THE

ONTARIO WEEKLY REPORTER

(TO AND INCLUDING NOVEMBER 19TH, 1904.)

VOL. IV. TORONTO, NOVEMBER 24, 1904. NO. 13

ANGLIN, J. NOVEMBER 11TH, 1904.

CHAMBERS.

CITY OF TORONTO v. TORONTO R. W. CO.

(TWO ACTIONS.)

Trial — Postponement — Determination of Questions Arising in another Action Pending.

Appeal by plaintiffs from order of Master in Chambers (ante 221) staying proceedings in two actions until the disposition of a certain other action pending between the same parties, and commonly known as the "omnibus action."

J. S. Fullerton, K.C., for plaintiffs.

J. Bicknell, K.C., for defendants.

ANGLIN, J.—The chief reason for making the order was that some of the issues raised in the omnibus action are identical with those invoked in these actions, and depend upon questions of construction of the principal agreement between these parties, which have been formulated in a special case. This special case has been heard and disposed of by me since the Master's order was made (see ante 330). As to the questions involved in that case an answer to which may affect issues in these actions, there need be no delay in proceeding with the trials of the latter. Plaintiffs' claim is for statutory damages for non-compliance by defendants with certain determinations of the city engineer, approved by the city council, in regard to "service" required upon certain lines of defendants' railway. The right to make such determinations and to require their observance by defendants has been affirmed in answer to the second question propounded in the special case above mentioned. It should not

be assumed that defendants will appeal from the judgment rendered upon the special case; and, if that were assumed, whatever might be the case as to other portions of that judgment, any contemplated appeal in regard to matters which affect the issues in the present cases, cannot serve any other purpose than delay. To continue the existing stay of proceedings because of such a prospective appeal would be tantamount to encouraging proceedings projected (if they be so) in the furtherance of a policy of temporization. An appeal from other parts of the judgment upon the special case would not affect these actions. Without saying that the order of the Master was erroneous under the circumstances existing when it was made, the stay of proceedings which it imposes should be removed.

Appeal allowed. Costs here and below to be in the cause.

NOVEMBER 14TH, 1904.

DIVISIONAL COURT.

MITCHELL v. WEESE.

Sale of Goods—Title—Trover—Bills of Sale Act—Estoppel—Ownership—Evidence.

Appeal by plaintiff from judgment of County Court of Victoria dismissing action in trover for the value of a black mare alleged to be the property of plaintiff.

The appeal was heard by FALCONBRIDGE, C.J., STREET, J., BRITTON, J.

C. A. Moss, for plaintiff.

H. O'Leary, K.C., for defendant.

STREET, J.—Edward Murphy owned the mare in question down to January, 1897, at least: that is the common case of both parties. Owen Murphy swears that in that month his father (Edward) gave him the mare and a horse, in consideration of some work, and that he received possession of both, and had both in his possession until he sold the horse to defendant some two or three years before the trial; and that he had the mare in his possession thereafter until he sold her also to defendant in October, 1903.

Plaintiff claims title from Edward Murphy under a purchase from the latter on 29th April, 1899, of the mare in question and also of the horse above mentioned.

The evidence is not contradicted that a bargain was made between Edward Murphy and plaintiff at about that date, by which any claim that Edward Murphy had to the mare and horse was transferred to plaintiff, in consideration of $15 cash and a note for $35 made by plaintiff to Edward Murphy. Plaintiff alleged a further consideration as having formed part of the bargain, consisting in the release by him of a claim for pasturage of the horses: but this is denied by Edward Murphy, and is inconsistent with the consideration mentioned in the bill of sale of the mare and horse given by Edward Murphy to plaintiff on 29th April, 1899.

There being no doubt that Edward Murphy did sell to plaintiff any claim or title he had to the horses, no question seems to arise as to whether the bill of sale was good under the Bills of Sale and Chattel Mortgage Act. The sale was perfectly valid, apart from that Act, of any interest Edward Murphy possessed in the subject matter, and the Act is only aimed at protecting the rights of creditors and subsequent purchasers. If Owen Murphy had any title, he acquired it before, and not after, the bill of sale in question, and so the Act does not apply.

Nor can I discover upon the evidence any estoppel in pais against plaintiff. The conduct which the County Court Judge seems to have thought created an estoppel against him, was his permitting the mare and horse to remain in Owen Murphy's possession after he himself had become, as he alleges, the owner of them by purchase from Edward Murphy; and his allowing Owen Murphy to sell as his own property the colts raised from the mare, and his returning the horse to Owen Murphy after he had taken it away, on his being threatened with criminal proceedings.

All these circumstances are important, no doubt, as throwing light upon the relationship, but they do not amount in law to an estoppel against plaintiff in favour of defendant, because it does not appear that plaintiff ever held out to defendant, by word or conduct, intending him to act upon it, that Owen Murphy was the owner of the horses. Plaintiff was under no duty to defendant to take possession of the horse, but might leave it in Owen Murphy's possession, if he chose, without incurring any liability to defendant or any one else: Hosegood v. Bull, 36 L. T. N. S. 620; Lelievre v. Gould, [1893] 1 Q. B. 491.

I am not quite sure that the Judge intended to hold that the Statute of Limitations was a bar to the action, but it seems clear that it was not. If Owen Murphy obtained possession of the mare in 1897, as owner by transfer from his

father Edward Murphy, as he says he did, then the question does not arise; but, if he received it to pasture for his father, any demand of possession was clearly within six years, and the time does not run until demand.

In my opinion, however, the judgment is properly entered in favour of defendant upon the facts disclosed in the evidence. . . .

Owen Murphy had married plaintiff's sister shortly before he received possession of the horses from his father, and was, with his wife, living in a house he had built upon a piece of plaintiff's land, with the promise of a deed of it. I think it is established that he remained in actual possession of both horses from that time forward; his possession of the one in question continued until he sold her to defendant in October, 1893. The other one he sold a year or two before that time. During that period his father (Edward) seems to have come down to Owen's place once to try and get the horses, but he failed to get them, and never seems to have troubled himself more about them. Then he made the bill of sale to plaintiff of both horses. The inadequacy of the consideration—$50—is explained by his statement that plaintiff was to fight Owen Murphy if he wanted to get the horses. As a fact plaintiff only paid $15 cash, and he has refused to pay the note of $35 given for the balance because he never got the horses. Plaintiff, therefore, living close to Owen Murphy, and claiming ownership of the horses, allows him to keep them and to treat them and their colts as his own property, and finally to sell them both. He seems to have taken away one of the horses and to have returned it under the pressure of criminal proceedings.

In my opinion the facts I have stated strongly support the statement of Owen Murphy that his father gave him the horses for his work, and that plaintiff knew of his title, but supposed for some reason that it could not be sustained. Plaintiff's conduct in allowing Owen Murphy to retain the horses after he had, as he says, purchased them from Edward Murphy, is totally unlike that of a man who had really purchased property and believed it to be his own. . . . I do not think there is any evidence sufficient to outweigh the strong presumption of title in Owen Murphy arising from the undoubted and admitted facts.

I think, therefore, that the appeal should be dismissed with costs.

FALCONBRIDGE, C.J., gave reasons in writing for the same conclusion.

BRITTON, J., concurred.

NOVEMBER 14TH, 1904.

C.A.

FARMERS' LOAN AND SAVINGS CO. v. PATCHETT.

Covenant — Assignment of Mortgage — Assignor's Covenant—Release of Part of Premises—Principal and Surety —Discharge.

Appeal by plaintiffs from judgment of MEREDITH, C.J., 2 O. W. R. 702, 6 O. L. R. 255, dismissing, as against defendant Coleman, an action on a covenant for payment contained in an assignment of mortgage by defendant Coleman to plaintiffs.

The appeal was heard by OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A.

W. M. Douglas, K.C., for appellants.

W. H. Irving, for defendant Coleman.

OSLER and GARROW, JJ.A., gave written reasons for judgment sustaining the appeal.

MACLENNAN, J.A., gave written reasons for dismissing the appeal, in which MACLAREN, J.A., concurred.

The Court being thus divided, the appeal was dismissed with costs.

NOVEMBER 14TH, 1904.

C.A.

McFADDEN v. BRANDON.

Limitation of Actions—Covenant in Mortgage—Acceleration of Time for Payment of Principal—Default of Payment of Interest—Commencement of Statutory Period—Potential Relief from Consequences of Default.

Appeal by plaintiff from judgment of STREET, J., 2 O. W. R. 623, 6 O. L. R. 247, dismissing the action, which was brought to recover the principal and interest due under a covenant in a mortgage made in 1879. STREET, J., held that the effect of the usual statutory provision contained in a mortgage, that in default of payment of the interest thereby secured, the principal should become payable, was to make

the principal at once due, so that the cause of action accrued upon such default under sec. 1 of ch. 72, R. S. O. 1897, the Limitations Act.

J. C. Judd, London, for appellant.

T. H. Purdom, K.C., for defendant.

The judgment of the Court (Moss, C.J.O., Osler, Maclennan, Maclaren, JJ.A.), was delivered by

Maclennan, J.A.—. . . It seems too clear for argument that the cause of action arose on 15th March, 1880, and continued unimpaired during all the subsequent years, and there could be no answer to a statement of claim alleging that it arose on that day by virtue of default in paying interest. The contract is clear that on default of payment of interest the principal money and every part thereof should forthwith become due and payable as if the time for payment thereof had fully come and expired. There was default on 15th March, 1880, and then it was that the principal became payable, and it was then the cause of action arose. It is true that, by virtue of the proviso, defendant could, if the action had been brought before the expiration of five years, have had relief against that action on payment of arrears; but, even if he had done that, if could not be said that a cause of action for the principal money had not arisen.

For plaintiff it was suggested that the acceleration clause merely gave him an option to claim payment before the expiration of the five years, which had never been exercised. But that does not remove the difficulty, which is, that a cause of action arose at the end of the first year. It is always optional with a plaintiff to bring any action which may have arisen to him.

It was also said that the acceleration was in the nature of a penalty. But, if it were, I do not see how it would affect the question. But . . Wallingford v. Mutual Society, 5 App. Cas. 685, shews that the proviso cannot be regarded as a penalty.

. . . Hemp v. Garland, 4 Q. B. 519, and Reeves v. Butcher, [1891] 2 Q. B. 509, . . . are distinct authorities in favour of defendant. . . .

Appeal dismissed with costs.

NOVEMBER 14TH, 1904.

C.A.

DILLON v. MUTUAL RESERVE FUND LIFE ASSN.

Life Insurance—Misstatements of Insured as to Age and Disease—Evidence of Age—Admission of Parish Register—Prerequisites—Findings of Jury—Materiality of Misstatements—Insurance Act, sec. 144.

Appeal by defendants from judgment of MACMAHON, J., upon findings of a jury, in favour of plaintiff.

There had been a previous trial before BRITTON, J., and a jury, and upon the jury's answers to questions judgment had been entered for plaintiff. Upon appeal to this Court a new trial was directed (2 O. W. R. 78), which resulted as above.

The action was by the widow of John Dillon to recover $2,000 upon a contract or policy of insurance upon his life.

The two defences principally relied upon were that the insured had misstated his age in his application for the policy, he having been born in 1847 and not in 1850 as stated, and that he had untruly stated that he had never had an abscess, whereas he had been a sufferer from abscesses all his lifetime.

The following questions, among others, were put to the jury at the second trial, and they made the following answers:—

1. Was the answer made by John Dillon that he was born on 24th August, 1850, untrue?

No, to the best of our knowledge.

2. Was the answer so given material except as to fixing the amount of premium?

No.

3. If you find Dillon misstated his age, was the answer given in good faith believing it to be true and without any intention to deceive the company?

We believe it was given in good faith.

4. Had Dillon, at the time of the application in 1891, or did he ever have, the disease of abscess or any open sore? State which.

He had a simple sore, but not at the time of his application.

5. If you find he had the disease of abscess or open sore prior to his application for insurance, state how long prior thereto.

About 20 years before the application, or when Dr. Maclean reduced the dislocation of the hip.

6. State whether the existence of the disease of abscess or open sore was something material to be stated by Dillon in answer to the question.

No.

7. Did Dillon suppress or withhold any information respecting his past or present physical condition which was material for the insurance company to know?

No.

G. T. Blackstock, K.C., and R. B. Henderson, for appellants.

I. B. Lucas, Owen Sound, and W. H. Wright, Owen Sound, for plaintiff.

The judgment of the Court (Moss, C.J.O., MACLENNAN and MACLAREN, JJ.A.), was delivered by

Moss, C.J.O.—. . . In view of their finding upon the first question, it was unnecessary for the jury to express any opinion upon the other questions, but there is ample evidence to support their conclusions with regard to them, and they may be regarded as not wholly immaterial.

As to the first question, the jury on the first trial found that the answer made by Dillon was not true, and on the appeal this Court expressed the opinion that the finding was in accordance with the evidence. But that opinion was formed having regard to all the evidence then before the Court, including a book or register of marriages and births produced upon the examination under commission of the Reverend Thomas O'Dwyer, described as administrator of Pallas Green, county Limerick, Ireland. At the first trial the register was received without objection, but at the second trial plaintiff, as she was entitled to, objected to its reception, and it was admitted subject to the objection.

The authorities shew that no proper case was made for its admission, and it should have been rejected. Nothing was shewn with regard to it except that the witness, who is described apparently by the commissioner as administrator of Pallas Green, county Limerick, says that he produces the registers of the parish in his custody. By what law or under what authority, if any, they were kept, is not disclosed. Reference is made to entries thereon, but the office or handwriting of the person by whom they were made is not shewn,

nor is it made to appear that they were made by him in the discharge of his duty, and that he is dead. The Imperial Act 7 & 8 Vict. ch. 81 (Ire.) does not apply to marriages of Roman Catholics. And in order to render the register admissible it was necessary to shew either that a public duty was imposed on the person making the entry, or that he made it in the course of his business, and to prove his handwriting and death. . . .

[Reference to Lyell v. Kennedy, 56 L. T. 647; Malone v. L'Estrange, 2 Ir. Eq. R. 16; Dillon v. Tobin, 12 Ir. L. T. R. 32; Ryan v. King, 25 L. R. Ir. 184; Riggs-Miller v. Wheatley, 28 L. R. Ir. 144.]

None of these prerequisites were shewn in this case, and the register ought not to have been before the jury.

Without it the jury could well conclude, as they have, that defendants, upon whom lay the onus of shewing an untrue statement, failed to prove it.

It may be that, even with the register before them, the jury were not wholly unreasonable in coming to the same conclusion.

But however that may be, defendants, having themselves introduced and pressed the admission of the register as evidence, cannot complain if the jury have come to a conclusion quite warranted by the evidence outside of it. Nor can they reasonably object to the principle of Rule 785 being applied in plaintiff's favour. As it turned out, no substantial wrong or miscarriage has been occasioned by the reception of the evidence. . . .

The answer of the jury to question 4, though not categorical, is in substance a distinct negative of defendants' allegation that the answer of the deceased with regard to abscesses and open sores was untrue. The question put to the deceased was: "Have you now or have you ever had any of the following complaints or diseases? Abscess? A. No. Open sores? A. No." If, as the jury find, he had only a simple sore before that time, and not even that at the time of the application, then these answers were quite true, for he had not at the time and never had the disease of abscess or open sores. By their answer to this question, as well as by their answers to the next two questions, the jury shew that they understood that the sore with which the deceased was afflicted prior to the time of the application was the sore spoken of by Dr. Maclean, and that it was not the disease of abscess or open sores, but was a simple sore which was not present at the time of the application. The jury do not find

that he had the disease of abscess or open sore prior to the application, but that there was a simple sore about 20 years before the application, when Dr. Maclean treated him for a dislocation of the hip. And so finding, it follows, as they also find, that its existence was something not material to be stated by deceased in answer to the questions. And the other allegations of the defence are covered by the last answer of the jury, that deceased did not suppress or withhold any information respecting his past or present physical condition which was material for the insurance company to know. The contract of insurance having been entered into in 1891, the provisions of sec. 5 of the Act 52 Vict. ch. 32 (O.) applied to it. By virtue of this section, no term, condition, . . . for avoiding the contract by reason of any statement in the application therefor or inducing the entering into of the contract by the company is valid unless limited to cases in which the statement is material to the contract, and the contract is not to be avoided by reason of the inaccuracy of any such statement unless it is material to the contract. This provision now forms part of sec. 144 of R. S. O. 1897 ch. 203. The effect is, to reduce all such statements virtually to the level of representations. And whether or not a representation was material was always a question for a jury, if there was one. And by sec. 33 (2) of 55 Vict. ch. 39 (O.), now sec. 144 (3) of R. S. O. ch. 203, it is expressly provided that the question of materiality in any contract of insurance shall be a question of fact for the jury or the Court if there be no jury.

