inference to be drawn from the fact that the prisoner was leaving the restaurant with some property of the owner in his pocket, was, upon the evidence, no more than he had a perfect right to say, leaving it as he did to the jury to form their own conclusions, there being evidence on both points, as bearing upon the conduct of the prisoner, from which conclusions unfavourable to him might be drawn.

In point of law on the subject of provocation and on that of the prisoner's intoxication as tending to reduce the offence to manslaughter, there is no fault to be found with the charge; the jury were instructed fully as to both, and quite as favourably to the prisoner as the evidence warranted.

Upon the whole of the evidence, which details the brief, simple, and uncomplicated facts of the tragedy, it is difficult to see how the jury could have arrived at any other verdict than that which they rendered.

It was urged that the trial should have been postponed, but of the propriety of doing so it was for the learned Judge to determine. It has at all events not been made to appear that the prisoner suffered any injustice by the refusal of a postponement, or that the other persons present when the deceased was slain could have given an account of the transaction more favourable to the prisoner than did the witness who was called for the defence.

On the whole, after having given the case the fullest consideration in my power, I have arrived at the clear conclusion that all the objections relied upon are groundless, and that the motion must be refused.

MEREDITH, J.A., also gave reasons for refusing the motion.

The other members of the Court concurred.

DECEMBER 14TH, 1909.

REX v. KARN.

Criminal Law—Inducing Young Girl to be on Premises for Purpose of being Unlawfully and Carnally Known—Criminal Code, sec. 217—"Unlawfully."

Case reserved by the police magistrate for the city of Toronto.

The defendant was convicted of an offence under sec. 217 of the Criminal Code (taken from the Imperial Act 48 & 49 Vict. ch. 69).

The question stated by the magistrate was: "Does the evidence in this case, on which I believe the evidence of the Crown witnesses, disclose and prove the commission by the defendant, as a matter of law, of the offence intended by sec. 217 of the Criminal Code?"

The section enacts that every one who, being the owner or occupier of any premises or having or acting or assisting in the management or control thereof, induces or knowingly suffers any girl under the age of 18 years to resort to or be in or upon such premises for the purpose of being unlawfully and carnally known by any man, whether such carnal knowledge is intended to be with any particular man or generally, is guilty of an indictable offence, and is liable to the punishment prescribed.

The defendant was the owner or occupier of his business premises in Queen street, Toronto, and there was ample evidence that the two young women who gave evidence on the prosecution, and who were both over 14 and under 18 years of age, were brought by the defendant to his shop aforesaid, and were there kept or invited to remain by him, and did so remain until he had carnal connection with one of them and his clerk carnal connection with the other of them. One of them went to the same place a second time, and there again had carnal connection with the defendant, who paid her therefor on each occasion. The evidence of the girls was sufficiently corroborated as required by sec. 1002 of the Code

The case was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

T. C. Robinette, K.C., and Eric N. Armour, for the defendant.

J. R. Cartwright, K.C., and E. Bayly, K.C., for the Crown.

OSLER, J.A.:— . . . The evidence brings the case within the very words of the section. The defendant invited or induced or knowingly suffered these girls to be upon his premises for the purpose of being, as they in fact were, unlawfully and carnally

known by him and another. What more is required to bring him within the danger of the enactment. . . .

[Reference to Regina v. Webster, 16 Q. B. D. 134, 15 Cox C. C. 775.]

The section is wide enough—"to resort to or be in or upon such premises"—to cover the case as well of a continued practice as of a single instance. . . .

Some point was attempted to be made upon the word "unlawfully;" and it was urged that the unlawful carnal connection which the section proscribes must be something of a character elsewhere declared to be unlawful and penalised by the Code or by some other definite law or the general law of the land; but I do not think so. If there was anything in the point, it was open in the case above cited, and was not likely to have been overlooked.

If the contention were sound, it would simply make the section of no effect. . . .

[Reference to Cowan v. Milburn, L. R. 2 Ex. 230, 236, per Bramwell, B.]

Section 217 is one of a group of sections (211 to 219) which now do deal with and penalise in the specified instances certain acts hitherto only unlawful in the sense that they were breaches of the moral law. . . .

In these sections the words "unlawful" and "illicit" appear to me to be synonymous and to be used, in describing the act penalised, in the sense of "not sanctioned or permitted by law," and as distinguished from acts of sexual intercourse which are not regarded as immoral. See the Oxford and the Century Dictionaries, sub verb. "illicit" and "unlawful."

I refer also to The Queen v. Clarence, 22 Q. B. D. 23.

Question answered in the affirmative, and conviction affirmed.

The other members of the Court concurred; MACLAREN and MEREDITH, JJ.A., stating their opinions in writing.

DECEMBER 14TH, 1909.

REX v. CORRIGAN.

Criminal Law—Magistrate's Conviction under Repealed Section of Railway Act, not Sustainable under sec. 283 of Criminal Code—Differences in Nature of Offence and Mode of Punishment.

Case reserved by the police magistrate for the district of Sudbury, under sec. 1014 of the Criminal Code.

The defendant was prosecuted for a breach of the provisions of sec. 415 of the Railway Act of Canada, R. S. C. 1906 ch. 37, which enacts that "every officer or servant of any company who wilfully or negligently violates any by-law, rule, or regulation of the company lawfully made and in force, of which a copy has been delivered to him, if such violation causes injury to any person or property, or, though no actual injury occurs, exposes any person or property to the risk of such injury . . . is guilty of an offence, and shall, in the discretion of the Court before which the conviction is had, be punished by fine or imprisonment or both."

On the evidence the defendant was found guilty of the offence as charged. No amendment was asked for, and the conviction was recorded on the charge as laid. Subsequently it was brought to the magistrate's attention that the section under which the defendant had been prosecuted and convicted had been repealed, and the magistrate thereupon reserved for the opinion of the Court the following question (among others):—

"3. The conviction having been made under sec. 415 of the Railway Act, which is repealed, should the conviction be allowed to stand under sec. 283 of the Criminal Code, and is it necessary under sec. 283 of the Code that a neglect of duty should be wilful?"

Section 283 enacts that "every one is guilty of an indictable offence and liable to two years' imprisonment who by any unlawful act or by any wilful omission or neglect of duty endangers or causes to be endangered the safety of any person conveyed or being in or upon a railway or aids or assists therein."

The case was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

A. J. Thomson, for the defendant.

J. R. Cartwright, K.C., for the Crown, admitted that the conviction was bad, and declined to argue the case further.

OSLER, J.A.:—It appears to me that when the representative of the Crown, in the exercise of his judgment and discretion, declines to support a conviction, on its face open to such an objection as exists in the present case, this Court ought not to be required to search for reasons to support it. . . .

