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MULOCK, C.J. MARCH 30TH, 1906.

TRIAL.

VOKES HARDWARE CO. v. GRAND TRUNK R. W. CO.

Mechanics' Liens—Time for Registering Lien—Completion of Work—Contract—Work to be Done to Satisfaction of Architects—Work Done after Registration of Lien.

Action to recover $1,447.50, claimed by plaintiffs as the balance owing to them on a sub-contract with defendant Whitham for the erection and completion by plaintiffs of the tile flooring, wainscoting, and marble work on a railway station which defendant Whitham had contracted to build for defendant company.

The action was begun under the Mechanics' Lien Act, the claim of lien having been registered on 24th June, 1905.

One of the terms of plaintiffs' sub-contract was that the work was to be done to the entire satisfaction of Spiers and Rohan, the architects.

J. W. St. John, for plaintiffs.

L. F. Heyd, K.C., for defendant Whitham.

MULOCK, C.J.:— . . . Defendant Whitham contended that the lien had not been registered within the time allowed by the statute, and, further, that plaintiffs were not entitled to a personal order under sec. 48, on the ground that at the time of the beginning of this action plaintiffs had

not obtained a certificate from the architects that the work had been done to their entire satisfaction. . . .

Plaintiffs on 20th May, 1905, ceased work upon the building, under the impression that they had completed their contract, and on 8th June J. L. Vokes, their secretary-treasurer, made an affidavit in connection with the registering of their claim of lien, wherein he testified that plaintiffs had completed their contract.

On 7th June plaintiffs sent Daniels, one of their employees, to Brantford to repair some of the work that had apparently been injured by other workmen, and on 8th and 9th June Daniels was engaged 23 hours—12 of these hours being spent in work of repair and 11 in work required by the contract. The architects, however, were not satisfied, and on 20th July Mr. Spiers, one of the architects, wrote to defendant Whitham pointing out certain defects which he required to be attended to at once. Defendant Whitham sent a copy of this letter to plaintiffs, whereupon they wrote to the architects, concluding their letter as follows: "Mr. Whitham says there are 2 or 3 other matters which you would like attended to before settlement of our claim is effected, and, in order to have our man make a complete clean-up of such, we would appreciate it very much if you would send us a memorandum of what you think should be done to make this job entirely satisfactory to you, all of which we will attend to promptly on receipt."

On 1st August, 1905, defendant Whitham wrote plaintiffs with further reference to Mr. Spiers's letter of 20th July, adding: "We expect Mr. Spiers here any day for the final settlement." Thereupon plaintiffs sent Daniels up to Brantford, and Daniels on his arrival there met Whitham and Spiers. The latter then instructed Daniels as to what he required to be done, whereupon Daniels proceeded to carry out the instructions, and was so engaged during all of the 3rd and 4th August.

Whitham contends that plaintiffs had completed their contract on 20th May, and that the work done by them thereafter, both in June and August, was repair work, rendered necessary because of some alleged negligence for which plaintiffs were responsible.

The evidence shews that a part of the work of June and August was of the nature of repairs, and part thereof was work which plaintiffs were by their contract required to perform. . . .

The parties had stipulated that the work was to be done to the satisfaction of the architects, and, thus having made the right to payment dependent on their approval, plaintiffs could not recover until such approval was given: Dobson v. Hudson, 1 C. B. N. S. 659; Morgan v. Bernie, 9 Bing. 672; Coatsworth v. City of Toronto, 10 C. P. 73.

It was, therefore, for the architects to determine whether plaintiffs had performed their contract. Whitham recognized this as the legal position of the matter on 20th July, when, on receipt of the letter of that date from the architects, complaining of the unsatisfactory condition of the work, he sent it to plaintiffs, and also telephoned them on the subject, and again on 1st August called their attention to the architects' complaint. Further, when, in compliance with the architects' demands, plaintiffs sent Daniels to Brantford, Whitham was with the architect Spiers when the latter instructed Daniels what to do, and not until after the work of Daniels on 3rd and 4th August were the architects satisfied.

As against the effect of this work in extending the time for registering a claim for lien, Neil v. Carroll, 28 Gr. 30, was cited in support of the contention that where a contract has been substantially performed, some trifling work in the way of removing defects would not extend the time, but in that case it was not, as here, left to a third person to determine whether, and if so when, the contract was completed. That question, by the express agreement of the parties in the present instance, is withheld from the jurisdiction of the Court, and left to the architects. They, therefore, and not the Court, are the judges of the materiality of any alleged shortcomings of plaintiffs in the performance of the contract. Until after the work of 4th August they were not satisfied, and I therefore am of opinion that the time for filing plaintiffs' lien had not expired on 24th June, and that they are entitled to judgment accordingly, with costs up to judgment, and to payment of whatever may be found due them by the Master.

It was stated at the trial that under the statute defendants had paid a sum of money into Court in discharge of the registered lien. This fund will be applicable towards meeting whatever amount may be found due to plaintiffs.

The case will be referred to the Master in Ordinary to take the account between the parties, to make all necessary directions, and to determine the costs of the reference.