It was contended that the findings of the jury were contrary to the evidence and the weight of evidence. But there was evidence upon which the jury might come to the conclusions that they did. As to the existence of the disease defendants were obliged to rest largely upon testimony . . . which carries the case no further than the existence of a sore on the leg. . . .

Defendants, in order to succeed in their defence, were obliged to convince the jury, first, of the existence of the disease of abscess or open sores, secondly, that the answers given in relation thereto were material to the contract, and lastly, that they were untrue. The findings of the jury are not in their favour on any of these points, and the defences therefore fail. . . .

Appeal dismissed with costs.

NOVEMBER 14TH, 1904.

C.A.

RE WATEROUS AND CITY OF BRANTFORD.

Municipal Corporations—By-law—Closing Highway—Private Interests—Notice to Person Affected—Increased Expense of Maintenance.

Appeal by city corporation from order of MACMAHON, J., 2 O. W. R. 897, quashing by-law No. 770 of the corporation, providing for the closing up of a portion of a public street called Jex street, in the city, and diverting the original course of the highway.

W. T. Henderson, Brantford, for appellants.

W. S. Brewster, K.C., for Julius E. Waterous, the applicant.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, MACLAREN, JJ.A.) was delivered by

MOSS, C.J.O.—. . . Notwithstanding the opposing affidavits, the applicant has succeeded in shewing that the proposed change in the street will seriously affect and depreciate his property. His access to and from his factory with teams and vehicles will be rendered more difficult. The direct route from his factory to the Toronto, Hamilton, and Buffalo Railway station, from which and to which he is constantly receiving and sending freight, will be cut off, and he will be obliged to go some considerable distance further if he wishes to get to the station by way of Market street. His fire protection will be rendered less effective, and in other respects the changed conditions will result to his disadvantage.

In view of these consequences to the applicant, it ought to appear clearly that the public interests imperatively called for the proposed change, or at all events that sufficient did appear to justify the council, acting in good faith, in coming to that conclusion.

If it appeared that in the public interest there was a pressing need for the change, if in the view of those acting on behalf of the city there had arisen a condition of affairs prejudicial to the general public, calling for intervention and remedy, and if, acting upon such considerations, and without reference to individuals or individual interests, it had been determined that the change must be made, the public interests should prevail, and the applicant must submit.

It is important to notice that until the receipt by the council of the letter of Mr. A. E. Watts, written on behalf of and in the interest of the Waterous Engine Works Co., there had been, as far as appears, no complaint from the public or any members of it concerning the condition of the street, or any demand for an alteration. So that it was only upon receipt of the letter that the attention of the council was directed to the street. They were then required to consider a distinct proposal to close up the portion of the street intervening between two parcels of land belonging to the Waterous Engine Works Co., and perhaps as involved therein the effect upon the street and its user by persons owning property thereon and others, in the event of the Waterous Engine Works Co. erecting buildings at the other side of the street. . . .

It is significant that no members of the council, or others who might be considered as regarding the matter from the point of view of the public interest, visited or examined the applicant's premises or made any attempt to ascertain how he or his property would be affected or what his views were with reference to the proposed change. On the contrary, the committee to whom Mr. Watts's letter was referred seem to have been satisfied to leave that task to the Waterous Co. They recommended that the company be requested to meet any "parties" affected by the proposed change, and, if possible, to make satisfactory arrangements with them, and the council adopted the report. Whether the company were requested to meet the "parties" does not appear, but, whether or not, nothing was done. The applicant was one of the public specially interested in the street, yet his interests were apparently not taken into consideration. The council left the publication of the notices and the conduct of the matter in the hands of the representative of the company. A draft agreement for the sale of the portion of the street to the company was prepared, and everything was done on the footing of a foregone conclusion that the proposal would be carried through.

It is further to be noticed that, although Mr. Watts's letter speaks of buildings to be erected and workmen to be employed as the result of the proposal being accepted, the agreement with the company is silent with regard to these matters. The company are in no way bound to build or employ further workmen. They are left free to make such use of the land to be conveyed to them as they think fit. On the other hand, the city is burdened with the maintenance for the future of a longer street or highway. The company are only

bound to pay a sum sufficient to reimburse the city all expenditure incurred in diverting the street, and in establishing it as diverted in the same condition as the portion to be closed, but there is no provision for the maintenance and care of the additional strip of roadway rendered necessary by the diversion. . . .

So far as the interests of the public are concerned, they do not appear to have been furthered. No person seems to be benefited except the Waterous Co., with whom the scheme originated.

Appeal dismissed with costs.

NOVEMBER 14TH, 1904.

C.A.

TORONTO GENERAL TRUSTS CORPORATION v. CENTRAL ONTARIO R. W. CO.

Railway—Mortgage on Undertaking — Bonds—Interest Coupons—Arrears—Real Property Limitation Act—Covenant —Acknowledgment.

Appeal by defendants Blackstock and Weddell from judgment of BOYD, C., 2 O. W. R. 946, 6 O. L. R. 534, dismissing appeal from report of local Master at Belleville, who allowed defendant Ritchie, the respondent, to prove in his office a claim for interest upon certain railway bonds for a period exceeding 6 years before action.

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

T. P. Galt, for appellants.

A. B. Aylesworth, K.C., and J. H. Moss, for defendant Ritchie.

GARROW, J.A.—The bonds in question were issued by defendant railway company pursuant to statutory powers in that behalf, and were secured by a first mortgage dated 1st April, 1882, upon the railway, its lands, rolling stock, tolls, revenues, and present and future property and effects, franchises, and appurtenances of every description; the principal payable on 1st April, 1902, and interest in the meantime at 6 per cent. half-yearly on the 1st days of October and April in each year on the surrender of coupons annexed, as they severally became due, for such interest.

The mortgage was in form a conveyance in trust by the railway company to the Toronto General Trusts Company (as it was then called), and the trustees were authorized and required, in case of default for 3 months in the payment of any interest, upon the request of 75 per cent. of the holders of such bonds, to take possession and operate the railway while such default continued. And upon default in payment of the principal of such bonds, upon a like request by 75 per cent. of the bond-holders, the trustees were directed to take proceedings to enforce payment of all bonds issued under the provisions of the said mortgage and the interest unpaid thereon, as speedily as possible. And the said mortgage contained a covenant by the railway company to pay the principal and interest of the said bonds, when and as the same became due, according to the tenor and effect thereof. The bonds were, on their face, made payable to "The Toronto General Trusts Company or the bearer hereof," and the coupons for interest were, on their face, payable simply to bearer.

Default having taken place in the payment of the principal and also of interest, the trustees commenced foreclosure proceedings, under which, by a judgment of the High Court dated 23rd March, 1903, it was referred to the said Master, among other matters, to inquire and report who are the holders of the bonds of the said railway and of any interest coupons issued with the said bonds, and what is due to each in respect thereof.

And upon this reference the Master found and certified, in what may be called an interim report, that the defendant Ritchie had appeared before him and claimed to be the holder of a large number of bonds with coupons attached, and also a large number of detached coupons, all of which detached coupons had matured more than 6 years prior to the institution of the action, and that, objection having been taken by counsel for the present appellants to the right of the said Ritchie to prove upon the said detached coupons, and also upon all attached coupons which matured more than 6 years prior to the date of the action, and further to the right to charge the lands and undertaking of the defendant railway company with more than 6 years' arrears of interest, he had proceeded to consider the said matter and found that none of the coupons, whether attached or detached, were barred by the Statute of Limitations, and that they are all entitled to the same rank as the principal payable by the bonds. . . .

I agree generally with the views expressed by the Chancellor, which are quite sufficient for the disposal of the case,

and will only add that it appears to me that two other and equally cogent reasons might, if necessary, be given in support of the learned Chancellor's judgment.

The first, that in foreclosure actions it is a matter of course, even in cases where the provisions of the Real Property Limitations Act apply, to allow upon the covenant, where there is one, more than 6 years' interest, if there are no subsequent incumbrances: Macdonald v. McDonald, 11 O. R. 187. And the different bond-holders in the present case, all claiming under the same mortgage security, do not, in my opinion, stand in the relation of prior and subsequent incumbrancers towards each other.

And second, the written acknowledgment of indebtedness in respect of the interest in question dated 4th July, 1903, appears to be amply sufficient to meet the objection of the statute, even if it is applicable.

This acknowledgment was apparently duly authorized at a meeting of the directors. Its terms are wide enough to embrace all the outstanding coupons, and not merely those held by Mr. Ritchie, and it is therefore not properly open, I think, to the reproach contended for in argument that it is in effect an acknowledgment given by Mr. Ritchie to himself. Mr. Ritchie, it is true, was at the directors' meeting, but he is the president of the company, and it was his duty to be there. But he was only one of eight directors present. Nor, so far as appears, is he the only holder of overdue and unpaid coupons who would gain by the acknowledgment.

The only answer made or attempted to be made to the sufficiency of this acknowledgment upon the argument before us was, that it was obtained by Mr. Ritchie for his own benefit and purpose, and reliance was placed upon the cases of Astbury v. Astbury, [1898] 2 Ch. 116; Bolding v. Lane, 1 DeG. J. & S. 122; and Lowndes v. Garnett, 33 L. J. Ch. 418. But an examination of these cases clearly shews that they have really no application. In Astbury v. Astbury it was held that one of two trustees could not bind the lands by an acknowledgment given against the wish of the co-trustee, nor indeed without his active concurrence; in Bolding v. Lane it was held that a mortgagor could not by an acknowledgment affect a subsequent incumbrancer; and in Lowndes v. Garnett it was held that the acknowledgment relied on did not amount to an admission that the debt in question was due.

For these, as well as the reasons given by the learned Chancellor, I think the appeal fails and should be dismissed with costs.

MACLENNAN, J.A., gave reasons in writing for the same conclusion.

MOSS, C.J.O., OSLER and MACLAREN, JJ.A., also concurred.

NOVEMBER 14TH, 1904.

C.A.

CONNELL v. CONNELL.

Will—Execution—Testator's Signature—Conflict of Evidence as to whether Witnesses Present—Lapse of Sixteen Years—Will Drawn by Person Taking Benefit—Onus of Proof.

Plaintiffs seek probate of the will of one James Connell, who died 30th May, 1903.

The alleged will was made 9th January, 1887. Plaintiffs were two of the brothers of deceased, and the executors named in the will; and defendants were four other brothers and the widow of the testator, and others interested in his estate in case the will should be held invalid.

The action was tried before BRITTON, J., who gave judgment (3 O. W. R. 35) declaring the will to be invalid on two grounds, namely, for want of due execution according to law, and also for want of sufficient proof that the instrument propounded was the last will of deceased. Plaintiffs appealed.

J. L. Whiting, K.C., and W. E. Middleton, for appellants.

J. A. Hutcheson, K.C., for defendant Jane E. Connell, the widow.

G. H. Watson, K.C., and C. F. Maxwell, St. Thomas, for the other defendants.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.), was delivered by

MACLENNAN, J.A.—The undisputed facts are the following: The deceased at the time of the making of the alleged will was a farmer, of mature age, having a wife still living, but without children. His father was still living, and he had six brothers, including the two plaintiffs, and two or three sisters. He was a prosperous man, having accumulated a large estate, amounting at the date of the will to about $50,000, and at the time of his death estimated at from $70,000 to $80,000. A few days before the making of the will he became ill with an attack of what is said to have been

pneumonia, of a serious character. The will was drawn up on Saturday night between ten o'clock and two the next morning, and was signed by the deceased with a strong vigorous looking signature, nowise different from other signatures made by him when in health. The will was drawn, in a fair, legible hand, by his brother, the plaintiff William, who, although not a professional man, had been in the habit of drawing wills. The attestation clause is in the regular form, and has appended to it the undisputed signatures of one James McFadden, who was then a hired servant of the deceased, then living in his house, and of one Annie Connell, a niece of the deceased. There is an interlineation in the will, to which these persons also admittedly appended their initials in the margin. The will therefore on its face has all the requisites of a valid will. It is also undisputed that the will was signed by the deceased, and also by the two witnesses in the bedroom in which he was lying. From that time until the death of the deceased the will remained in the possession of the plaintiff William. The deceased recovered from his illness in a short time, and lived more than sixteen years afterwards, carrying on his business, and in the interval largely increased the volume of his estate. The widow testifies that some time during the following year after the will was made, she spoke to her husband, saying that she had heard he had made his will and had not left her much, and that he went on to tell her what he had left her and others.

What we have here then is a will which, upon its face, appears to be made with all the formalities required by law, and believed by the deceased to be his will, and attacked after more than sixteen years for want of due conformity to the requirements of the law as to its execution, enjoined by sec. 12 of the Wills Act.

What that section requires is that "the signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator."

Now what the defendants say on the question of the due execution of the will is, that the signature of the testator was not made or acknowledged by him in the presence of the two witnesses; and that is the sole point, for it is not disputed that they attested and subscribed it in the presence of the testator, and it was not essential that they should have subscribed in presence of each other: Theobald, p. 30, and cases there cited.

The evidence in favour of due execution is that of William, who drew the will, and that of his brother Martin; and the evidence against it is that of the two subscribing witnesses.

William's evidence is that the will was completed, ready for signature, and read over to the deceased carefully during the night, about two o'clock in the morning, and that the execution of it was deferred until after breakfast, and that in the morning he went out and brought McFadden and Annie Connell into the bedroom, telling them what they were wanted for. He then told the deceased to ask them to be his witnesses, which he did by saying, "You will be witnesses, or you will act, or will you act?" He says he then told them it was necessary for them to sign in each other's presence, and read over the attestation clause to them. He then said to the deceased, "Are you ready, James?" Whereupon he rose into a sitting posture on the side of the bed and wrote his name upon the will, which was placed upon a stand in front of him, after which McFadden and Annie Connell signed their respective names in succession and placed their initials in the margin opposite to the interlineation. The will was then folded, and the testator asked William to take care of it, which he did.

That is William's evidence, and I do not find that it is shaken in cross-examination.

Martin's evidence is, that he was present when the will was executed, that when the two witnesses went to the bedroom, he followed them to the bedroom door, and he relates the proceedings as to the request by the deceased to the witnesses, the reading of the attestation clause, the signing by the deceased and by the witnesses, the intialling, and all the other details, in the same manner as had been related by William. This witness was also subjected to a very lengthy cross-examination on behalf of defendants, but without affecting his testimony.

This is all denied by both McFadden and Annie Connell. They both say they did not see the testator sign, that they were simply asked to sign their names, and did so. It was only after much hesitation that either of them, particularly Annie Connell, admitted that he or she thought or knew that it was a will they were asked to witness. Annie Connell says that she came into the bedroom after McFadden, that she did not see the deceased sign, that when she came in McFadden stepped aside, and she signed and put her initials in the margin. She denies having observed either the deceased's signature or that of McFadden on the paper when

she signed, and admits that on a former examination she denied having appended her initials. McFadden says that the attestation clause was probably read over in his presence before he signed, but he did not see the deceased sign. The trial was on 3rd December, 1903, and he was shewn a letter of the previous 29th June, written by him to William Connell. In this he says he cannot see his way to make an affidavit proving the will as a subscribing witness. He says he remembers quite well signing the will, but has no recollection of seeing the deceased do so. He says he had two letters from the solicitors of two of the sets of defendants making inquiries. At the trial he says positively that the deceased did not sign in his presence, that, although that happened 16 or 17 years ago, since then he has had a good deal of thought on the matter, and his mind has been greatly revived on it. He then said he did not know the deceased's signature, never saw him sign his name, never witnessed any other document for him, no never. He is then confronted by a deed made by the deceased on 16th January, 1888, witnessed by him, with an affidavit indorsed thereon sworn by him, which he was obliged to admit, but which he had forgotten.

Upon this evidence, absolutely contradictory as between William and Martin Connell on the one side, and McFadden and Annie Connell on the other, the learned Judge says he believes the latter. He thinks the occasion was so impressive that they would be likely to remember whatever was said or done by the sick person. He thinks it not impossible that William would get the signature of his brother before the witnesses were called in, and would be satisfied with the mere signatures of the witnesses without a complete compliance with the statute, that it is conceivable that, not being a lawyer, he thought a statement of compliance with the law as good as if actually done. . . . [Further reference to parts of the evidence.]

