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COURT OF APPEAL.

MACLAREN, J.A., IN CHAMBERS. NOVEMBER 2ND, 1911.

STAVERT v. McMILLAN.

Appeal—Privy Council—Security—Amount of—More than one Respondent—10 Edw. VII. ch. 24, sec. 3.

Motion by the defendants in this and other actions for the allowance of an appeal to the Judicial Committee of the Privy Council from the judgment of the Court of Appeal, ante 6.

F. Arnoldi, K.C., and J. Parker, for the defendants.
J. Bicknell, K.C., for the plaintiff.
A. W. Anglin, K.C., for the third parties.

MACLAREN, J.A.:—The defendants have deposited in Court the sum of $2,000 as security for their appeal to the Privy Council from the judgment of this Court, and have moved for the allowance of their appeal. They have given notice both to the plaintiff and to the third parties, the Sovereign Bank, who oppose the application on the ground that security to the amount of $2,000 should be given in favour of each of them.

Only one judgment was given, and I am of opinion that, under a proper construction of sec. 3 of the Privy Council Appeals Act, 10 Edw. VII. ch. 24, such deposit of $2,000 is sufficient. Nothing has been made to appear before me that would shew that such security is insufficient.

In consequence, I declare my satisfaction therewith, and approve of and allow such security. Costs of the motion to be costs in the appeal.

HIGH COURT OF JUSTICE.

BOYD, C. OCTOBER 27TH, 1911.

MONTREUIL v. WALKER.

Will—Construction—Devise—Life Estate—Remainder in Fee to Children of Life Tenant—"Issue"—Title to Land—Ejectment—Improvements under Mistake of Title—Compensation.

Action to recover possession of land.

A. H. Clarke, K.C., for the plaintiffs.
J. H. Coburn, for the defendants.

BOYD, C.:—Cases do not much help, according to the modern view, in the interpretation of wills: of those cited I think Chandler v. Gibson, 2 O.L.R. 442, is more in point than Sisson v. Ellis, 19 U.C.R. 559, 567, where the prevalent clause was: in case the daughters "shall die without leaving issue," which was not limited by the previous use of the word "children," so that the Court could find that the intention of the testator was, that his estate should not go over to his brothers, while any of his descendants were living. In this case, the intention is, that it shall go over if the son dies childless.

The construction of this will should conform to the testator's intention, which appears to me to be plainly expressed. He gives a life estate and no more to his son Honore, with remainder in fee simple to his children, vesting as each comes into existence. If Honore dies childless, the estate in remainder goes over in fee simple to the other sons and daughters of the testator. I read the word "issue" from its context as synonymous with "children."

The result is, upon the will, that the defendants are without title and that the land is vested in the children of Honore.

I think the same result would follow even if the estate in Honore was an estate tail; for, upon the evidence, I cannot see that such an estate has been effectually barred.

But, either way, it is conceded that the present occupants are entitled to be compensated for their improvements made under mistake of title, and it will be referred to the Master at Sandwich for that purpose, who will deal with the costs of reference: costs to the hearing should be paid by the defendants.

There was evidence of pedigree to be taken, but it may be that nothing further needs to be argued on that branch of the case.

DIVISIONAL COURT. OCTOBER 27TH, 1911.

SOVEREIGN BANK OF CANADA v. CLARKSON.

Contract—Pledge of Shares to Bank as Security for Indebtedness—Written Agreement—Exclusion of Extrinsic Evidence—Effect of Agreement—Extension of Time—Sale of Securities by Bank—Notice—Authority to Sell at Fixed Price—Sale at Lower Price—Liability to Account for Difference.

An appeal by the defendant Clarkson from the judgment of FALCONBRIDGE, C.J.K.B., in favour of the plaintiffs in an action upon promissory notes.

The appeal was heard by BOYD, C., BRITTON and MIDDLETON, JJ.

