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DIVISIONAL COURT.

TOWNSHIP OF ELMSLEY v. MILLER.

Discovery—Production of Documents — Privilege—Evidence Produced in Contemplation of Litigation.

APPEAL by defendants from order of TEETZEL, J., ante 651.

Grayson Smith, for appellants.

C. A. Moss, for plaintiffs.

THE COURT (FALCONBRIDGE, C.J., BRITTON, J., MAGEE, J.), dismissed the appeal with costs, agreeing with the reasons given by Teetzel, J.

CARTWRIGHT, MASTER. MAY 9TH, 1905.

CHAMBERS.

GOODISON THRESHER CO. v. WOOD.

Venue—Motion to Change—Provision of Contract as to Venue —Neglect to Comply with Statute—Application of Statute—County Courts—Division Courts.

Motion by defendant to change the venue in a County Court action from Sarnia to Owen Sound and to transfer the action from the County Court of Lambton to the County Court of Grey.

George Wilkie, for defendant.

C. A. Moss, for plaintiffs.

The Master:—On the material there is a preponderance of convenience sufficient to justify the order asked for.

Plaintiffs, however, rely on the usual provisions in the agreement for sale of the machine in question. These are as follows: "If any action or actions arise in respect to said machines or notes or any renewals thereof, the same shall be entered, tried, and finally disposed of in the Court which has its sittings where the head office of the said company is located." . . . Any action brought with respect to this contract or in any way connected therewith between the parties shall be tried at the town of Sarnia, and the purchasers consent to have the venue in any such action changed to Sarnia, no matter where the same may be laid." The agreement is dated 21st June, 1904.

It was contended by defendant that the motion must be granted because of the failure of plaintiffs to comply with the provisions of 3 Edw. VII. ch. 13, sec. 1 (O.) That enactment took effect on and after 1st November, 1903, and is in the words following: "No proviso, condition, agreement, or statement contained in any lien note, hire receipt, contract for the conditional sale of chattels, or other like contract, which provides that any action, matter, or other proceedings arising upon or under such lien note or contract, shall be tried in any particular place or elsewhere than in the Court having jurisdiction in the locality in which the defendant resides or in which the contract was made, shall be of any force or effect, unless there was, at the time of making or entering into the same, printed in type not smaller than pica type, in red ink, across the face of such note, hire receipt, or other contract, with the signature of the maker thereof subscribed thereto, the words following: 'Any action which may be brought or commenced in a Division Court in respect or on account of this note, hire receipt, or contract, may be brought and commenced against the maker or person liable hereon in a Division Court other than where he resides or in which the contract was made;' provided, however, that this section shall not apply to any lien note, contract for the conditional sale of chattels, or other like contract, heretofore signed or executed."

Had it not been for this statute, the motion must have failed, as it would have been governed by the decision in Noxon Co. v. Cox, 6 O. L. R. 637, 2 O. W. R. 1046, 1057. But now for the first time, so far as I am aware, the words of the Act have to be interpreted. . . .

The motion must succeed. There could be no possible room for doubt if the words of the red ink clause had been "any action in any Court," instead of "any action in a Division Court." If such was the intention of the legislature, then it can easily be carried into effect. If no such alteration is made, then the question of the effect of a literal compliance with the Act must be left for determination. But where, as in the present case, the statute has not been complied with, I think the proviso in the contract has no effect.

Order made changing venue. Costs in cause.

ANGLIN, J. MAY 9TH, 1905.

CHAMBERS.

HILL v. EDEY.

Summary Judgment—Rule 603—Action on Agreement to Pay Money in Settlement of Claim—Repudiation of Settlement —Authority of Solicitor—Case for Jury—Unconditional Leave to Defend.

Appeal by plaintiff from order of local Master at Ottawa, ante 689, dismissing a motion for judgment under Rule 603.

J. F. Orde, Ottawa, for plaintiff.

G. F. Henderson, Ottawa, for defendant.

ANGLIN, J.:—The action is brought to enforce an alleged agreement for settlement of a claim . . . by plaintiff. . . . . The settlement, if any, was effected on 28th February, between Mr. Glyn Osler, solicitor for plaintiff, and Mr. A. W. Fraser, solicitor for defendant.

The Master expressed the opinion that an agreement was then concluded, but was unable, upon the evidence before him, to find that Mr. Fraser's authority had been satisfactorily established.

Whatever view might be taken of the evidence, were I dealing with this action as a trial Judge, it, in my opinion, falls short of what is requisite to support a motion for judgment under Rule 603. While I entertain no doubt whatever that Mr. Osler fully believed that Mr. Fraser had in fact made an offer to settle for $1,500, Mr. Fraser's evidence is, I think, reasonably clear that he had no authority to make such an offer, and did not at any time intend to do more than to ascertain the lowest sum which plaintiff could be induced to

accept in settlement, and that he at no time and in no way exceeded his instructions. From a careful perusal of all the evidence given by Mr. Fraser, I cannot gather anything inconsistent with this being the true position. The Master, of course, had the advantage of seeing Mr. Fraser as a witness. He was examined before him. He has not expressed any opinion that Mr. Fraser's evidence is not worthy of credit. Without treating Mr. Fraser's statement in regard to what took place, when he says "In none of my interviews did I offer to pay an amount," as the veriest quibbling, I must read it as a denial of having ever made an offer to settle such as is alleged by plaintiff. As I have said, it is manifest that Mr. Osler's view of what took place and of the scope of Mr. Fraser's authority was very different. I could not, however, find that it has been established that the agreement alleged in this action was in fact made between Mr. Osler and Mr. Fraser, without discrediting Mr. Fraser's testimony, or concluding from the surrounding circumstances that he must be mistaken. Upon the material before me there is not enough, in my opinion, to justify a judicial officer disposing of a motion under Rule 603 in acting upon either of these views of Mr. Fraser's evidence.

If it were incontrovertibly established that a settlement had in fact been concluded, the argument, that, though not within the real, it was within the apparent, scope of Mr. Fraser's authority to make such an arrangement, would be very formidable. As it is I find it unnecessary to consider that phase of the matter.

Neither does the testimony, in my opinion, sufficiently establish ratification by defendant of a settlement, if made without authority, nor such acquiescence as would estop him in this action from denying that such settlement was in fact made, or that it was binding upon him. Mr. Fraser swears that during the interval between 28th February and 30th March, when all idea of settlement was explicitly repudiated, he had, in answer to several telephone communications from Mr. Osler, informed that gentleman that he had not seen Mr. Edey, and that he was ill. This robs the lapse of time between the letter written by Mr. Osler on the 28th February, stating in terms his acceptance of what he understood to be Mr. Fraser's offer to settle for $1,500, and Mr. Fraser's letter of 30th March declaring all negotiations off, of much of the significance and effect which it would otherwise have.

A reputable witness distinctly denying the making of any agreement; the scope of the authority of defendant's agent being controverted; communication of the limitation upon that authority to plaintiff's solicitor being averred; the lapse of time relied upon as evidence of acquiescence being at least partly explained—the case is eminently proper for the full investigation and consideration for which opportunity is afforded only by a trial in due course. In such circumstances it was never intended that Rule 603 should be invoked. The appeal must be dismissed with costs to defendant in any event of the action.

MACMAHON, J. MAY 9TH, 1905.

CHAMBERS.

RE LUMBERS AND HOWARD.

Landlord and Tenant—Overholding Tenants Act—Summary Proceeding by Landlord to Obtain Possession—Jurisdiction of County Court Judge—Dispute as to Length of Term—Application for Review.

Motion by William Howard, the tenant, for an order under sec. 6 of the Overholding Tenants Act, directing the senior Judge of the County Court of York to send the proceedings, evidence, and exhibits in this matter to the High Court under his hand, and for an order staying all proceedings therein.

The application by the landlord, James Lumbers, to the County Court Judge was to recover from the tenant the possession of a shop and dwelling above the shop, situated at the north-west corner of Lee avenue and Queen street in the city of Toronto, of which, it was alleged, the tenant was wrongfully holding possession.

W. H. Blake, K.C., for the tenant.

S. C. Smoke, for the landlord.

MACMAHON, J.:—Under sec. 3, sub-sec. 2, of the Act, R. S. O. 1897 ch. 171, the Judge is to "inquire and determine whether the person complained of was tenant to the complainant for a term or period which has expired, . . . and whether the tenant does wrongfully refuse to go out of possession, having no right to continue in possession, or how otherwise."

Moore v. Gillies, 28 O. R. 358, decided that since the amendment to the then Overholding Tenants Act (which amendment is now embodied in sec. 5 of R. S. O. 1897 ch. 171), the County Court Judge now tries the right and finds whether the tenant wrongfully holds. In that case the dispute was in reference to the tenancy, the landlord alleging it to be a monthly holding, and the tenant a yearly tenancy. That case was followed in Ryan v. Turner, 14 Man. L. R. 624, the Act in that Province, as amended by 3 & 4 Edw. VII. ch. 21, sec. 2, now being in effect the same as sec. 5 of our Act.

No question of law is involved in the present case. The right of the landlord to recover possession depends altogether upon the question of fact, as to whether the lease to the tenant (which is under seal) was a demise of the premises for 3 years, as contended by the landlord, or for 5 years, as alleged by the tenant.

The tenant in his evidence said that his negotiations with the landlord were for a lease for 3 years; and the landlord instructed his solicitors to prepare a lease for that term, which was prepared in duplicate and sent to their client. . . .

The dispute being as to whether the tenancy was for 3 years or 5 years, the learned County Court Judge was, on the authority of Moore v. Gillies, 28 O. R. 358, justified in holding that he had jurisdiction to try the right.

Having regard to the evidence and the judgment of the learned County Court Judge, I think this is not a case in which a certiorari should issue, and the motion will therefore be dismissed with costs.

ANGLIN, J. MAY 9TH, 1905

TRIAL.

BROWN v. BEAMISH.

Fraudulent Mortgage—Action to Set aside—Judgment Creditor—Intent to Defraud—Pre-existing Agreement—Consideration—Insolvency of Grantor—Knowledge of Grantee—Preference—Action Begun within 60 Days after Mortgage—Presumption—Costs—Remedy by Summary Proceeding.

Plaintiff on 9th January, 1905, obtained a verdict for $1,100 for the seduction of his daughter, against defendant John Beamish, whose only property consisted of an undivided one-third interest in the equity of redemption in a farm,

such interest being worth about $566. On the same day the trial Judge directed judgment to be entered upon that verdict. On 13th January defendant John Beamish mortgaged his interest in the farm to his brother and co-defendant, Barnet Beamish, for $635.

This action, commenced on 31st January, was brought to set aside the mortgage as fraudulent and void as against plaintiff.

J. P. Mabee, K.C., and W. McCue, Smith's Falls, for plaintiff.

J. A. Hutcheson, K.C., and F. W. Hall, Perth, for defendant Barnet Beamish.

J. M. Hall, Ottawa, for defendant John Beamish.

ANGLIN, J.:—The only witnesses examined were defendant Barnet Beamish, called for plaintiff, and defendant John Beamish, called on his own behalf. For defendants it is contended that the evidence does not establish an intent to defraud, and that a pre-existing agreement to give the mortgage rebuts any intention to afford to the mortgagee an undue preference. I assume that there was an indebtedness of John Beamish to his brother Barnet. How much of that which defendant Barnet Beamish claimed to be due to him, was a bona fide liability of John, the evidence left in doubt. But upon these points it seems unnecessary for me to make explicit findings. I was, however, satisfied by the testimony and demeanour of defendants—considered in the light of the circumstances surrounding the impeached transaction—that the allegation of a further advance or assumption of liability by Barnet Beamish at the time of and as consideration for the giving of the mortgage is untrue, and that what is put forward to make good this defence is, as a present consideration, merely pretended and colourable.