In its present form the conviction is, of course, bad, the information having been laid, the charge prosecuted, and the conviction recorded under a section of the Railway Act which has been repealed. And it cannot be upheld under sec. 283 of the Criminal Code, because the offence therein mentioned is of a different nature from that mentioned in sec. 415 of the Railway Act.

One is an indictable offence, to be prosecuted by indictment—R. S. C. 1906 ch. 1, sec. 28—for endangering the safety of any person conveyed or being in or upon a railway; the other was an offence punishable on summary conviction—R. S. C. ch. 1, sec. 28—under part XVI. of the Code, for causing, or exposing to risk of, injury to person or property. For the one the limit of the term of imprisonment is two years; for the other it was five. For the one, which is finable in addition to or in lieu of imprisonment under sec. 1035 of the Code, no limit seems to be imposed in respect of the fine: secs. 1028, 1029. For the other the fine was limited—sec. 415 (2)—to $400.

Then also, the prosecution having expressly proceeded and the magistrate having expressly convicted under the repealed clause, there is nothing by which to uphold the conviction under a different statute. . . .

[Reference to Marshall v. Brown, 1 E. & E. 267.]

The first half of the third question in the case reserved must, therefore, be answered in the negative, with the result that the conviction must be quashed.

The other questions it is unnecessary to answer.

The other members of the Court concurred; MEREDITH, J.A., stating his opinion in writing.

DECEMBER 14TH, 1909.

REX v. STEFFOFF.

Criminal Law — Murder — Evidence — Statements of Prisoner —Admission or Confession—Admissibility—Person in Authority—Threats or Inducements—Warning or Caution—Criminal Code, secs. 684, 685.

Case reserved for the opinion of the Court of Appeal by RIDDELL, J., after trial and conviction before him of the prisoner on a charge of murdering one Sinioff.

The trial Judge admitted in evidence certain statements made by the prisoner in answer to questions addressed to him by a policeman through an interpreter. At the time, the prisoner had not been formally placed under arrest, but he was detained by the policeman, and would not have been allowed to go away had he so desired.

The Judge also admitted in evidence certain other statements made by the prisoner in answer to questions addressed to him

through an interpreter by another policeman, after the prisoner had been placed under arrest and taken to the police station.

The substantial questions reserved were whether the evidence of these statements was properly admitted.

The case was heard by Moss, C.J.O., Osler, Garrow, Maclaren, and Meredith, JJ.A.

J. M. Godfrey, for the prisoner.

J. R. Cartwright, K.C., and E. Bayly, K.C., for the Crown.

Moss, C.J.O.:—Upon the argument, counsel for the prisoner conceded that he could not successfully argue against the admission of the evidence of the firstly above mentioned statements; and, upon the facts and circumstances attending the occasion, which were proved before the learned Judge admitted the evidence, there is no reason for doubting the correctness of his ruling.

As to the statements made on the second occasion, it was strongly urged by the counsel for the prisoner that enough was not shewn by the Crown as preliminary to their reception to justify the learned Judge in admitting them in evidence.

The case and evidence shew that the prisoner was placed under arrest and taken to the police station, where the policeman in charge instructed the interpreter to tell the prisoner that, in view of any charge that might be brought against him, he need not answer anything unless he liked, but anything he said would be used in evidence against him. This was all that the policeman told the interpreter to say to the prisoner, and the interpreter told the prisoner exactly what he had been told to tell him. There was no negation in terms of the absence of threats or promises or inducements, but apparently all that actually took place was related. The learned Judge was satisfied that the statements were not made under the influence of threats, promises, or inducements made or held out to the prisoner.

It was contended for the prisoner that the evidence did not go far enough, inasmuch as there was no direct affirmation by the witnesses that no threats, promises, or inducements were made or held out. But all that was required was sufficient proof to satisfy the mind of the learned Judge, and from the facts sworn to before him he could readily draw the inference that the statements were not made under the influence of either hope or fear. The facts proved, themselves, demonstrated that neither coercion nor persuasion was resorted to in order to induce the prisoner to speak.

He was informed that he need not answer any question unless he liked, and he was warned that anything he might say would be used in evidence against him. And nothing appears which would lead to the inference that he was not or might not have been answering the questions voluntarily and of his own free will.

Much stress was laid upon The Queen v. Thompson, [1893] 2 Q. B. 12, 17 Cox C. C. 641. The actual decision was that, on the broad plain ground that it was not proved satisfactorily that the confession was free and voluntary, it ought not to have been received. The language of Cave, J., who delivered the judgment of the Court, must be read with reference to and in the light of the facts appearing in the case. . . . It is clear . . . that the Court did not intend to lay down any new rule. The difficulty in the case was introduced by the statement made to the prisoner's brother, and the doubt whether or not it had been communicated to the prisoner. And the holding was that, in such a case of doubt, it was the duty of the prosecution to go further and shew either that the statement had not been communicated or that the inducement it suggested had clearly been removed before the prisoner's statement was made.

This case has no elements of this kind.

It was also argued that the warning or caution was insufficient, and that everything that is set forth in sec. 684 (2) of the Code should have been said to the prisoner. But these directions are intended for the guidance of a justice holding preliminary inquiry. The following section (685) shews that the law as to giving in evidence admissions, confessions, or other statements made at any time by an accused person, remains unaffected.

The first and second questions, which are the only material ones, should be answered in the affirmative.

OSLER, J.A., gave reasons in writing for the same conclusion. He referred to The Queen v. Thompson, supra; and also to Regina v. Rose, 18 Cox C. C. 717; Phipson on Evidence, p. 228; The King v. Best, [1909] 1 K. B. 692; Regina v. Day, 20 O. R. 209; Roscoe, 13th ed., p. 35.

MEREDITH, J.A., gave reasons in writing for the same conclusion. He referred to Taylor on Evidence, sec. 867; Am. & Eng. Encyc. of Law, 2nd ed., vol. 6, p. 54 et seq.; 12 Cyc., pp. 459, 460.

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

DECEMBER 14TH, 1909

REX v. BOWES.

Criminal Law—Attempting to have Unlawful Carnal Knowledge of Child—Evidence of Child not Given on Oath—Criminal Code, sec. 1003—Corroboration—Sufficiency—Reasonable Evidence to Sustain Conviction.