G. Lynch-Staunton, K.C., and R. B. Henderson, for the defendant Clarkson.

J. Bicknell, K.C., for the plaintiffs.

R. F. Segsworth, for A. F. Maclaren, brought in as a third party.

The judgment of the Court was delivered by MIDDLETON, J.:—Much time was consumed in this case by the failure to regard the wholesome rule that where there is a written contract all preliminary negotiations leading up to it are merged in it, and, in the absence of fraud or a claim to rectify, it is to be presumed to contain the entire engagement of the parties and to govern their rights. To this general rule there are, no doubt, exceptions—it is not obligatory upon the contracting parties to put the whole agreement in writing; but, speaking generally, the written document will be found to contain the whole agreement. A perusal of the correspondence in this case satisfies me that this is so here; and the document of the 28th April, 1908, governs the rights of the parties as to the matters therein dealt with.

Clarkson and Maclaren owed the bank a large sum. The bank as security held certain stock, part of which was pledged by Clarkson and part by Maclaren.

Clarkson had pledged, inter alia, 10,000 shares of Crown Reserve. The bank sold this on the 10th July, part at 53, part at 53½ ex dividend, and received a 4 per cent. dividend. The question argued before us concerned this sale. It is said that this sale was improper, as the agreement operated to extend the time for payment of the debt, and the extended time had not expired, and because the sale was without notice.

The stock in question had been transferred to the bank in December, 1907. The account was then overdue, and the bank was not willing to grant any extension on the strength of this security. The letter acknowledging the transfer of this stock (12th December, 1907), threatened suit unless a large payment was made immediately. As the result of the correspondence, Clarkson conveyed to the bank certain real estate and certain other stock, subject to "the existing and continuing claim of the Bank of Hamilton, now amounting to $45,000, and unpaid purchase-money on the real property."

The agreement in question recited that this property was to be held as security for the indebtedness in question, "all of which is overdue." No extension of time is given, but it is provided "that if the moneys so owing as aforesaid be not materially reduced and repaid within a period of three months" the bank may, on ten days' notice, sell the lands, and, on default of payment and 15 days after notice, may sell the lands and stocks thereby hypothecated.

There is nothing in this agreement from which an extension of time can be inferred; the three months' delay was given with reference to the lands and stock then pledged, and had no reference to the securities held by virtue of prior hypothecation. This agreement was not in fact delivered till the 29th June.

In the meantime the question of realising on this Crown Reserve stock had been the subject of discussion.

On the 27th April (the day before the day of the date of the agreement), Clarkson saw Boland, the bank's solicitor, and on the 28th Boland wrote Clarkson's solicitor stating: "He," Clarkson, "gave us instructions to sell the Crown Reserve stock when it reaches 50, and you had better get a letter in writing authorising us to sell this."

In answer to that, on the 1st May, the solicitor, after discussing the probable increase in price of this stock and the desirability of holding till 75 is reached, adds: "I will have a letter from him, however, on his return, giving you permission to sell." After some other correspondence as to the security and as to this stock, which makes it plain that the giving of the further secur-

ity was not intended to delay realisation, on the 19th the bank solicitor wrote: "The bank insist that Clarkson should sell that Crown Reserve stock, and, unless he places some reasonable price on it now, they will sell it themselves. I think he ought to let it go at the present price, 57. I am not sure whether this can be got or not; but, in any event, the order must be given at once, otherwise we sell without any notice." Clarkson replied to this letter on the 21st: "I expect to be in Toronto the latter part of this week or the first of next and will take the matter up with you personally. In the meantime, however, you can sell Crown Reserve at 57. I think it advisable to sell, and this will be your authority for so doing."