Now, I do not think there is any substantial conflict in all these statments, no greater discrepancy than might be expected after the lapse of sixteen years. Both McFadden and Annie Connell say Martin was present when they signed—McFadden says towards the door; Annie Connell says he was present at her left. William says when the witnesses came in Martin stepped out, stepped into the other room, and Martin himself, while relating with detail all that took place, says that when the witnesses came in he followed them to the door. I think all this evidence means that while the signing was going on Martin was standing in the dining-room just outside

of the bedroom door, where he could and did hear and see all that was said and done in the bedroom.

I therefore think, with great respect, that the learned Judge was wrong in excluding from consideration the important evidence of Martin, on the ground that he was not present, and could not have seen or heard what he relates.

The case is, therefore, not a question between William alone on the one side, and the two witnesses on the other, as treated by the learned Judge, but between William and Martin on the one side, and the two witnesses on the other.

While very great weight is to be given to the opinion of the learned Judge, who saw and heard the witnesses, and also to the fact that McFadden was disinterested, while all the others were more or less interested in the result of the action, yet I think that, assuming that they are all honestly telling what they believed to be the truth, and particularly having regard to what I think was an error by the learned Judge in excluding all consideration of Martin's evidence, we are in the same position as the learned Judge in considering the case, and bound to form an independent judgment upon the question, which is, what upon the evidence is the most probable conclusion of fact?

With great respect I think that conclusion is in favour of the due execution of the will.

The will is in all respects in proper legal form. The signature of the testator is undoubted. It is a strong vigorous signature, nowise different from other signatures of his made in health, and which could hardly have been made by a person in a reclining position. The witnesses admit they signed it on a small table standing by the bed. The attestation clause signed by the two witnesses declares that it was signed by the testator in the presence of both of them who in his presence and at his request subscribed their names in presence of each other. Now I think all this affords an overpowering presumption in favour of the due execution, and when we add to this that one of the witnesses thinks that, before he signed it, the attestation clause was read over to him, the case is presented of two persons asserting that the statements in a paper which they signed sixteen years before were not true. No doubt, as the learned Judge says, the occasion was an impressive one; but beyond that it was not a matter in which either of the parties was otherwise interested, and it is common experience how much, after so many years, the details of an occurrence in which one is not interested, fade from the memory. I think it most improbable that William, who was in the habit of drawing wills, and who

had drawn the attestation clause from memory, without, as appears, having any form from which to copy it, should have had the testator sign before the witnesses came in. There is no pretence that the signature of the deceased was covered over or concealed, and yet the witnesses have no memory of having seen it. They must have seen it, and have forgotten the fact, and I think the proper conclusion is that they saw the testator sign, just as they have certified over their respective signatures, and as related by William and Martin, and that they have forgotten that fact, just as they must have forgotten that they saw his signature.

Many cases were cited to us, but none which, in my opinion, obliges us to hold on the evidence of the two subscribing witnesses, and contrary to the evidence of William and Martin, that this will was not executed just as expressed on its face, and as expressed in the certificate signed by the two witnesses.

The other question is, whether the will having been drawn by William, who takes a substantial benefit under it, he has satisfied the onus cast upon him by that circumstance, as laid down in Fulton v. Andrew, L. R. 7 H. L. 471, Tyrrell v. Painton, [1894] P. 151, and Adams v. McBeath, 27 S. C. R. 13, of shewing the righteousness of the transaction. I think that onus is satisfied by the fact that the testator soon recovered his usual health, and lived for sixteen years afterwards, and allowed his will to stand without taking any step to alter or revoke it.

For these reasons I am of opinion that the judgment should be reversed, and that probate should be ordered to go.

NOVEMBER 14TH, 1904.

C.A.

MYERS v. RUPORT.

Limitation of Actions—Real Property Limitation Act—Acquiring Title by Possession to Undivided Half of Lot—Husband and Wife—Joint Occupancy—Rights of Husband Surviving Wife—Declaration of Title—Rights of True Owner.

Appeal by defendants from judgment of BRITTON, J., 2 O. W. R. 674, in favour of plaintiff.

The appeal was heard by Moss, C.J.O., Osler, Maclennan, Garrow, Maclaren, JJ.A.

A. B. Aylesworth, K.C., for appellants.

D. B. Maclennan, K.C., for plaintiff.

Moss, C.J.O.—Plaintiff seeks a declaration that he is seised in fee simple of an undivided half of the north half of the south-west quarter of lot 31 in the 9th concession of Cornwall, of which he is now in the sole possession.

He admits that defendant Beaque Ruport is entitled to the other undivided half, subject to incumbrances in favour of the defendant Newman; and he asks that partition be made between him and defendants.

Defendants deny plaintiff's title and assert that the title to the whole parcel is vested in defendant Beaque Ruport subject to the incumbrances.

Plaintiff founds his claim of title upon possession of the parcel for more than the statutory period.

A short statement of the paper title will suffice for the purposes of the question to be determined.

On and after 1st March, 1872, defendant Beaque Ruport and one Adam Ruport were the owners as tenants in common of the south-west quarter of the lot, containing 50 acres, and Adam Ruport alone was in possession.

He died on 30th March, 1872, having by his will devised his undivided half to his wife Caroline Ruport for life. He made no disposition of the remainder, and died without issue; consequently the remainder descended to his father, Levi Ruport. After Adam's death his widow continued in possession of the whole parcel. On 4th March, 1873, she intermarried with plaintiff, and they continued in sole possession until 24th December, 1887, when they conveyed the south half of the south-west quarter to defendant Beaque Ruport, who entered into possession thereof.

Plaintiff and his wife continued in possession of the whole of the north-west quarter during their joint lives. On 3rd March, 1903, plaintiff's wife died without issue, and plaintiff has remained in possession of the whole.

Levi Ruport died in the year 1885, leaving a will whereby he devised his undivded estate in remainder to defendant Beaque Ruport.

Upon the death of plaintiff's wife, defendant Beaque Ruport became entitled, as devisee of his father, to the undivided one-half of which she was tenant for life, and he claims that he is still the owner of the other undivided half,

notwithstanding the possession commencing with that of plaintiff's wife from 30th March, 1872, and continuing until her death on 3rd March, 1903. But the sole question in this action is, whether plaintiff is entitled to a declaration of title in his favour. Plaintiff's marriage was after the coming into force of the Married Women's Property Act, 1872. His wife was in sole possession, and, as against defendant Beaque Ruport's undivided half, the Statute of Limitations had begun to run in her favour. At all events the possession was in her, and it was such as was capable of ripening into a title under the statute as against Beaque Ruport. It was an interest in real estate which was capable of transmission by will or by transfer inter vivos. As against everybody but Beaque Ruport she was the owner in fee.

This interest in real estate was secured to her on her marriage by virtue of the 1st section of the Married Women's Property Act, 1872. She owned it at the time of her marriage, and it was hers to be held and enjoyed for her separate use free from any estate or claim of plaintiff.

The marriage did not disturb her right or interest in the estate. Neither could her husband's possession, for she was in possession at the same time.

The possession which she had begun against Beaque was continued by her notwithstanding her coverture. She made no assignment or transfer of her rights or interests or any part of them to plaintiff. To hold that he acquired such rights or interests by the mere fact of coverture and by possession taken only in consequence of the marriage, would be to deprive her of the benefit and protection of the Married Women's Property Act. Plaintiff could not become seised or entitled jointly with his wife, and thus acquire some of her rights, simply because they lived together on the land, any more than he could thus acquire her estate in other lands owned by her at the time of the marriage. But for the fact that there was a lawful marriage, the nature of plaintiff's possession resembles that of the person who had gone through the ceremony with the wife of plaintiff in McArthur v. Egleson, 43 U. C. R. 406, 3 A. R. 577.

As against defendant Beaque Ruport, therefore, the possession was that of plaintiff's wife, and, if that possession ripened into a title, it was gained by the wife and during her lifetime.

Upon the facts and the record as framed there should not be a declaration in plaintiff's favour, and his action should be dismissed. The rights of his wife's heirs are not

in question in this action. Neither is his right to possession as against others.

It may appear anomalous at first sight, but, although plaintiff is not entitled to a declaration of title from the Court, it does not follow that he is subject to be dispossessed by defendant Beaque Ruport or those claiming under him. In that respect plaintiff's present possession, coupled with the non-possession of defendant Beaque Ruport, may prove to be difficulties in the latter's way. . . .

[Reference to Kipp v. Incorporated Synod of Diocese of Toronto, 33 U. C. R. 220; Willis v. Earl Howe, [1893] 2 Ch. at p. 553, 554; Agency Co. v. Short, 12 App. Cas. 793.]

In the present case we are not called upon to determine more than that plaintiff has not shewn himself entitled to the relief he seeks in this action.

The appeal should be allowed and the action dismissed with costs.

OSLER and GARROW, JJ.A., concurred, the former giving reasons in writing.

MACLENNAN and MACLAREN, JJ.A., dissented, the former giving reasons in writing.

NOVEMBER 14TH, 1904.

C.A.

RE DONALDSON, GIBSON v. DONALDSON.

Executors and Administrators — Charging Administratrix with Loss to Estate—Contract for Sale of Land—Reasonable Price—Statute of Frauds—Chattels.

Appeal by plaintiff from order of a Divisional Court (3 O. W. R. 290) allowing appeal from order of FALCONBRIDGE, C.J. (2 O. W. R. 810), dismissing defendant's appeal from report of local Master at St. Catharines, in an administration proceeding, charging the defendant as administratrix with $1,025 as loss to the estate by reason of a sale of 80 acres of land belonging to the estate to Arthur Traver, her nephew and an infant.

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

I. F. Hellmuth, K.C., and J. H. Ingersoll, St. Catharines, for appellant.

W. H. Blake, K.C., for defendant.

MACLAREN, J.A. (after stating the facts at length):—From the very careful summary of the evidence as to the value of the land made by the Chancellor in his judgment in the Divisional Court, it appears that the price paid by Traver was a fair one. It was at least $700 more than the highest bid at the auction, and only $100 below the reserve bid.

The evidence is conflicting as to the extent of the knowledge of the administratrix of the negotiations of Traver with these purchasers and others. The Master found and the plaintiff has contended before us that, as she was aware of some at least of these negotiations, it was her duty to have inquired further into them, and as she had not then given a deed to Traver, that she should have made the sales to these persons herself, and thereby have secured the benefit of the increased price for the estate.

A sufficient answer to this claim is, as to Singer, it was not in her power to have made it. If she had repudiated her sale to Traver, there is no evidence that his mother would have given her the required strip to Lake Ontario to make the rifle range, and without this Singer would not have bought. Indeed it may reasonably be assumed that she would not have given it at all in the event of such repudiation.

The sale to Coleman is one that it would not have been proper for an administratrix to have made. From his record it is very doubtful if Traver will be able to realize his money from him. Further, there is no satisfactory evidence as to the value of the remaining 25 acres still in Traver's hands. It is shewn that the land is impoverished and without a roadway.

In the circumstances I do not think we are called upon to decide whether the administratrix had a right to cancel her agreement with Traver, and refuse to give him a deed. There is no satisfactory evidence that she could have sold to better advantage. In my opinion the Master erred in looking at the matter in the light of the subsequent sales by Traver and assuming that she could have made them. There is no evidence to sustain such an assumption. On the contrary, if he had refused his offer, she might have been held liable.

On the whole, I am of opinion that the judgment of the Divisional Court should be affirmed.

MOSS, C.J.O., MACLENNAN and GARROW, JJ.A., concurred.

OSLER, J.A., with some hesitation, also concurred.

NOVEMBER 14TH, 1904.

C.A.

CITY OF OTTAWA v. OTTAWA ELECTRIC CO.

Arbitration and Award—Municipal Corporation—Agreement with Electric Company—Erection of Poles and Wires in Streets—Use of by another Company—Authorization—Resolution of Council—By-law—Compensation—Action—Reference to Arbitrators—Motion to Set aside Award—Weight of Evidence—Interference with Operation of System—Misconduct of Arbitrators—Champerty—Decision on Questions of Law.

Appeal by defendants from order of FERGUSON, J. (3 O. W. R. 65), dismissing motion by defendants to set aside an award in respect of the use of the poles erected by defendants for transmitting electricity in the city of Ottawa.

G. F. Henderson, Ottawa, for appellants.

E. D. Armour, K.C., and Glyn Osler, Ottawa, for plaintiffs.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.), was delivered by

GARROW, J.A.— . . . The submission was made by counsel at the trial, in an action brought by plaintiffs against defendants to enforce an agreement between defendants and plaintiffs the corporation of the city of Ottawa, whereby, on the granting to defendants of a right to place poles upon public highways in the city of Ottawa, to be used for the purpose of supplying electricity by the defendants, the corporation of the city had reserved the right to permit and allow any other company authorized by the city to use defendants' poles so placed, for electrical purposes, on paying such compensation as might be agreed upon, or, failing agreement, by arbitration.

The submission as contained in the judgment, so far as material, is in the following words:

"2. This Court doth order that this action be and the same is hereby referred to the award of a board of arbitrators, consisting of one person to be appointed by plaintiffs the Consumers' Electric Co., Limited, one person to be appointed by defendants, and a third person, being an expert electrical engineer, to be appointed by the Court under and pursuant to the provisions of the Arbitration Act, R. S. O. ch. 62.

"3. And this Court doth further order that the said board of arbitrators do survey or view the streets and the poles of defendant company in the statement of claim mentioned, and ascertain, note, and award whether plaintiffs the Consumers' Electric Company, Limited, can use said poles on the said streets or any or some of them for electrical purposes without interfering with the efficiency, operation, and completion of the system of defendant company according to the terms of the agreement between plaintiffs the corporation of the city of Ottawa and the Ottawa Electric Light Co., and others, dated 30th June, 1894, in the pleadings mentioned, and to what extent, and in what manner the same can be done.

"4. And this Court doth further order that in addition to the matters in question in this action the said board of arbitrators do ascertain, state, and award what compensation shall be paid by plaintiffs the Consumers' Electric Company, Limited, to defendants for or in respect of the use of the said poles or any of them in the manner and for the purpose ascertained and stated in accordance with the preceding paragraph hereof, if any such use is allowed.

"6. And this Court doth further order that the council of the city of Ottawa may supplement the license granted by them to plaintiffs the Consumers' Electric Company, Limited, by the passing of the resolution of 21st April, 1903, in the pleadings mentioned, by a by-law in the same terms.

"9. And this Court doth further order that the award of a majority of the said arbitrators shall be the award of the said board, and shall be binding upon the parties hereto in every respect in the same manner as if it were the unanimous award of the said board of arbitrators."

Acting under this reference plaintiffs appointed R. F. Kelch, defendants H. D. Bayne, and the Court James B. Cahoon, as the arbitrators, and a majority of them, namely, James B. Cahoon and R. F. Kelch, made their award dated 7th August, 1903, whereby they awarded that the Consumers' Electric Company may go on the poles of the Ottawa Electric Company "as specified in No. 13 herein," (a list in detail of the streets and poles), and "we rule that they are entitled to take in accordance with their petition dated 10th March, 1902, exhibit No. 15 herein, and in accordance with by-law No. 1472 of the corporation of the city of Ottawa, and resolution of the city council dated 21st April, 1902, and that such use will not interfere with the efficiency, operation, and completion of the system of the Ottawa Electric Company."

. . .

Defendants contended on the original motion before the late Mr. Justice Ferguson, and again before us, that what is called an award was in fact merely a report, and that therefore they were entitled, as in the case of a report, to appeal against the findings upon the evidence. We, however, at the hearing overruled this contention, holding that what was before us was strictly an award and not a report, and that the argument should be accordingly limited as in the case of a motion to set aside an award, and upon this footing the argument proceeded.

Mr. Henderson for the defendants then argued:

1. That the resolution of the city council of 21st April, 1902, was insufficient—that a by-law should have been passed before the award;

2. That the arbitrators had exceeded their authority in allowing plaintiffs the Consumers' Electric Company to interfere with defendants' wires by confining them as proposed;

3. And that the award was void for uncertainty in that it failed to prescribe the length of the cross-arms, the kind of wires, and the voltage, which might be used by the Consumers' Electric Company.

He also contended that the agreement between plaintiffs to carry on this litigation was champertous, and that the arbitrators or some of them had been guilty of misconduct, but he evidently did not place much faith in these latter objections, for which, in my opinion, there was no foundation.