Case stated by the Judge of the County Court of Brant, heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

L. F. Heyd, K.C., for the prisoner.

J. R. Cartwright, K.C., and E. Bayly, K.C., for the Crown.

OSLER, J.A.:—The only questions reserved by the learned Judge of the County Court are: (1) whether the child's account of the offence attempted by the prisoner was sufficiently corroborated so as to comply with the requirements of sec. 1003 of the Criminal Code, which permits the evidence of a child of tender years to be received under certain circumstances, though not given upon oath; and (2) whether the learned Judge was right in holding that there was sufficient evidence to justify him in finding the defendant guilty.

The defendant was charged with the indictable offence under sec. 302 of the Code, of having attempted to have unlawful carnal knowledge of a child under the age of 14 years, to wit, of the age of 7 or 8 years.

I am of opinion that the evidence of the child was sufficiently corroborated by the evidence:—

(*a*) Of the statement made by her to her mother within an hour or two after the occurrence, a statement volunteered by her and not extracted, so far as the evidence shews, by interrogation or suggestion on the part of the mother: Rex v. Osborne, [1905] 1 K. B. 551.

(*b*) Of the condition of the child's clothing, as testified to by the mother and by the doctor and by Cyril Mulley.

(*c*) Of the fact of the child having been with the prisoner in his waggon or buggy during the time testified to as that during which his improper conduct took place. See the evidence of Atkins and of the prisoner himself.

By the second question the learned Judge meant, I assume, to ask whether there was any evidence or any reasonable evidence on which, if he believed it, he could find the charge proved, as he has not given leave under sec. 1021 of the Criminal Code to apply to

this Court for a new trial on the ground that the verdict was against the weight of evidence. And this question I must answer by saying that there undoubtedly was such evidence, though for myself I must add that I should have been better satisfied if the conviction had been for indecent assault, as it is quite consistent with the evidence that nothing more than that was committed. It was, however, for the learned Judge to draw his own conclusion from the facts proved, and he, no doubt, gave the case full and careful consideration, having in view all the consequences of his finding.

The questions submitted must be answered in the affirmative.

The other members of the Court concurred; Moss C.J.O., and MEREDITH, J.A., expressing their opinions in writing.

DECEMBER 14TH, 1909.

SOVEREIGN BANK v. McINTYRE.

Promissory Note—Action on, by Bank—Defence—Failure of Consideration—Onus—Purchase of Shares—Absence of Allotment—Receipt of Dividends—Estoppel.

Appeal by the defendant from the order of a Divisional Court, 13 O. W. R. 509, affirming the judgment of MAGEE, J., in favour of the plaintiffs in an action on a promissory note.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

J. M. McEvoy, for the defendant.

J. B. McKillop, for the plaintiffs.

MOSS, C.J.O.:— . . . It is not disputed that on the 25th January, 1906, the defendant signed an application for 10 shares of the capital stock of the plaintiffs at $130 per share, and that it was not accepted, and apparently was . . . abandoned by both parties. . . . The application is now produced with the figures $130 changed in pencil to $140, and it is apparently put forward to do duty as an application for 10 shares at $140. The alteration was made at the plaintiffs' head office by the then inspector, but without the knowledge or authority of the defendant.

A letter is produced by the plaintiffs from the inspector to the plaintiffs' manager at London, dated the 19th April, 1906. . . . With that letter appears to have been sent a draft by the head office upon the London branch for $9,380, "in payment of 67 shares at $140 distributed as follows." A list is given, in which

the defendant's name appears, and opposite to it "10 shares." This was not communicated to the defendant, and no immediate action appears to have been taken upon the letter.

Then there is produced a certificate signed by the inspector, dated the 19th April, 1906, purporting to certify that the defendant "holds at this date" 10 shares of the capital stock, "each share being of the sum of $100 (fully paid up), amounting to $1,000."

The next thing that appears is that on the 1st June an entry is made in the defendant's account in the London branch . . . debiting him with $1,400. This was done without the defendant's knowledge or authority.

Neither on the 19th April, 1906, nor before that date, had there been any allotment of shares to the defendant, and, as the evidence shews, there were no shares left unallotted or undealt with by the directors out of which the directors could make an allotment if they had been so minded. Even if there were any such shares, the directors never did deal with them or allot out of them any shares to the defendant.

The certificate of the 19th April is wholly false and misleading. There is not a pretence that at that time the plaintiffs had received any sum of money for shares from the defendant. He had not "fully" or even partly paid for them. Of course the plaintiffs never parted with the custody of the certificate, and the defendant was never made aware of its existence, even after the debit of $1,400 on the 1st June.

There had not in the meantime been any allotment of shares to the defendant by the directors, and there is no action of theirs on record to shew that at any time they assumed to deal with shares otherwise than as directed by the resolutions of the 31st March, 1906. So that on the 1st June, when the debit was made, the defendant was not in fact or in law a shareholder or indebted to the plaintiffs in respect of an allotment of shares to him.

The plaintiffs do not pretend that there was any consideration for the note now sued upon, other than the purchase by and allotment to the defendant of 10 shares of their capital stock. It seems plain that at the time of the debit, on which the plaintiffs base the making of the promissory note, he was not indebted to them in that or any other sum.

The next thing that appears is an entry in the defendant's account of "discount $1,365.30," under date of the 14th July, 1906, on which day it is said the defendant gave a note for $1,400. There is much obscurity about the giving of this note, which is not produced or satisfactorily accounted for. . . .

Bearing in mind the want of allotment, the want of knowledge of the defendant, and the whole situation at this time, how can it be said that the plaintiffs gave the defendant any consideration for a promissory note on the 14th July, if he did then sign one? He had received no shares, and the plaintiffs had not then, and have never since, taken the necessary and only steps that they could take in order to make the defendant the owner and holder of 10 shares for which he had agreed to pay. . . .

The note now sued upon is put forward as a renewal of the note of the 14th July, and it is clear that there was no new consideration for it.

It is not to be overlooked that the onus of shewing want of consideration was on the defendant, and that he did receive and use certain dividend warrants. But the receipt of these did not estop the defendant from shewing the true facts. The plaintiffs' position was not altered to their detriment or to a degree that the return of the dividends would not fully restore. Facts and circumstances have been disclosed sufficient to shift the onus and cast upon the plaintiffs the burden of proving an agreement to accept and pay for the shares at $140, and a valid allotment to the defendant, and that the defendant received the dividend with full knowledge of all the facts and with the intention of accepting the shares and becoming liable therefor. In that the plaintiffs have failed, and the defendant stands in the position of one who never received any consideration for the note sued upon.

Appeal allowed and action dismissed with costs.

OSLER, GARROW, and MACLAREN, JJ.A., concurred; reasons in writing being stated by MACLAREN, J.A.