It is contended that this authority is limited by the words "in the meantime," and that the only authority was to sell at 57 at any time before the interview promised. I do not agree with this. The bank had on foot negotiations touching many matters. The interview would deal with them all—"in the meantime" i.e., before all these questions are arranged, Clarkson gives the consent to realise on this security, as he agrees with the bank that it is advisable to sell. This view is apparently Clarkson's own, as on the 9th July the bank wrote, saying that a sale would probably be made that day at 53, the 57 being reduced by a dividend of 4 per cent. On the 10th, Clarkson writes: "I think it would be a great mistake to sell this for less than the price given you some time ago, namely, 57 cents. Certainly, when I gave you this letter it was not with the intention that the dividend was to reduce the selling price." No statement is made that the authority to sell had expired. The sale having been made in the meantime, this letter cannot be relied upon as an estoppel; but it is evidence that the letter was intended to be an absolute authority to sell at 57. The same remark applies to the letter of the 16th January. When told that the stock had been sold, Clarkson writes, "I think it a great mistake to sell the Crown Reserve at 53"—not that the sale was without authority.

The letter authorised a sale at 57, and not at 53 and 53½, and I think the bank should give credit for the difference.

Subject to this variation, the appeal should be dismissed with costs.

The issue as between the defendant and third party must be tried, as there seems to have been a misunderstanding.

DIVISIONAL COURT. OCTOBER 28TH, 1911.

*RE QUIGLEY AND TOWNSHIPS OF BASTARD AND BURGESS.

Municipal Corporations—Local Option By-law—Voting on—Irregularities in Conduct of Voting—Violation of Provisions as to Secrecy—Acquiescence by Agents of those Opposed to By-law—Municipal Act, 1903, *sec.* 204—*Onus.*

An appeal by the townships corporation from an order of SUTHERLAND, J., 2 O.W.N. 1047, quashing a local option by-law.

The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

W. E. Raney, K.C., and James Hales, for the appellants.

James Haverson, K.C., and J. A. Hutcheson, K.C., for Quigley et al., the applicants.

RIDDELL, J.:— . . . On the 2nd January, 1911, . . . 484 votes were cast for and 300 against the by-law. As a consequence of those numbers, 34 votes might be disallowed for the by-law and still the by-law carry; but a change of 14 votes from the affirmative to the negative column would defeat the by-law. . .

There are three polling-places at which the proceedings all complained of—No. 1 Portland, No. 2 Harlen, and No. 5 Delta.

No. 1 Portland. Here the polling took place in a harness-shop owned by one Lyons. At the opening of the poll there, Lyons had just finished fixing up his shop as a polling booth, and asked if there were any objection to his remaining in the shop. No objection was taken, and he remained in the shop. . . It is sworn, and not denied, that Lyons could hear how the illiterate voters directed their ballots to be marked, and Lyons swears that he can "remember only three persons state how they wanted to vote, and these persons spoke out in loud tones. I have not divulged to any person how any of such persons voted." About twelve voters at this subdivision required to have their ballots marked for them; and it seems clear that Lyons could hear how they directed their ballots to be marked. The voting compartment consisted of three horse-blankets pinned together.

In Delta No. 5, the voting took place in a hall about 60 feet long and 40 wide. At one end of this hall is a platform about

*To be reported in the Ontario Law Reports.

12 feet by 40 and about 2 feet high. This platform the supporters of the by-law call the "polling place." The body of the hall was allowed to be filled by voters without restriction, and many came near the deputy returning officer's table. It is asserted, and not denied—and indeed it is obvious—that these could hear the manner in which illiterate voters directed their ballots to be marked.

These irregularities are in themselves, as it seems to me, sufficient to justify the judgment appealed from. . .

[Reference to Re Hickey and Town of Orillia, 17 O.L.R. 317, 340, 342.] .

It may be—it is not proved that it is not—the case that every one of the illiterates was adverse to the by-law and voted for it because he knew that the manner in which he voted might become public. The onus of supporting a by-law, under sec. 204 of the Municipal Act, 1903, is upon those setting up that section, and they must shew that the irregularity did not affect the result of the election.

I do not go through all the other irregularities proved—it is to my mind plain that the onus has not been met by the supporters of the by-law.

But we are pressed by the consideration that these irregularities were acquiesced in by the agents of those opposed to the by-law. That there was no objection is clear. . . .