SCOTT, LOCAL MASTER. MARCH 7TH, 1906.

CLUTE, J. MARCH 31ST, 1906.

WEEKLY COURT.

WILSON v. McLEAN.

Landlord and Tenant—Farm Lease—Covenants—Breaches—Waiver—Acceptance of Rent—Damages.

Action by landlord against tenant to recover damages for breaches of covenant in a farm lease, and counterclaim for breaches of covenant in the same lease, referred to the local Master at Ottawa for trial and adjudication.

George McLaurin, Ottawa, for plaintiff.

J. M. Hall, Ottawa, for defendant.

THE MASTER:—The lease is dated 8th March, 1902, is made in pursuance of the Act respecting Short Forms of Leases, and demises, in addition to the land, "one span of horses valued at $200, and all cattle and one brood sow and all farm implements and machinery and 150 hens." The portions chiefly in question read in the plaintiff's copy as follows:—"The said lessee covenants to leave on the premises at the end of the term 20 good milch cows and their calves, 3 yearling heifers, one thoroughbred shorthorn bull, one brood sow and litter of pigs, one span working horses valued at $200, . . . 150 hens," etc. The defendant's copy is identical, excepting that there is a blank before the word "hens," both in this covenant and in the demise clause, instead of the figures "150." The lessee further covenants "to provide the lessor with what wood he may require in sleigh lengths delivered at the house."

Plaintiff claims $100, on the ground that the pair of horses left on the place by defendant at the end of the term was worth only $100. This is amply proved. The defendant points out that the horses he left there were the same ones he received, which were valued in the lease at $200. This is no answer to the claim. There is evidence going to shew that the horses depreciated in value owing to bad usage on the part of defendant. I need not enter into this. The plain fact is that the horses left on the place by defendant

were worth only $100, and plaintiff is entitled to recover the difference between that and $200 as damages. If the value of the horses when defendant got them has any bearing on the matter, after agreeing on a valuation of them then at $200, he cannot now be heard to say that they were worth in fact only $100.

Defendant, instead of 20 milch cows, left only 13 milch cows and 2 two-year old heifers, and plaintiff claims for the shortage. He also alleges that the cows left were not average good cows. Defendant, as before, alleges that he left what he got, and counterclaims for damages for non-delivery to him of the cattle agreed on. As regards the counterclaim, it is entirely too late for defendant to allege that he did not receive the property leased to him. If there was any breach of covenant, he has long ago waived it by going into possession and paying his rent. Moreover, it is clear from the evidence that defendant was quite satisfied at the time that he was getting all that he was entitled to. The two-year old heifers were not "milch cows with their calves," so plaintiff is entitled to recover the value of 7 milch cows, less the value of the 2 two-year old heifers. There is a conflict of evidence as to whether or not the 13 that were left were of average value. I find that the leaving of them was a sufficient compliance, pro tanto, with the covenant. I find that the value of milch cows with their calves in March last was $40, and that the value of the 2 two-year olds was $35. I find that the pig left on the premises was not a brood sow with litter of pigs, and that the value of such a sow and litter is $30. Defendant is however entitled to credit for the pig he left, the value of which I find to have been $7.50.

It is admitted that the number of the hens was to be filled in by the parties after they were counted, and I find that this was properly done by plaintiff, and, if it is important, that defendant when he went into possession got the full number of 150, in addition to those retained or afterwards taken by plaintiff. If there was any breach of covenant with regard to the condition of the hens, it was long ago waived, as in the case of the cattle. The number left on the place was 41, so plaintiff is entitled to credit for the value of 109, which I find to have been 40 cents each.

During the first year the covenant to provide the wood (which the parties agree in interpreting to draw wood when cut for the purpose by plaintiff) was duly performed. In the second year defendant declined to draw any, on the

ground that the place from which it was to be drawn was not on the demised premises, but much further away. If this was a breach of covenant, it was waived by plaintiff accepting rent at the end of the current quarter, and allowing defendant to continue to occupy without protest: Nellis v. McNee, 7 O. W. R. 158. In the third year the wood was not cut in sleigh lengths, and defendant, after delivering some, declined, on that ground, to draw any more. The covenant, as both parties understood it, was contingent on plaintiff's having the wood cut in sleigh lengths, and, as this was not done, there was no breach.

I am unable to find on the evidence that plaintiff is entitled to the alleged cost of pulling mustard, or to any damages for the alleged injury to a spray motor. Similarly, with regard to the cupboard, I find that it was a gift to defendant, and that plaintiff is not entitled to recover anything for it.

This brings us to the counterclaim, or rather to the portions of it not already disposed of. The defendant claims $20 for repairing a silo. I find on the evidence that this work came under his covenant to repair, and that he is not entitled to recover anything for it. Plaintiff used defendant's horses several times, and defendant claims $24 for horse hire, but in his evidence puts the total at $20. Plaintiff admits the liability to the extent of $3.50. There is a conflict of evidence as to the number of times the horses were taken out. I fix the amount due at $6 for driving and $5 for drawing sand, or $11 in all. I find no foundation for defendant's claim of $25 for ditching, and I disallow it. Defendant also claims $10 for ploughing and manuring plaintiff's garden. I allow the item at $4. Defendant, finally, claims $5 for pasturage of a cow. My impression is that this item has not been proved, but, if necessary, it may be further spoken to.