In my opinion defendants also fail upon the other or main objections.

As to the first, I am not at all satisfied that the resolution was not in itself sufficient, but in any event the objection does not appear to be open to defendants after agreeing to clause 6 of the submission or judgment. Under that clause the city council clearly might (as they afterwards did) pass a by-law either before or after the making of the award.

As to objection 2. The powers which the arbitrators assumed to exercise in directing the interference complained of with defendants' wires, seem to fall directly within the terms of clause 3 of the submission. By that clause the arbitrators were directed to ascertain, state, and award whether plaintiffs the Consumers' Electric Company could use defendants' poles without interfering with the efficiency, operation, etc., of defendants' system, and to what extent, and in what manner the same could be done. This language seems to be sufficiently comprehensive to justify the method or interference complained of. That method represents the

opinion and judgment of the arbitrators as to how and to what extent plaintiffs the Consumers' Electric Company might and could use defendants' poles "without interfering with the efficiency, operation, &c., of defendants' system" within the terms of clause 3 of the submission.

As to objection 3. I am wholly unable to see any proper foundation for this objection. Plaintiffs the Consumers' Electric Co. evidently contemplate carrying on a business somewhat similar to that of defendants, a rival company in fact. Their cross-arms, wires, etc., will therefore probably be somewhat similar in length, size, voltage, etc., to those of defendants. But there is nothing in the submission to shew that the arbitrators were required to specify anything as to length, size, or voltage, so that, instead of holding that the award is void for uncertainty in not dealing with these matters, I am inclined to think that it would have been a valid objection if it had, as in excess of jurisdiction. However that may be, it is, I think, clear that this objection also wholly fails.

Appeal dismissed with costs.

NOVEMBER 14TH, 1904.

C.A.

FENSOM v. CANADIAN PACIFIC R. W. CO.

Railway—Injury to Animals on Track—Neglect to Fence—Escape of Animals from Private Way to Track—Escape from Highway—By-law of Municipality Allowing Cattle to Run at Large—Crown Lands.

Appeal by defendants from judgment of a Divisional Court (3 O. W. R. 227, 7 O. L. R. 254), dismissing defendants' appeal from judgment of BRITTON, J. (2 O. W. R. 479), and allowing plaintiff's cross-appeal, in action to recover the value of cattle killed upon defendants' track in the township of Nairn, Algoma.

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

I. F. Hellmuth, K.C., for appellants.

J. H. Clary, Sudbury, for plaintiff.

OSLER, J.A.—Plaintiff's cattle, the loss of which is in question in this appeal, not being in charge of any one, were at large upon a highway, within half a mile of the intersection of such highway with defendants' railway at rail

level, and got upon the railway at the point of intersection. Had they been killed at this point, or (probably) elsewhere on the track, before they had left the railway, the owner would have had no right of action against the company (sec. 271 of the Dominion Railway Act, 1888). They did, however, leave the track in safety, and, after wandering hither and thither, finally got upon the railway again from certain lands of the Crown, between which and the lands of the railway company it was the duty of the latter to have erected and maintained fences along each side of their track, a duty which they had omitted to perform; and it was in consequence of this omission that the cattle got upon the railway at the place where they were killed.

The case turns upon the proper construction of sub-sec. 3 of sec. 194 of the Railway Act, 1888, as amended by 53 Vict. ch. 28, sec. 2, read in the light of sec. 546 of the Municipal Act of Ontario, and sec. 32 of R. S. O. ch. 225, extending the powers conferred by the former section to municipalities organized under the latter Act. Under these provisions the council of the union municipality of Nairn, Lorne, and Hyman, in the district of Algoma, within the territorial limits of which municipality the animals in question were killed, had passed a by-law prohibiting the running at large of certain animals, and allowing all milch cows and cattle other than those mentioned in the first clause of the by-law to run at large, and providing that, so far as the law enabled the council so to enact, it should be lawful for such cattle, without being in charge of any person, to loiter or stop on the roads and highways of the municipality. This appears to me to be such a by-law as, to the extent at all events of allowing such cattle to "run at large," might be lawfully passed by the municipality under the authority of sec. 546 (2). I do not, however, for a moment, suppose that such a by-law or any by-law would authorize the trespassing of such cattle upon the lands of the Crown or of any private person. I agree in this respect with the views so forcibly expressed by my learned brother Meredith in the Court below. The authority of the council extends no further than to allow the running at large upon the roads and highways of the municipality. With the consequences which might follow from the trespassing of cattle upon such lands, after the passing of the by-law, and the right of the landowner against the cattle or as between their owner and himself, we have nothing to do in this case.

Then the amended sub-sec. 3 of sec. 194 of the Railway Act provides for two distinct cases: (*a*) If the company omit to erect and complete any fence or cattle guard, or if,

after it is completed, the company neglect to maintain the same, and if, in consequence of such omission or neglect, any animal gets upon the track from an adjoining place where under the circumstances it might properly be, then the company shall be liable to the owner of every such animal for all damages in respect of it caused by any of the company's trains or engines; (*b*) and no animal allowed by law to run at large shall be held to be improperly on a place adjoining the railway merely for the reason that the owner or occupant of such place has not permitted it to be there.

The first branch of the sub-section is no more than an enactment or declaration of the existing law; but the second branch makes a new provision, and is an extension of the company's liability in respect of the particular case of cattle which are by law allowed to run at large, and, while not affirming, as between the cattle-owner and the land-owner, the right of the cattle of the former to trespass on the lands of the latter, nevertheless provides that, as regards the railway company, who ought by law to have fenced their lands from the adjoining lands, the cattle which escape from such unfenced adjoining lands upon the railway shall not be held to have been improperly there merely because the owner of the land has not permitted them to be there. But for this provision the owner of the cattle would in such a case have had no right of action against the railway company, but the Legislature, recognizing no doubt the fact that cattle lawfully running at large upon a highway would be very likely to stray upon lands not fenced from the highway, have deemed it right to enact that the railway company shall not be at liberty to set up, as an answer to the breach of their own general obligation to fence their railway, the fact that the cattle were trespassing on the adjoining land, from which, in consequence of their own breach of duty, though a duty owing immediately to the land owner, the cattle have escaped upon the track and been killed or injured by their trains or engines. In short, if the cattle were properly on the lands, a fortiori the company are liable, and, in the very words of the Act, they are not to be held to have been improperly there merely because they have not been permitted to be there by the land owner or occupant, which is the case before us.

Appeal dismissed with costs.

GARROW, J.A., gave reasons in writing for the same conclusion.

MOSS, C.J.O., MACLENNAN and MACLAREN, JJ.A., concurred.

NOVEMBER 14TH, 1904.

C.A.

OSTERHOUT v. OSTERHOUT.

Will—Construction—Bequest of Personalty—"Reversion"—Gift over—Absolute Interest.

Appeal by defendant from judgment of a Divisional Court (3 O. W. R. 249, 7 O. L. R. 402), reversing judgment of MACMAHON, J. (2 O. W. R. 842), in an action for the construction of the will of Wilfred E. Osterhout. The testator gave to his father (the defendant) one-half of his ready money and of all his estate, "with reversion" to his brother (the plaintiff) on the decease of his father, and the other half to his brother. The portion of the estate in question consisted of $7,000 deposited in a bank. The Court below held that the father was entitled for his life only to the use of one-half of the money, and that, subject to the life interest of the father, the brother took the same absolutely.

W. E. Middleton and C. H. Widdifield, Picton, for appellant.

G. Kerr and Joseph Montgomery, for plaintiff.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.), was delivered by

MACLENNAN, J.A.— . . . It has often been remarked that the construction put upon different words in other wills affords but little help in such cases, and in In re Blantern, [1891] W. N. 54, the Court of Appeal said: "The proper rule for construing a will is to form an opinion apart from the cases, and then to see whether the cases require modification of that opinion; not to begin by considering how far the will resembled others on which decisions had been given."

Now here the testator gives the half to his father, and if he had stopped there no question could arise. But that is not all his meaning or intention. He means his brother to have something at the decease of his father. What is it? It is the "reversion," and evidently the reversion of what he had given to his father. I think the plain meaning of the words used, "with reversion to my brother," is, that what he has given to his father should "revert" to his brother on the event named, that is, should go over to his brother.

This construction gives effect to the words used by the testator, whereas the construction contended for by the appellant would give them no effect at all, but would hold them to be meaningless and useless.

If we now look at the decided cases, there are none, as I think, which require us to put a different construction upon the words, or to hold that the testator's intention to give something to his brother in the half which he gave to his father at the latter's death, should be defeated. . . .

[Reference to Sheldon v. Kimble, 53 L. T. N. S. 527, and cases cited; Re Russell, 52 L. T. N. S. 559.]

Appeal dismissed with costs.

NOVEMBER 14TH, 1904.

C.A.

MARKLE v. DONALDSON.

Master and Servant—Injury to Servant—Negligence—Unsafe Method—Absence of Knowledge of Master—Workmen's Compensation Act—Defects in "Ways, Works," etc., of Building—Negligence of Workman—Person Intrusted with Seeing that Condition of Ways Proper.

Appeal by defendants from order of a Divisional Court (3 O. W. R. 147, 7 O. L. R. 376), setting aside a nonsuit entered by FERGUSON, J., at the trial at Hamilton, and directing a new trial of an action by a workman against his employers to recover damages for injuries sustained in the course of his employment, by reason of the alleged negligence of defendants in the condition of a cleat upon the roof of a house which plaintiff was shingling.

W. R. Riddell, K.C., for appellants.

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

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.), was delivered by

MACLENNAN, J.A.— . . The question turned upon sec. 3 (1) of the Workmen's Compensation Act, as qualified by sec. 6 (1) of the same Act.

According to the evidence, if believed, the plaintiff fell in consequence of a cleat which had been placed in the roof to support the workmen, had been insufficiently nailed or secured to the sheeting, and gave way under the weight of the plaintiff's body, whereby he fell and received his injury. . . .

The cleats used were for the sole purpose of supporting the workman and the shingles and materials used by him while he was at work, and to be removed when the work

was done. They served a temporary purpose—the same purpose as a scaffold. They were, therefore, a "work" or "plant" "connected with, intended for, or used in" defendants' business, within the meaning of the statute. This would be so even if they had been put in place by plaintiff. There was evidence, however, that the cleat in question was in position, and was not properly secured, when plaintiff went upon the work, and had been so placed and left unsecured on a former day by persons in the employment of defendants. When plaintiff began his work he had a right to assume that the work previously done, including the means provided for the safety of the workman, had been done with care, and without negligence. In these circumstances we do not see how it can be contended that the person who put the cleat in position was not a person intrusted by defendants with the duty of seeing that the condition of the works, etc., was proper. . . .

Appeal dismissed with costs.

NOVEMBER 14TH, 1904.

C.A.

SASKATCHEWAN LAND AND HOMESTEAD CO. v. LEADLEY.

SASKATCHEWAN LAND AND HOMESTEAD CO. v. MOORE.

Appeal to Court of Appeal—Leave to Appeal—Question of Practice—Use of Company's Name as Plaintiff in Actions —Discretion.

Motions by defendants for leave to appeal from orders of a Divisional Court (ante 39) allowing appeals by plaintiffs from orders of FALCONBRIDGE, C.J. (3 O. W. R. 191), varying orders of Master in Chambers (3 O. W. R. 133), and holding that the name of plaintiff company may be used by certain shareholders.

A. J. Russell Snow, for defendant Moore.

J. W. St. John, for defendants the Leadleys.

R. J. Maclennan, for plaintiffs.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, JJ.A.) was delivered by

MOSS, C.J.O.—The question involved is in a certain sense a question of practice merely, and is not likely to affect the ultimate rights of the parties.

Defendants have by no means made it apparent that the majority of the shareholders are opposed to the actions, or that they do not desire them to be proceeded with in the name of the company. But, if it be assumed that defendants are able to shew that the name of the company is being used as plaintiff contrary to the wish of the majority of the shareholders, that would not end the litigation, but would merely alter the form of the actions. Enough is shewn to enable it to be seen that the actions are being prosecuted with the sanction of a large body of the shareholders. The decision of the Divisional Court goes no further than to determine that, in the facts of these cases, the actions should be allowed to proceed as framed. No rule of practice has been seriously interfered with . . . and the decision has established no precedent likely to be of general application. There are no grounds upon which the discretion to permit the matter to be considered further should be exercised.

Motion dismissed with costs.

NOVEMBER 14TH, 1904.

C.A.

RE BADEN MACHINERY MANUFACTURING CO.

Company — Winding-up — Contributories — Shares—Payment—Evidence of.

Appeal by Charles Hood and A. J. Snow from order of FERGUSON, J., 3 O. W. R. 190, dismissing their appeal from report of local Judge at Berlin, in a winding-up reference, placing them upon the list of contributories for $2,500 each.

R. S. Robertson, Stratford, and R. F. Segsworth, for appellants.

J. C. Haight, Waterloo, for liquidator.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, JJ.A.), was delivered by

MOSS, C.J.O.— . . . The appellants' contention is that the shares are fully paid up. It is admitted that they were not paid for in cash, but it is contended that they were issued to them as fully paid up shares, in consideration of the transfer by them or on their account of certain property to the company after its formation. They claim to have acquired the property in question by purchase from a firm of Oelschlager Bros., who for some years prior to the formation of the company had been carrying on the business of

manufacturers of engines, boilers, and other machinery in the town of Baden. The firm had been doing business with the Buffalo Tool and Machine Co., in which company Hood was interested and of which he was treasurer. Oelschlager Bros. were not prospering in their business, and appearances seemed to indicate that it must come to an end. For reasons pertaining to the business of the Buffalo Machine and Tool Co., Hood was anxious to prevent the business terminating. He associated with himself the appellant Snow, and one Oliver Masters, and made arrangements for the purchase of the Oelschlager Bros. property for the purpose of an intended joint stock company, of which Hood, Snow, and Masters were to be provisional directors. And a memorandum of agreement for the formation of a company under the Ontario Joint Stock Companies Act was signed by Hood, Masters, and one William Cram, on 26th July, 1902, and by Snow on 29th July, 1902.

Hood, Snow, and Masters then joined in a writing authorizing Cram as their attorney and trustee to obtain for them the property of Oelschlager Bros. to be acquired and held for the purposes of the intended company.

Cram procured a bill of sale of the property from Oelschlager Bros., dated 4th August, 1902, the stated consideration being $1,155, paid to the vendors, and the assumption of the registered incumbrances against the property—but it appears that that sum was not paid to Oelschlager Bros., and Henry Oelschlager testified that the firm transferred the property to Cram for the intended company, which was to assume all the indebtedness of the firm, as he understood.

To enable some of the claims against the property to be paid, Hood made a promissory note in favour of Masters for $2,000, dated 6th August, 1902, payable 3 months after date. This note was discounted, and some part of the proceeds used in paying liabilities of Oelschlager Bros. But this left unpaid certain liens and registered claims against some parts of the property, and on 13th September, 1903, Cram made a draft on the Buffalo Tool and Machine Co. in favour of Masters for $1,200, which was accepted, and, being discounted by Cram at the Bank of Hamilton in Berlin, the proceeds were applied in paying certain liens and incumbrances, which were transferred to the bank. This draft was afterwards paid by the Buffalo Tool and Machine Co., which thus became entitled to and received the benefit of the securities held by the bank. Other drafts were made upon and accepted by the Buffalo Tool and Machine Co., but it is not material to follow them further.

On 27th August, 1902, the letters patent incorporating the Baden Machinery Manufacturing Company, Limited, were issued, the incorporators named being Hood, Snow, Masters, Cram, and one Charles Henry Carter. The provisional directors were Hood, Snow, and Masters. All the above named persons had previously become subscribers to the memorandum of agreement for the formation of the company. By this memorandum Hood and Snow each subscribed for and agreed to take $2,500 of shares in the company.

On 4th October, 1904, the provisional directors held a meeting at which it was decided to call a general meeting of the shareholders for 17th October for the purpose of organization. The minutes of the meeting also record that it was resolved to demand from Mr. W. Cram, one of the promoters of the company, a transfer of all property purchased by him as trustee for the company since incorporated, transferring such property to the said company, and to require the said Cram to give an account of all property and moneys passing through his hands since he acquired the said property.

The meeting of shareholders was held on 17th October, but the minutes have no record of any further action with regard to the transfer of the property by Cram to the company.