[Reference to Re Sturmer and Town of Beaverton, 24 O.L.R. 65, at p. 76, per Boyd, C.; The Queen v. Ward, L.R. 8 Q.B. 210; Regina ex rel. Regis v. Cusac, 6 P.R. 303; Regina ex rel. Harris v. Bradburn, 6 P.R. 308; Rex ex rel. McLeod v. Bathurst, 5 O.L.R. 573.]

There is no evidence of any actual knowledge and acquiescence of these applicants. And I am unable to convince myself that the knowledge and acquiescence of the "agents" can have the same effect—they are appointed by the head of the municipality to attend at the polling place on behalf of the persons interested in and desirous of promoting or opposing the by-law: Municipal Act, 3 Edw. VII. ch. 19, sec. 342; but, in my view, it is going quite too far to say that they must make an objection at the time to an irregularity, or no one can take advantage of such irregularity on a motion to quash. . . .

The personal disqualification—for that is really what it is—of one who stands by and acquiesces in an irregularity does not attach to one who does not, but against whom the facts alleged are but that some one appointed by the head of the municipality to represent all who have the same interest and desire as himself

in reference to the proposed by-law, does not object to irregularities.

I am of opinion that the appeal should be dismissed with costs.

BRITTON, J.:—After the best consideration I can give to this case, and after more than one perusal of the evidence, my conclusion is, that the judgment of Sutherland, J., cannot be disturbed; and I cannot usefully add anything to the reasons given by my brother Riddell, which I have had an opportunity of reading.

FALCONBRIDGE, C.J.:—I agree in the result.

DIVISIONAL COURT. OCTOBER 28TH, 1911.

*KING v. NORTHERN NAVIGATION CO.

Negligence—Death of Person Falling into Open Hatchway of Vessel—Cause of Death—Absence of Direct Proof—Inference—Conjecture—Findings of Jury—Duty of Owners of Vessel to Trespasser—Termination of Period of Service—Licensee—Evidence.

Appeal by the defendants and cross-appeal by the plaintiff from the judgment of CLUTE, J., in favour of the plaintiff for the recovery of $3,900 damages, upon the findings of a jury, in an action for the death of the plaintiff's husband by reason of the negligence of the defendants, as alleged.

The deceased had been employed by the defendants as engineer of one of their steamers, the "Ionic;" on the 7th March, 1911, his dead body was found in the hold of the "Huronic," another of the defendants' steamers, laid up for the winter at Sarnia alongside of the "Ionic," he having apparently fallen from the main deck through the hatch.

The following were the questions put to the jury and their answers:—

1. Were the defendants guilty of negligence which caused the death of William King? A. Yes.

2. If so, what was the negligence? A. The hatchway unprotected.

*To be reported in the Ontario Law Reports.

3. Could the deceased William King, by the exercise of ordinary care, have avoided the accident? A. Not under the circumstances.

4. Was the accident caused by reason of any defect in the condition or arrangement of the ways, plant, or premises connected with, intended for, or used in the business of the defendants? A. Yes.

5. If so, what was the defect? A. A defective system in protecting hatches.

6. Was the injury which resulted in the death of said King caused by reason of the negligence of any person in the defendants' service who had any superintendence intrusted to him, whilst in the exercise of such superintendence? A. Yes.

7. If so, name such person and state what the negligence was. A. The foreman carpenter, by leaving No. 3 hatch unprotected.

8. Did the defendants adopt a negligent and dangerous system in regard to the hatchways when the boats were laid up, which caused the death of King? A. Yes.

9. If so, describe the negligent and dangerous system to which you refer. A. The system of leaving the hatches unprotected.

10. Was the deceased returning to the ship "Ionic" in the course of his duty and employment, when he received the injuries complained of? A. Yes.

11. At what sum do you assess the damages?

(1) Under the Workmen's Act? A. $3,900.

(2) At common law? A. $7,000.

The trial Judge directed judgment to be entered for the plaintiff for $3,900 with costs.