The only remaining question to consider is with regard to an alleged settlement. On the day after defendant went out of possession he returned to pay his rent, and, after some discussion, a deduction of $22.50 was agreed on for a shed which defendant had erected, and which he threatened to demolish if he was not paid for the work, and plaintiff gave the following receipt for the balance of the rent: "Received from Thomas A. McLean the sum of eighty-seven dollars and fifty cents ($87.50) being quarterly rent up to March 8th, 1905. John C. Wilson, Kenmore, Mar. 8-'05." Conflicting accounts

are given of what was said on the occasion, but I find that the parties did not intend to settle for any more than the rent and the shed, and, as there is nothing in the writing releasing defendant from the consequences of his breaches of contract, he is still liable for them.

Although the point was not raised on the argument, I have been in some doubt as to whether the acceptance of rent by plaintiff was not, as a matter of law, a waiver by him of the breaches of covenant on the part of defendant. See Nellis v. McNee, 7 O. W. R. 158, and Walron v. Hawkins, L. R. 10 C. P. 343. I have, however, come to the conclusion that it was not. The waiver in such cases is due to the lessor's accepting during the term, without protest, rent accruing after the commission of the breaches of covenant. The present is an entirely different case. The breaches of covenant were contemporaneous with the close of the term. The rent due had all accrued prior to the commission of them, and, when defendant came to pay it, he had already gone out of possession. Both the rent and the damages had become ordinary debts, and defendant by accepting the former did not preclude himself from recovering the latter also.

Plaintiff is therefore entitled to recover from the defendant the sum of $398.10.

Defendant appealed from the Master's decision, without questioning the conclusions of fact, on the ground that as a matter of law the Master was wrong in not holding that plaintiff by accepting the rent had waived his claims for breach of covenant.

A. E. Fripp, Ottawa, for defendant.

George McLaurin, Ottawa, for plaintiff.

CLUTE, J., upheld the Master's decision.

APRIL 2ND, 1906.

DIVISIONAL COURT.

ROWE v. HEWITT.

Club—Expulsion or Suspension of Member—Injunction—Jurisdiction of Court—Property Rights.

Appeal by the defendants, members of the executive committee of the Ontario Hockey Association, from judgment of FALCONBRIDGE, C.J., upon motion for an interim injunction

turned into a motion for judgment, in favour of plaintiff, restraining defendants from taking any action depriving plaintiff of his rights as a member of the association.

W. E. Middleton, for defendants.

C. E. Hewson, K.C., for plaintiff.

The judgment of the Court (BOYD, C., MAGEE, J., MABEE, J.), was delivered by

BOYD, C.:—The whole cause of action alleged by plaintiff is, that defendants, or the body they represent, are about to expel or suspend him as a playing member of the Ontario Hockey Association. He holds a playing certificate for one year, which expired pending this action, and his anxiety was to be allowed to play hockey in one match with the Barrie club on 9th February last. An ex parte injunction was granted on 7th February by Judge Ardagh, which was ultimately made absolute as on a motion for judgment on 21st February. The game in view either did not go on, or went on without plaintiff. So that we have here the beginning and end of the grievance—asking the interference of the Court that plaintiff might play in one game of hockey.

Plaintiff has lost nothing nor will he lose anything in the nature of property by his suspension or expulsion. It does not appear that he has paid any fee for admission, nor would it matter if he had, for that would be answered by his having access to the rooms and grounds of the association—if there be any, for as to that also we are in the dark. According to the rules, the only result which follows the expulsion of a player is that he shall be barred from playing with or against any club in the Ontario Hockey Association till reinstated (regulation 7, p. 17). Even if he is to be permanently barred from play, that . . . is certainly no deprivation of any property right.

In brief, there is no allegation and no proof of any property, real or personal, of the association; nothing of value in this sense from which plaintiff has been excluded—nothing which by any possibility could come to him if the association were to be dissolved or wound up. Jusisdiction then, according to binding authorities, is fundamentally lacking in this case, so far as an injunction is concerned—and that is the only relief given or claimed.

This point on which we proceed was not raised or suggested before the Chief Justice—otherwise we should not have been troubled with an appeal.

Even if jurisdiction existed, I should as a matter of discretion refuse an injunction. That, as said by Cozens-Hardy, J., is a formidable legal weapon which ought to be reserved for less trivial occasions: Llandudno Urban District Council v. Woods, [1899] 2 Ch. 705, 710; see also as to a football match, Radford v. Campbell, 6 Times L. R. 488.

It must appear, to give jurisdiction to interfere by way of injunction to restrain the expulsion of a member of a society or club, that the plaintiff as member has some right of property for the protection of which the Court will interfere by this method of relief. If it be no more than this, that paying a subscription entitles one to the use and enjoyment of the rooms and property and effects of the society, without any right to participation in its assets if distribution ensued, then the right is only a personal one, and, if the expulsion is wrongful or injurious, the person injured has his remedy in seeking damages; this is the highest measure of relief which the Court will give in the absence of a right of property: Baird v. Wells, 44 Ch. D. 661.