MEREDITH, J.A., dissented, for reasons stated in writing.

DECEMBER 14TH, 1909.

RE MARSHALL.

Succession Duty—7 Edw. VII. ch. 10 (O.)—Valuation of Property of Deceased—Method of Valuation—Affidavit of Executor—Inquiry by Surrogate Court Judge — Appeal — Fair Market Value at Date of Death—Costs—Counsel Fees.

Appeal by the Treasurer of Ontario under the Succession Duty Act from the judgment of the Surrogate Court of the County of

Kent in respect of the liability to succession duty of the estate of John Harwood Marshall, deceased.

The questions arising on the appeal were as to the value of a certain farm, part of the assets of the estate of the deceased, and as to costs.

The Succession Duty Act of 7 Edw. VII. ch. 10 (now repealed by 9 Edw. VII. ch. 12) was in force when the proceedings which gave rise to the appeal took place. The important sections on the question of value were secs. 3 (1) (h), 7, 8, 10, all of which are found in substance in the existing Act.

The value is to be the fair market value at the date of the death: sec. 8, sub-sec. 5.

The executor valued the farm as worth at the date of the death $20,000.

The farm had a substantial value for agricultural purposes, but was chiefly prized for its supposed oil-producing capacity, not then fully developed, which led the testator to treat it as worth from $30,000 to $35,000.

The Surrogate Court Judge, after inquiry at the instance of the Treasurer, fixed the value at $11,717.87, and the Treasurer appealed.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

M. Wilson, K.C., for the Treasurer.

W. E. Gundy, for the executor.

E. C. Cattanach, for the Official Guardian.

OSLER, J.A.:—I do not regard the proceeding taken before the Surrogate Court Judge at the instance of the Treasurer as an appeal from the executor's valuation. It is not so spoken of. It is rather a general inquiry into the dutiable value of the estate, to be determined by the fair market value of the property at the date of the death of the deceased; and it is, in my opinion, open on the one hand to Treasurer and on the other to the executor to prove what was such fair market value, with an appeal to either party from the decision of the Surrogate Court Judge. The sworn market value must necessarily be an estimate of such value —what, in the best opinion of the executor, the property was worth, and the market value is the fair market value, that is to say, the price which at the prescribed time could probably have been obtained or made in the open market: Belton v. London County Council, 68 L. T. R. 411.

In the face of the clear language of the Act, it cannot be maintained that, if the property at the prescribed date had a fair market value, such value could be reduced by proof of facts which, had they been known, would have made it then less valuable or by proof of subsequent depreciation.

The question remains, what was its fair market value at the date fixed by the Act? And that question must be solved by evidence of what could then have been procured had it been offered for sale. . . .

Difficult though it may be to form an accurate estimate, the evidence seems to me, taken as a whole, sufficient to warrant us in saying what is not too large a sum to fix as the fair market value if the testator had been really minded to sell. I think it reasonably clear that he might have got at least $20,000, though it is also clear that he was not disposed to sell for so small a sum. The executor valued it at $20,000. It is true that this was only an estimate, and that he was not estopped from shewing that it was wrong, but that, considering that it was his sworn valuation, would have to be very clearly made out, and, in my opinion, it has not been done.

The appeal must, therefore, be allowed, and the Surrogate Court Judge's valuation set aside, and that of the executor restored. . . .

A further objection was made to the Judge's order in respect to the allowance of $50 each to the solicitor for the executors and the agent of the Official Guardian. Looking at sec. 10, sub sec. (2), of the Act, which provides that the costs of all proceedings before the Judge shall be on the County Court scale, and at item 153 of the County Court tariff, it would appear that there was no jurisdiction to direct payment of higher counsel fees than $25, and the learned Judge's order in this respect must be varied accordingly.

In other respects the order as to the costs below will stand; and success on the appeal being divided, there will be no order as to the costs of the appeal.

The other members of the Court concurred; MEREDITH, J.A., expressing his opinion in writing.

HIGH COURT OF JUSTICE.

MEREDITH, C.J.C.P. DECEMBER 2ND, 1909.

ROBERTSON v. CITY OF TORONTO.

Municipal Corporations—Sale of Corporation Lands—Action by Ratepayer to Set aside—Sale at Less than Value Placed upon it by Assessor—Fair Value—Absence of Fraud.

Action brought by John Ross Robertson, on behalf of himself and all other ratepayers of the city of Toronto, to have it declared that a certain sale made by the defendants the Corporation of the City of Toronto to the defendants the National Iron Works Limited, of certain lands in the city of Toronto, being part of what was known as Ashbridge's Bay, was a violation of the provisions of the Municipal Act, as being in the nature of a bonus granted by the council without the assent of the ratepayers, and that the by-law and resolution of the council were void, and for an order that they should be quashed and set aside, and for judgment quashing the same accordingly, and for an injunction restraining the defendants the city corporation, their officers, servants, and agents, from consummating the sale, and from delivering possession of the lands to the defendants the National Iron Works Limited, and for judgment setting aside the conveyance to the defendants the National Iron Works Limited, of the said premises.

Some weeks before the trial, the plaintiff moved for an interim injunction to restrain the defendants as above, but his motion was unsuccessful. Before the trial the sale was completed by the delivery of the deed, payment of the purchase money, and the defendants the National Iron Works Limited taking possession of the property.

The action was tried before MEREDITH, C.J.C.P., without a jury.

James Bicknell, K.C., and F. R. Mackelcan, for the plaintiff.

I. F. Hellmuth, K.C., and H. Howitt, for the defendants the city corporation.

G. F. Shepley, K.C., and C. Millar, for the defendants the National Iron Works Limited.

Bicknell. The question is whether the aldermen knew they were selling the land for less than its value. Under the Municipal Act no bonus is to be given for the purpose of bringing industries to the city, and to the extent to which the value of the

land was in excess of the price obtained the city corporation were giving a bonus without obtaining the assent of the ratepayers. That is the simple question of law; the statement of facts your Lordship has.

MEREDITH, C.J.:—What right have you to inquire into the action of the city?

Bicknell. The case of Phillips v. City of Belleville, 9 O. L. R. 732, 11 O. L. R. 256.

MEREDITH, C.J.:—They are not trustees.

Bicknell. We represent the cestuis que trust.

MEREDITH, C.J.:—I do not think so. Just as in the case of the province, the legislature legislates, and the government is the administrative body, so in a similar way, though in a lesser degree, and subject to control, a municipal council is a branch of the government of the country.