By bill of sale dated 4th October, 1902, between Cram, of the first part, and the company, of the second part, after reciting that Cram was possessed of the property therein described as trustee for Hood, Cram, and Masters, purchased for the purpose of forming a joint stock company, and that the company had been formed, and that Hood, Snow, and Masters, provisional directors, had demanded a transfer to the company in fulfilment of the trust, it was witnessed that Cram sold, assigned, and transferred the said property to the company.

And Hood and Snow now set up and claim that this transfer was made in consideration of the issue to them of the amount of the shares subscribed for by them as fully paid up shares.

But neither in the minutes of the company nor elsewhere is there any record of any bargain or agreement to that effect between the company and Hood and Snow. Oral testimony was given to shew that at the meeting of shareholders on 17th October some explanation was given by Hood to the shareholders present, of some arrangement or understanding

whereby his and Snow's shares were to be issued as fully paid up shares. Even if this evidence could be permitted to supplement the record of the minutes, which may well be doubted, for there is nothing to shew that the minutes were not properly kept, it is not undisputed, and it is of too vague and general a character to establish an agreement.

It does not appear to have been stated in the documents on the application for the letters patent that any amount had been paid in on shares taken by transfer of property to a trustee. See the Ontario Companies Act, sec. 10 (3).

But the conclusive answer to the appellants' contention is, that it is clearly shewn that the purchase of the property from Oelschlager Bros. was not made for Hood and Snow, but for the company.

It is to be observed that the only moneys for the purchase derived from them were the proceeds of the $2,000 note made by Hood. But it was agreed that this note was to be assumed and paid by the company. It was in fact to be treated as representing some of the firm's liabilities which the company was to assume. And on 1st November, 1902, the company made its promissory note for $4,000, which was discounted at the Western Bank, and out of the proceeds thereof Hood's $2,000 note was retired and handed over to him.

The evidence goes to shew that this was the agreement and understanding from the first, and Hood admits that it was so arranged at the time when the company was formed, and that the $2,000 note was merged in the $4,000 note made by the company.

This being so, any other arrangement made for issuing to Hood and Snow their shares as fully paid up was an arrangement for giving them to them for nothing.

Further, this evidence wholly displaces the contention that the property was the property of Hood and Snow, and was transferred by them in payment of their subscribed shares. In fact the property was purchased for the company, and any advance made by Hood for the purpose was agreed to be assumed and was assumed by the company.

In view of these facts, the issue to Hood and Snow of certificates of fully paid up shares was a mere form, and could not bind the company or the liquidator.

Appeal dismissed with costs.

NOVEMBER 14TH, 1904.

C.A.

COULTER v. EQUITY FIRE INS. CO.

Fire Insurance—Oral Contract—Interim Receipt—Insurance for 30 Days—Application for Insurance for One Year—Acceptance by Agent of Premium for One Year—Knowledge of Insurers—Estoppel—Statutory Conditions—Omission to Disclose Incumbrances—Immateriality.

Appeal by defendants from judgment of MEREDITH, C.J. (3 O. W. R. 194, 7 O. L. R. 180), in favour of plaintiffs in an action upon a fire insurance policy.

G. H. Watson, K.C., for appellants.

W. R. Riddell, K.C., and S. B. Woods, for plaintiffs.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.), was delivered by

GARROW, J.A.—The learned Chief Justice apparently found upon conflicting evidence, clearly involving the question of credibility, that defendants accepted plaintiffs' application for an insurance for one year at a premium agreed upon, and paid, and with that finding, so based, we cannot, or at least ought not to, interfere.

The transaction took place at defendants' head office with their general manager, and the proposal and acceptance, followed by payment of the premium, in such circumstances, were, although by parol, quite sufficient to constitute a valid and binding contract of insurance capable of enforcement: Perry v. Newcastle M. F. Ins. Co., 4 U. C. R. 363; Jones v. Provincial Ins. Co., 16 U. C. R. 477; London Life Ins. Co. v. Wright, 5 S. C. R. 513; Porter on Insurance, 2nd ed. (1889), p. 20: Joyce on Insurance (1897), sec. 31 et seq.; R. S. O. 1897, ch. 203, sec. 2, sub-sec. 37. Formerly, of course, the remedy would have been in equity to compel delivery of a policy and consequential relief, but now, since the Judicature Act, all the Courts have equitable jurisdiction, and are bound to act upon and enforce equitable as well as legal rights.

Assuming, then, that there was a binding contract to insure for one year, the burden was clearly upon defendants to shew that something had occurred after that contract was made to modify or end it before the fire, which took place within the year, and in that I think defendants entirely fail.

The only thing affecting plaintiffs to which defendants point is the fact that an interim receipt valid only for 30 days (for that, I think, is its proper construction) was issued to and received by plaintiffs. This receipt, however, was issued apparently as matter of routine by an under officer of defendants. It is on the usual printed form, and was not passed upon nor required to be passed upon by the general manager, who had just made the parol contract. It was, it is true, received by plaintiffs, but the evidence shews, and the Chief Justice has found, that they did not observe that it by its terms might modify the earlier parol contract. And after they received it they paid the full year's premium. So long as the question was, contract or no contract, the fact that an interim receipt in this limited form had issued was of prime importance, the argument by the defendants being of course that it and it alone created the only contract between the parties. But beginning, as I think we must, with the finding in plaintiffs' favour that there really was the completed prior parol contract, the importance of the interim receipt at once practically ceases, because in such case, and upon this branch, its only use must be as shewing or tending to shew that plaintiffs had agreed to accept it in performance of or substitution for the larger contract, a contention for which there is, in my opinion, no foundation.

The remaining question is as to the effect of plaintiffs' failure to disclose the incumbrance upon their property at the time of the application for insurance.

The parol agreement, apart from the interim receipt, included, in my opinion, as a term to be necessarily implied to carry out the intention of both parties, that a proper written policy would issue in due course. And I also think, differing in this respect to some extent from the opinion of the learned Chief Justice, that plaintiffs were only entitled to claim, and defendants bound to tender, a policy in the usual form then used by them, that is, a policy subject to the statutory conditions and to such variations of these conditions, properly printed, as were just and reasonable: Citizen Ins. Co. v. Parsons, 7 App. Cas. 96, at pp. 126, 127; Eureka Ins. Co. v. Robinson, 56 N. Y. St. 226, at p. 264; De Greve v. Metropolitan Ins. Co., 61 N. Y. St. 594, at p. 602; Machine Co. v. Ins. Co., 50 Ohio St. 549, at p. 556; Smith v. State Ins. Co., 64 Iowa St. 716, at p. 718.

There is in this case, as in the Parsons case, an interim receipt which states that the insurance is "subject to the terms and conditions contained in the policies of the company, at the date hereof." And while, in my opinion, the

receipt is insufficient to cut down the contract to an insurance for 30 days only, it is still a part of the evidence surrounding the making of the contract, and may be properly referred to upon this subject, and it apparently supports the implication to which I have referred. Indeed such implication seems to be absolutely necessary in plaintiffs' interest. There is certainly nothing to suggest, but quite the contrary, that defendants, at all events, ever intended anything but their usual contract as set forth in their usual policy, with the result that but for the implication in question it might and perhaps should be properly held that there never was a completed contract in which the minds of the parties had fully and completely met. The point, however, is not, in my opinion, important, or at least decisive in this case, in the view I take of the effect of the variation relied upon. The variation is to the first statutory condition, and requires the applicant to communicate the fact of any mortgage or other incumbrance and the amount thereof on the insured property, and is properly printed on defendants' policies then in use, in red ink.

It is, I think, a question of some nicety whether the language of the variation really adds anything to the statutory condition, which requires the insured not to misrepresent or omit to communicate any circumstance which is material to be made known to the company in order to enable it to judge of the risk it undertakes. "Any circumstance" is a large enough expression to include, if necessary, the words added by the variation, "Mortgage, execution, or other incumbrance, and the amount thereof, on the insured property." The matter in either event to be communicated is one which is material to the risk. So that the construction would be apparently the same whether the general words only of the statutory condition are employed or the more amplified and specified language of the variation is used. In either case the fact communicated or omitted to be communicated must be one "material to be made known to the company in order to enable it to judge of the risk it undertakes." And in this case and on the evidence I would without hesitation hold that the existence of the incumbrance in question was not a fact material to be made known to defendants. And, even if the proper conclusion be that the variation has added something "just and reasonable" to the statutory condition, the result would still, I think, be the same.

The object plainly expressed, reading the whole condition originally, or as varied or attempted to be varied, is to obtain information before accepting the risk to enable the company

to judge of the risk about to be undertaken. Such information is usually obtained by answers in writing to questions in a written application, although, doubtless, verbal questions and answers would serve the purpose, and if no questions are asked it is to be assumed, in the absence, of course, of fraud, that the company is willing to accept the risk without such information, or that the company has otherwise satisfied itself as to the title.

There were here no written application and no questions or answers, written or verbal, and there was, therefore, in my opinion, no duty to communicate, within the meaning of the condition and variation. See Klein v. Union Fire Ins. Co., 3 O. R. 234.

Appeal dismissed with costs.

NOVEMBER 14TH, 1904.

C.A.

CITY OF TORONTO v. MALLON.

Landlord and Tenant — Action for Rent — Agreement for Lease—Refusal to Sign Lease—Taking Possession—Possession Referable to Agreement.

Appeal by defendants from judgment of MACMAHON, J., 2 O. W. R. 933, in favour of plaintiffs.

G. F. Shepley, K.C., and J. E. Day, for appellants.

J. S. Fullerton, K.C., and W. C. Chisholm, for plaintiffs.

The judgment of the Court (MOSS, C.J.O., MACLENNAN, GARROW, MACLAREN, JJ.A.), was delivered by

MACLAREN, J.A.—Defendants have appealed from the decision of the trial Judge, which held them liable for $217, being for 3 months' rental of stalls 2 and 72 in the new St. Lawrence market, less $200, the amount of a cheque deposited by them when these stalls were knocked down to them at the auction on 27th August, 1902.

The appeal is based on a number of grounds; that most strongly urged being the alleged misrepresentation by the city officials who had charge of the matter, before or during the auction sale, that no fresh meat would be permitted to be sold in that portion of the market south of what is called the gangway. Stress is also laid by defendants on the fact that on the day of the auction and before it came off, Alderman Lamb, the chairman of the sub-committee which was

appointed to look after this matter, had received a written offer from the William Davies Co. for space south of the gangway, where fresh meat might be sold by them, which offer was subsequently accepted and acted upon by the city council.

At the auction, all the stalls north of the gangway, 20 in number, being the only ones which were then fitted up, were put up for one year from 1st October, 1902, and stalls 2 and 72 were knocked down to defendants' agent for a monthly rental of $94 and $45 respectively. He signed an agreement to execute a lease, and deposited defendants' cheque for $200, which had been previously given him for that purpose.

These two stalls were the first that were put up. Later in the sale, stall 74 was bid in by one of defendants' employees for $14, and an agreement signed by Mr. Mallon personally. However, defendants did not take possession of this stall, and the claim of the city with respect thereto was dismissed by the trial Judge, and from this there has been no appeal.

There can be no doubt that the prices at which stalls 2 and 72 were bid in were grossly extravagant. The reserve bids placed upon them by the city were respectively $25.67 and $19.83, and the trial Judge has found on the evidence that a fair rental would have been $50 a month for the two. . .

There had been a previous auction sale of stalls in this market on 18th March, 1902. The results of this sale and of private arrangements for leases were embodied in a report of the property committee, which was adopted by the city council on 7th April, 1902. In this report defendants were down for 4 stalls immediately south of the gangway, at an aggregate rental of $50.75 a month. Stalls 2 and 72 were at this time allotted to other persons for $30 and $20 respectively. The defendants and the other lessees were notified to call at the city solicitor's office and sign their leases, but it appears that none of them did so, and the whole arrangement was cancelled. At this time none of the stalls was fitted up. The 4 then allotted to defendants were part of the 6 subsequently leased to the William Davies Co. in August, by private arrangement.

Several witnesses testify that at the last auction sale either the auctioneer or Alderman Lamb or Alderman Richardson stated that no fresh meat would be allowed to be sold south of the gangway, and that any butchers who wished to secure stalls for such a business must bid at that auction. Mr. Mallon does not say that he heard this at the auction

sale, but that it was said to him by Alderman Lamb before the day of the sale.

Each of these persons strongly denies that he made any statement, or that he heard such a statement made. The trial Judge finds against the defence on this point, and is of opinion that the impression conveyed to intending buyers that sales of fresh meat would not be allowed south of the gangway, probably arose from the fact that the stalls put up for sale on 27th August were north of the gangway, and that that was the place in which the butchers would have to carry on their business.

The defence also calls special attention to the fact that the plan according to which the sale took place had the words "pork and provisions" marked upon the stalls immediately south of the gangway, including those leased to the William Davies Company. As pointed out by the trial Judge, none of these stalls was fitted up, and none was offered for sale on that day, and a large number of them did not appear to have been set apart for any particular business, and might have been devoted to almost any trade.

At the close of the sale Mr. Mallon heard of the offer of the William Davies Company for the stalls south of the gangway, and that it was likely to be accepted. The next day he stopped payment of the $200 cheque, and wrote to the mayor that he had decided not to take the stalls in the new market, as he had not been aware that favouritism had been shewn to one tenant more than another, and for other reasons.

As pointed out by the trial Judge, if the matter had ended there, plaintiffs' action would have failed. Defendants remained on in the old market, where they had been for over 30 years, until 15th November, 1902, when plaintiffs began to pull it down, and they were obliged to move. They took possession of stalls 2 and 72, which they had purchased on 27th August, apparently without making any other arrangement or agreement. Matters appear to have remained in this position until about the middle of February, 1903, when the city treasurer requested defendants to allow the cheque in his possession to be paid. Their solicitor wrote in reply that payment would be allowed without prejudice to defendants' rights in the matter, and upon the understanding that the proceeds of the cheque should be applied on account of the rent to be fixed and agreed upon between them and the city with respect to the stalls which they were occupying. Negotiations followed but without result, and on 12th May the city issued a writ. . . .

The case is undoubtedly one of great hardship for the defendants. By a combination of circumstances, for which the city cannot be held responsible, they were led in a state of panic to enter into agreements for the leasing of these two stalls at prices which the chairman of the property committee describes as "ridiculously high." With full knowledge they voluntarily entered into possession without protecting themselves in any way. They allowed the city treasurer to obtain payment of their cheque by the letter of 16th February, 1903, and the cashing of this cheque by him would not have been conclusive evidence against the city even if he had power to bind it: Day v. McLea, 23 Q. B. D. 610; Mason v. Johnston, 20 A. R. 412. They apparently trusted to being able to make satisfactory arrangements with the city, which they subsequently were unable to accomplish.

On the whole I am of opinion that the judgment appealed from is correct and ought to be affirmed.

NOVEMBER 14TH, 1904.

C.A.

GRATTAN v. OTTAWA ROMAN CATHOLIC SEPARATE SCHOOL TRUSTEES.

Schools—Separate Schools—Qualification of Teachers—Religious Community—Ante-Confederation Status—Contract—Invalidity—Residence of Teacher—Payments for Furnishing—Duration of Contract—Erection of School House.

Appeal by defendants from judgment of MACMAHON, J., ante 58, 8 O. L. R. 135, granting an injunction restraining defendants from constructing a school building such as proposed by a contract entered into between defendants and the Brothers of the Christian Schools for the direction of boys' separate schools for the parish of Nôtre Dame in the city of Ottawa, and from carrying into effect the provisions of the contract, upon the ground that the employment of the Brothers as teachers without certificates was illegal. A question was raised involving the construction and meaning of a clause of the Separate Schools Act permitting the employment of "persons qualified by law as teachers" at the time of the passing of the British North America Act. The appeal was limited to the question of the right of defendants to engage the Christian Brothers as teachers.

G. F. Shepley, K.C., for appellants.

G. F. Henderson, Ottawa, and D. O'Connell, Peterborough, for plaintiff.

The judgment of the Court (Moss, C.J.O., Osler, Maclennan, Garrow, Maclaren, JJ.A.), was delivered by

Moss, C.J.O.—. . . As the learned Judge's opinion that defendants are not authorized or permitted to engage any of these persons who has not passed the examinations and does not hold the certificate of qualifications prescribed by sec. 78 of the Public Schools Act, was only one of several grounds upon which the contract was adjudged invalid, and as the other grounds appear, and indeed, are conceded to be, quite sufficient to sustain the formal judgment, the present appeal seems to be directed against one of the reasons rather than against the judgment itself.