I am convinced that both defendants knew of the insolvent condition of John Beamish, and were aware of plaintiff's judgment when the mortgage was given, and that they were prompted to carry out the mortgage transaction, when they did, because of such knowledge. They fully appreciated the effect of what they did upon plaintiff's chances of recovery. They both intended that defendant Barnet Beamish should absorb the entire available assets of John Beamish, leaving nothing to satisfy the claim of the judgment creditor.

Neither does the evidence satisfactorily establish that this security was given pursuant to any valid and enforceable pre-existing agreement. . . . The winding-up of the estate, which should have taken place upon the youngest beneficiary attaining her majority, in September, 1904, had been deferred, the defendants state, owing to the absence from home of John Beamish. How much longer Barnet Beamish would have remained a creditor, unpaid and unsecured, had not the news of plaintiff's verdict operated as an incentive to action, is extremely problematical. Barnet Beamish, according to his own testimony, did not know where John was between August, 1904, and 13th January, 1905. Not until aroused by hearing of the plaintiff's recovery did he trouble to inquire or take any steps to ascertain his brother's whereabouts. On that day, however, he not only succeeded in promptly locating him, but brought him immediately from Ottawa to Perth, and had him execute on his arrival the mortgage in question.

This action was brought within 60 days after this impeached mortgage was given. Against plaintiff it is "presumed prima facie to have been made" with intent "to defeat, hinder, delay, or prejudice" him in enforcing his rights as a creditor, and "to be an unjust preference." (R. S. O. 1897 ch. 147, sec. 2.) The onus of rebutting this presumption is on defendants—and that burden they have, in my opinion, failed to satisfy.

Counsel for defendants directed my attention to the provisions of Con. Rules 1015 and 1016, and asked that, if plaintiff should succeed and be awarded costs, such costs should be limited in amount to what would have been properly incurred had plaintiff, instead of bringing action, taken summary proceedings under these Rules.

In my opinion, the circumstances of this case justified the procedure which plaintiff adopted. It has, moreover, entailed little, if any, greater expense than would have been necessary in order to effectively prosecute plaintiff's rights under the Rules cited. It is, I think, very doubtful whether proceedings under these Rules could have been made equally effective.

Judgment will be therefore entered for plaintiff declaring fraudulent and void and setting aside the mortgage in question as against him, and for his costs of this action.

MAY 9TH, 1905.

DIVISIONAL COURT.

STONE v. JAFFRAY.

Defamation—Finding of Jury—Meaning of Words Published —Defamatory Sense—Damages.

Appeal by defendant from judgment of TEETZEL, J., in favour of plaintiff in an action for libel, tried with a jury.

The publication complained of was alleged to be defamatory of plaintiff in reference to his conduct in two matters, one in connection with the flotation or attempted flotation of a binder twine company, and the other as to his connection with the attempted formation of an hotel company in London.

The jury found for defendant as to the first of these matters, their finding as to it being: "We find in the case of the binder twine factory no bill for libel."

As to the second matter the jury found for plaintiff with $2,500 damages, for which judgment was directed to be entered for plaintiff with costs.

The appeal was heard by MEREDITH, C.J., BRITTON, J., ANGLIN, J.

G. C. Gibbons, K.C., for defendant.

J. P. Mabee, K.C., for plaintiff.

MEREDITH, C.J.:—The alleged defamatory words as to which the jury found for plaintiff are as follows: "It is reported that one Stone (i.e., plaintiff), a recent arrival in London, who has failed to foist some hotel scheme on the city, has allied himself with the promoters who have decided to work the farmers into this gigantic flotation (i.e., the binder twine scheme)." . . .

I am of opinion that the words complained of . . . were capable of the defamatory meaning which, in the light of the charge to them and their finding, the jury must have thought they actually bore, that is to say, that they imputed to plaintiff dishonourable or discreditable conduct; that he had thrust or forced, in a surreptitious way or without warrant, or impertinently, dishonestly, or untruthfully, the hotel scheme upon the citizens of London.

The trial Judge, therefore, properly left the case to the jury, and the appeal fails.

As to the damages, they are, no doubt, large, but, in view of the justification pleaded by defendant, and the other circumstances of the case, not so large as to warrant our directing a new trial, according to the well understood principles upon which the finding of a jury as to damages may and ought to be set aside.

Appeal dismissed with costs.

BRITTON and ANGLIN, JJ., concurred, each giving reasons in writing.

MAY 9TH, 1905.

C.A.

WINDSOR BOARD OF EDUCATION v. COUNTY OF ESSEX.

High Schools — Payment to City High School for County Pupils—Dispute as to—Reference to County Court Judge —Absence of Jurisdiction—Res Judicata—High Schools Act—Payment for Particular Year.

Appeal by defendants from judgment of BRITTON, J., in favour of plaintiffs, for $1,704.73, being the amount fixed by the report dated 5th May, 1904, of the Judge of the County Court of Essex, as payable under the High Schools Act, 1 Edw. VII. ch. 4, by defendants to plaintiffs for the maintenance of county pupils at the Windsor high school, for the year 1902, under a statutory reference to him by the trustees of the Windsor high school.

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

A. H. Clarke, K.C., for defendants, appellants.

J. H. Rodd, Windsor, for plaintiffs.

GARROW, J.A.:—The real dispute between the parties concerns the payment to be made in the year 1903. And the cause of the dispute very clearly is the change in the amount previously payable, created by the amendment contained in the statute 3 Edw. VII. ch. 33, whereby the county's contribution was reduced to 65 per cent., defendants contending that they are entitled to the benefit of that reduction upon the payment to be made in the year 1903, while plaintiffs contend that they are not—that in fact in each prior year

the payments which defendants had made (about which there is no dispute) were always paid in discharge of the previous year's obligation, so that the payment of $1,392.18 made on 4th December, 1902, was really only for the year 1901.

The trustees had no power, under sec. 34 of the High Schools Act, to compulsorily refer such a dispute to the County Judge, and without defendants' consent that learned Judge had no power whatever to determine that the amount payable for 1902 is still unpaid, which is the clear effect of his report. Defendants did not consent to, but on the contrary protested against, this asserted jurisdiction, and the reference proceeded subject to this objection. And finding the opposite view persisted in, defendants commenced an action to obtain an injunction to restrain the further progress of the reference, which action was heard before the Chancellor on the motion for the injunction, turned by consent into one for judgment, and was on 2nd April, 1904, dismissed with costs: see 3 O. W. R. 403.

Plaintiffs now contend that the question in dispute is res judicata, by the report of the County Judge, and also by the judgment in the other action. But this contention is not, in my opinion, well founded. The reference to the County Judge did not authorize him to find that the liability was in respect of the year 1902, or of any other year. He could only, upon the material which the statute indicates, fix the amount, in case of a dispute as to amount, where the general liability was otherwise not in dispute. That was not the case in the present instance, and the reference to him was, therefore, wholly unauthorized. He had not, when the action was heard, made his report, and all the Chancellor intended to do, as clearly appears from his judgment, was to refuse to interfere with the reference.

If I am right in my opinion so far expressed, it is, of course, obvious that the evidence tendered at the trial should have been received and the merits should have been determined instead of assuming, as was done, that plaintiffs' contention of res judicata was well founded. It was apparently agreed that the evidence so tendered was or was not to be regarded as in, according to the view to be taken of the question of res judicata, and I shall, therefore, in what follows now regard it as properly before me. The question to be determined is one purely of fact, and its proper determination depends, in my opinion, on the selection of the proper starting point, which I think is at the time when the legal

obligation first began, namely, in the year 1891. And Mr. Rodd very candidly admitted that if the payment made in the end of that year was payment for that year, and not for the year 1890, his case failed.

The town of Windsor separated from the county of Essex on 1st January, 1881, and remained separated until it became a city on 14th April, 1892.

The High Schools Act was passed on 4th May, 1891. Until then the county was under no legal obligation to contribute towards the support of a high school situated in a town separated from the county, or in a city, but by sec. 31, sub-sec. 2, a change was introduced, and a county became liable thereafter to pay its proportionate share, upon the trustees of the high school notifying the county clerk that such high school was open to county pupils. Acting under this provision the trustees of the Windsor High School, on 11th June, 1891, notified the county clerk of the county of Essex, in the manner prescribed by the statute, and on the next day, as appears from a minute in the books of plaintiffs, a meeting was held between the warden of the county and the Windsor high school board, for the purpose of settling the amount which the county should pay, and a proposition was made by the warden to pay $500 as a fixed sum per annum, but not accepted by the board. Then on 30th December, 1891, this cheque was issued to and received by the plaintiffs: "$500. Treasurer of the county of Essex, pay to the order of Alex'r Bartlet five hundred dollars due from the county to him for amount granted to Windsor high school for 1891. F. B. Bouteiller, Warden of the county of Essex. Office of the County Council, Sandwich, Decr. 30th, 1891."

Mr. Bartlet was the secretary-treasurer of the Windsor board. He apparently received and used the cheque in due course, and it now appears with his indorsement upon it.

This cheque was preceded by and evidently founded upon a report of defendants' education committee, dated 27th November, 1891, in which they reported to the warden and council "that after hearing Alex'r Bartlet, Esq., in behalf of the Windsor high school board, would recommend that $500 be paid to the said school as the county's proportion in full for the year 1891." And in plaintiffs' minutes of 24th November, 1891, it is stated that the secretary reported that "he had made up the account of the high school as nearly as at present it could be ascertained, and that there has been

at the high school 97 pupils from town, 41 from county, and 5 from Walkerville, that the cost per pupil, after deducting government grant, will be in the neighbourhood of $30 per scholar."

The language of this minute leaves no room for doubt that the estimate then being made was for the then current year, and not for the previous year, because for the latter the account must then have been complete, and an estimate quite unnecessary. And the conjunction of this minute, followed 3 days after by the report of defendants' educational committee after hearing Mr. Bartlet, the officer who had made the estimate, leaves no room for doubt that what both parties then intended and understood was to fix the amount to be paid by defendants for the year 1891, which after all was not a full year, as the Act only came into force on 4th May. And following upon this was the cheque before set out, plainly expressing on its face that it is "for amount granted to Windsor high school for 1891," and which was accepted by plaintiffs without objection of any kind, so far as appears. This evidence appears to me to be in favour of defendants' contention. It is true that defendants had previously made grants in each year for several years prior to 1891, but these were wholly voluntary, and not in any way based upon allowance or expenditure, as became the case under the Act of 1891, and as made in each year were plainly for that year and not for a previous year, and were usually so expressed in the cheques. The next previous one, the only one which could bear upon the question in this action, bears date 23rd January, 1891, and is for $500 "for amount granted to Windsor high school for 1890." Then following upon the cheques before set out are yearly cheques for 1892, 1893, 1894, 1895, 1896, and 1897, all paid at or near the end of each of these years, all expressing on their face for what year they were given, and all in like manner accepted and received by plaintiffs without objection. In 1898 the cheque expresses on its face that it was for the year 1897, and the same with the cheque issued in 1899, which on its face says that it is for the year 1898. But the cheque issued in 1900 again follows the course of the first seven, and says it is for the year 1900 and the same in 1901 and 1902. Certain statements submitted from time to time by plaintiffs to defendants were produced and much relied on by plaintiffs. They shew that the amounts payable from year to year were calculated upon the previous year's attend-

ance, which is, I think, what the statute intended, but this circumstance could not alter the fact really in question that the amount to be paid in 1903, however arrived at, was in fact the payment for that, and not for the previous year, and therefore one to which the reduction authorized by the statute 3 Edw. VII. ch. 33 would apply.