The defendants by their appeal asked to have the action dismissed.

The plaintiff by her cross-appeal asked judgment for $7,000.

The appeal and cross-appeal were heard by FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

R. J. Towers, for the defendants.

A. Weir, for the plaintiff.

RIDDELL, J.:—. . . On the 6th March, Anderson, the servant of the defendants, opened the port gangway on the "Huronic" to get out to do some repairs on the "Ionic." Between the port gangway thus opened and the starboard gangway there was a hatch closed, with the exception of two planks in the middle, which had been placed on edge, leaving an open-

ing of about 26 inches in width and 7 feet long—these planks, running fore and aft, were connected by two pieces of wood nailed across their top. It was not to be expected that any one should pass from one port to the other; and, consequently, at least until the opening of the port gangway, no negligence can, I think, be charged against the defendants.

Anderson did not interfere with the hatch, but left it open as described, although he did not close the port gangway which he had opened.

The locus was not very well lighted, and it was most natural for any one . . . seeing the opposite port opened to think the proper way to cross the vessel was straight across.

On the same day, William King, who had been employed as engineer on the "Ionic," left his home in Sarnia shortly before 11 a.m. and did not return. The alarm being given, his body was, on the following day, about one or two p.m., found in the hold of the "Huronic" below the hatchway, having apparently fallen the sheer 17 feet from the main deck through the hatch. His skull and neck were fractured, as also some of his ribs. The medical man thought that the skull and neck had been broken by the 17-foot fall, and the ribs by striking something when falling through the hatch—and that is most probably the case. No suggestion is made as to any other cause of death—and, on the principle of McArthur v. Dominion Cartridge Co., [1905] A.C. 72, the jury were justified in finding that the death of King was due to this fall. Any other verdict would be absurd. Much argument was addressed to the learned trial Judge and to us that the exact cause of the death had not been proved; but none of the many cases cited goes as far as this; and I am of opinion that it is no mere conjecture to say that a cause proved to exist, which might have produced the result, is the cause of the result, where no other cause can be reasonably suggested. . .

The main contention of the defendants is, that King was a mere trespasser. He had been employed by the defendants for the season of 1910 as engineer on the "Ionic," the season terminating on the 31st December. . . . There was nothing he was called upon to do on the "Ionic" for the defendants as their servant until the 1st April. . . .

The facts . . . not justifying King in being upon the "Huronic," I think he must be considered a trespasser, unless the other facts of the case shew him to have been a licensee.

There are circumstances under which the owner of property cannot hold another person a trespasser, even if there be no express invitation or permission. Lowery v. Walker, [1911] A.C. 10, is an extreme instance of such a case. . . .

[Reference to Lowery v. Walker, [1909] 2 K.B. 433, [1910] 1 K.B. 173, [1911] A.C. 10, 12, 14; 27 Law Quarterly Review, pp. 273, 274; Grand Trunk R.W. Co. v. Barnett, [1911] A.C. 361, 369, 370; Great Northern R.W. Co. v. Harrison, 10 Ex. 376; Lygo v. Newbold, 9 Ex. 302; Murley v. Grove, 46 J.P. 360; Bist v. London and South Western R.W. Co., [1907] A.C. 209; Deyo v. Kingston and Pembroke R.W. Co., 8 O.L.R. 588; Grand Trunk R.W. Co. v. Birkett, 35 S.C.R. 296; Markle v. Simpson Brick Co., 9 O.W.R. 436, 10 O.W.R. 9; D'Aoust v. Bissett, 13 O.W.R. 1115; Bondy v. Sandwich Windsor and Amherstburg R.W. Co., 2 O.W.N. 1476, 24 O.L.R. 409.]