Bicknell. Your Lordship will remember what was laid down by the Divisional Court and by the Chancellor in Phillips v. City of Belleville.

MEREDITH, C.J.:—That was on a different view of the policy. However, in my view, it will not be necessary to discuss that question. I do not think you have made any case whatever. In the first place, I do not think it was a sale at an undervalue. I think it was a fair sale—just such a sale as a private owner would have made in the circumstances of the case. It is not a case of bonus. It is the ordinary case of an owner of property taking into consideration the advantages that would be gained by making a sale to some one who would establish an important industry—that it would give a value not only to the property immediately adjoining it, a large tract belonging to the city, but to all the city property, and be of advantage to the city generally. This cannot in any sense come within the bonus sections (if I may so call them) of the Municipal Act. I do not doubt that if any private person or corporation had owned this property, he or it would, upon this evidence, and in view of the advantages to the property from the establishment of so important an industry as was proposed, have sold it at less than the value that was placed upon it by Mr. Forman. It must be borne in mind too that this was a property which, as Mr. Forman says, and as one must know, it was extremely difficult to value. It may be possible in the future to form a better judgment on that point. Taking into consideration the advantages which would accrue to the city, it would be compensated or more than compensated for the difference in the value, even assuming that the city council was bound to take the

valuations that were put upon it by Mr. Forman. I entirely dissent from the proposition that a municipal council is not warranted, if in its judgment it is prudent to do so, in selling at even a lower price than that which the officer of the corporation puts on the property. It would be impossible to carry on the affairs of a municipality like this, if any ratepayer, simply because he thought the price which was being paid for a particular property low, could intervene, and by injunction restrain the corporation from carrying out the sale. I think the Court should be slow to interfere in matters of that kind, and that they should not interfere unless there is clear evidence of evasion of the law, or clear evidence of fraud, which is entirely absent in this case. I think the case entirely fails, and that the action must be dismissed.

Bicknell. I, of course, have not gone into the question of valuation; because we had to take the valuations that were put upon it by the council at the time. I know your Lordship could not decide any question of that kind.

MEREDITH, C.J., IN CHAMBERS. DECEMBER 6TH, 1909.

ROSS v. VOKES.

Costs—Scale of—Jurisdiction of County Courts—Trespass to Land —County Courts Act, sec. 23 (1), (8).

Appeal by the plaintiff from the ruling of the junior taxing officer at Toronto that the costs were to be taxed on the County Court scale.

The action was brought by the plaintiff, as the owner of lot 37 on the west side of Sidney street in the city of Toronto, to recover damages occasioned to him owing to the defendant having placed buildings on a street called Marlborough avenue, into which Sidney street ran, and which led to Avenue road, and thereby obstructed the plaintiff's access to and from Avenue road by way of Marlborough avenue and that means of ingress to and regress from the plaintiff's lot, and these damages were in the statement of claim stated to be $200, and the plaintiff also claimed a mandatory order requiring the defendant to remove the obstruction complained of.

No statement of defence having been delivered, the plaintiff moved for and obtained judgment by which the defendant was restrained from continuing the obstructions and ordered forthwith to remove them, and also ordered to pay the costs of the action.

The taxing officer ruled that the action was one within the proper competency of the County Court and that the costs of the plaintiff were to be taxed on the scale of that Court.

J. R. Roaf, for the plaintiff.

H. C. Fowler, for the defendant.

MEREDITH, C.J.:—I should have agreed with the ruling, if paragraph 1 of sec. 23 of the County Courts Act were the provision applicable.

By that paragraph jurisdiction is conferred "in all personal actions where the debt or damages claimed do not exceed the sum of $200."

The plaintiff's action is a personal action to recover damages for a nuisance, and the claim for injunction is a remedy which the County Court may grant in any action within its jurisdiction, and such an action, where the damages claimed do not exceed $200, is within the proper competency of the County Court. For this proposition, in addition to the cases mentioned by the taxing officer, Martin v. Bannister, 4 Q. B. D. 212, 491, may be referred to.

The generality of the provision of paragraph 1 is, however, controlled by paragraph 8, which provides that the County Court is to have jurisdiction "in actions for the recovery of or trespass or injury to land where the value of the land does not exceed $200."

The nuisance of which the plaintiff complained was one causing injury to his land, and his right to sue was dependent on his having suffered injury differing in kind from that which the publi csustained in consequence of this nuisance: Bickett v. Midland R. W. Co., L. R. 2 C. P. 82.

As the plaintiff's land is shewn to be of greater value than $200, the action was not within the jurisdiction of the County Court, and he is entitled to his costs on the High Court scale.

The appeal will therefore be allowed, and the defendant must pay the costs of it.

MACMAHON, J. DECEMBER 10TH, 1909.

DOMINION LINEN MANUFACTURING CO. LIMITED v. LANGLEY.

Contract—Sale by Liquidator of Stock in Trade of Insolvent Manufacturing Company—Goods Included in Inventory not Delivered—"Subject to Shorts and Longs"—Breach of Contract—Damages—Measure of.

Action for damages for breach of a contract, or for conversion.

On the 30th January, 1906, an order was made under the Dominion statute for the winding-up of the Dominion Linen

Mills Limited, an incorporated company, carrying on a manufacturing business in Ontario, and the defendant was appointed liquidator.

Some time before the order, the company had hypothecated all their stock of manufactured linens to the Crown Bank as security for advances. An inventory of the stock was prepared by the former officials of the company, and the stock was sold by the liquidator to one Todd, who on the 26th April, 1906, assigned his rights as purchaser to the plaintiffs.

The agreement for sale provided, as to parcel 3, being all the company's raw material, goods in process of manufacture, and manufactured goods, as per inventory, that the price should be 80 cents on the dollar on the inventory value, "subject to shorts and longs." All the properties (with one exception, not material) were to be free from incumbrance.

Amongst the articles in the inventory, put therein as being "at bleach," were certain unbleached goods which had been sent to Lumsden & Mackenzie, Scotland, to be bleached, and which, therefore, were not delivered to Todd or his assignees, the plaintiffs.

On the 6th May, 1906, the defendant wrote to Lumsden & Mackenzie: "I, as liquidator, have no objection to your disposing of the goods in the highest market, applying the proceeds of such sale on your claim (for the expense of the bleaching) and advising me accordingly." On the 8th June, 1906, Lumsden & Mackenuzie wrote to the defendant that they had sold the goods for the highest offer made.

On the 29th May the plaintiffs sent to Lumsden & Mackenzie a draft for £87 10s. 10d, the amount of their claim against the old company for the amount due for bleaching these goods. But this letter did not reach Lumsden & Mackenzie till after the goods had been sold.