So that, upon the whole, and for the reasons given, I am of the opinion that defendants' contention is correct, and that the appeal should be allowed and the action dismissed, both with costs.

OSLER and MACLENNAN, JJ.A., each gave reasons in writing for the same conclusion.

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

MAY 9TH, 1905.

C.A.

STEEP v. GODERICH ENGINE CO.

Contract—Breach—Manufacture of Patented Articles—Defective Design—Royalties—Novation—Damages—Reference.

Appeal by defendants from judgment of TEETZEL, J., 3 O. W. R. 638.

Plaintiff, being the patentee of certain improvements in seed drills, on 29th August, 1900, assigned to defendants the exclusive right to manufacture and sell in Canada the patented article, and defendants agreed to manufacture and sell or offer for sale such drills, or at least the part covered by plaintiff's patent, in sufficient quantity to fully supply the market therefor in Canada, and to pay plaintiff a royalty of 25 cents for each such article. The agreement further provided that plaintiff should be employed for a time for the introduction and sale of the drills.

The venture did not turn out to be a commercial success, and there were difficulties between the parties, each of them laying the blame upon the other for the failure. On 19th January, 1902, a further agreement was made whereby plaintiff was to devote his entire time to the business for 6 months, and at the end of that time defendants were to have the option of continuing the manufacture or allowing plaintiff to make other arrangements. At the end of the 6 months the difficulties had not been overcome, but defendants had hopes that they would be, and elected to continue the

manufacture. They were again disappointed in the results, and early in December, 1902, plaintiff was again engaged at a salary of $100 a month to superintend alterations in the seed drills which he had advised in order to complete them for the market. This also proved to be abortive, and on 21st February, 1903, the services of plaintiff were finally dispensed with. On 11th January, 1904, he brought this action for damages and for an account.

The action was tried by TEETZEL, J., without a jury. He found that the drills had not been put in marketable shape, and that the principal difficulties were attributable to defective design or specifications, for which plaintiff himself was responsible, and not to defective construction on the part of defendants. He held, however, that defendants, having in July, 1902, exercised the option of continuing to manufacture the drills, thereby assumed the risk of being able to make the drills marketable, and ordered a reference to ascertain what damages plaintiff had suffered subsequent to that date, on the assumption that it was practicable to remedy the defects which up to that time had caused the unsatisfactory working of the drills, and thereby prevented a market being made. In other words, the Master was to assume, as against defendants, that all defects of design had been overcome, and that defendants were after that date able to manufacture drills so as to perform their work as efficiently as was claimed by plaintiff in his patents.

From the judgment ordering the reference defendants appealed. Plaintiff did not complain of the findings as to the defects in the design or specifications.

E. L. Dickinson, Goderich, for appellants.

J. P. Mabee, K.C., for plaintiff.

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

MACLAREN, J.A.:—With great respect, I am unable to concur in the conclusions arrived at by the Judge as to the liability of defendants after July, 1902, and as to what is to be assumed against them on account of their not having abandoned at that time all attempts to make the machine marketable and to overcome the defects that were found to exist in it. They appear to have been hopeful and to have expended large sums, first, in manufacturing and placing the machines on the market, and, when they were found to

be imperfect, in endeavouring to remedy the defects. For both of these purposes they employed plaintiff himself, and appear to have given him a reasonable opportunity in both respects. They shewed their good faith by expending about $10,000, although they received in return only $280. I cannot see on what principle they could be held liable to do more. It seems to me that they may be said to have done or attempted even more than they were legally bound to do. They manufactured and placed upon the market, under the direction of plaintiff himself, more machines than could be sold, and continued to do so as long as there was any reasonable hope of their finding a sale. In their endeavours to aid plaintiff in remedying the defects pointed out by the learned Judge they appear to have gone beyond the obligations assumed by them under the contract.

Plaintiff asked for a reference on the ground that he had no knowledge whether the statements rendered by defendants to him were accurate, and that he had had no inspection of their books. By their agreement defendants were to keep a proper record in their books, to which plaintiff was to have access at reasonable times. He has not shewn that he was refused such privilege, or any sufficient ground for a reference.

The defence being, in effect, that the invention in its present form was practically unworkable and commercially valueless, there is no good reason why they should not make a reconveyance to plaintiff of the rights and privileges assigned to them by the agreement of 29th August, 1900. He did not ask for this by his action, nor does he appear to have demanded it from them. Negotiations to this end were going on in November, 1901, but this was previous to the settlement of 19th January, 1902, and they do not appear to have been subsequently resumed.

Counsel for defendants stated before us that they were willing to re-assign to plaintiff the rights which he had conveyed to them, provided they were allowed the privilege of disposing of the patented articles which they have on hand.

In my opinion, this offer should be accepted by plaintiff.

On the whole, as plaintiff has not shewn that there has been a breach of the agreement on the part of defendants, or that he is entitled to a reference, the appeal should be allowed, and plaintiff's action dismissed with costs, subject, however, to the re-assignment by defendants of all their

rights in plaintiff's patent on the terms mentioned. If necessary, the form of the order may be spoken to in Chambers.

MAY 9TH, 1905.

C.A.

WEDDELL v. RITCHIE.

Railway Company—Bondholders—Right to Vote at Annual General Meeting of Company—Interest in Arrear—Scope of Right as to Future Meetings—Number of Votes—Value of Bonds Compared with Shares—Construction of Statutes.

Appeal by defendants from judgment of MEREDITH, C.J., dated 15th November, 1904, declaring plaintiffs entitled to vote at a meeting of the shareholders of the Central Ontario Railway Company in respect of certain bonds, and that defendants were not, by reason of plaintiffs not being allowed to vote, duly elected directors of the company; and cross-appeal by plaintiffs from the same judgment in so far as it refused plaintiffs other relief.

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

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

G. T. Blackstock, K.C., for plaintiffs.

MOSS, C.J.O.:—The only question raised by defendants' appeal, and the principal question raised in the action, is, whether the holders of the bonds issued by defendants the Central Ontario Railway Company on or about 1st April, 1882, which bonds are secured by a first mortgage deed of trust bearing the same date, are entitled to vote in respect of such bonds at a general annual meeting of the company, when the interest upon them is in arrear.

The other questions raised by the plaintiffs are : (1) whether, assuming the right to vote, it can be exercised at every general meeting while the interest is in arrear, or whether it is confined to the general meeting next following the arrear; and (2), whether the holder of a bond is entitled to a vote in respect of every $100 represented by the bond.

The solution of the first question turns upon the construction to be placed upon the language of the Act 45 Vict. ch. 61 (O.), and particularly upon secs. 6 and 7. Prior to

the passing of that Act, the power of the company to issue bonds was governed by the provisions of the Act of incorporation, 36 Vict. ch. 73 (O.), supplemented by 36 Vict. ch. 60 (O.) and 44 Vict. ch. 72 (O.) None of these Acts enabled the company to create a mortgage for securing payment of their bonds or gave them power to issue bonds under the general Railway Act of Ontario.

But by sec. 15 of 36 Vict. ch. 73 it was enacted that the bonds of the company should, without registration or formal conveyance, be taken and considered to be first and preferential claims and charges upon the undertaking, real property, rolling stock, and equipment then existing or at any time thereafter acquired . . . "Provided that, in the event at any time of the interest upon the said bonds remaining unpaid and owing, then at the next ensuing general annual meeting of the said company all holders of bonds shall have and possess the same rights and privileges and qualifications for directors and for voting as are attached to shareholders—provided that the bonds shall have been first registered" as directed.

Before the Act 45 Vict. ch. 61 was passed in the year 1882, there had been an issue of bonds, and one object of this Act was to enable the company to increase their bond indebtedness to $20,000 a mile. And in furtherance of the object two methods of issuing and securing bonds were provided, the one method similar to that which the company had always been authorized to adopt, the other method, new so far as the company were concerned. The company were authorized by sec. 6 to issue bonds up to the increased amount, all to be a claim and charge upon the whole line or to be divided and made a claim and charge upon specified sections. Then followed the provisions of sub-sec. (4), declaring that the provisions of secs. 15 and 17 of ch. 73 of 36 Vict., as to rights and security of the bondholders and the form of bonds and other obligations, shall apply to all bonds that may be issued under the terms of "this Act" in so far as they are not inconsistent therewith. And then by sec. 7 it was enacted that the company may, instead of availing themselves of the provisions above contained, issue bonds and create a mortgage under the provisions of sec. 9 (11) of the Railway Act of Ontario. But this section (7) was not to become an effective part of the Act without the consent in writing of the holders of the outstanding bonds. And sec. 9 of the Railway Act of Ontario was made applicable to the company,

but nothing was to be done under the foregoing provision of sec. 7 which would impair the security of the present holders of bonds on the already constructed portions of the road.

Here is a new right given for the first time to the company, enabling them to issue bonds in a certain way, conditioned upon the performance by the company of certain things required to be done for the security of the holders of the outstanding bonds. Without the performance of these conditions no bonds could issue under the provisions of sec. 7 of the Act. Can it be said that bonds issued after compliance with these conditions are not bonds issued under the terms of this Act by the authority of which alone they could issue? Unless they were issued under and in compliance with the terms of that Act, they could not issue at all. And, unless there is something in the context necessarily and imperatively confining the operation of the words "issued under the terms of this Act" to the bonds authorized to be issued under sec. 6, they should be held to apply to every part of the Act. It is not inconsistent with any language of the Act to say that the holders of bonds issued under sec. 7 shall, in addition to the security of a mortgage given in lieu of a general lien or charge upon the company's undertaking and assets, have the right of voting in respect of the bonds of which they are the owners. That the security of a mortgage and the right to vote in respect of bonds may co-exist is recognized in the Act 53 Vict. ch. 45 (O.), now embodied in R. S. O. 1897 ch. 207, sec. 9 (20) and (22).

Then if the right of voting exists, the fair reading of the language of sec. 15 of the Act 36 Vict. ch. 73 is, that it may be exercised at any time when interest is in arrear. It could not have been intended that it should be restricted to the one general annual meeting next after the interest fell into arrear, and that it was not to be exercised at another meeting although the arrear continued. The language does not drive one to that conclusion, and, in view of the end manifestly aimed at, that construction should be adopted which will secure to the bondholders a voice in the affairs of the company as long as their interest is in arrear.

The question as to the extent of the voting power is one of more difficulty. But the language of sec. 15, "all holders of bonds shall have and possess the same rights and privileges and qualifications for directors and for voting as are attached to shareholders," is very comprehensive. It implies equality

with the shareholders in every respect as regards directors and voting. It is not dealing with their rights, privileges, and qualifications as between the bondholders themselves, but as between them and the shareholders. And as against the latter the bondholders are given the same rights, privileges, and qualifications for directors and voting. The only just way of effecting this is by giving to each holder of a bond one vote for each portion equivalent to the amount of one share. Thus each share being for $100, each holder of a bond for $1,000 should be upon an equal footing with the holder of 10 shares. If this be not so, the shareholders have an advantage over the bondholders in regard to directors and voting, and the latter do not possess the same rights, privileges, and qualifications in these respects as are attached to shareholders.

The appeal should be dismissed and the cross-appeal allowed with costs.