An attempt was made upon the argument to bring this case within Lowery v. Walker; but the facts, on the evidence, are not at all like those in that case. Glass, a carpenter, saw no one on the "Huronic" but his own little boy and apparently an occasional visitor; and there is no evidence that the defendants or their officers knew anything of these. Mr. West went to visit Captain Glass on the "Huronic" as a casual visitor; but there is nothing to shew that the defendants knew anything of it. I can find nothing to indicate that the defendants gave an implied license to the public or any member thereof or to King to enter upon their steamer "Huronic;" and I am of opinion that the action fails.

The appeal should be allowed, the cross-appeal dismissed, and the action dismissed—all with costs.

FALCONBRIDGE, C.J., and BRITTON, J., agreed in the result.

MASTER IN CHAMBERS. OCTOBER 31ST, 1911.

REX EX REL. WARNER v. SKELTON.

Municipal Election—Proceeding to Set aside—Death of Relator—Dismissal of Motion—Costs—Recognizance.

After the judgment in this case, reported in 23 O.L.R. 182, the relator elected to proceed against the respondent Skelton only, and the order issued on the 13th February, 1911, gave costs of the appeal to the respondents in any event, and gave costs of the proceedings to the respondent Woods forthwith after taxation.

Nothing had been done since in the matter except that the costs of the respondent Woods were taxed at $53.10.

The respondent Skelton now moved for an order dismissing the relator's motion as against him, with costs.

T. N. Phelan, for the motion.
E. Meek, K.C., contra.

THE MASTER:—No affidavit is filed in answer, but Mr. Meek states that the relator died shortly after the issue of the order of the 13th February.

Assuming that this is so, the proceeding would seem to be at an end, as it could not be revived, nor could any new proceedings be taken after the lapse of six weeks from the election.

So far as I can ascertain, the case is one of first impression in this respect.

It was argued by Mr. Meek that, as the costs of Woods had been taxed, and the same solicitors and counsel acted for both respondents, there could be no further costs. But this is a question to be determined on the taxation.

The respondent Skelton is entitled to the order asked for and also to have all necessary assistance in seeking to recover any costs he may be held entitled to.

But for that purpose or for the recovery of costs by Woods, the production, at a trial, of the recognizance will be sufficient. There is no need of handing it out at present, nor (if at all) until the respondents are obliged to sue.

The order will go dismissing the proceedings with costs against the relator, payable forthwith after taxation.

MYLES v. GRAND TRUNK R.W. CO.—MASTER IN CHAMBERS—OCT. 31.

Evidence—Appeal from Award—Examination of Arbitrator—Necessity for Leave of Court—Appointment Set aside—Practice.]—Motion by the plaintiff to set aside as irregular an appointment issued by the defendants for the examination of an arbitrator for use as evidence in a pending appeal in the action from the award of three arbitrators. There was an arbitration under the Railway Act, as well as an action, and the assessment of damages in the action was referred at the trial to the arbitrators. The Master referred to In re Cavanagh and Canada Atlantic R.W. Co., 14 O.L.R. 523, and Trethewey v. Trethewey, 10 O.W.R. 893; and said that the appointment must be set aside,

being intituled in the action only, and no leave to take the evidence having been obtained from the Court before which the appeal was pending; this to be without prejudice to such other proceedings as the defendants might be advised to take. Costs to the plaintiff in the cause. W. G. Thurston, K.C., for the plaintiff. Frank McCarthy, for the defendants.

WALTERS v. WYLIE—BRITTON, J.—NOV. 1.

Landlord and Tenant—Lease—Provision for Forfeiture—Keeping Intoxicating Liquors for Sale—Failure of Proof—Possession—Damages.]—The plaintiff was the lessee of a house and land at Grimsby Beach. She complained that the defendant, the lessor, had, during the currency of the lease, broken into the house, excluded her from possession, and taken possession of her furniture; and she claimed possession and damages. The defendant justified under a provision in the lease for the avoidance of it and resumption of possession upon the lessee bringing intoxicating liquors upon the premises for the purpose of sale or carrying on any business that shall be deemed a nuisance. The allegation was that the plaintiff kept a disorderly house and sold intoxicating liquor upon the premises. BRITTON, J., referred to certain suspicious circumstances in regard to the occupation of the premises by a woman, under permission from the plaintiff; but found that it had not been proved that the plaintiff, or any one with her knowledge or connivance or consent, did any act, matter, or thing, upon the premises, that would work a forfeiture of the lease; and that the act of the defendant was illegal and unauthorised. Judgment for the plaintiff for possession and $225 damages with costs. M. J. O'Reilly, K.C., for the plaintiff. P. D. Crerar, K.C., for the defendant.