In cases of voluntary societies the Court has jurisdiction, because all the property, in the event of dissolution, will go ratably among the members, and each one has a pecuniary interest in being a member and to resist being improperly expelled: Brown v. Dale, 9 Ch. D. 78; Rigby v. Connol, 14 Ch. D. 482, at p. 487, per Jessel, M. R. . . .

Appeal allowed with costs and action dismissed with costs.

APRIL 2ND 1906.

DIVISIONAL COURT.

RE VILLAGE OF BEAMSVILLE AND FIELD-MARSHALL.

Arbitration and Award—Appeal from Award—Absence of Provision for, in Submission—Application of Provision of Municipal Act giving Right of Appeal—Submission Including Matters outside of Municipal Act—Breach of Contract—Trespass—Validity of Submission.

Appeal by the village corporation from order of TEETZEL, J., ante 276, quashing their appeal from an award.

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

E. D. Armour, K.C., for Agnes Field-Marshall, the respondent.

The judgment of the Court (MULOCK, C.J., ANGLIN, J., CLUTE, J.), was delivered by

CLUTE, J.:—The Municipal Waterworks Act, R. S. O. 1897 ch. 225, sec. 6, provides, in case of any disagreement between the corporation and the owner, that the same shall be decided by arbitration in accordance with the provisions of the Municipal Act. An arbitration under the Municipal Act is subject to review on the merits (secs. 463, 464), and Mr. Lynch-Staunton contends that the present appeal falls within the Act.

The first question on this appeal, therefore, is, whether the parties, by the terms of the submission, have incorporated matters not within the above mentioned Acts.

After proceedings had been commenced under the Municipal Act and the arbitrators appointed, the parties entered into an agreement under seal defining the scope of the arbitration.

It is clear, I think, that matters were included in the agreement and dealt with by the award which are not within the purview of the Acts; for, whatever may be said with reference to the alleged trespass for which an action for an injunction was pending, it cannot be successfully contended that the claim for breach of contract is within the Acts. The award assumes to deal with both of these claims, and awards one sum both for the claim "under the Acts and in respect of the matters referred to in the said submission." The result is, that there is a finding as to matters not within the Act, and, as the agreement does not provide for an appeal under sec. 14 of the Arbitration Act, there can be no appeal in respect of this portion of the award. And, as these matters not under the Acts cannot be distinguished in the amount found from the questions referred under the Acts, the award being one and indivisible in its present form, it follows that no appeal upon the merits lies in this case.

It was urged, however, that it was the duty of the arbitrators to assess a separate sum for each subject matter referred, and that on that ground the award is bad upon its face. If that be so, the relief sought may be had under sec. 12 of the Arbitration Act. But, even assuming it to be so, that does not enable the Court to hear the appeal on the merits. Indeed, it seems to be impossible, having regard to the form of the reference and award, to deal with the case on the merits. For all we know to the contrary, a large part

of the sum awarded may be for damages allowed in the matters referred not under the Acts, and, if this appeal were allowed, it would, in effect, be giving an appeal upon the merits in respect of matters not appealable.

It was further urged that the reeve of the municipality had no power to enter into the agreement in question. I do not think that objection is open on this appeal. For the purpose of the present appeal, it must, I think, be assumed that the municipality had authority to do what it has done. At all events the want of such authority cannot be invoked as a reason for holding that an appeal upon the merits lies, where no provision for such appeal exists.

I think the appeal should be dismissed with costs.

APRIL 2ND, 1906.

DIVISIONAL COURT.

MORRISON v. CITY OF TORONTO.

Way—Non-repair—Hole in Sidewalk—Injury to Pedestrian—Negligence of Municipal Corporation—Contributory Negligence—Notice of Accident—Reasonable Excuse for not Giving—Incapacity by Injury—Absence of Prejudice.

Appeal by defendants from judgment of CLUTE, J., in favour of plaintiff for the recovery of $750 damages in an action for personal injuries caused by a fall into an open space in a sidewalk.

The appeal was heard by MULOCK, C.J., TEETZEL, J., ANGLIN, J.

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

Z. Gallagher, for plaintiff.

MULOCK, C.J.:—On the evening of 14th November, 1904, plaintiff was proceeding from his hotel, the Walker House, in Front street, to the office of the Toronto "Telegram" in Bay street, in the city of Toronto, and, when walking northerly along the east side of Bay street, fell into an open space in the sidewalk, sustaining serious injury, and this action was brought to recover damages by reason thereof.

Defendants deny negligence and plead contributory negligence, and also plaintiff's failure to give the 7 days' notice contemplated by sub-sec. 3 of sec. 606 of the Municipal Act, as amended by 3 Edw. VII. ch. 18, sec. 130.

The trial Judge found that, to defendants' knowledge, the street at the time of the accident was, and since the previous April had been, out of repair; that defendants were guilty of gross negligence in having omitted to adopt any precaution, by use of light, bar, or other protection, to prevent accidents happening; that plaintiff's condition, as a result of the accident, furnished a sufficient excuse for his failure to give the required notice; and that defendants were not thereby prejudiced.