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

OSLER and MACLAREN, JJ.A., agreed in the result, except as to one branch of the cross-appeal. They were of opinion (for reasons stated by each in writing) that the bondholders' right of voting was confined to one vote on each bond.

MAY 9TH, 1905.

C.A.

WADE v. PAKENHAM.

Company—Diversion of Funds of—Payment of Liabilities of Partnership Business Carried on before Incorporation—Agreement with Partnership — Confirmation by Shareholders—By-laws—Withdrawal of Partners — Notice—Power of Company to Acquire Assets—Account of Profits —Resolution of Directors.

Appeals by the several defendants, other than the Standard Bank (against whom the action was dismissed at the trial), from judgment of STREET, J., in favour of plaintiff, the liquidator of the Pakenham Pork Packing Co., Limited, for $25,202.67, in an action against certain persons who carried on as partners a pork packing business in the village of Stouffville, from 2nd December, 1901, to 31st October, 1902, when the incorporated company took over

the business, to recover moneys alleged to have been wrongfully taken out of the company's funds to pay the liabilities of the partnership.

G. F. Shepley, K.C., and D. Ormiston, Uxbridge, for defendant Mrs. Forsythe.

J. W. McCullough, for defendant Kendrick.

C. R. Fitch, Stouffville, for defendants Byer and Pakenham.

W. M. Douglas, K.C., and S. B. Woods, for plaintiff.

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

Moss, C.J.O.:—Plaintiff is liquidator of the Pakenham Pork Packing Company, Limited, which purchased and took over a pork packing business carried on at Stouffville under the name and style of the Pakenham Pork Packing Company. This business had been carried on for some years by the defendant James Pakenham under the above mentioned trade name, and was so continued until 2nd December, 1901. On that day a partnership was formed between the appellants for the carrying on of the business, the partnership to continue for 6 months, subject to an earlier determination in case of the consummation of certain arrangements between defendant Pakenham and two trustees for the Pakenham Pork Packing Company, Limited. It will be convenient hereafter in speaking of these two business concerns to refer to the incorporated company as the limited company, and to the other as the partnership.

The judgment now in appeal declares plaintiff entitled to recover from the appellants all moneys paid by the limited company in respect of the liabilities of the partnership, less some allowances, and fixes the sum to be paid to plaintiff at $25,202.67.

There is a separate appeal by each defendant, but all were argued together.

The limited company was incorporated on 13th June, 1901, by letters of incorporation under the Ontario Companies Act. Among the incorporators were defendants Pakenham, Byer, and Kendrick, and one H. J. Morden, who was then the local manager of the Standard Bank at Stouffville. The company was empowered to carry on the business of packing, curing, and dealing in pork and other

meats and the various products thereof, and for these purposes to acquire the plant, business assets, and goodwill of the partnership. There were 5 provisional directors, of whom Pakenham, Byer, and Morden were 3.

At this time the partnership business was being carried on by Pakenham alone, but he had on 20th May, 1901, entered into an agreement with Messrs. Stouffer & Coulson, of Stouffville, brokers, as trustees for the limited company to be formed, to sell, assign, and transfer to the limited company all the machinery, plant, and goodwill of the partnership business, and to transfer the lease of the premises in which the business was carried on, in consideration of $20,000 in cash and $10,000 in fully paid up stock in the limited company.

The limited company did not organize until 2nd April, 1902. On that day the shareholders held their first meeting, elected directors, and transacted other business. Before that date, however, a partnership had been formed between the defendants Pakenham, Byer, Kendrick, and Mrs. Forsythe, upon terms contained in articles of partnership dated 2nd December, 1901, and executed by all the parties. The purpose was to carry on the existing business in the same premises and under the same name, but apparently there was no grant to the partnership of any of Pakenham's property engaged in the business, further than that he agreed to give them the use of the machinery in the factory free of charge. The capital of the firm was declared to be $10,500, represented by a line of credit arranged with the Standard Bank, to be secured to the Bank by a joint note of the parties—and for such other sums as might be agreed upon. The profits and losses were to be divided and borne in equal shares. It was further agreed that the partnership should continue for 6 months unless terminated under a provision whereby, when the limited company so requested, the firm would hand over to the company the factory, plant, business, and goodwill of the business, free and clear of all cost and charge, and thereupon the partnership should be wound up, and, after payment of debts, the profits, if any, should be divided among the parties share and share alike.

It is plain from the agreement, and is further shewn by the testimony, that all that the partnership possessed when entering into business was the right to use the premises and machinery in and with which Pakenham carried on his business, and that the partnership was arranged and the three

other persons brought in in order to secure advances or a line of credit from the Standard Bank, to enable the business to be carried on until such time as it was expected that the limited company would be in a position to take it over. The arrangement was brought about by the joint efforts of Pakenham and Morden, who was then the manager of the bank, and one of the provisional directors of the limited company. The partners other than Pakenham were really only partners as to profits and losses. The partnership assets would be the stock in trade, book debts, moneys, and other property derived by or acquired in the prosecution of the business. The partnership liabilities would consist of all debts or obligations incurred during the continuance of the term of the partnership. The partnership capital was the line of credit in the Standard Bank. The business was being carried on in this way at the date of the shareholders' meeting. At that meeting the shareholders approved of, adopted, ratified, and confirmed the agreement of 4th May, 1901, and ordered that an agreement be executed to give effect thereto. By-laws were adopted, and the defendants Pakenham and Byer were elected directors along with H. J. Morden, W. C. Renfrew, and N. Clarke. Pakenham was appointed managing director with a salary of $2,500 per annum and a percentage of profits for 5 years. Among the by-laws adopted were the following:

10. The directors shall have power in all things to administer the affairs of the company, and may make or cause to be made for the company any description of contract which the company may by law enter into.

23. Three directors shall be a quorum for the transaction of business.

31. The managing director shall have general charge and control of the business affairs of the company and of the work and management thereof, and may make and enter into all contracts necessary or proper for the transaction of the business of the company, and it shall be his duty to purchase goods, employ labour, make arrangements in regard to selling the product of the company, and in all respects manage and attend to the business of the company.

43. The managing director of this company is hereby authorized and instructed to open a bank account with the Standard Bank, Stouffville, and to arrange with the bank for the advancing or loaning to the company of such moneys as

the bank may see fit to advance for the purposes of the business of the said company, and . . . to draw cheques, etc.

The first meeting of directors was held on the 7th April, at which all the directors except Kendrick were present. Pakenham was elected president, Renfrew vice-president, and A. Low secretary.

The next meeting of importance was held on 30th May, the same 4 directors being present. Among other business transactions a resolution was passed directing the secretary to put the company's seal on Pakenham's agreement.

These steps were probably taken in view of the near approach of the expiration of the term of the partnership, which occurred on 2nd June.

But when that time arrived the limited company was not in a position to take over the business. And at a meeting of the directors held on 4th June, at which Pakenham, Byer, Morden, and Renfrew were present, a resolution was passed "that in consideration of the Pakenham Pork Packing Company, comprising Messrs. Byer, Kendrick, Pakenham, and Mrs. Forsythe, continuing and carrying on the present partnership business until such times as the business can be taken over by the Pakenham Pork Packing Company, Limited, the said Pakenham Pork Packing Company, Limited, do indemnify and save harmless the said Pakenham Pork Packing Company from all the loss occasioned by the continuation of said busuiness by said partnership company."

Kendrick and Mrs. Forsythe did not assent to the terms of this resolution. On the contrary they both took the ground that they would not continue longer in the partnership, and of this Pakenham and Byer were made aware, as was also Morden.

Pakenham prepared a statement of the affairs of the partnership and submitted it to Kendrick and Mrs. Forsythe, from which it appeared that the assets amounted to $34,490, while the debt due to the Standard Bank amounted to $33,600, leaving a surplus of $890. This was on 6th June, and on the same days Mrs. Forsythe wrote letters in the same terms to Pakenham and Morden. That addressed to Pakenham was submitted to the board of directors on 10th June, and on motion of Morden seconded by Byer it was resolved that Pakenham write to Mrs. Forsythe and ask her to meet Byer and Kendrick in reference to her letter. There was a meeting, with the result that Mrs. Forsythe and Kendrick

adhered to their resolution not to continue longer in the business.

At the trial it was shewn that the letter to Pakenham was lost, but that addressed to Morden was proved. It stated that after consideration of the statement of affairs of the partnership she had decided to withdraw therefrom, and that she would not be responsible for any further advance or liability in any way, and that from the statement furnished by the partnership, their affairs appeared to be in a prosperous condition, and she therefore expected a cheque for $225.50 and a release signed by all the members of the partnership from further liability. She repeated that she would not be responsible for any further advances, and concluded: "From the statement you furnished me the company's affairs appear to be in a prosperous condition, and no doubt you will be able to get Mr. Renfrew or some other stockholder in the new company to take the position in the present company which I now vacate."

Thus the limited company, as well as the Standard Bank through the manager Morden, had full notice of Mrs. Forsythe's position, and neither she nor Kendrick ever receded from their position in this respect.

The business seems to have been carried on by Pakenham, with Low, the secretary of the limited company, in charge as bookkeeper. Byer says he took no part in the conduct of it, but he seems to have kept in touch with it through his position and actions as a director of the limited company.

The next action of the board of directors was on 4th July, when at a meeting at which Pakenham, Byer, Morden, and Renfrew were present, it was, on motion of Morden seconded by Byer, resolved that the agreement between Pakenham and the company be signed by the president and secretary and the seal of the company be affixed thereto.

The instrument referred to was reformed at the trial, and as reformed sets forth an agreement whereby the partnership, in consideration of $20,000 in cash and $10,000 in fully paid up shares of the limited company to be issued to Pakenham, bargains, sells, assigns, transfers, and sets over to the limited company the plant, business, and goodwill (but not the stock in trade or book debts) of the partnership, with provisions for assignment of the lease of the premises, the engagement of Pakenham as general manager at a salary and defining his duties—and a final provision for the payment of $2,068 as the amount fixed and agreed upon between the

parties as the value of certain additions made to the plant since the agreement of the 20th May, 1901. It is signed "The Pakenham Pork Packing Company, per James Pakenham," and is also signed by him as president of the limited company and as an individual. Kendrick and Mrs. Forsythe deny all knowledge of this agreement, and it seems probable that they did not see it until some time in February, 1903, when they executed an instrument of date —— November, 1902, hereafter referred to. And on 4th July, the same day on which the directors ordered the execution of the agreement, a letter was written to Mrs. Forsythe by Mr. Low, the secretary, informing her that at a meeting of the directors held that day it was decided that owing to the position that she took in the matter of continuing the business it would be better to close it up at once, and inviting her to meet Pakenham.

No alteration in Mrs. Forsythe's or Kendrick's attitude was effected. But the business proceeded, the Standard Bank still continuing to deal with it. During the interval between 2nd June and 31st October, 1902, the account in the bank was continued without any change. An examination of the bank account and the pass book shews that on 31st May, 1902, there was a balance of $41,032.78 against the partnership on overdrawn account. This balance is brought forward into June, and the items of deposit and payments out are continued in the same form of current account as before. The entries shew that no attempt was made by the bank or any of the parties to appropriate any item of payment in, to any special item on the opposite side. All the sums paid in form one blended sum and are carried forward from month to month until 31st October, 1902, when the account is closed by a deposit of $30,094.63 against the balance to that amount appearing in the pass book. The deposit was of a cheque of the limited company, and the sum forms one of the items of plaintiff's claim in this action.