SMITH v. HAMILTON BRIDGE WORKS CO.—DIVISIONAL COURT—NOV. 1.

Master and Servant—Injury to Servant—Negligence—Orders of Foreman of Works—Use of Implements Insufficient for Purpose of Dangerous Work—Cause of Injury—Workmen's Compensation for Injuries Act—Appeal—Reversal of Judgment on Facts.]—Appeal by the plaintiff from the judgment of

SNIDER, Co.C.J., who (by consent) tried the action, which was in the High Court, and dismissed it. The action was brought by a workman to recover damages for injuries sustained by him while in the employment of the defendants. The plaintiff had his leg fractured in two places. Negligence on the part of the defendants was charged; but the trial Judge found that there was no actionable negligence. While dismissing the action, he assessed the plaintiff's damages provisionally at $1,500. The plaintiff and four fellow-workmen were moving an iron beam, which weighed two and a half tons, from one side of the defendants' works to the other, using power hoists. Hooks, resembling ice-tongs, with a ring in the top, were spread across the beam and hooked over the edge on each side. A hook let down from the hoist was hooked into this ring, and the beam then lifted, to be carried, thus suspended, to its destination. A pile of iron stringers lay on the floor, in the direct course of the moving beam. The hoist would not raise it high enough, with the long hooks at first in use, to pass it over the pile of stringers, and so the defendants' foreman handed a shorter pair of hooks to the plaintiff and his fellow-workmen to be substituted for the long hooks. The plaintiff was in the act of placing the hook of the block of the hoist in the ring attached to the pair of shorter hooks, when these hooks slipped or spread, and the beam fell, injuring the plaintiff. The appeal was heard by BOYD, C., BRITTON and MIDDLETON, JJ., each of whom gave reasons for holding, upon a review of the evidence, that the cause of the injury was the use of hooks which were too short, and that the defendants were liable, the foreman having directed the hooks to be used. Appeal allowed with costs, and judgment to be entered for the plaintiff for $1,500 with costs. J. G. Farmer, K.C., and M. Malone, for the plaintiff. S. F. Washington, K.C., for the defendants.

GRICE v. BARTRAM—MASTER IN CHAMBERS—NOV. 2.

Pleading—Statement of Claim—Relief Sought beyond Claim Indorsed on Writ of Summons—Inconsistent Relief—Amendment.]—The writ of summons was indorsed with a claim for $34,436.83 for the amount due under an agreement made between the plaintiff and defendant, dated the 15th February, 1910. In the statement of claim the prayer was for: (a) payment of $34,436.83; (b) damages for breach of the agreement; and (c), in addition or in the alternative, rescission of the agreement. The defendant moved to set aside the statement of claim.

It was conceded that it went beyond the indorsement. The Master was of opinion, further, that it was embarrassing as claiming inconsistent relief. He referred to Hives v. Pepper, 6 O.W.R. 713; Evans v. Davis, 27 W.R. 285; Moore v. Ullcoats, [1908] 1 Ch. 575; Gent v. Harrison, 69 L.T.R. 307. The distinction to be observed is between alternative ways of making the same claim, as was the case in Hives v. Pepper, and asking for inconsistent relief, as here. The plaintiff cannot ask for payment under the agreement, damages for its breach, and also rescission. Order made requiring the plaintiff to amend so as to shew which ground of relief he intends to ask. Costs to the defendant in any event. F. E. Hodgins, K.C., for the defendant. M. C. Cameron, for the plaintiff.