The evidence shews that the stone sidewalk where the accident occurred had for a length of about 20 feet along Bay street fallen into the area below, the bottom of which was covered with broken stones, bricks, iron, and other débris; that bricks had been piled to the height of about 8 feet on the roadway, along the curb in front of the whole length of the open area; that a lamp at the south end of the brick pile was placed at its west side, leaving the open area in darkness.

No guard of any kind was erected to prevent persons walking into this veritable death trap, and it is difficult to imagine a case of more culpable neglect of duty on the part of a municipal corporation. This condition of non-repair had existed for over 6 months prior to the accident, and, therefore, notice of its existence was properly attributable to the corporation.

Plaintiff was unfamiliar with the city, having been in Toronto less than 3 months, and about 8 o'clock in the evening, on reaching a point opposite the pile of bricks, the walk became dark, and all at once he fell into a hole some 15 feet deep, striking his head on some hard substance, which inflicted a deep wound on his forehead. His knee was cut, his right hand and elbow were also slightly injured, and he was stunned by the fall. Recovering, though it was quite dark, he realized where he was, and found his way through the débris to the street. Constable Jarvis conducted him to the Emergency hospital, where it was necessary to put 21 stitches in the wound, which extended to the bone. The next day he was conveyed in the ambulance to the hospital, and went under the care of Dr. Garrett, who says that when he first saw plaintiff he was in a rather hazy condition, but

was a "lot better the next day." Plaintiff was confined to bed in the hospital for about 3 weeks—during the first 2 was not allowed to read, and seems to have been in continuous pain.

He swore that on the night of the accident he suffered excruciating pain in the forehead, and that his nerves were all unstrung by the shock; that the pain continued during his 3 weeks' stay at the hospital; that thereafter for almost 4 months he suffered more or less; his "nerves were shocked from the fall;" that his head hurt him almost continuously; and that he still suffers pain in the region of the wound in his head.

Asked why he did not give the notice, he said . . . "Well, I was suffering so much during my confinement in the hospital that I did not give the matter any thought. In fact I was not thinking anything about it, and did not give it any attention until I was able to get around after I got out of the hospital. . . . In the hospital I could not have attended to anything; I was suffering entirely too much pain, and my head ached so much and pained me so that I wasn't thinking anything about a case or giving any notification whatever. Could not have done so. I was unable to have done so." . . .

[Extracts from evidence.]

Defendants relied to a large extent upon O'Connor v. City of Hamilton, 8 O. L. R. 391, 3 O. W. R. 918, 10 O. L. R. 529, 6 O. W. R. 227, but the facts there differ widely from those in the present case. . . .

In the present case the trial Judge, having had an opportunity of hearing plaintiff's evidence, said: "Then, as to the notice, I think this case is distinguishable from the case relied upon by Mr. Riddell. I am satisfied that this plaintiff was not in a condition when it ought to have been expected that he would give the notice within the 7 days. I think it would be unreasonable to expect him to give notice within that time, and I find that there was from his condition a reasonable excuse for want of notice within that time, and I find further that the want or insufficiency of notice has in no way prejudiced defendants in their defence."

As to disturbing such a finding, Sedgewick, J., in delivering the judgment of the Court in City of Kingston v. Drennan, 27 S. C. R. 61, says: "The rule is universal, however, that when the statute gives a Judge discretion to do a particular act, his decision will not be interfered with by an

appellate Court, unless he has made a palpable mistake or has acted upon a manifestly erroneous principle."

Although plaintiff gradually improved, yet after nearly 3 weeks his suffering was still so great that when his employer, Mr. Dickson, urged him to institute a suit, he was then unable to bring his mind to bear upon the question. I therefore think there was abundant evidence to support the trial Judge's finding, and, in accordance with the rule mentioned by Mr. Justice Sedgewick, it should not be interfered with.

Defendants' counsel contended that plaintiff's cross-examination shewed that if his attention had been called to the statutory requirements, or if they had been present to his mind, he could have given the required notice, and that, therefore, no sufficient excuse existed for his failure in doing so. This conclusion does not follow from the premises, but involves a confusion between mere knowledge and will power. One may understand his duty, but not possess the necessary directive will power to enable him to perform it, and such a disability must be within the meaning of the saving clause of the amending statute, if it is to have any force. Assuming plaintiff to have known the law, his condition during the 7 days, and for some time thereafter, was such that he was mentally incapable of directing his thoughts to any legal question growing out of the accident—of deciding what course should be taken in order to preserve his rights, and of causing the necessary steps to that end to be taken. I, therefore, am of opinion that, defendants not having been prejudiced, plaintiff has shewn sufficient excuse for failure to give the notice.