And it might suffice for the disposition of the appeal to hold that the judgment should be affirmed upon the grounds which are not attacked. Upon the broad ground that defendants are not authorized to engage with any person or body of persons in a contract such as proposed, and that its whole scope is beyond the powers of the defendants, as well as upon the grounds referred to by the learned Judge apart from the question of the engagement of the Brothers of the Christian Schools, the contract is invalid, and defendants were rightly enjoined as directed by the judgment.

But all parties joined in expressing a wish for an opinion upon the question of the right of defendants to employ as teachers in their schools Brothers of the Christian Schools who have not passed the examinations and do not hold the certificates of qualification referred to.

On behalf of defendants it is urged that the learned Judge put an erroneous construction upon sec. 36 of the Separate Schools Act, R. S. O. 1897 ch. 294. This enactment had its genesis in sec. 13 of 26 Vict. ch. 5. It next appeared with a variation in sec. 30 of ch. 206 of R. S. O. 1877, and was first enacted in its present form as sec. 62 of 49 Vict. ch. 46.

At the time of the passing of 26 Vict. ch. 5, the provision with regard to teachers' qualifications was sec. 28 of C. S. U. C. ch. 65, by which it was enacted that a majority of the trustees of separate schools in townships or villages, or of the board of trustees in towns or villages, should have power to grant certificates of qualification to teachers of separate schools under their management. . . .

The question must be determined upon the proper construction to be placed upon the words of the section as it now appears.

The general policy declared by the later enactments was to require that teachers of separate schools should undergo the same examinations and receive the same certificates as common school teachers. But it was thought proper to exempt some persons from its immediate operation. Evidently the persons aimed at in this Province were individuals holding certificates granted by trustees under the consolidated statute, and authorized to teach or engaged in teaching by virtue thereof. The word "persons" is to be read as individuals and as applying to individuals thus qualified by law as teachers. On ordinary principles of construction, the word ought to be given the same meaning as regards those aimed at in the Province of Quebec. And there is nothing in the words of the Act pointing to a different or more extended meaning in regard to that Province. On the contrary, the language seems intended to confine the meaning to individuals. As it now reads, it is "the persons," i.e., the individuals, specifically denoted by the use of the definite article. The period of their existence is limited and circumscribed. Not all persons qualified by law as teachers, but the individuals so qualified at the time of the passing of the British North America Act, are to be considered qualified for the purpose of the Act. It is no doubt the case that when 26 Vict. ch. 5 was passed, there were persons falling within the description in the proviso of sec. 50 of 9 Vict. ch. 27 (which was applicable only to the Province of Lower Canada) engaged in teaching in this Province, but there was nothing in the law preventing them from accepting the grant of certificates of qualification by trustees under the consolidated statute. And possibly without such a certificate they could not engage in teaching in this Province, though an examination might not be a necessary preliminary to its grant. Thus they would become qualified by law as teachers either in Upper or Lower Canada.

The Legislature in 1886, and again in 1897, recognized, and perhaps not without reason, that not improbably there were still surviving some individuals who were within the category of persons qualified as teachers under the law as it existed at the time of the passing of the British North America Act, and for their benefit carried forward the saving clause. And where, as in this enactment, there is found in unambiguous language a general declaration as to the qualification required, any restriction upon that declaration should not be extended beyond what the language, construed in the ordinary and natural meaning of the words, and in the light of the context, clearly requires.

Thus treating the section in question, it does not appear that the learned Judge has come to an erroneous conclusion.

Appeal dismissed with costs.

NOVEMBER 14TH, 1904.

C.A.

MONRO v. TORONTO R. W. CO.

Partition—Lease by Infant Tenant in Common—Repudiation—Partition by Deed among Tenants in Common—Effect as to Lessees — Reformation of Deed — Trial — Adjournment—Evidence at Former Trial and on Reference—Ouster—Conduct Amounting to—Mesne Profits—Waste—Damages — General Costs — Costs of Proceedings under Order of Reference Subsequently Reversed—Costs of Appeal—Variation of Judgment.

Appeal by defendant company from judgment of TEETZEL, J. (3 O. W. R. 14), in favour of plaintiff for partition of Monro Park, near the city of Toronto. The partition sought was between plaintiff and defendant company for the remainder of the term of a lease to defendant company, which was not binding on plaintiff, as he was an infant when it was made.

J. Bicknell, K.C., and J. W. Bain, for appellants.

F. Arnoldi, K.C., and G. F. Shepley, K.C., for plaintiff.

S. B. Woods, for defendant Amy Monro.

The judgment of the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.), was delivered by

MOSS, C.J.O.—. . . It was strongly urged that no case had been made for reformation of the conveyance, and that defendant railway company ought not to be deprived of any benefit which it had derived thereunder. But it is manifest, as well from the testimony as from the whole circumstances, that there was no intention on the part of any of the parties to the conveyance to take from plaintiff any part of his rights as the owner of an undivided one-third of the premises, or to give any of his property or rights to his brother and sister, so as to increase their property and rights and leave him with less than each of them was to have. Neither his brother nor sister contends that there was any such intention or that they understood that to be the effect of the conveyance.

The evidence of the solicitor who acted for plaintiff and prepared the conveyance goes to shew that the only object was to make a partition, leaving the lease to stand as it then stood. It was not intended to affect the railway company as lessee of two undivided one-third shares. And if the general words of grant and release contained in the conveyance operate to take away from plaintiff or to convey to his brother and sister any right of his in the premises during the existence of the term, it is proper and just to reform it so as to prevent it from so operating. The railway company cannot reasonably complain of this being done. Throughout the litigation they have contended, and their contention has been upheld by all the Courts, that the partition made was not binding on them. So far as the railway company were concerned, it was res inter alios acta. Then, as the railway company were not parties to or bound by it, how can they insist that the conveyance made must stand for their benefit, even though it be shewn or admitted to be contrary to the intention of the parties to it? The railway company gave no new consideration, and their position has not altered. They hold their lease and their leasehold interest unaffected by the partition. . . . The railway company would not be permitted to take for their benefit the property of plaintiff because by mistake he had executed a conveyance which appeared to give rise to a claim to that effect.

Upon the facts as now disclosed, the good faith of the parties must be taken as established. . . . What the plaintiff and his brother and sister desired and intended neither prejudiced the railway company nor furnished it with any defence to plaintiff's claim to a partition of the premises during the term.

It was further objected that without the evidence given at the former trial and in the Master's office there was not evidence to support the charge of ouster of plaintiff, or on which to found the award of damages and mesne profits, and that the trial Judge ought not to have received that evidence. For plaintiff it is argued that, as regards the evidence taken at the former trial, there was only an adjournment of the trial and a continuation of it on the later occasion. A reference, however, to the judgment of Meredith, C.J. (4 O. L. R. 36, 1 O. W. R. 25), shews that he did not contemplate or direct an adjournment of the trial. An adjournment of a trial after it has been begun and evidence has been taken, ordinarily means a resumption before the same Judge at the point where it had been left. In

this instance the judgment pronounced directs that the action — not the trial — do stand adjourned to add parties and amend the pleadings. And in the next paragraph the costs are reserved to be disposed of by the Judge before whom the action is ultimately tried. These provisions are entirely at variance with the notion that there was an adjournment of the trial so as to entitle plaintiff to put in and use the evidence taken on the former occasion. The effect was the same as when a new trial is ordered. And, unless by consent or on proof of the death or absence from the jurisdiction and consequent inability to procure his attendance at the trial, the deposition of a witness taken at the former trial could not be received. And so with regard to the depositions taken in the Master's office. None of the usual grounds for admitting any of the depositions was made, and, the railway company refusing to consent, they were not admissible.

The question then is, whether the evidence given at the trial was sufficient to support the judgment. . . . There is enough to remove all difficulty and objection based on the partition proceedings between plaintiff and his brother and sister.

The partition made by the trial Judge is in accordance with the evidence, and appears to be fair and equitable as regards the railway company. It enables the company to make the best use of the premises for the purposes for which it acquired them, and calls for the least disturbance of the present arrangements.

Whether or not there was an ouster is a mixed question of fact and law. From the date of his repudiation of the lease plaintiff was entitled to possession of the whole of the premises in common with the railway company, who were bound upon demand to let him into possession along with them. On 17th August, 1900, plaintiff wrote to the railway company stating his repudiation of the lease and asking the company to give him immediate possession. This demand must be reasonably construed as a claim not for the sole but for the joint possession, and it is apparent from the company's letter in reply of 20th August that it was so understood. The demand was not assented to, but it was sought to induce plaintiff to confirm the lease and accept the rent under it. The railway company had at that time their buildings and tracks upon the premises, and after the demand they continued in possession and used the property in the same way as before. It is a fair inference from all the facts that there was a refusal to permit plaintiff to enter. And when this action was brought, there is not only a refusal of posses-

sion on the part of the railway company, but there is a denial of his title. The lease is insisted upon as valid and binding upon him, and in argument the provisions of the Settled Estates Act were invoked against him. This is continued and made even more evident by the amended statement of defence. The railway company thus put themselves in the position of one tenant in common in possession claiming the whole and denying possession to the other. These alone, without reference to the manner of the company's user of the premises, which in itself amounts to a virtual exclusion, are acts and conduct from which an ouster may properly be inferred: Doe Hellings v. Bird, 11 East 49; Freenman on Co-tenancy, secs. 235, 236.

Ouster being found, damages either as for trespass or by way of allowance for mesne profits should follow, and upon the evidence as to the value and rental of adjoining properties it cannot be said that the trial Judge has made an excessive award. . . . There is some slight evidence of waste destructive of the freehold, and the amount awarded on this head ($50) should not be disturbed. . . .

For the railway company it is argued that the trial Judge improperly awarded the general costs of the action to plaintiff; . . . first, that the litigation was due to the fault of plaintiff, and second, that in any case a partition and consequent relief could have been obtained upon summary proceedings.

In view of the attitude assumed by the railway company, it is difficult to see how it can be made to appear that plaintiff was in fault in resorting to litigation. His rights were not admitted, and he was being excluded from all enjoyment of the property. As it turned out, it was even necessary for him to obtain a declaration that the lease was not binding upon him before he could proceed to obtain a partition or any other relief. For similar reasons and on similar grounds he could not have obtained relief in a summary proceeding. . . .

It does not appear that the trial Judge departed from principle in dealing with these costs. But as regards the costs of the reference and the appeals and motions relating thereto, which by the certificate of this Court were reserved to be disposed of by the trial Judge, the matter is different.

The reference was directed by the order of the Divisional Court (4 O. L. R. 36, 1 O. W. R. 316), which was afterwards reversed in this Court (5 O. L. R. 483, 2 O. W. R. 207). It had been proceeded with notwithstanding the stay of proceedings by reason of the pendency of the appeal. The pro-

ceedings fell with the reversal of the order directing them. This Court dealt with the costs so far as to reserve them to be disposed of by the trial Judge, in the hope that at the trial or otherwise during the further conduct of the action they might, by consent of all parties, be made available and serviceable in saving further delay and costs. And it was thought that in that case the trial Judge, having all the facts before him, and in view of the benefit or otherwise to any of the parties of these proceedings, would be in a position to deal with the costs in a more satisfactory way than they could otherwise be dealt with. Probably it would have been reasonable for the railway company to have consented to these proceedings being used, but the refusal was in the exercise of an undoubted right.

The result is, that the proceedings have turned out to be useless, and plaintiff, at whose instance they were taken, is not entitled to any of the costs connected with them. On the other hand, if the railway company had been successful in their defence, the costs would have been awarded to them as against plaintiff. But, considering that the railway company have failed in their defences, some of which should not have been set up at all, and having regard to all the other circumstances of the case, there should be no costs of the reference or of the motion and appeals with regard to it.

Success on the appeal being but partial, there will be no costs except to defendant Amy Monro, whose costs of the appeal will be paid by the railway company. She was not a party when the costs of the reference were incurred, and cannot be held responsible for the judgment as to them.

The judgment appealed from will be varied to the extent indicated.

NOVEMBER 14TH, 1904.

C.A.

LANGLEY v. KAHNERT.

Bankruptcy and Insolvency—Goods in Possession of Insolvent —Agreement with Owner—Option of Purchase—Sale or Agency for Sale—Bills of Sale Act.

Appeal by plaintiff from judgment of MEREDITH, C.J., 3 O. W. R. 9, 7 O. L. R. 356, dismissing action for return of goods.

W. R. Smyth, for appellant.

W. M. Douglas, K.C., and J. M. Ferguson, for defendant.

THE COURT (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A.), dismissed the appeal with costs, agreeing with the judgment below.

NOVEMBER 14TH, 1904.

C.A.

CROWDER v. SULLIVAN.

Promissory Note—Illegal Consideration—Unreasonable Restraint on Marriage—Public Policy.

Appeal by plaintiff from judgment of STREET, J. (2 O. W. R. 1129, 6 O. L. R. 708), dismissing action by an unmarried woman against the administrator of the estate of Albert Rose, whose housekeeper plaintiff was, upon a promissory note for $1,500 made by the intestate. The consideration was an agreement by plaintiff not to marry while the intestate lived.

STREET, J., held that the contract was one in restraint of marriage for an unreasonable period, and the consideration for the note illegal.

D. B. Maclennan, K.C., for appellant.

R. C. Clute, K.C., and W. B. Lawson, Chesterville, for defendant.

The judgment of the Court (OSLER, MACLENNAN, GARROW, JJ.A.), was delivered by

GARROW, J.A.—. . . Albert Rose was a farmer and a widower with one young daughter, when plaintiff in or about the year 1890 entered his service as housekeeper at $8 per month. She was then about 23, and he about 57 years old. He died on 15th November, 1901, and had been for the greater part of the last year of his life insane.

In the year 1897 plaintiff was about to marry one Levere, when it was agreed that if she would remain with Albert Rose as long as he wanted her, or as long as he lived, it is put both ways in the evidence, he would either give her $1,000 in cash, his promissory note for $1,500, or remember her in his will. Plaintiff gave up her proposed marriage, and performed the agreement fully on her part. Albert Rose died intestate, leaving an estate of about the value of $15,000 to his only child, the daughter before mentioned, then of the age of about 15 years.

On 19th September, 1900, Albert Rose, without any request from plaintiff, made and gave to her the promissory note now sued on, presumably in performance of his part of the agreement before referred to, and in the following month of December became insane and so remained. Plaintiff had throughout been paid the original wage of $8 per month.

The evidence shews very clearly that her services were highly prized by Albert Rose, and that to several of the witnesses, friends and neighbours, he had announced his intention to provide for her in recognition of her long and faithful services. . . .

I think there are one or two slight omissions, or perhaps they might be called inaccuracies, in the learned Judge's summary. The first is in the statement that the bargain was specifically that plaintiff would remain with deceased as long as he lived. The evidence given by plaintiff on her examination for discovery used at the trial, and also upon her cross-examination at the trial, is that she promised to remain "as long as he needed me," and the statement that she would remain as long as he lived appears rather as an inference than as a fact expressly agreed upon.

On her cross-examination at the trial she says: Q. You were examined for discovery as to the bargain, by Mr. Lawson the other day? A. Yes, sir. Q. Did you tell the truth about it? A. Yes. Q. This is what you said about that? "Q. 88. Did you tell him who you were going to marry? A. Yes. Q. Who was it? A. Levi Levere. Q. He said he could not think of you getting married? A. Yes, he could not think of my leaving. He did not know what he should do. Q. He finally told you he would give you $1,000, or $1,500? A. Yes." Q. What were you to do in order to get this $1,000? A. I was to remain with him, and I did so. Q. That is to say, you were not to marry Levi Levere at that time? A. Yes. Q. If somebody else came along were you at liberty to marry. Was that part of the agreement? A. Yes, I was to remain and not to get married to Levi Levere. Q. Nor any person else? A. Nor any person else while he needed me, and I did not. Q. There was no fixed time? A. No. Q. I want to be sure about this bargain, because it differs a little from the way it was stated in your statement of claim. You say four or five years previous to the making of the note you were about to get married? A. Yes. Q. And you acquainted Mr. Rose with the facts? A. I did? Q. And he told you he could not hear of it? A. Yes. Q. And at that time there was an agreement made between you, you were not

to get married to anybody as long as he needed you? A. Yes. Q. Is that all true? A. Yes. . . . Q. And you did not know how long you would have to stay with Mr. Rose? A. No, I did not know. Q. I suppose the intention was to stay during his lifetime? A. If he were living, I would stay. Q. That was the bargain, as long as he wanted you, you were to stay during his lifetime? A. Yes.