Another item is the sum of $442.22 debts alleged to be due by the partnership to others than the bank. A third item is the sum of $7,000 alleged to have been advanced by the limited company to the partnership. And these 3 items form the sum (less certain deductions . . .) for which defendants have been found liable to plaintiff.

As to the item of $7,000 it is plain upon the evidence that all 4 of the defendants were properly found liable therefor. It appears that on 30th May, 1902, during the existence of the

partnership, defendant Pakenham drew a cheque of the limited company for the sum of $7,000 payable to "Pakenham Co. or bearer," and on the same day he deposited the cheque or its proceeds in the Standard Bank to the credit of the partnership, and it so appears in their bank account. There is nothing to shew any consideration to the limited company for this payment. . . . It seems clear that it was drawn by Pakenham, as president and general manager of the limited company, and paid in to the credit of the partnership as an advance or loan to the latter for the purposes of the business.

But with respect to the liability of all 4 of the defendants for the other 2 items the case stands on a different footing. It is not disputed that the limited company paid these sums. . . . They were paid pursuant to the terms of an agreement bearing date the —— day of November, 1903, authorized at a meeting of the directors on 19th November, 1902, but not executed by the parties until some time in January or February, 1903. At the directors' meeting there were present Pakenham, Byer, Renfrew, and Morden. On motion of Renfrew, seconded by Morden, it was resolved that the limited company now take over from the partnership the plant and premises, in accordance with the agreement made, the limited company to take from the partnership an assignment of all book debts, choses in action, and rights of the partnership in connection with the business of the limited company, also to take and receive from the partnership all the stock in the factory and in transit, also to receive an assignment of the existing lease of the present premises—the limited company to indemnify the partnership against all its outstanding debts in connection with the business, according to a list to be furnished and attached to and form part of the agreement embodying the arrangement as hereinbefore set out—the agreement, with list of debts attached, to be submitted to the directors for approval before being finally executed.

Before this the limited company had formally assumed the conduct of the business, but, owing to delays in the preparation of the list of debts and otherwise, it was not until 21st January, 1903, that the directors, at a meeting at which all were present, finally resolved that the agreement as presented in accordance with the resolution of 19th November be approved and executed by the different parties, as set out in the agreement, and seal of company be attached thereto.

The agreement, as approved, was subsequently presented to Kendrick and Mrs. Forsythe, and was duly executed by them.

The agreement was within the powers of the limited company. The letters of incorporation authorized it to acquire and take over not only the plant and goodwill but also the "business assets" of the business then being carried on under the name of the Pakenham Pork Packing Company. And business assets unquestionably comprise stock in trade and book debts. The limited company had on or about 4th July, 1902, acquired the machinery, plant, and goodwill. This was property on which the partnership had no claim. The partnership property consisted of the business assets, such as stock in trade and book debts of the kind acquired by the limited company under the agreement of the —— day of November, 1902.

The power of the company to acquire these assets could be exercised by the directors under the authority of the by-law whereby there was vested in them power to make or cause to be made for the company any description of contract which the company might by law enter into.

Judged as a question of power and of the exercise thereof, the transaction of November, 1902, cannot be questioned. And with its advisability or wisdom defendants Kendrick and Mrs. Forsythe were not concerned. They were, as members of the partnership, the affairs of which had not been wound up, interested in its business assets, and were proper parties to the transfer thereof to the company. There was no fraud or impropriety in their conduct. . . .

The proper manner in which to regard the transaction is not to accept plaintiff's contention that the resolution of 19th November and the agreement following upon it are void as against defendants Kendrick and Mrs. Forsythe, but to treat them as valid and binding on the limited company.

The proper relief to which plaintiff is entitled is on the footing of a subsisting transaction, but one in respect of which defendants Pakenham and Byer, by reason of their position as directors and of their active intervention and participation, are liable to account to the company for all profit and advantage derived by them from the making of the agreement. If the transaction was to be set aside even as against defendants Pakenham and Byer, it could only be done on terms of restoring the property, and there are difficulties in plaintiff's way in that respect; but the trial Judge did not set aside the

transaction. He permitted it to stand, but reduced the amount of the consideration to what he found to be the value of the property taken by the limited company. This was, in effect, compelling defendants to account for the profit or advantage derived from the agreement. But, while that was the appropriate form of relief as respects the directors Pakenham and Byer, it was not as against the other two defendants. They were not directors of the company. They received no part of the moneys paid or deposited on 31st October, and they were guilty of no act which can render them personally responsible to the limited company in respect of the two items in question; and, as against them, the judgment should be confined to the sum of $7,000.

But the two directors Pakenham and Byer were in a different position. The transaction was one in which they were personally interested as vendors, but they took an active part throughout in all the proceedings relative to the carrying out of the arrangement. Byer, it is true, testified that, though he was present at the meeting of 19th November, 1902, he did not vote for the resolution. The minutes do not contain any record to that effect, and they shew that he was present and took part in the proceedings of the meetings of 21st January and 17th February, 1903, when the matter was dealt with, and at the latter meeting seconded the adoption of a by-law referring to the agreement, and confirming the assumption of the liabilities. . . .

These defendants are therefore liable for any profit realized upon the agreement and the arrangement therein contained. And they are not entitled to the benefit of the provisions of sec. 48 (a) of the Ontario Companies Act, as enacted by 2 Edw. VII. ch. 24, sec. 1. The profits upon the transaction would appear to be the difference between the amount of the debts and liabilities of which they were relieved and the value of the stock in trade and book debts.

And upon the evidence the latter was ascertained and agreed upon and deducted from the sum of $7,000 and $30,736.85, leaving the amount for which they are accountable at $25,202.67.

The judgment as against them should be affirmed to the full extent.

As regards defendants Kendrick and Mrs. Forsythe it is not perhaps necessary to refer to any other ground for relieving them to the extent indicated. But there appears to be force in the argument that if the state of the accounts

between the partnership as it existed on 2nd June, 1902, and the Standard Bank, was inquired into, and the accounts themselves properly taken, it would appear that by the application of the rule in Clayton's Case, 1 Mer. 572, the debt due to the bank by the partnerhip on 2nd June, 1902, was satisfied in whole, or, if not wholly, to such an extent as to leave a sum well within the value of Kendrick and Mrs. Forsythe's share of the assets received by the limited company. These defendants would not be liable to the bank for indebtedness incurred after their retirement, of which the bank had notice.

On the other hand, they may be entitled to credit for all sums deposited to the unchanged account up to 31st October: Brooke v. Enderby, 2 Br. & B. 70. And if the result proved to be as suggested, the indebtedness paid to the bank by the limited company was not one for which these two defendants were liable.

The judgment against these defendants should be reduced to the sum of $7,000, and to this extent their appeals are allowed. The appeals of the other defendants must be dismissed.

As to costs of defendants Kendrick and Mrs. Forsythe. The plaintiff should have failed in part as against them at the trial, and defendants have failed in part upon their appeals, and neither should have any costs against the other of the action or appeal.

The other defendants must pay to plaintiff the costs of their appeals.

TEETZEL, J. MAY 10TH, 1905.

TRIAL.

GAMBELL v. HEGGIE.

Seduction—Evidence of Plaintiff's Daughter Disclosing Case of Rape—Nonsuit—No Reasonable Evidence of Seduction —Disagreement of Jury—Rule 780—Scope of.

The jury having disagreed for the third time at the third trial of this action (for seduction of plaintiff's daughter), defendant, having moved for a nonsuit at the close of plaintiff's case, moved after the disagreement for judgment under Rule 780 dismissing the action notwithstanding the disagreement.

W. E. Middleton, for defendant.

T. J. Blain, Brampton, for plaintiff.

TEETZEL, J.:—It was argued . . . for plaintiff that Rule 780 only applies to cases which may be tried either by a Judge or a jury, and not to a case like this, which by statute must be tried by a jury.

I am not able to find from the cases cited or elsewhere anything affording a definition of the limits of the Rule. . . .

[Reference to Floer v. Michigan Central R. W. Co., 30 O. R. at p. 635, 27 A. R. 122.]

I think this is a case in which the Rule applies, and I am of opinion, from further consideration of the evidence given on behalf of plaintiff only, and in view of the authorities . . . that I should not have allowed the case to go to the jury.

The evidence of plaintiff's daughter was most emphatic that the connection effected by defendant with her was by force and without her consent, and there was no evidence given either by her or any one else from which a jury, in my opinion, would be justified in finding that she had consented, either by act or word, to the connection.

Her whole story as to the circumstances of the alleged sexual intercourse was highly improbable, but, if believed at all, could only lead to the conclusion that defendant had committed the offence of rape, and it would seem to me that a jury could not find that the act of seduction had been committed by defendant, without discarding entirely the evidence of the particulars given by the daughter, and guessing at an entirely different set of circumstances. . . .

[Reference to Vincent v. Spragge, 3 U. C. R. 283.]

The action of seduction is predicated upon the consent of the person seduced having been given either by act or word. In this case the daughter was over 21 years of age at the time of the alleged seduction, and was not in the actual employment of the father, but was at service at the house of defendant's father.

The right of the father to recover is a statutory one, and in order to entitle him to succeed the fact of seduction must be proved; and, the daughter not being his servant in fact, he would not be entitled to recover damages for an assault upon her. Any damages resulting to her from acts which would amount to rape, although pregnancy might follow, would be personal to her, and would not accrue to the father.

It has been judicially stated that, "in order to constitute seduction, the defendant must use insinuating acts to overcome the opposition of the seduced, and must by wiles and

persuasions without force, debauch her;" also, "in order to constitute seduction it is necessary to shew that the consent of the woman was obtained by flattery, promise, or other artifices, used by defendant;" also, that "the word 'seduction,' when applied to the conduct of a man towards a female, is generally understood to mean the use of some promise, acts, or means on his part by which he induces the woman to surrender her chastity and virtue to his embraces." See "Words and Phrases Judicially Defined," vol. 7, p. 6389 et seq.

The actions of defendant in this case, as sworn to by plaintiff, are absolutely inconsistent with the above or any other definition of seduction that I have been able to find. . .

[Cole v. Hubble, 26 O. R. 279, and Regina v. Doty, 25 O. R. 362, referred to.]

I am of opinion that in this case there was no reasonable evidence upon which seduction only could be found by the jury. Outside of the evidence of plaintiff's daughter there was nothing which would support the suggestion of defendant having seduced her, and there was no part of the daughter's evidence, improbable and unnatural as the circumstances narrated by her were, that would justify the jury in finding that she was induced to surrender or did voluntarily surrender her chastity and virtue to the embraces of defendant.

Action dismissed with costs.

MAY 11TH, 1905.

DIVISIONAL COURT.

HILLYER v. WILKINSON PLOUGH CO.

Master and Servant—Injury to Servant—Negligence—Findings of Jury—Causal Connection—New Trial—Costs.

Appeal by defendants from judgment of TEETZEL, J., upon findings of a jury, awarding plaintiff $500 as damages for personal injuries sustained by plaintiff, who was severely burned by liquid metal cast upon him as the result of an explosion caused by a wet sprue being thrown by a fellow workman into a ladle filled with molten iron.

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

1. Were defendants through their foreman guilty of negligence? A. Yes.

2. If so, in what did such negligence consist? A. In carelessness of foreman in placing wet sprues where workmen would use them.