An admission was made by the defendant and recited in an order made by the Master in Chambers on the 25th June, 1909, "that the goods sued for (in this action) were included in the inventory accompanying the agreement of sale between the defendant and F. C. Todd, and assigned by the said Todd to the plaintiffs."

In the same order an admission was also recited that the following was a correct statement of the law of Scotland applicable to this transaction: "Messrs. Lumsden & Mackenzie had no right at common law to sell the goods in question without the authority of the Court or the consent of the owners. According to the law of Scotland, any one employed to perform a piece of work on

a particular subject has a right to retain the subject till he is paid for his work. It has, accordingly, been decided in the Scottish Courts that a bleacher has this right, but has no right to sell the subject. If the retention of it is causing him expense, he may intimate to the owner that he intends to sell; if the owner refuses to relieve of the goods, he may sell, or he may apply to the Court for power to sell. But he cannot do so without these formalities."

Two causes of action were alleged in the statement of claim: the first was on the contract for not delivering the goods sold to the plaintiffs' assignor, and which were included in the inventory and paid for; the second was for the conversion by the defendant in the consent he gave to Lumsden & Mackenzie to sell the goods to satisfy the lien for bleaching amounting to £87 10s 10d.

J. Bicknell, K.C., and J. W. Bain, K.C., for the plaintiffs.

G. F. Shepley, K.C., for the defendant.

MacMahon, J.:—Mr. Shepley contended that the plaintiffs could not succeed on the first ground, as the sale was "subject to shorts and longs," which protected the defendant from any shortage of goods mentioned in the inventory. I do not understand the meaning of the words to be as contended for. No evidence was given at the trial as to the meaning of the words in such a contract. But I understand that if some pieces of cloth are included in the invoice as containing 25 yards, when their actual measurement is 20 yards, and other pieces are inventoried or invoiced as containing 20 yards, when in fact they measure 25 yards, the buyer accepts the short pieces, and the loss thus sustained is compensated for by the long pieces, and in this way a rough and ready adjustment is effected. . . . It would be a total perversion of language to say that 149 pieces of goods, containing 4,332 yards, and valued in the inventory at $1,084.94, should be considered as coming under the designation of "shorts and longs."

As the goods were sold by the defendant as "free from incumbrances," and were paid for by Todd, the plaintiffs' assignor, and as the goods were not delivered by the defendant, he is liable for a breach of his contract.

The goods were put in the inventory at the mill manufacturers' prices, and I assess the plaintiffs' damages at $1,084.94, for which they are entitled to judgment and costs.

CLUTE, J. DECEMBER 11TH, 1909.

TRUSTS AND GUARANTEE CO. v. COOK.

Deed—Conveyance of Land—Gift—Action by Administrators of Donor to Set aside—Lack of Independent Advice—Failure of Evidence to Establish Execution by Marksman—Absence of Fraud—Costs.

Action by the administrators with the will annexed of the estate of John Malloy to set aside a deed of conveyance of 50 acres of land from John Malloy to the defendant Andrew Cook, as fraudulent and void, the principal grounds being that the deed was prepared at the instance of the defendant and executed by Malloy without independent advice and without full and proper explanation; that it was not in fact his act and deed; and was procured by undue influence and fraud.

The deed was dated the 28th January, 1909, and was registered on the 16th February, 1909. John Malloy was an old man, 84 at least; neither he nor the defendant could read or write. Malloy made a will on the 5th May, 1909, and died on the 17th May, 1909. The original instructions given by the defendant to a conveyancer were to prepare a will in his (defendant's) favour for Malloy to sign, but the conveyancer suggested a deed, and prepared the deed in question.

F. Stone and R. S. Brackin, for the plaintiffs.

O. L. Lewis, K.C., for the defendant.

CLUTE, J. (after stating the facts):—The testator was of sound mind and memory at the time he is said to have made the deed and up to the time that the will was executed, although weak in body and his hearing somewhat affected from age.

I find that there was no evidence of direct undue influence on the part of the defendant, i.e., beyong what may be inferred. . . .

I am in grave doubt whether Malloy ever instructed the defendant to have the will prepared as he alleges, or whether the change from the will to the deed was ever communicated to Malloy or not, or whether the deed was ever read over or explained to him or not.

I am of opinion that the onus was clearly upon the defendant to satisfy the Court of the fairness of the transaction and that Malloy fully understood what he was doing. . . . In such a case I do not think it is sufficient, where the validity of the deed itself is in question, to produce a registered copy and supplement that by alleged conversations from which the Court is asked to

find as a fact the due execution of the instrument attacked. At most, the registration is made prima facie evidence of the execution as a fact; not that the grantor understood the same: Canada Permanent Loan and Savings Co. v. Page, 30 C. P. 1. . . .

In my opinion the defendant has not discharged the onus cast upon him . . . of clearly establishing that the transaction is one which, under all the circumstances, ought to be sustained.

. . . .

[Reference to Barry v. Butlin, 2 Moo. P. C. 480; Fulton v. Andrews, L. R. 7 H. L. 460; Adams v. McBeath, 27 S. C. R. at p. 23; Collins v. Kilroy, 1 O. L. R. 503; British and Foreign Bible Society v. Tupper, 37 S. C. R. 123; Mayrand v. Dussault, 38 S. C. R. 480; Anderson v. Elsworth, 3 Giff. 154; Cooke v. Lamotte, 15 Beav. 234, 239; Walker v. Smith, 29 Beav. 394; Coots v. Acworth, L. R. 8 Eq. 558, 567; Huguenin v. Baseley, 14 Ves. 273; Forshaw v. Wellesley, 30 Beav. 343; Bridgeman v. Green, 2 Ves. Jr. 627; Turnbull v. Duval, [1902] A. C. at p. 435; Chaplin v. Brammall, [1908] 1 K. B. 233; Slater v. Nolan, I. R. 11 Eq. 367, 386; Mason v. Seney, 11 Gr. 447; Smith v. Alexander, 12 O. W. R. 1144; Wigmore on Evidence, Can. ed., vol. 4, sec. 2503.]

Applying the foregoing authorities to the present case, I am clearly of opinion that—having regard to the position of the parties, the age, condition, and helplessness of Malloy, the fact that, so far as there was evidence at all, it is to the effect that he desired a will and not a deed—that the transaction is in substance a gift from Malloy to the defendant, and that the defendant procured the preparation of the deed—the onus was clearly upon him to establish the perfect fairness of the transaction, and that the donor clearly and perfectly understood what he was doing, and realized that by signing the deed he was in effect giving away all his property.