The other statement of fact which is not, I think, quite accurate, is as to the age of Albert Rose, which the learned Judge puts as about 60 years when the bargain was made in 1897. Albert Rose died in November, 1901, and his brother Samuel, who was examined at the trial, states that he was then of the age of 67 years. So that in 1897 his age was some three years greater than as stated by the learned Judge.

I cannot help feeling rather strongly that the defence is not a meritorious one. Plaintiff has fully performed the contract, and the intestate doubtless in giving his promissory note intended to perform his part. Defendant, it is true, is merely the administrator, and as such probably doing his duty in questioning as he has done plaintiff's right to recover. But the defence is essentially a dishonest one, and should only, in my opinion, succeed if it is established that the law has interposed an insurmountable barrier against her claim. The only general principle that I have been able to find is that a general restraint upon marriage is, on grounds of public policy, void, and possibly a second, if isolated instances may be trusted, that restraints which are not general but merely temporary or otherwise limited in their effect are not illegal unless unreasonable in extent. The present case falls within the second class, as pointed out by the learned Judge.

If the contract had not involved the postponement or abandonment of plaintiff's marriage, it would scarcely be contended that the contract was not an eminently reasonable and proper one. The deceased was a farmer carrying on a farm. He had no other housekeeper or female servant. He had a young motherless daughter to bring up. Plaintiff had been in his service for years when the bargain was made, and had approved her skill and faithfulness. It was, apparently, therefore a matter of prime importance to deceased, in the circumstances, to retain plaintiff's services if possible and at any reasonable price, at least until his daughter had grown older or his circumstances or mode of life had changed. There was the chance of his giving up farming (which actually happened shortly before his final illness), or even, at his age, of his marrying again; in either of which events plain-

tiff's services might, and probably would, have been dispensed with, and there was of course the other chance that he might not live long, and thus put a period to the restraint.

The parties were not bargaining expressly for a restraint upon the marriage, but, in substance, for the continued services of plaintiff as housekeeper; and the temporary interference with her marriage was at most merely an incident, or collateral result.

But, assuming that it had the effect and even that the parties had in contemplation a postponement of plaintiff's marriage as long as Albert Rose required her services, up to, if he elected, the close of his life, this was at most only a temporary restraint, and upon the authorities was not necessarily invalid. What is reasonable is not always easy to define. What I may regard as reasonable another with equal authority may regard as highly unreasonable. The question is usually one entirely of fact, and so for a jury where the trial is by a jury. But in another class of cases involving, like this, offences against what is called public policy—I refer to actions upon contracts in restraint of trade—the question has been called one of law and therefore for the Judge: see Dowden v. Pook, [1904] 1 K. B. 45.

But, whether the question is one of law for the Judge or of fact for a jury, the mode of treatment must be very much the same. There is no such thing in the abstract as reasonableness or unreasonableness. These terms can only have a meaning as applied to concrete circumstances. Then no two cases are wholly alike. Each has its own special atmosphere, so to speak, of reasonableness or the reverse, arising out of the facts and circumstances, and for this reason former decisions must be at best but faint guides to what must in the end be declared upon its special facts to be the law in any given case. Perhaps, from this point of view, the paucity of decisions, for there are not many, is an advantage rather than the reverse. In the case of Lowe v. Peers, 4 Burr. 2225, referred to in the judgment, it was held that the contract amounted to a general restraint, and for this reason was void. In the other case referred to, Hartley v. Rice, 10 East 22, the question arose upon demurrer. The restraint there was for 6 years, but no facts to explain the reason or necessity for the limited restraint were stated, and it was held that in the absence of explanation the restraint was illegal. But it is quite apparent from a perusal of the judgment that the decision would, or rather might, have been the other way, if there had been a reasonable explanation to account

for the restraint, so that the case is scarcely an authority against plaintiff, but rather the reverse. . . .

[Reference to Box v. Day, 1 Wils. 59; Woodhouse v. Shepley, 2 Atk. 535.]

Restraints which are combined with gifts by will or settlements are also, of course, distinguishable. It is not unreasonable that a donor should be allowed some freedom to stipulate the conditions upon which he is willing to make the proposed gift. There no question of the freedom of contract is involved. But such cases may properly enough be looked at, and when looked at it appears to me that they shew a movement always towards greater freedom from the trammels of so-called public policy in this connection. And as an instance, the case of Allan v. Jackson, 1 Ch. D. 399, may not be without interest, where it was held that a restraint upon a man's second marriage was not illegal, it having been previously held that a similar restraint in the case of a woman was legal: see Newton v. Marsden, 2 J. & H. 356; see also Perrin v. Lyon, 9 East 170; Jenner v. Turner, 16 Ch. D. 188; Jones v. Jones, 1 Q. B. D. 179; Robinson v. Ommanney, 21 Ch. D. 786, 23 Ch. D. 285.

Upon the whole I am, with deference and after much consideration, unable to agree that the restraint in question was, in all the circumstances, unreasonable, or that it in any way invaded the policy of the law. No decided case brought to my notice, or which I have been able to find, compels me to an opposite conclusion. I entirely approve in this connection of the language of Jessel, M.R., in Printing Co. v. Sampson, L. R. 19 Eq. at p. 495, where he says: "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because, if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider, that you are not lightly to tamper with the freedom of contract."

And, in my opinion, the appeal should be allowed with costs here and below, and plaintiff should have judgment for the amount of the promissory note sued on and interest.

MACBETH, Co.J. NOVEMBER 14TH, 1904.

COUNTY COURT MIDDLESEX.

RE LONDON DOMINION ELECTION.

Parliamentary Elections — Recount of Votes — Ballots — Irregularities.

Upon a recount of the votes cast at the London election for the House of Commons objection was taken to three ballots without the official stamp of the returning officer, and to five ballots from which the deputy returning officer had omitted to remove the counterfoils. The ballots were in other respects regular, and were counted and allowed by the deputy returning officer.

J. C. Judd, London, J. P. Moore, London, and R. A. Bayly, London, for applicant.

G. C. Gibbons, K.C., A. O. Jeffery, K.C., and J. E. Jeffery, London, for respondent.

MACBETH, Co. J., refused to disallow the ballots, following Re South Grenville, 14 C. L. J. 322; Re Brockville, 18 C. L. J. 324; Re Muskoka and Parry Sound, ib. 364; Re Digby, 23 C. L. J. 171.

ANGLIN, J. NOVEMBER 15TH, 1904.

TRIAL.

O'DONNELL v CANADA FOUNDRY CO.

Malicious Procedure — False Arrest and Imprisonment — County Constable—Absence of Malice and of Notice of Action—Responsibility for Arrest—Special Employment and Payment of Constable—Labour Troubles—Picketting.

Action for false arrest and imprisonment. Plaintiff joined as defendants one Wilson, the county constable by whom he was arrested, and the Canada Foundry Co., by whose instructions and on whose behalf Wilson, as alleged, effected plaintiff's arrest.

At the trial defendants moved for a nonsuit, and judgment was reserved, the case being allowed to go to the jury, who gave a special verdict in favour of plaintiff.

J. G. O'Donoghue, for plaintiff.

G. H. Watson, K.C., for defendants.

ANGLIN, J.—. . . The only grounds urged in support of the motion which it seems to me necessary to consider are the following:—

As to Wilson, that, being a peace officer, he is entitled to the protection of the statute, and that plaintiff has failed to prove notice of action, and has given no evidence upon which a jury could find malice.

As to the Canada Foundry Co., that there is no evidence upon which a jury could properly find that they expressly instructed or impliedly authorized the arrest of plaintiff or his subsequent detention. . . .

The arrest of plaintiff and his detention were clearly proven. Defendants failed to establish that plaintiff had committed any offence justifying such arrest. Defendant Wilson is a county constable, and, upon defendant company agreeing to pay him for his services, was sent by the chief constable of the county of York to the premises of his co-defendants, upon their request, for protection against strikers and their sympathizers, a strike of the company's employees being in progress. Plaintiff was arrested by Wilson upon a charge of "picketting" on the morning of 16th July, 1903. It is not pretended that any express instructions were given for this arrest by or on behalf of the company. But it is urged that the arrest and detention were within the scope of Wilson's employment by the company, and were effected for their benefit and in the discharge by Wilson of his duties as their paid servant. Wilson himself, called as a witness for plaintiff, swore that he received his instructions from the chief constable, and that pursuant to those instructions and in the discharge of his duties as a peace officer he did the acts which form the basis of plaintiff's claim. He swore that he made the arrest in good faith, and that he bore no malice or illwill to plaintiff, and believed him guilty of an offence. Constable Ford, who was with Wilson and arrested plaintiff's companion, was also called as a witness for plaintiff. He said that the arrests were made pursuant to the orders of the Crown Attorney. Mr. Wall, the assistant general manager of defendant company—another witness called for plaintiff—swore that Wilson did not receive from the company any authority to make arrests, and that the company had nothing to do with the proceedings taken against plaintiff. Plaintiff failed to prove any notice of action to Wilson.

Upon the evidence . . . no jury could, in my opinion, properly find that in arresting and detaining plaintiff Wilson was acting otherwise than as a county constable dis-

charging his duty as a peace officer, or that he was acting within the scope of an authority conferred upon him by his co-defendants.

To succeed as against Wilson, therefore, plaintiff must establish notice of action (R. S. O. ch. 88, sec. 14), and that he acted maliciously and without reasonable and probable cause (sec. 1). He has not proved malice. The evidence is not such as would justify a finding of malice—in the sense of wilfulness in doing a wrongful act, still less in the sense of personal spite or ill will, and I much doubt whether it is sufficient to sustain a finding of want of reasonable and probable cause. Upon these grounds plaintiff, in my opinion, entirely fails as to his claim against the constable Wilson.

As to the Canada Foundry Co., unless every citizen who, apprehensive of danger to his person or property, asks to have a constable detailed to give special attention to his premises, offering to remunerate the constable for his time so spent, thereby assumes responsibility for every arrest which such constable, acting upon his own judgment, may make in the discharge of such duties, and must be treated as having impliedly authorized such arrests, liability for Wilson's acts in the present case cannot attach to his co-defendants. There is no evidence that they did more than seek protection for their property from the chief constable. Any officer detailed for this duty would, while so employed, lose opportunities of earning fees for the discharge of his ordinary duties as a constable. It is not unreasonable that compensation for such loss should be made by the person at whose instance it is incurred. This is, I think, all that can be legitimately deduced from the fact established in evidence that the company made some payment to Wilson. The evidence would not, in fine, warrant a finding that Wilson in arresting and detaining plaintiff acted within the scope of an authority conferred upon him by defendant company.

Action dismissed with costs.

NOVEMBER 16TH, 1904.

DIVISIONAL COURT.

BANK OF NEW BRUNSWICK v. MONTROSE PAPER CO.

Summary Judgment—Promissory Note—Renewal—Banking—Notice—Leave to Defend.

Appeal by defendants from order of Judge of County Court of Lincoln granting plaintiffs' application for sum-

mary judgment under Rule 603 in an action upon a promissory note.

The appeal was heard by FALCONBRIDGE, C.J., STREET, J., BRITTON, J.

J. Bicknell, K.C., for defendants.

W. H. Blake, K.C., and W. S. Lane, St. Catharines, for plaintiffs.

STREET, J.—. . . The action is upon a note for $540.98, dated 30th April, 1904, at St. Catharines, made by defendants, payable one month after date, at the Imperial Bank there, to the order of the St. John Sulphite Pulp Co., and indorsed by them to plaintiffs.

The secretary-treasurer of defendant company filed an affidavit stating that he had a knowledge of the matters therein deposed to; that the negotiation of the note sued upon was in fraud of defendants; that the note sued on was a renewal of a note made by defendants in favour of the St. John Sulphite Pulp Co. for $537.54, which fell due on 1st May, 1904, held by plaintiffs; that plaintiffs have been paid the amount of that note, and are now in this action seeking payment of the renewal note; that he is advised by the St. John Sulphite Co. and believes that they left funds in the hands of plaintiffs for payment of the note for $537.54; that defendants have received no value for the note sued on other than the renewal of the note due 1st May, 1904, and that defendants had notice thereof; that from his knowledge of banking arrangements he says that the discounting of the note sued on and the issue of a cheque by the St. John Sulphite Co. to pay that due on 1st May, 1904, which cheque was refused by plaintiffs, were, to plaintiffs' knowledge, one and the same transaction; and that he believes defendants have a good defence on the merits; and that the appearance has not been entered for the purpose of delay.

A few days before the note due 1st May, 1904, matured, defendants sent a renewal to the St. John Sulphite Pulp Co., which is the note now sued on. The note due 1st May, 1904, was then under discount with plaintiffs' bank; the St. John Sulphite Pulp Co. sent to plaintiffs the note now sued on for discount, and the proceeds were placed to their credit in plaintiffs' office at St. John, N.B.; at the same time they sent to defendants their cheque on the account with plaintiffs, to which these proceeds had been credited, to take up the note due 1st May, 1904, at St. Catharines. That cheque, upon being presented for payment, was refused by plaintiffs, who claimed a right to appropriate the proceeds of the discount

of the note sued on in payment of other debts due them by the St. John Sulphite Pulp Co. That company, having its head office in Scotland, had gone into voluntary liquidation there on 4th May, 1904.

It seems clear that, as between defendants and the St. John Sulphite Pulp Co., defendants were entitled to have the proceeds of the note sued on applied in payment of the note of which it was a renewal, and there is a positive statement, which is equally positively denied, that plaintiffs had notice of the circumstances. There is a further assertion that plaintiffs must have known that the note sued on was a renewal of the other; and there is the further contention that the course of business between the sulphite company and plaintiffs precluded plaintiffs from transferring a general liability at the debit of one account of the sulphite company in plaintiffs' books to the debit of their current account, without notice to the company, so as to put plaintiffs in a position to say there were no funds to meet the cheque given by the sulphite company to defendants in pursuance of their arrangement.

I do not think we can shut defendants out from having these questions determined in the ordinary way by a trial of the issues: see Jacobs v. Booth's Distillery, 85 L. T. 262, 5 O. W. R. 49; and the appeal should, therefore, be allowed, and the judgment which has been entered in the Court below should be set aside, and the parties must proceed to trial in the usual way.

The costs of the motion and of the appeal should be costs to defendants in any event.

BRITTON, J., gave written reasons for the same conclusion, referring to Buckingham v. L. and M. Bank, 12 Times L. R. 70.

FALCONBRIDGE, C.J., also concurred.

NOVEMBER 16TH, 1904.

DIVISIONAL COURT.

BARTON v. GILBERT.

Promissory Note—Payment—Collateral Security—Mortgage of Lease—Receipt of Rents by Creditor—Creditor Chargeable with Rents that might have been Collected.

Appeal by plaintiff from judgment of County Court of Prince Edward dismissing action upon a promissory note for

$222 and interest, made by defendant, dated 16th January, 1894, to the order of Thomas C. Barton, plaintiff's testator.

The defences were the Statute of Limitations and payment.

The appeal was heard by FALCONBRIDGE, C.J., STREET, J., BRITTON, J.

Allan Cassels, for plaintiff.

E. M. Young, Picton, for defendant.

STREET, J.—I am of opinion that we should not disturb the judgment appealed from. The deceased Thomas C. Barton was mortgagee of a lease as collateral security for the payment of the note sued on, and notified the tenant that the rent must be paid to him, and not to the original lessor, defendant. There is evidence that the rent due on 1st November, 1894, was in fact paid to the payee of the note by the tenant, and whether further payment was made by the tenant, or whether further rent which might have been had for the asking was lost because it was not asked for by the creditor, the creditor is chargeable with it under Synod v. DeBlaquiere, 27 Gr. 549, and the authorities referred to.

Appeal dismissed with costs.

BRITTON, J., gave reasons in writing for coming, with some hesitation, to the same conclusion.

FALCONBRIDGE, C.J., concurred.

CARTWRIGHT, MASTER. NOVEMBER 18TH, 1904.

CHAMBERS.

MOSHER v. MOSHER.

Alimony—Interim Order—Disbursements — Foreign Defendant—No Assets in Jurisdiction—Provision for Wife.

Motion by plaintiff for interim alimony and disbursements.

D. L. McCarthy, for plaintiff.

W. J. Boland, for defendant.

THE MASTER.—Plaintiff admits having received from defendant $1,350 in October, 1903, also $50 a month down to and including June last. She admits she has still $600 left. This was on 27th October. She was paying $6 a week for room and board. There are no children. Plaintiff, by

advice of counsel, refused to finish her cross-examination and left the examiner's room, so that it is not signed or concluded.