3. Could plaintiff by the exercise of reasonable care have avoided the injury? A. No.

4. Did plaintiff fully appreciate the danger he was in and voluntarily assume the risk of injury? A. No.

5. If plaintiff should be entitled to recover damages, at what sum do you assess such damages? A. $500.

E. E. A. DuVernet, for defendants.

R. McKay, for plaintiff.

The judgment of the Court (MEREDITH, C.J., FALCONBRIDGE, C.J., ANGLIN, J.), was delivered by

ANGLIN, J.:—The use of wet sprues in order to dull molten metal is admittedly highly dangerous. There was evidence sufficient to justify the submission of this case to a jury, and to sustain their findings. The only question, in my opinion, is, whether these findings are conclusive.

Although the jury have found negligence imputable to defendants, and have stated in what that negligence consisted, they were not asked to and did not find whether such negligence was the cause of plaintiff's injuries. Had the jury been explicitly directed to confine their findings upon the first and second questions submitted to such negligence, if any, as, upon the evidence, they should be satisfied had caused the explosion which injured plaintiff, the actual answers given by them might have been sufficient to support the judgment in appeal. But a careful study of the Judge's charge does not enable me to say that such direction was given. In its absence, the finding of negligence is not conclusive in plaintiff's favour, and a new trial will therefore be necessary. It is to be regretted that counsel did not call the attention of the Judge to the omission of a question which would elicit from the jury a specific determination as to the causal connection between the negligence found and the injuries sustained by plaintiff. This was a duty incumbent upon the counsel for both parties. While, therefore, the judgment of my brother Teetzel must be vacated and a new trial ordered, neither party should have costs of the abortive trial or of this appeal.

MAY 11TH, 1905.

DIVISIONAL COURT.

RE DILLON AND VILLAGE OF CARDINAL.

Municipal Corporations—By-law—Local Option — Voting on By-law — Irregularities in Polling — Saving Clause of Statute.

Appeal by applicants from order of MAGEE, J., ante 653, dismissing applicaion to quash a local option by-law of the village of Cardinal.

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

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

W. E. Middleton, for village corporation.

FALCONBRIDGE, C.J.:—We are all of opinion that the judgment of Magee, J., is entirely right and should be affirmed. In applying the saving clause of the Municipal Act, sec. 204, it is no matter in this case on which party the onus is, for the evidence shews clearly that the result was not affected by the irregularities. The appeal will be dismissed with costs.

BRITTON, J.:—I am of opinion that this is a case for the application of sec. 204 of the Municipal Act. The council of the village of Cardinal intended that the voting upon the by-law in question should be, and the voting in fact was, conducted in accordance with the principles laid down in that Act. In so far as there was any non-compliance or irregularity or mistake, it seems clear to me, from a careful perusal of the affidavits and papers filed and a consideration of the arguments addressed to the Court, that the result of the voting upon the by-law was not affected thereby.

It is important, in considering the objections to what was done and omitted by the returning officer after the close of the poll, to note that in this village there was only one polling place, and that the clerk of the village was himself the returning officer. In cities and towns a deputy returning officer shall in no case take, or allow to be taken, a ballot box to his house or office or place of business, but it must be delivered at once to the clerk of the municipality: see sec.

177, sub-sec. 4. In this case the clerk was the custodian of the ballots which as returning officer he had received.

I think the appeal fails.

ANGLIN, J., concurred.

MEREDITH, C.J. MAY 12TH, 1905.

CHAMBERS.

O'CONNOR v. O'CONNOR.

Pleading—Defences—Irrelevancy—Amendment.

Appeal by defendant from that part of order of local Master at Ottawa, ante 701, which directed that paragraphs 6, 7, and 8 of the statement of defence and counterclaim should be struck out.

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

H. M. Mowat, K.C., for plaintiff.

MEREDITH, C.J., varied the order of the Master by allowing defendant to amend the paragraphs by introducing apt words to shew that the matters therein set forth formed part of the consideration for the agreement which defendant alleged.

ANGLIN, J. MAY 12TH, 1905.

TRIAL.

TALBOT v. HALL.

DELAIRE v. HALL.

Master and Servant—Injury to Servant — Negligence—Elevator—Defective Appliances—Inspection—Duty of Tenant —Duty of Landlord—Evidence for Jury—Nonsuit.

Actions to recover damages for injuries sustained by plaintiffs owing to the fall of an elevator in a building of which defendants were tenants. Plaintiffs were in the employment of defendants, and were, when injured, upon the elevator at the invitation or with the knowledge and approval of their employers.

A motion for a nonsuit was made after the evidence on behalf of plaintiffs was given, and was renewed after all

the evidence was in. The case was allowed to go to the jury, who found in favour of plaintiffs.

D. O'Connell, for plaintiffs.

G. H. Watson, K.C., and L. M. Hayes, Peterborough, for defendants.

ANGLIN, J.:—Plaintiffs charge that the immediate causes of the fall of the elevator were two defects in its condition: one, that the stop-balls upon the operating cable were placed too far apart, permitting of excessive speed; the other, that the safety devices were improperly and unevenly adjusted; that the existence of these defects could have been revealed by such reasonable inspection as it was defendants' duty to have made; and that they were negligent in not adequately providing for such inspection.

As to the improper position of the balls upon the operating cable, assuming that the distance between them immediately before the fall of the elevator was in fact too great, I incline very strongly to the opinion that it is necessarily a matter of pure conjecture whether such an inspection as upon the evidence the jury would be warranted in finding defendants bound to provide for, would have revealed this defect. The position of these balls may have been entirely proper up to the very . . . hour of the accident. . . .

With regard to the safety devices, however, the case is entirely different. Whatever may be said of its weight, there was evidence for the jury that these devices were improperly adjusted and that such improper adjustment was a cause of the fall of the elevator. There was evidence that, unless they had been interfered with in the interval, a possibility which nobody suggested, the safety devices when originally installed, 10 months before the fall of the elevator, must have been improperly adjusted. The landlords installed the elevator. Under their lease defendants were required to keep it in repair. For plaintiffs evidence was adduced that reasonable care would demand an inspection by a competent man at least once in 3 months to ensure the elevator and appliances connected with it being in proper working order, and that such inspection, if thoroughly and efficiently made, would involve a testing of the safety devices which would have disclosed the fact of their improper adjustment. Inasmuch as the defect, if any, in the adjustment of these devices must,

upon the evidence of plaintiffs' own expert witnesses, have been due to imperfect workmanship in the erection of the elevator by the landlords, as to which counsel for plaintiffs conceded that defendants were in no wise responsible, I much doubted whether it could be said to be the duty of defendants to provide for the inspection or testing of these devices, which, once properly adjusted, cannot, according to the expert evidence, by use or lapse of time, become out of adjustment. But perhaps the concession of counsel was too sweeping, or it may be that I took from it more than he intended. In view of the evidence adduced as to the scope of an adequate and reasonable inspection, and of the duty of the occupier to use reasonable care to see that persons going upon his premises upon business which concerns him, and upon his invitation, express or implied, shall find these premises themselves and the appurtenances and appliances connected therewith fit for the purposes to which they are to be put, and to prevent injury from unusual danger, which he knows or ought to know (Marney v. Scott, [1899] 1 Q. B. 986, Jones v. Page, 15 L. T. N. S. 619), the question whether the non-discovery of the defects, if any, in the adjustment of the safety devices, was attributable to neglect of duty on the part of defendants in regard to such inspection, was necessarily left to the jury.

It follows that the motion . . . fails, and that judgment must now be entered for each plaintiff for the damages which the verdict of the jury awards her.

STREET, J. MAY 12TH, 1905.

TRIAL.

PLENDERLEITH v. SMITH.

Mortgage—Foreclosure—Action—Parties—Devisee of Deceased Mortgagor — Executors — Joint Assignees of Mortgage—Death of One—Action by Survivor—Trustees—Objection —Laches—Action to Open Foreclosure.

On 13th October, 1882, Mary Ann Plenderleith and her husband joined as mortgages in mortgaging certain lands in the city of Toronto to one Byrch as security for a loan of $2,600 and interest.

On 7th August, 1884, Byrch assigned the mortgage to James Maclennan and John Downey, who took it as trustees for certain clients of theirs, with whose money it was purchased, but no trust appeared on the face of the assignment.

On 1st October, 1887, an agreement under seal was entered into between the mortgagors and the assignees of the mortgage by which the time for payment of the mortgage money was extended to 1st October, 1892, and the rate of interest was reduced, and it was agreed that all the covenants, powers, provisions, and conditions expressed in the said mortgage should apply to the extended term; and the mortgagors covenanted with the assignees to pay the principal money and interest at the new dates mentioned in the agreement as if those dates had been inserted in the original mortgage.

The husband of Mary Ann Plenderleith died on 14th July, 1890, leaving a will whereby he devised and bequeathed all his real and personal estate to his wife, and appointed her to be his sole executrix. This will was proved by her on 23rd July, 1890. She died on 22nd September, 1890, also leaving a will whereby she appointed defendants James M. Brown and Jessie Brown to be her executors, and whereby also she devised and bequeathed all her real and personal estate to her daughter, Eliza Plenderleith, the plaintiff in this action, then an infant. Probate of this will was granted to the executors named therein on 2nd October, 1890.

John Downey, one of the assignees of the mortgage, died on 11th April, 1894, leaving a will and appointing executors.

On 28th November, 1894, the surviving assignee of the mortgage, James Maclennan, brought an action upon the mortgage for foreclosure against James M. Brown and Jessie Brown, executors, representing the estates of Mary Ann Plenderleith and her husband. In the statement of claim it was alleged that plaintiff and Downey held the mortgage as mortgagees in trust, and that plaintiff, after the death of Downey, was entitled as surviving mortgagee and trustee to the moneys secured by the mortgage. Defendants filed an answer admitting their character of executors under the wills of the mortgagors, setting out the devise to Eliza Plenderleith, and submitting that she was a necessary party to the action. The usual foreclosure judgment was obtained upon motion for judgment, and, after a reference and report, a final order of foreclosure was made on 28th November, 1895, against all the defendants.

On 1st May, 1902, James Maclennan conveyed the land in question to one George Hamilton. On 2nd May, 1902, George Hamilton conveyed the land in question to the defendant George B. Smith, who on the same day conveyed it by way of mortgage to defendant M. Augustus Thomas to secure a loan of $1,700 and interest.

On 14th November, 1904, Eliza Plenderleith brought this action against Smith and Thomas to set aside the foreclosure and for redemption, alleging that the foreclosure proceedings were irregular because the personal representatives of Downey were not made parties, and because Eliza Plenderleith, the plaintiff in the present action, was not a party to those proceedings.

Maclennan had entered into possession of the lot after the foreclosure as owner, and since then the possession had followed the conveyances.

T. Hislop, for plaintiff.

J. B. O'Brian, for defendants.

STREET, J.:—It is contended by plaintiff that the title to the equity of redemption at the time of the foreclosure proceedings was vested in her, and not in the executor and executrix of her mother, who were treated in the foreclosure action as the owners of the equity and were the sole original defendants in the action.

If the law laid down in Re Martin, 26 O. R. 465, were to govern, that would be the case, for it was there held by the Chancellor that the joint effect of 54 Vict. ch. 18, sec. 1, and 56 Vict. ch. 20, sec. 4, was to vest all estates in the devisees under the wills of persons dying at any time, whether before or after 4th May, 1891, unless the executors registered a caution within a year. That construction, however, was not approved by the legislature, and the declaratory sec. 29 of 60 Vict. ch. 14 expressly interprets sec. 1 of 54 Vict. ch. 18 as applying only to the estates of persons dying after 4th May, 1891, and this interpretation is made retrospective, save where a conveyance has been made before the passing of the declaratory section.