I think there should have been a power of revocation in the deed, under certain conditions; that the rights and obligations of the parties should be clearly explained to and understood by the donor. The defendant having failed to shew that Malloy understood the transaction, and realised what he was doing, has failed, I think, in establishing the fact of a valid transfer of the property.

I am left wholly in doubt as to what really took place, with a grave suspicion, amounting to probability, that Malloy did not understand what he was doing, and only supposed that he was making some arrangement which would last during his lifetime.

I think this is a case in which a strong inference against the defendant ought to be drawn from the fact that he did not see fit

to put in the box the witnesses who could have explained what took place when Malloy is said to have put his mark to the deed.

The transaction cannot stand. The plaintiffs are entitled to have the conveyance set aside and the registration thereof cancelled.

Having regard to all the circumstances of the case, and that I find no actual fraud or active undue influence on the part of the defendant, and that the evidence shews that he treated Malloy kindly and cared for him during his lifetime, I do not think there should be costs.

DIVISIONAL COURT. DECEMBER 11TH, 1909.

JONES v. TORONTO AND YORK RADIAL R. W. CO.

Street Railways—Injury to Person Crossing Track—Negligence—Failure to Give Warning—Contributory Negligence—Failure to Look for Approaching Car—Evidence—Question for Jury—New Trial.

Appeal by the plaintiff from the judgment of MACMAHON, J., at the trial, withdrawing the case from the jury at the close of the plaintiff's evidence, and dismissing the action, which was brought to recover damages for injuries sustained by the plaintiff, owing, as he alleged, to the negligence of the defendants, whereby he was run over by a car as he was crossing Yonge street, south of Eglinton avenue, and seriously injured. The railway track was on the west side of the road. The plaintiff was going north, and, desiring to see a person upon the west side of the road, he stopped his horse and waggon upon the east side. When getting out of the waggon he saw that a car was standing about 550 feet north upon a siding. The plaintiff then started to cross the track, going in a south-westerly direction. He was somewhat hard of hearing. He had passed between the rails and was almost over the track when a car, coming south, struck him. There was evidence that the gong did not sound, that the whistle was not blown, and the speed of the car was not slackened. The plaintiff could have seen the car approaching, had he turned and looked; the motorman must have seen him.

The trial Judge held that the plaintiff was the author of his own injury.

The appeal was heard by MULOCK, C.J.EXD., CLUTE and LATCHFORD, JJ.

John MacGregor, for the plaintiff, contended that there was evidence to go to the jury of negligence on the part of the defendants in travelling at too high a rate of speed, in not keeping a proper look-out and having the car under control, in not giving warning to the plaintiff, and in not applying the brakes.

C. A. Moss, for the defendants.

CLUTE, J., referred to Commonwealth v. Temple, 14 Gray (Mass.) 69, 75; Haight v. Hamilton Street R. W. Co., 29 O. R. 279, 281; Driscoll v. West End Street R. W. Co., 159 Mass. 142, 146; Toronto R. W. Co. v. Gosnell, 24 S. C. R. 582, 587; Hegan v. Eighth Avenue R. R. Co., 15 N. Y. 380; Vallee v. Grand Trunk R. W. Co., 1 O. L. R. 224; Toronto R. W. Co. v. Mulvaney, 38 S. C. R. 327; Wright v. Grand Trunk R. W. Co., 12 O. L. R. 114; Misener v. Wabash R. W. Co., 12 O. L. R. 71, affirmed (Wabash R. R. Co. v. Misener), 38 S. C. R. 94; Peart v. Grand Trunk R. W. Co. (Jud. Com.), 10 O. L. R. 753; Brill v. Toronto R. W. Co., 13 O. W. R. 114; and said that he had not been able to find any authority directly in point; each case must be decided upon its own facts and circumstances; applying, however, the general principles laid down in the above cases, he could not say that there was no evidence to submit to the jury of negligence on the part of the motorman in not sounding the gong and exercising more care in keeping a look-out and applying the brakes before the car struck the plaintiff.

Appeal allowed and new trial directed. As the defendants expressly took their chances of the result, the plaintiff should have the costs of the first trial and of this appeal, forthwith after taxation.

MULOCK, C.J., said that the plaintiff's explanation for not looking northerly was that he was familiar with the defendants' practice in using the siding for the purpose of enabling cars to pass each other, and he assumed that the car was standing still for the purpose of allowing a car from the south to pass it. He assumed that the car waiting on the siding was to allow another from the south to pass it at that point. Accordingly, when about to cross the track, apprehending danger from the south only, his attention was wholly turned in that direction. Was he negligent in not looking also to the north? The motorman had a clear view of the track. Was the plaintiff to assume that the motorman would start his car from a point enabling him to see the plaintiff walking in a direction that would soon bring him upon the track, and, nevertheless, that the car would be driven at such a speed as to overtake him, and that without giving any warning of its

approach by gong or whistle? The question admits of but one answer.

New trial with costs.

LATCHFORD, J., concurred.

DIVISIONAL COURT. NOVEMBER 11TH, 1909.

MILLER v. TEW.

Landlord and Tenant—Assignment for Benefit of Creditors—Preferential Lien—Landlord and Tenant Act, R. S. O. 1897 ch. 170, sec. 34—Destruction of Tenant's Goods by Fire after Assignment—Substitution of Insurance Moneys for Goods in Hands of Assignee.

Apeal by the defendant from the judgment of BOYD, C., 14 O. W. R. 207, upon a stated case.

The question was whether the plaintiff, a creditor of S. E. Mitchell for $300, being the amount of rent owing by him for one year immediately preceding his assignment for the benefit of his creditors, was entitled to a preferential lien therefor on moneys in the hands of the assignee, the defendant.

On the 2nd November, 1908, the defendant, as assignee, entered into possession of the demised premises, and on the 4th November, 1908, the goods on the premises, the stock in trade of Mitchell, assigned to the defendant, were destroyed by fire. At the time of the execution of the assignment the goods were insured against loss by fire, and the policies were assigned to the defendant, who collected the insurance moneys, $6,450.

The Chancellor allowed the claim of the plaintiff to rank as a preferred creditor in respect of the $300, holding that the landlord's preferential lien attached to the insurance moneys in the assignee's hands.

The appeal was heard by MULOCK, C.J.Ex.D., MACLAREN, J.A., and CLUTE, J.

M. H. Ludwig, for the defendant.

Featherston Aylesworth, for the plaintiff.