Defendant has no assets in Ontario except personal effects and a contingent interest in certain shares in "some exploration company whose operations are in Trinidad."

Having all these facts in view, and the parties being, as it would seem, both citizens of the United States, I think the motion should be dismissed.

I refer to Knapp v. Knapp, 12 P. R. 105; Pherrill v. Pherrill, 6 O. L. R. 642, 2 O. W. R. 1096; Wheeler v. Wheeler, 17 P. R. 45; Sirdar Gurdyal Singh v. Rajah of Faridkote, [1894] A. C. 670.

Plaintiff seems able to go to trial on 28th instant, if she really wishes to proceed with the action.

ANGLIN, J. NOVEMBER 18TH, 1904.

WEEKLY COURT.

RE LAMB AND CITY OF OTTAWA.

Municipal Corporations—By-law—Lease of Municipal Property—Bonus — Manufacturing Industry — Necessity for Submission of By-law to Ratepayers—Closing up of Public Place—Exemption from Municipal Taxation—Taxation for School Purposes—Application to Quash—Time—Promulgation of By-law—Discretion.

Motion by one Lamb to quash by-law 2351 of the city corporation, passed 21st March, 1904, authorizing a lease to Owain Martin and others of premises formerly used as a public market and known as "The Western Meat, Fish, and Produce Market."

Glyn Osler, Ottawa, for applicant, contended that the by-law in substance granted a bonus in aid of a manufacturing industry, and the assent of the ratepayers requisite under sec. 591, sub-sec. 12 (a), of the Municipal Act, 1903, had not been obtained; and (2) that the by-law and the lease thereby ratified purported to grant an exemption from taxation for school purposes.

Taylor McVeity, Ottawa, for city corporation.

ANGLIN, J.—In support of the contention that by-law 2351 is "a bonus by-law," counsel for plaintiff argued: (a) That, although the application of the lessees was for the market building only, and the report of the finance committee, adopted by council, recommended a lease merely of the build-

ing, the lease ratified by the by-law includes lands not covered by the market building, and theretofore used as an open public place. As to these lands it is contended that they are "leased freely" for a purpose connected with a manufacturing industry, and therefore amount to a bonus under sec. 591a, clause (c), of the Municipal Act, 1903. (b) That, as it involves the closing up of a public place, the by-law grants "aid by way of bonus" under clause (d) of sec. 591a. (c) That, inasmuch as it grants an exemption from municipal taxation for a term of years, it is a "bonus by-law" under clause (g) of sec. 591a.

Upon the argument I expressed the opinion as to ground (a) that the applicant's case failed because the lands included in the lease as authorized by the by-law had formed part of the market premises, and might well be regarded as intended to be included as part and parcel thereof in an application and arrangement for a lease of the market building. They cannot be regarded as "leased freely," but may fairly be deemed part of the premises for which the $500 rental is to be paid.

In view of the opinion I have formed as to other points taken, I find it unnecessary to deal with (*b*).

(*c*) I find it impossible to escape the conclusion that this by-law and the lease it ratifies involve an exemption from municipal taxation. Mr. McVeity ingeniously contended that, if the lessees had been required to pay taxes, their rental would have been reduced by the estimated amount of such taxes, and that, therefore, their rental must be deemed to include the taxes which the municipality would otherwise receive from the lessees. The door would be thrown wide open to evasions of the statute, were effect given to this specious argument. The difference is not one of form or name merely; it is, I think, of substance. Money payable as rent may be dealt with in a manner entirely different from money received for taxes. I consider this by-law to be within sec. 591a, clause (g), and, therefore, under sec. 591, sub-sec. 12 (a), I must hold that it required the assent of the electors. This assent not having been obtained, the invalidity of the by-law is established.

Canadian Pacific R. W. Co. v. City of Winnipeg, 30 S. C. R. 558, supports the contention that the exemption from taxation here granted includes exemption from taxation for school purposes—something clearly ultra vires: sec. 591a, clause (g). The by-law is upon this ground illegal.

If this were its sole defect, the by-law might perhaps be quashed as to this provision only, under sec. 378, which en-

ables the Court to quash in whole or in part. But, in view of the general exemption already dealt with, whatever discretion the Court may have should not, I think, be so exercised. . . .

Notwithstanding what is said in Re Grant and City of Toronto, 12 U. C. R. at p. 358 . . . I doubt whether the applicant is called upon to prove non-promulgation. The statutory limitation is set up by respondents. Should they not put in evidence the facts necessary to support such a plea, one of which is the date of the third publication of the promulgating notice and the by-law? How otherwise can the Court determine whether three months had elapsed between such third publication and the launching of the motion to quash?

But, in the present instance, promulgation, if assumed, could not help respondents. A by-law which the municipal council is only competent to pass after the assent of the electors has been obtained, if passed without such assent would not be validated under the curative provisions of sec. 377—by promulgation: Canada Atlantic R. W. Co. v. Township of Cambridge, 15 S. C. R. 219, at p. 226, 14 A. R. 299.

Although in Re McKinnon and Village of Caladonia, 33 U. C. R. 502, a large expenditure made by a railway company in reliance upon an impeached by-law seems to have been deemed a matter which the Court might consider in determining whether it should exercise its discretionary power to quash, a similar change of their position by persons interested in maintaining the by-law was not deemed of paramount importance in Re Village of Markham and Town of Aurora, 3 O. L. R. 609. It is true that in the latter case application to quash was made within three months after registration. . . . The Legislature has expressly enacted that "in the case of a by-law requiring the assent of electors or ratepayers . . . an application to quash the by-law may be made at any time:" sec. 379 of the Municipal Act, 1903. It has thus emphasized the supreme importance of this limitation upon the powers of municipal councils. . .

Assuming that the applicant is seeking by the present motion to subserve his private purposes rather than to promote the general interests of the municipality, I should not on that account decline to interfere, and thus in effect uphold, as a valid by-law, a document which appears to be "utterly void and in fact no by-law:" per Gwynne, J., in Canada Atlantic R. W. Co. v. Township of Cambridge, 15 S. C. R. at p. 226.

Order made quashing by-law with costs.

STREET, J. NOVEMBER 18TH, 1904.

TRIAL.

CITY OF HAMILTON v. HAMILTON STREET R. W. CO.

Street Railways—Contract with Municipal Corporation—Sale of Workmen's Limited Tickets—School Children's Tickets—Right of School Children to Use Limited Tickets.

Motion by defendants to vary minutes of judgment, ante 311.

E. D. Armour, K.C., for defendants.

W. R. Riddell, K.C., for plaintiffs.

STREET, J.—A question was raised as to whether the declaration that defendants are bound to receive the limited tickets called workmen's tickets from all persons during the prescribed hours should be qualified by excepting the case of children between 5 and 14 years of age when going to school. The agreement between the parties was modified on 13th September, 1898, in accordance with by-law 955, by requiring defendants, in addition to the other limited tickets, to "give to any child between 5 and 14 years of age, when going to school, a ticket to go and return on the date of issue, for 5 cents." There is nothing in this amendment to prevent children, when going to school, from paying their fares by using workmen's tickets, provided they use them within the prescribed hours, as they might have done before the amendment to the agreement, if they preferred to do so. The amendment does not make it compulsory upon the children to buy return tickets for 5 cents, when going to school, although it makes it compulsory on defendants to sell such tickets to them if demanded.

Costs of speaking to minutes to be added to plaintiffs' costs of action.

NOVEMBER 18TH, 1904.

DIVISIONAL COURT.

REX v. PIERCE.

Constitutional Law—Powers of Provincial Legislature—Loan Corporations Act, R. S. O. 1897 ch. 205—Intra Vires—Penalty — Prohibition — Criminal Law — Conviction—Application of sec. 117, sub-sec. 2—Contracts.

Appeal by defendants, under sub-sec. 4 of sec. 117 of the Loan Corporations Act, R. S. O. 1897 ch. 205, from their

conviction by the police magistrate for the city of Toronto of the offence of having, acting as agents for the Preferred Mercantile Company of Boston (incorporated), entered into a contract contrary to the provisions of sec. 117.

E. F. B. Johnston, K.C., and J. M. Godfrey, for appellants.

J. W. Curry, K.C., for the private prosecutors.

J. R. Cartwright, K.C., for the Attorney-General.

The judgment of the Court (MEREDITH, C.J., MACLAREN, J.A., MACMAHON, J.), was delivered by

MEREDITH, C.J.—. . . Two points only were taken against the conviction. . .: (1) that clause (b) of sub-sec. 2 of sec. 117, as amended, is not of general application, but applies only to such contracts as are mentioned in clause 5 of sec. 2 of ch. 205; (2) that, if of general application, clause (b) deals with criminal law, and is, therefore, ultra vires of the Provincial Legislature.

I am of opinion that neither of these objections is well taken.

The language of clause (b), standing by itself, is plain, and the contract which defendants entered into, if the clause is to be read literally, was entered into in contravention of its provisions. . . . It was argued that, having regard to the fact that it forms part of a statute dealing with loan corporations, and reading it in connection with and in the light of the other provisions of the statute, the expressions "contract, agreement, undertaking, or promise," must be taken to mean such a contract, agreement, undertaking, or promise as is mentioned in clause 5 of sec. 2.

I see no reason for so limiting the operation of the clause. . . .

[Reference to R. S. O. ch. 205, sec. 117; sec. 2, clause 5; the amending Acts 63 Vict. ch. 27, sec. 12, and 4 Edw. VII. ch. 17, sec. 4.]

Clause (b), but for the exception from the operation of it of corporations registered under the Act or under the Ontario Insurance Act, would have applied to these corporations, and there is nothing in the nature of the exception which makes it necessary to confine the application of the clause to such of the contracts with which it deals as a registered loan corporation or a corporation registered under the Ontario Insurance Act may lawfully enter into. Some at all events of the contracts with which clause (b) deals these corporations may lawfully enter into, and the Legislature may well

have intended absolutely to prohibit the entering into of such contracts by any one except a corporation registered under the Act or under the Ontario Insurance Act, leaving the last named corporations free to enter into such of them as they were respectively empowered to enter into by the Acts relating to such corporations. . . .

The exception in favour of companies registered under the Ontario Insurance Act shews, I think, that it was not intended to deal merely with such contracts as come within the provisions of clause 2 of sec. 5 of ch. 205, and the provisions of clause (c) make it quite clear that the Legislature had in view changes in the general law, and not merely provisions affecting the business of loan corporations. . . .

The form which the prohibition takes is not well chosen. The undertaking or effecting, or offering to undertake or effect, any of the contracts mentioned in clause (b) by any person, partnership, society, association, company, or corporation, not being a corporation registered under the Act or under the Ontario Insurance Act, is made an offence against sub-sec. 1 of sec. 117, and any person acting in behalf of such person, partnership, society, association, company, or corporation, is declared to be guilty of an offence against sub-sec. 2 of the same section.

Sub-section 1 of sec. 117 prohibits the undertaking of the business of a loan corporation as described in clause 5 of sec. 2, and contains a declaration as to what shall be deemed "undertaking the business of a loan corporation" within the meaning of the section, and sub-sec. 2 provides that, if any promoter, organizer, office-bearer, manager, director, officer, collector, agent, employee, or person whatsoever, undertakes or transacts the business of a loan corporation which does not "stand registered under the Act," he shall be guilty of an offence.

While the form of this legislation lends colour to the argument of the appellants' counsel that what is struck at is the making of such of the contracts mentioned in clause (b) as form part of the business of a loan corporation as described in clause 5 of sec. 2, it is not enough to warrant us in cutting down what is, I think, the otherwise plain and unambiguous language of clause (b), and I prefer to adopt the view that what the Legislature has said in this respect is but a clumsy way of saying that the penalty for doing any of the acts mentioned in clause (b) shall be the same as that provided by the sections to which reference is made.

There remains to be considered the question as to the constitutionality of the enactment.

It was contended by counsel for the appellants that the legislation is in form as well as in substance criminal law, but it was conceded that if the effect of clause (b) is to prohibit the making of such contracts as it deals with, under the penalty which it imposes, the enactment is intra vires the Provincial Legislature.

That such is the effect of the enactment is not, I think, open to doubt.

It was said by Lord Hatherley in In re Cork and Youghal R. W. Co., L. R. 4 Ch. 745, at p. 758, that "everything in respect of which a penalty is imposed by statute must be taken to be a thing forbidden and absolutely void to all intents and purposes whatsoever;" and that he states to be the view taken by the learned Judges in Chambers v. Manchester and Milford R. W. Co., 5 B. & S. 568. That a penalty implies a prohibition is stated in Pangborn v. Westlake, 36 Iowa 546, 549, to be the general rule, and that was also the view taken by the Supreme Court of the United States in Miller v. Amenon, 145 U. S. 421-426.

If it be necessary to the validity of the enactment that it be construed as prohibiting that for the doing of which a penalty is imposed, that construction, upon well understood principles, should be given to it, if the language used at all warrants that being done.

Appeal dismissed with costs.

BRITTON, J. NOVEMBER 19TH, 1904.

CHAMBERS.

RE CLARK.

Will—Construction—Bequest to Children at a Certain Place—Gift to Class—Deceased Child—Right of Issue to Represent—Absentee.

Motion by executors of will of Thomas Clark for an order under Rule 938 determining the question whether the children of William Clark, a deceased child of the late Thomas Clark, were entitled to share under the will.

W. Bell, Hamilton, for executors and all persons interested except the children of William Clark.

F. W. Harcourt, for the children of William Clark.

BRITTON, J.—The deceased once resided in England. By his first wife he had four children. His first wife died, and

then deceased came to Canada and settled in Hamilton. His four children remained in Barnstable, England. Deceased married again, and by his second wife had one child. Deceased made his will on 15th May, 1891, and died on 8th April, 1900.

By his will, after providing for his widow and her child, he devised two dwelling-houses in Hamilton to his "children at Barnstable, England, to be divided among them in equal shares."

The four children living at the time the will was made were: Samuel, John, William, and Sarah. William died after the making of the will, and before the death of the testator, leaving ten children.

The question is, do these grandchildren take the share which their parent William would have been entitled to had he been alive at the time of the death of the testator?

It was conceded on the argument that these grandchildren would not take under the word "children" in the will, but it was contended that under sec. 36 of the Act respecting wills in Ontario, they would be entitled. . . .

[Re Williams, 5 O. L. R. 345, 2 O. W. R. 47, referred to and applied.]

The gift in this case is to a class, and the rule is "that those members of the class who are at the death of the testator capable of taking, take the whole, the gift being construed as shewing an intention on the part of the testator that the class shall take as far as the law allows:" In re Coleman and Jarrow, 4 Ch. D. 165.

The rule is clearly laid down that sec. 33 of the Wills Act, 1837, does not apply to gifts to children or grandchildren of the testator as a class, and this rule is not affected by the fact "that in the events which happened the class consisted of but one individual:" In re Harvey, [1893] 1 Ch. 567.

Following these cases, the division must be among the children of deceased who were living at the time of his death, and who were then residing or had resided at Barnstable, so as to come within the class. Sarah disappeared from Barnstable some years ago, and . . . cannot be found. There is no evidence of her death, and for the purposes of the present application she must be considered as alive and entitled to share with her brothers Samuel and John.

Costs of all parties out of estate.

MACLAREN, J.A. NOVEMBER 19TH, 1904.

C.A.—CHAMBERS.

HAMILTON v. MUTUAL RESERVE LIFE INS. CO.

Appeal to Supreme Court of Canada—Application for Leave to Appeal after Time Expired—Dismissal by Judge of Court of Appeal—Leave to Appeal to full Court.

Motion by defendants (1) for leave to appeal to the full Court of Appeal from order of MACLAREN, J.A., ante 299, dismissing application of defendants, under sec. 42 of the Supreme and Exchequer Courts Act, to allow an appeal to the Supreme Court of Canada after the time for appealing had expired; or (2) to refer the matter to the full Court; or (3) to rehear the motion.

The order dismissing the former application had been settled and issued.

Shirley Denison, for defendants.

D. L. McCarthy, for plaintiff, opposed the application on the ground that the Judge was functus officio.

MACLAREN, J.A.—I have not been referred to any authority precisely in point; nor have I found any provision of the law which would give me jurisdiction to make such an order as is here asked for.

The application is, therefore, dismissed with costs.