Both Mr. and Mrs. Plenderleith died before 4th May, 1891, and the result is, that I must hold that the equity of redemption was vested in their executors at the time of the foreclosure action and judgment; they were properly made defendants as the owners of the equity, and the present

plaintiff, Eliza Plenderleith, the devisee of her mother, was neither a necessary nor a proper party to the foreclosure action. . . .

The other objection is, that Downey's personal representatives were necessary parties to the foreclosure proceedings. In my opinion, they were not necessary parties.

In the first place, I think the case is within sec. 13 of ch. 121, R. S. O. 1897, which entitles a surviving mortgagee, in the case of a mortgage or obligation made or assigned to two persons "jointly and not in shares," to receive the mortgage money from the mortgagor and to give a valid discharge of the mortgage. This mortgage became the property of the two assignees, in my opinion, "jointly and not in shares," within the meaning of this section, and James Maclennan, the survivor, became entitled as against the mortgagors to receive the money and to enforce payment of it by action. It is true that the section applies only to securities made or assigned after 1st July, 1886, but the renewal agreement was made after that date, and contains a direct covenant by the mortgagors with the assignees to pay the mortgage money and interest at a new day, and this constitutes a new "obligation" after 1st July, 1886, so as to bring the case within the section.

Even, however, if this section should be held not to govern, plaintiff, in my opinion, must still fail. The statement of claim in the foreclosure action alleges that Maclennan and Downey took and always held the mortgage and the moneys secured by it as trustees. They being trustees, the right to recover the money survived, both at law and in equity, upon the death of Downey, to his co-trustee Maclennan.

It is true that if defendants had objected that Downey's representatives should be made parties, they must have been added in order that defendants might have them bound by the judgment. But defendants made no such objection, being no doubt satisfied of the truth of the statement that Maclennan and Downey had held as trustees, and that therefore the action was properly maintainable by Maclennan alone. The truth of that statement has been proved before me, and it is impossible to give effect to an objection taken 10 years after the judgment, based upon the unfounded statement that Downey had a beneficial interest in the mortgage money.

The action must, therefore, be dismissed with costs.

MAY 12TH, 1905.

DIVISIONAL COURT.

DANIEL v. BIRKBECK LOAN AND SAVINGS CO.

Security for Costs—Absent Plaintiff—Property in Jurisdiction—Burden of Proof—Building Society—Terminating Shares.

Appeal by defendants from order of TEETZEL, J., in Chambers, allowing an appeal by plaintiff from an order of a local Judge refusing to set aside a præcipe order for security for costs obtained by defendants, and holding that defendants had a lien upon 6 shares of terminating stock in their hands for such costs.

C. A. Moss, for defendants, appellants.

J. F. Faulds, London, for plaintiff.

The judgment of the Court (FALCONBRIDGE, C.J., STREET, J., ANGLIN, J.), was delivered by

STREET, J.:—Plaintiff in this action asks for a declaration that the action of defendants in converting certain terminating stock into permanent shares was irregular, and that the original stock has, therefore, not been in fact converted.

Defendants have power by statute, in certain circumstances, to convert terminating stock into permanent shares, and the question here is, whether these circumstances existed. If the action succeeds, the property in question is worth considerably over $200; if it fails it is not worth $200; but it is not shewn what it is in fact worth.

Plaintiff resides out of the jurisdiction, and defendants are, therefore, entitled prima facie to retain the order for security for costs which they have obtained; they are entitled to retain it unless plaintiff shews herself possessed of sufficient property within the jurisdiction to answer the costs if the action fails. The onus of shewing this is entirely upon plaintiff, and plaintiff has, in my opinion, not shewn it.

The appeal should be allowed with costs here and below.

Some loose statements in two of the affidavits filed as to the ownership by plaintiff of an equity of redemption in property in Strathroy are not sufficient to justify us in ordering

that security for costs be dispensed with. If, however, plaintiff is so advised, she may renew her application in Chambers, notwithstanding this judgment, but the costs of the present application and appeals must first be paid.

BRITTON, J. MAY 13TH, 1905.

TRIAL.

PLOUFFE v. IRON FURNACE CO.

Negligence—Leaving Unguarded Hole in Ice Formed upon Navigable Water—Evidence of Negligence—Death of Person Walking over Ice—Cause of Death—Absence of Direct Proof — Contributory Negligence — Argumentative Finding of Jury—Interpretation of.

Action by widow of Urgel Plouffe, on behalf of herself and children, under the Fatal Accidents Act, to recover damages for the death of her husband, alleged to have been occasioned by the negligence of defendants in leaving unguarded a hole made by them in the ice in Midland harbour in February, 1903.

A. E. H. Creswicke, Barrie, for plaintiff.

E. E. A. Du Vernet and W. A. Finlayson, Midland, for defendants.

BRITTON, J.:—Defendants are the owners of a large dock at Midland, lying along side of which in the winter of 1902-3 was their tug "Voyageur," which accidentally filled with water and sank at the dock, breaking the ice and leaving open water above her deck. The sunken boat was not immediately raised, and ice formed above it. In a short time, and at defendants' convenience, they cut the new ice recently formed, and proceeded with the work of raising the tug. Defendants did not place any brush or obstruction or sign near the open water or in any way mark the place of open water or give any warning of danger.

On the morning of 7th February, 1903, the body of deceased was found near this tug. He was lying upon his back, his feet and legs were upon solid ice, his head in open water. Some witnesses stated that the nose and mouth were not under water or covered by water. Other witnesses said

the mouth and nose had been covered with water, and there was a thin coating of ice on the mouth, which was broken off upon the body being moved. The deceased came to his death by drowning or exposure. There was no post mortem examination of the body.

On the evening before the morning when the body was found, the deceased was at Midland; he had been drinking that day, and upon the undisputed evidence there is no doubt that he was that evening in a state of intoxication. . . . Le Rush (his brother-in-law) left deceased at Midland about 10 o'clock on the evening of the 6th, and that is the last that was seen of deceased when alive.

At the close of plaintiff's case, and again after all the evidence was in, defendants asked for a nonsuit. I reserved decision upon this motion and submitted certain questions to the jury, all of which were answered by the jury in favour of plaintiff except the 5th question, which was: "Could the deceased, by the exercise of ordinary and reasonable care, have avoided the accident which occasioned his death, and, if so, in what respect or how could the deceased have avoided the accident ?" The latter part of the question was added at the request of counsel for plaintiff. To this question the answer was: "Yes. He might have taken another road, or if sober on a bright night he might have avoided the hole." The jury assessed the damages at $1,200. . . . .

There is no doubt that the deceased had a right to be on the ice in the vicinity of the hole. He was not a trespasser. He was upon the ice over navigable water. He was, when he lost his life, at a place "open to" but not "frequented by" the public.

Defendants in making the hole through the ice did so in the exercise of their rights for the purpose of saving their tug, which, without fault of theirs, so far as appears, had sunk in navigable water. Defendants had no reason to suppose that in the ordinary course of business or travel any one other than those in their employment would be near enough to their boat or to this hole to be in any way in danger. While the public had the right to be, or travel, upon the ice, there was no invitation by defendants to deceased or to any of the public to travel upon the ice or to go near the opening. There was not, apart from what was

being done by defendants in the raising of the tug, any work or business being carried on, or any road or way defined by bushes or marks or by travel on the ice, that would give notice to defendants that any one would be likely to drive or ride or walk near to where the hole was, and the ice was not in condition to be skated upon.

Assuming that the hole through the ice was made by defendants, it was of sufficient size or area to endanger human life, and so was within the letter of sec. 255 of the Criminal Code, but Tompkins v. Brockville Rink Co., 31 O. R. 124, is authority for the conclusion that, even if defendants are guilty of an offence within the meaning of that section, that of itself does not give plaintiff a right of action. The action is founded upon negligence, and, upon all the facts and circumstances which are beyond dispute, I am of opinion that there was not evidence of negligence that should have been submitted to the jury.

Then as to the cause of death, it is quite as reasonable to conclude from the evidence that the deceased voluntarily sat down or fell upon the ice, close to the edge, and perished from cold, as that he accidentally walked into the hole. Upon the evidence, the way in which Plouffe met his death is as consistent with the theory that he did not fall into the water as that he did, and, that being so, the case should not go to the jury: see Armstrong v. Canada Atlantic R. W. Co., 4 O. L. R. 560, 1 O. W. R. 612.

If I am wrong in my present opinion, plaintiff is entitled to recover, unless the Court considers that the answer to the 5th question is a finding in favour of defendants on the point of contributory negligence. Defendants contend that it is such a finding. It may have been so intended by the jury. Their answer to the first part of the question is simply "yes." Then they add that deceased might have taken another road. That amounts to nothing. But they further add, "if sober on a bright night he might have avoided the hole." Upon the undisputed evidence the deceased was not sober on the evening of the 6th, but this answer is not, in my opinion, an express finding that deceased was intoxicated. Upon the evidence the night was a bright one, but the finding as to that is not direct. Even if it amounts to an argumentative finding, I am of opinion that, although the answer is in two distinct sentences, it must be considered

as a whole, and so cannot be considered by me as an answer in favour of contributory negligence: see Rowan v. Toronto R. W. Co., 29 S. C. R. 717.

Action dismissed without costs.

MAY 13TH, 1905.

DIVISIONAL COURT.

GREEN v. STEVENSON.

Specific Performance—Oral Contract for Sale of Land—Statute of Frauds—Memorandum in Writing Incomplete as to Terms — Admission of Terms by Plaintiff — Parol Evidence—Purchaser for Value—Enforcement of Contract against—Notice to Solicitor—Registry Laws—Misconduct —Costs.

Apeal by defendant Mary G. Bowerman from judgment of TEETZEL, J., in favour of plaintiff in an action for specific performance of an agreement for the sale by defendant Stevenson to plaintiff of a house and premises known as No. 328 in East avenue, in the city of Hamilton.

The appeal was heard by MEREDITH, C.J., BRITTON, J., ANGLIN, J.

E. E. A. Du Vernet and W. L. Ross, Hamilton, for appellant.

J. P. Mabee, K.C., for plaintiff.

ANGLIN, J.:—Defendant Stevenson, in October, 1904, orally agreed to sell the property to plaintiff for $400, payable $50 in cash and $350 by the assumption of an existing mortgage, plaintiff agreeing also to pay the taxes upon the property for the year 1904 and interest upon the $350 mortgage accrued since 14th May. At the time when this arrangement was made plaintiff paid $10 on account of his purchase, and obtained the following receipt: "Hamilton, Oct. 10, 1904. Received from Mr. Edwin Green the sum of ten dollars on house and lot number 328 East avenue sold by Mr. James Stevenson for $350 by paying (fifty dollars) to Mr.

Stevenson, allowing one-half for lawyers' fees, also paying water rates. M. J. Stevenson. Balance $40 on house."

Defendant Stevenson subsequently sold and conveyed the property in question to defendant Bowerman for $425.

Plaintiff in his statement of claim alleges an agreement for sale to himself at $400, making no reference to the terms as to interest and taxes. He frankly admitted them, however, in his evidence at the trial upon cross-examination.

Defendant Stevenson by his plea denies the contract in toto, and sets up the Statute of Frauds. He does not allege that the receipt of 10th October, the only memorandum of the bargain, omits the special terms as to interest and taxes. His application to amend by specifically pleading these omissions as a defence, the trial Judge refused. It is not clear that this amendment was not sought on behalf also of defendant Bowerman.