MULOCK, C.J.:— . . . With all respect, I find myself unable to accept the Chancellor's conclusion. Nor, in my opinion, are the right of the parties affected by the circumstance that the moneys in the assignee's hands are the proceeds of the insurance of the insolvent's goods upon which the landlord had a lien for rent. . . . .

[Reference to Bunyon's Law of Fire Insurance, 5th ed., pp 389, 400; Lees v. Whitely, L. R. 2 Eq. 143; Columbia Insurance Co. v. Laurance, 10 Peters at p. 511; Lynch v. Dalyell, 3 Bro. P. C. 497; Marshall on Insurance, p. 803.]

The fact that the moneys in the assignee's hands are the proceeds of the insurance effected by the tenant upon the chattels which had been distrainable by the landlord, at least up to the time of the assignment, gives to the landlord no right to a lien thereon; and the question involved in this appeal is whether, irrespective of the source from which the assignee in fact derived the fund in question, the landlord is, under the other circumstances of the case, entitled to a preferential lien thereon.

It was argued that the effect of the assignment was to place the estate in custodia legis, and, as in the case of an estate in the hands of a receiver, to deprive the landlord of his right to distrain, and In re McCracken, 4 A. R. 486, is relied on in support of this proposition. That case, however, can have no application here, as it turned largely upon the effect of sec. 125 of the Insolvent Act of 1875. . . . The Act under which the debtor here made the assignment contains no such provision. . . .

[Reference to Linton v. Imperial Hotel Co., 16 A. R. at p. 346.]

I am, therefore, of opinion that the goods upon which the plaintiff might have levied did not, upon the assignment, pass in custodia legis.

The remaining point for consideration is whether, the plaintiff not having distrained, and the goods having ceased to exist, the plaintiff has a preferential lien within the meaning of sub-sec. 1 of sec. 34 of the Landlord and Tenant Act. . . .

[Reference to Mason v. Hamilton, 22 C. P. 190, 411, 413, 416; Re McCracken, 4 A. R. at p. 492.]

It appears to me that the intention of the sub-section under consideration was merely to limit the amount of rent in respect of which the landlord should retain his lien, and not to enlarge his right by entitling him to resort to property not distrainable by him. . . .

The sub-section, in my opinion, makes no change in the law except to the extent of cutting down the landlord's common law right to a lien from six years' rent to one year's, and rent subsequent to the assignment. In other respects the rights of parties are not affected by the sub-section. It would thus follow that, the only funds in the assignee's hands being the insurance moneys, which are not the proceeds of the tenant's goods subject to the landlord's lien, there is no fund to which the lien applies; and,

therefore, the landlord is not entitled to any priority, but must, in respect of his debt, rank ratably with the other unsecured creditors.

Appeal allowed with costs.

CLUTE, J.A., agreed, stating reasons in writing, and referring to Tew v. Traders Bank of Canada, 19 O. L. R. 74.

MACLAREN, J.A., also agreed.

DIVISIONAL COURT. DECEMBER 15TH, 1909.

MANDLEY v. TOWNSHIP OF MONCK.

Municipal Corporations — Ditches and Watercourses—Construction of Road Ditches by Corporation—Liability for Flooding Lands in Neighbourhood — Ditches and Watercourses Act — Award of Township Engineer—Jurisdiction—Damages.

Appeal by the plaintiff from the judgment of BRITTON, J., 14 O. W. R. 65, dismissing the main part of the plaintiff's claim in an action brought to have it declared that certain awards made under the Ditches and Watercourses Act were null and void, and for damages for wrongfully causing water to be discharged upon the plaintiff's premises; for an injunction restraining the defendants from continuing to flood the plaintiff's land; and for a mandamus requiring the defendants to construct a ditch to carry the water to a proper outlet.

BRITTON, J., gave judgment for the plaintiff for $40 without costs.

The appeal was heard by MULOCK, C.J.Ex.D., CLUTE and SUTHERLAND, JJ.

O. M. Arnold, for the plaintiff.

A. Mahaffy, K.C., for the defendants.

The judgment of the Court was delivered by CLUTE, J., who, after setting out the facts, said that the evidence was quite sufficient to support the findings of the trial Julge; and proceeded:—

Although the plaintiff initiated the proceedings for both awards, and did not appeal therefrom or apply for reconsideration or to have the same enforced, he seeks now to disregard the provisions of the Ditches and Watercourses Act, and all that has been done thereunder, and brings this action for the relief which he might have sought under the Act. I am of opinion that he cannot do so. . . .

[Reference to Dalton v. Ashfield, 26 A. R. 363; Re McLellan and Township of Chinguacousy, 27 A. R. 355.]

The question is, had the engineer jurisdiction to make the award; if he had, his award cannot be reviewed by the Court: York v. Township of Osgoode, 24 O. R. 12.

The defendants are not liable for work done in accordance with the award made by the township engineer under the Ditches and Watercourses Act: Seymour v. Township of Maidstone, 24 A. R. 370.

It is further objected to the award that the outlet of the ditches passes through land not owned at the time by any one of the petitioners, and that the engineer had no authority to direct the drain to be constructed except upon lands mentioned in the requisition. . . . I think, under all the circumstances, it must be assumed that authority was obtained for the outlet as it now exists, and that this objection also fails.

The damages suffered by the plaintiff for non-repair, if any, as found by the trial Judge, are very small. The amount of damages found by the trial Judge for the year 1904 fairly covers all the damages to which the plaintiff is entitled prior to the award, and ought not to be disturbed.

Appeal dismissed with costs.

MOFFAT v. GLADSTONE MINES LIMITED—MEREDITH, C.J.C.P., IN CHAMBERS—DEC. 10.

Pleading—Amendment.]—An appeal by the plaintiff from the order of the Master in Chambers, ante 223, was dismissed with costs to the defendants in any event. G. H. Kilmer, K.C., for the plaintiff. R. C. H. Cassels, for the defendants.

OAKLEY v. SILVER—MASTER IN CHAMBERS—DEC. 13.

Third Party Procedure.]—Motion by one Bunker, upon whom the defendant Silver had served a third party notice, for an order setting aside the notice. The action arose out of a sale of mining claims, as to which the defendant Silver and Bunker were partners. Bunker sold out to Silver, who sold to the plaintiffs; the latter now alleged misrepresentation of the nature of the claims and also shortage, and asked for rescission and repayment. The Master held that Bunker should not have to bear the burden of supporting the sale to the plaintiffs. He referred to Miller v. Sarnia Gas Co., 2 O. L. R. 546. Order made as asked, with costs. W. H. McGuire, for Bunker. E. P. Brown, for defendant Silver.