I also agree with the finding of the trial Judge that the defence of contributory negligence must fail. There was nothing to warn plaintiff of the condition of the sidewalk, and therefore he had a right to assume it to be in a safe condition. It was contended that the evidence shewed that he was under the influence of liquor. It is true that the attendants at the emergency hospital made such an entry in their records. Instances of such mistakes are not rare. Plaintiff, a short time before, had had a glass of whisky, which, doubtless, would be observable by a person dressing his wounds. He arrived at the hospital in an excited state, doubtless resulting largely, if not wholly, from the accident. His face was covered with blood, and he was in the company of a policeman. On such evidence the attendants concluded

that he was under the influence of liquor. The evidence does not, I think, support such a conclusion. Even if it did, I would question whether that would be a defence to the present action. It is not, however, necessary to decide that point, for the evidence fails to shew that the accident arose from plaintiff being under the influence of liquor.

Appeal dismissed with costs.

TEETZEL, J., concurred.

ANGLIN, J.:— . . . The appeal of defendants upon the merits entirely fails. . . .

That the want of notice of the accident within 7 days did not at all prejudice defendants cannot, upon the admitted facts, be questioned. But I have found more difficulty in considering the sufficiency of the excuse for failure to give such notice. Were it not for the decision of the Court of Appeal in O'Connor v. City of Hamilton, 10 O. L. R. 536, I should have had no hesitation in holding that a man disabled as was this plaintiff was undoubtedly excused. So far as it is permissible or proper to do so, I desire, with most profound respect, to express my continued adherence to the views upon which I acted in the Divisional Court in that case (8 O. L. R. pp. 396-8), both as to the character of the legislation in question and as to the interpretation which it should receive from Courts required to apply it. But, in deference to the decision of the appellate Court, it must, I think, now be held that absolute physical inability to write, due to his injuries, does not suffice as a reasonable excuse for the failure of an injured person to give the "notice in writing" which the statute prescribes.

My difficulty in the present case arises from statements elicited from plaintiff upon cross-examination: that he saw his wife on the day after the accident; that he discussed the circumstances of the accident with members of his family immediately after it happened; and that, if at that time he had known that the law required notice to be served within a certain period, he would have told his wife to have such notice served. But, read in the light of the rest of the evidence, I think the last statement should be taken to mean that, if his attention had been aroused and the necessity for giving such notice sufficiently impressed upon him, he would have assented to its being given—not that he was, during at least the first week following the accident, himself capable

of the effort of mind and will requisite to have enabled him, had he been cognizant of the statutory requirement, to give, of his own initiative, spontaneously and unaided, any direction or instruction as to notice. That he was not so capable, that his attention was not directed to the requirement of notice, and that he was physically unable to give such notice himself, are, upon the whole evidence, fair conclusions.

It follows that the finding of the trial Judge that there was in this case reasonable excuse for want of the statutory notice should, notwithstanding the ultimate decision in O'Connor v. City of Hamilton, be sustained.

MACWATT, CO. C.J. JANUARY 6TH, 1906.

DIVISIONAL COURT. APRIL 2ND, 1906.

COUNTY COURT OF LAMBTON.

ARMSTRONG v. TOWNSHIP OF EUPHEMIA.

Way—Non-repair of Highway—Loss of Horse—Negligence of Municipal Corporation — Contributory Negligence—Proximate Cause of Damage — Findings of Judge—Appeal.

Action in the County Court to recover $200 damages for the loss of a horse by drowning and for damage to plaintiff's harness and buggy, owing to the alleged negligence of defendants in not repairing a road.

John Cowan, K.C., for plaintiff.

W. J. Hanna, Sarnia, and R. V. LeSueur, Sarnia, for defendants.

MACWATT, CO. C.J.:—On 6th August last, between 11 and 12 o'clock in the forenoon, plaintiff was driving along the side road which ends at the concession road, and alleges that on account of the non-repair of the road, because there was not a fence erected on the south of the concession road, and because the grade was only 18½ feet wide where side road and concession road unite, defendants were negligent and caused the accident. I confess that, after hearing the

evidence, I was prepared to give judgment, were it not that Mr. Hanna laid so much stress on the point that where a horse has a reputation of being vicious and dangerous and that to plaintiff's knowledge, the decision of Mr. Chief Justice Falconbridge in Hemphill v. Township of Haldimand, 3 O. W. R. 605 (affirmed 4 O. W. R. 163), would apply.

I have now had an opportunity of reading over the evidence and the cases cited and am still of the opinion I was at the end of the argument, that plaintiff must succeed. I find from the evidence that the road was out of repair within the meaning of the statute: that the horse was not vicious or dangerous; that plaintiff had no notice that the horse was vicious or dangerous; that he had the horse in control until the new grade at the junction was reached; that the condition of the road was the cause of the accident; and that plaintiff used proper care and skill in handling the horse, and was not guilty of negligence.

In Armour v. Town of Peterborough, 10 O. L. R. 306, 5 O. W. R. 630, the Master in Chambers held that "non-repair" means any omission of duty on the part of the municipality which makes the highway unsafe. Making a new road or walk defectively and leaving it in such unsafe condition would seem to be "non-repair" within the words of the statute as interpreted by the cases.