Defendant Bowerman alleges a purchase from Stevenson for value without notice of the interest of plaintiff, and claims the protection of the Registry Act. She did not originally plead the Statute of Frauds, but gave notice of motion that she would seek leave at the trial to amend by setting up this defence. . . . I assume that such an amendment was made. No doubt, even if not allowed at the trial, it would be our duty now to allow such amendment upon proper terms, having regard to . . . Williams v. Leonard, 16 P. R. 544, 17 P. R. 73, and Patterson v. Central Canada Savings Co., 17 P. R. 470.

Defendant Stevenson, though represented at the trial, does not appeal from the judgment against him.

My brother Teetzel expresses in very decided terms his view that the sale by Stevenson to Bowerman was made male fide. He finds in effect that the solicitor for Mrs. Bowerman had full knowledge of the previous sale to Green, and, with such knowledge, acting for Bowerman, "allured" Stevenson to sell to his client for the paltry advance of $25. The motive which induced this reprehensible conduct, so scathingly denounced by the trial Judge, was, he suggests, a prospective profit of some $200 to be made by a resale of the house, and to be shared between the solicitor and Bowerman.

Counsel for the appellant urge these grounds of appeal:—(1) That the notice which Bowerman had through the solicitor was constructive merely, and therefore insufficient to deprive the client of the protection of the Registry Act. (2) That from the receipt of 10th October it is not possible to glean with certainty the terms of the agreement between the parties. (3) That the receipt does not shew Edwin Green to be the purchaser. (4) That, it being admitted in evidence that the receipt does not contain all the terms of the bargain, it is not a sufficient memorandum to satisfy the requirements of sec. 4 of the Statute of Frauds.

Upon the first point the evidence amply supports the findings of the Judge that the solicitor acted as solicitor for Bowerman, and that he had full knowledge of the prior sale to plaintiff. He obtained this knowledge in the very transaction in which he represented Bowerman. If he kept Bowerman in ignorance of plaintiff's position, he did so in breach of his duty, and for the sinister purpose of enabling Bowerman to advance a plea of want of notice. In this he cannot succeed. Actual notice to the solicitor had in the transaction in which he represents his client, is actual notice to that client.

The remaining grounds of appeal rest on the Statute of Frauds.

The trial Judge thought it plain, upon the receipt, that the contract was for a sale at $400, of which $350 was to be paid by the assumption of the existing mortgage and $50 in cash. I find no difficulty in deducing such a contract from the receipt. In my opinion, it admits of no other construction. The second ground of appeal is, therefore, untenable.

It is true that Edwin Green is not in this receipt described as the purchaser. But neither does anything appear to suggest that he is making payment in any representative capacity. Prima facie he is paying upon his own account, and therefore as purchaser. In Evans v. Prothero, 1 De G. M. & G. 572, a similar receipt was the sole memorandum. No exception was taken to it upon this ground. It can hardly be supposed that a point so obvious, if at all tenable, would have entirely escaped the attention of counsel, who, for want of anything better, were driven to rely upon the absence of a stamp upon the receipt as their

sole objection to its sufficiency. I have no doubt that the receipt in evidence here sufficiently shews Edwin Green to be the purchaser from Stevenson.

The remaining and most formidable objection is that founded upon the omission from the receipt of all reference to the special terms as to interest and taxes. These terms, admittedly a part of the bargain, rest in parol. Can the Court, against a resisting defendant who pleads the Statute of Frauds, decree specific performance of an agreement, within the purview of that statute, of which an essential term is not in writing? Cases in which the requirements of the statute have been satisfied by part performance must be put carefully aside, as must also cases in which the written memorandum is absent or defective because of the fraud of defendant.

I am unable, upon principle, to distinguish such a case as this from the long line of decisions by which it has been established that, although the defendant in his plea admits an oral agreement, it cannot be enforced against him if he nevertheless insists upon the bar of the statute. To enforce against an unwilling party, pleading the statute, a mere oral contract which he admits, would do no greater violence to the provisions of the statute than would be done by enforcing against such party a contract of which only some of the essential terms are evidenced by writing.

There has been some discussion upon the question whether, on the ground of mistake, a court of equity may upon parol evidence reform a written agreement, and may in the same action decree specific performance of the rectified instrument. When this question arises upon an executory agreement for the sale of lands, and is complicated by a plea of the Statute of Frauds . . . the judgment of a Divisional Court in Knapp v. Carley, 3 O. W. R. 940, declares it to be important and difficult. Learned writers express the view that this double relief may be given in cases not within the Statute of Frauds: Fry on Specific Performance, 4th ed., p. 353; Kerr on Fraud, 3rd ed., p. 459; and judicial countenance has been given to this view: Olley v. Fisher, 34 Ch. D. 367. But from these statements cases within the Statute of Frauds have been carefully excepted. Mr. Cyprian Williams, in his recent book on Vendor and Purchaser, expresses, at p. 707, the view that if the decision

in Olley v. Fisher "be right there is no reason for not extending it to a case where the statute is pleaded," because, he says, "it is settled that that statute can afford no defence to an action for rectification." The cases which he cites upon this latter point appear, upon examination, to be all cases in which, not executory contracts, but deeds or documents evidencing executed contracts, have been rectified: see pp. 700, 703. Moreover, as Mr. Williams says, before there can be rectification there must be evidence of a common intention that the document to be rectified should contain the whole contract, and that the omitted terms were left out by fraud or mutual mistake: p. 701. In many cases where plaintiffs have sought specific performance of agreements relating to land, the terms of which have been only partly evidenced in writing, there have been very emphatic expressions of opinion that such relief, against an unwilling defendant who pleads the statute, must be denied. . . . [Reference to Attorney-General v. Sitwell, 1 Y. & C. Ex. at p. 583; Davies v. Fitton, 2 D. & War. 225, 232; Fry on Specific Performance, 4th ed., sec. 815.

There are some dicta from which an inference may be drawn that certain Judges inclined to a contrary view, but nowhere do I find that view in terms expressed, nowhere can I find that it has ever been made the basis of a binding and authoritative decision, unless, perhaps, in the case of Martin v. Pycroft, referred to below. In many of the text books there is much learning expended upon a discussion of the question whether rectification and enforcement can be granted simultaneously. The late case May v. Platt, [1900] 1 Ch. 616, casts some doubt upon the right to grant such double relief even in cases to which the Statute of Frauds does not apply. But the weight of English opinion seems to favour the exercise of such jurisdiction in those cases, and with us the question is so concluded: Carroll v. Erie County Natural Gas and Fuel Co., 29 S. C. R. 591, 594; Clark v. Walsh, 2 O. W. R. 72.

Where the Statute of Frauds applies, however, plaintiff's difficulty is not due to his demand for double relief; it consists in this, that, though the contract be rectified, the portion of it which is evidenced by parol is not and cannot be thus made an agreement, memorandum, or note in writing, signed by the party to be charged. It is not until he seeks to

enforce the contract that the plaintiff really brings action upon it. In seeking rectification he brings suit which concerns the contract, not, in reality, upon it. So that, even though, in cases within the statute, a plaintiff seeking rectification may establish his right to that relief by parol testimony, it by no means follows that he is, therefore, entitled to further relief upon the contract so rectified.

We are not, however, here dealing with the reformation of an executory written agreement. The document before us is merely a receipt, which cannot be said, except prima facie perhaps, to purport to contain all the terms of the contract to which it refers. Some of these terms it, no doubt, does set forth. But it is quite consistent with the receipt serving all the purposes for which, as a receipt, it was designed, that there should be terms of the contract to which it relates not embodied in it. Evidence of such additional terms in no wise conflicts with the receipt, and their omission from the receipt cannot be urged as a ground for rejecting parol testimony adduced to prove them. Reformation of a written instrument is not in question. Neither can it be said that the omission of the terms as to taxes and interest is shewn to be a mistake. Their inclusion in a mere receipt may well have been deemed quite unnecessary.

Perhaps the strongest argument for plaintiff is furnished by . . . Martin v. Pycroft, 2 De G. M. &. G. 785. In that case an agreement in writing for a lease, otherwise complete, omitted a term requiring the plaintiff to pay a premium of £200. The plaintiff, seeking specific performance, by his bill stated this omission, and offered to pay the premium. The defendant set up the Statute of Frauds unsuccessfully, the Lords Justices, in reversing the decision of Parker, V.-C., declaring that in such a case the defendant could only ask the Court to refuse its aid if the plaintiff would not consent to performance of the omitted term.

The fact that plaintiff (Green) does not in his statement of claim set out the omitted terms and offer to perform them, does not, in my opinion, distinguish this case from Martin v. Pycroft. On cross-examination by defendant's counsel, plaintiff admits these terms, and his position is that he is ready to perform them as a condition of obtaining specific performance.

In Martin v. Pycroft had the plaintiff chosen to insist upon his written agreement without variation, the defendant could have successfully resisted its enforcement only by the aid of a court of equity permitting him to adduce parol evidence, inadmissible at law, to vary or add to its terms. That aid the court might well refuse to the defendant unless upon the condition that he do equity by submitting to a decree for specific performance with the variation or addition which such parol evidence disclosed. It is not surprising that in such a case the plaintiff should be in no worse plight because of his frankness in stating the omitted term in his bill and of his docility in offering to perform it, thus rendering the introduction of parol testimony to prove it unnecessary. Having regard to the grounds upon which the decision proceeds, I cannot reconcile Martin v. Pycroft with the strong and uniform current of authority that neither at law nor in equity can a plaintiff, against a defendant resisting and pleading the Statute of Frauds, enforce a contract whose terms are not evidenced by a memorandum in writing sufficient to satisfy that statute, unless upon the ground that equity, when allowing advantage to be taken of its own rule permitting parol proof of the omitted term, does so upon such conditions as are in the particular case deemed equitable.

Here, however, we are dealing with a mere receipt. The defendant is not obliged to seek any special favour from a court of equity in defending himself against plaintiff's claim. The receipt, not purporting to contain the whole terms of the bargain, offers no legal impediment to the introduction of parol evidence to prove terms which it omits. The contract was, for aught that appears to the contrary, designedly left in part parol. Its special equitable jurisdiction not being invoked by defendant or requisite to his defence, the Court is not in a position to impose terms upon him. He defeats plaintiff's claim without any indulgence which it is peculiarly the province of a court of equity to afford. By evidence admissible in any court he shews a parol contract of which only some of the terms are evidenced as required by the Statute of Frauds. His defence is thus complete. By no known process can those terms not so evidenced be put in a writing signed by defendant. Nothing less can constitute an enforceable agreement so long as the Statute of Frauds prevails. There is no fraud, no

mistake, even if that would suffice, to enable the Court to avoid the effect of the statute; nor part performance to satisfy it in the absence of a sufficient memorandum.

With much regret, because of the dishonesty of defendant's conduct, which called forth such deservedly severe condemnation from the trial Judge, I find myself compelled to hold, for the reasons above indicated, that this action cannot succeed. In allowing defendant's appeal, however, in my opinion we should mark our abhorrence of the conduct of herself and of those by whom she has been advised, by withholding all costs from her.

The appeal will be allowed, therefore, without costs, and the action dismissed likewise without costs. The appellant must, however, comply with the terms which the trial Judge would, had he given effect to her plea of the statute, no doubt have imposed as a condition of her being allowed to amend at the trial by then setting up that plea. She will be ordered to pay to plaintiff his costs of this action from delivery of defence down to the opening of the trial.

MEREDITH, C.J.:—I agree.

BRITTON, J.:—I agree in the result—that the appeal should be allowed without costs and the action dismissed without costs.