Here we have a concession road joining a side road, the former running north and south, and the latter east and west. On the concession road there is a level space of 100 feet from the side road, then a hill for 250 feet. There is also a river 10 feet deep, running nearly parallel with the side road, westerly from the junction with the concession road. Formerly there was a bridge some distance west of the junction with a level and safe approach. Last summer a new bridge was erected at a different angle with a high grade. This work was completed about a month before the accident happened. The evidence is fairly general that the approach to the old bridge was safe, but that the approach to the new is not. The work was done by one Elijah Armstrong, a member of the township council. The grade at the junction was only 18 to 18½ feet wide, with a ditch on the east side and a dip to the west, which was filled in after the accident, and now gives about 28¼ feet instead of 18½ feet, where the turn is made to the west. There is no fence or barrier at end of concession road, although there is a dip

of 4 or 5 feet caused by removing earth to make up the road bed.

In Walton v. York, 6 A. R. at p. 184, Burton, J.A., said: "It is not disputed that if in some places this ditch was more than 4 feet in depth, it would be the duty of the municipality to protect the travelling public by the erection of a railing, or by some other method, and many cases might be suggested in which some such precaution might be necessary, as at the foot of a hill," etc.

I find that there was non-repair because there was no fence or barrier, and because the turning was far too narrow, and consequently dangerous, through the declivities on the east and west sides of the concession road, on the 6th August last. The horse had run away once to plaintiff's knowledge, but the evidence convinced me that the fault on that occasion was more that of the driver Dennis than that of the horse. The other runaway, of which plaintiff had no knowledge until after the accident, is also explained to my satisfaction. As to the kicking straps, it was, in my opinion, more a matter of precaution than anything else. During the time plaintiff had owned the horse, he had no trouble in driving him. In any event the horse did not kick on the day of the accident. That the horse was high spirited is no doubt true, but that is not a reason why plaintiff should not recover. In fact, I am of opinion that, even if a horse be vicious and the driver uses proper skill in handling the animal, if there is non-repair and an accident happens, the municipality will be liable. Mr. Justice Mabee, in finding that there was no contributory negligence on the part of the plaintiffs in Kelly v. Township of Whitchurch and Baker v. Township of Whitchurch, 6 O. W. R. 839 (affirmed 7 O. W. R. 279), said, speaking of the horse in that case: "It was described as somewhat spirited and inclined to shy a little, but its general character was not successfully attacked . . . I do not think the horse had become entirely unmanageable, and I am of opinion that had the buggy not come into contact with this obstruction, the accident would not have happened." The foregoing, in my opinion, fits in exactly with this case.

The horse was under control. Joyce and his wife must be mistaken, as the horse could not have been galloping when he only went 15 rods to Joyce's 5, the latter walking his horse.

From the evidence, I am of opinion that had a barrier been erected at the end of the concession road or the easterly side filled in as it is now, the accident would not have happened.

A barrier is very necessary and should be erected and the westerly side of the concession road filled in. I am further of opinion that the horse was going from 8 to 9 miles an hour; that the 18½ foot grade was not sufficient to allow the turn safely; that the left wheels of the buggy got over the grade or "slewed" at the junction, thus causing the horse to put on more speed and the buggy to tip where the accident happened, west of the junction. Had there been a barrier, even with the same grade, I think no accident would have happened.

I had in my mind at the trial the case of Foley v. Township of East Flamborough, 26 A. R. 43, a decision of the Court of Appeal, where Osler, J.A., at pp. 45 and 46, quotes with approval Sherwood v. Hamilton, 37 U. C. R. 410, and Toms v. Township of Whitby, 37 U. C. R. 100, as follows:—"I do not regard the fact that the horses were running away at the time of the accident as by any means a conclusive answer to the plaintiff's right to recover. Their driver was still endeavouring to control them, and both he and the deceased were travellers on the highway. It may well be that Sullivan could not recover if it was his fault that the horses were not under control, but, assuming that he was not negligent and was suing for his own loss, the question would be whether that loss would have been sustained but for the defect in the way. I think Sherwood v. Hamilton, 37 U. C. R. 410, a well decided case, and it, as well as Toms v. Township of Whitby, in the same volume, in appeal, p. 100, support that conclusion. So long as the driver is trying to manage and recover control of his horses which are carrying him over the road, I think he has the right to complain if by reason of a defect in the road he sustains an injury while he is in that situation. I do not see that it matters that he lost control over his horses for one minute or for five, or why the existence of the defect would not properly be held to be the proximate cause in the one case quite as much as in the other. In both it was a natural and probable result of the defendants' neglect to repair the road that such an accident should happen at the place in question, whether at the moment of passing it the horses were under control or not. I refer also to Town of Prescott v. Connell, 22 S. C. R. 147, and Englehart v. Farrant, [1897] 1 Q. B. 240, in support of the proposition that the defect in the road was the proximate cause or 'an effective cause' of the accident; in other words, 'a cause of

which the accident was a sufficiently natural and to be looked for consequence.'"

Now, in the present case I do not think the horse was running away or beyond control when he struck the grade at the junction, but, from the above case, even if he were beyond control and running away, the defendants would be liable because of the non-repair of the road. Had there been a barrier at the end of the road and a width of 26 or 28 feet, as there is now, I am firmly of opinion no accident would have happened.

Foley v. Township of East Flamborough puts it clearly that if a driver in spite of ordinary care on his part loses control of his horses and they run away, if the road is out of repair, the municipality are liable.

In the same case Lister, J.A., says at p. 51: "The public have a right to be protected against excavations or obstructions on or near the travelled way which render the road unsafe for travellers using it. Any object in, upon, or near by the travelled path which might necessarily obstruct or hinder one in the use of the road for the purpose of travelling thereon, and which from its nature and position would be likely to produce injury is, in my opinion, a defect or want of repair within the statute."

In Thomas v. Township of North Norwich, 9 O. L. R. 666, 6 O. W. R. 13, a Divisional Court, following Toms v. Whitby and Sherwood v. Hamilton, held that "where two causes combine to produce an injury, both of which are in their nature proximate, the one being a defect in a highway and the other some occurrence for which neither party is responsible, the corporation is liable in damages if the injury would not have been sustained but for the defect in the highway." . . .

In the present case surely with such a narrow roadway, at a dangerous corner, with cuttings to the east and west, and also to the south, and beyond that a river 10 feet deep, a barrier was necessary, and consequently on that account, and because of the narrow roadway, there was non-repair.

As to the width of roadway, the necessity of a good rail where there is an embankment, and especially where, as in this instance, the speed of a high-spirited horse would be accelerated by the high hill down which he had just come, see Plant v. Township of Normanby, 10 O. L. R. 16, 17, 6 O. W. R. 31.

I do not place much stress on Ryan's evidence that plaintiff said he had got a fast horse cheap because of faults. Mr. Hanna, in his argument, pressed this as shewing that plaintiff knew of the viciousness of the horse. I consider it was just such a bit of bragging as one farmer would use towards another when he thought he had a fairly good animal. Plaintiff swore he was not a three-minute but a four-minute animal.

I cannot see that Bell Telephone Co. v. City of Chatham, 31 S. C. R. 61, applies. There was no "violent uncontrollable speed or running away" in this case.

Following Walker v. York, 6 A. R. 181 at p. 189, where it is said the ordinary rule is now well settled, I find as a fact that the road was not "in a state reasonably safe and fit for the ordinary travel of the locality." . . .

[Reference to Preston v. Toronto R. W. Co., 6 O. W. R. 786; Wallace v. Ottawa and Gloucester Road Co., 6 O. W. R. 652; Addison on Torts, 6th ed., p. 135.]

I am of opinion that defendants are liable to plaintiff in damages, and assess them at $160.

The defendants appealed from the judgment of the County Court Judge.

D. L. McCarthy, for defendants.

John Cowan, K.C., for plaintiff.

The judgment of the Court (BOYD, C., MAGEE, J., MABEE, J.), was delivered by

MABEE, J.:—Defendants alleged that the horse had taken fright at a lady's umbrella some distance north of the place of the accident, had then run away and become entirely beyond plaintiff's control—relying upon Bell Telephone Co. v. City of Chatham, 31 S. C. R. 61, as authority for the contention that the proximate cause of the damage was the running away of the horse, and not the non-repair of the highway.

The case seems to have been very fully tried, and upon conflicting evidence the trial Judge has found the following facts against the defendants: that the roadway at the point in question was out of repair, and not in a state reasonably safe and fit for the ordinary travel of the locality; that the horse was not vicious or dangerous, and that plaintiff had

her under control when the point at which the accident happened was reached; that plaintiff used proper skill and care in the management of the horse; that plaintiff was not guilty of contributory negligence; and that the condition of the roadway was the proximate cause of the damage.

Upon these findings of fact plaintiff must recover; but we were urged to say that the conclusions reached by the trial Judge were wrong. Of course we are at liberty to overturn findings of fact in proper cases, but upon the evidence here, some witnesses swearing one way and some another, it would be manifestly improper for us to interfere with findings arrived at after the full and careful consideration the written opinion shews was given to the case.

All the leading authorities upon this branch of municipal negligence are collected in the judgment appealed from, and it is impossible to say there is error either in the conclusions of fact arrived at or the law applicable thereto.

Appeal dismissed with costs.

OSLER, J.A. APRIL 2ND, 1906.

C.A.—CHAMBERS.

McKERGOW v. COMSTOCK.

Leave to Appeal — Discovery — Examination of Plaintiff — Libel—Qualified Privilege—Malice.

Motion by plaintiff for leave to appeal from an order of a Divisional Court, ante 449.

J. Jennings, for plaintiff.

C. A. Moss, for defendants.

OSLER, J.A.:—This is to me a perfectly plain matter. The action being libel, and the defence qualified privilege, and the reply malice, the plaintiff must be prepared at the trial to prove actual malice in case the Judge should rule that the case is one of qualified privilege. Equally the defendant must be prepared with evidence of honest belief or other evidence to rebut the plaintiff's evidence of actual malice, in case the issue should be narrowed down to that.

These I consider the issues on the record, and the general course of the proposed examination for discovery seems to me quite proper, even though it be at present directed to anticipate the case the plaintiff may attempt to make of actual malice. How far it may turn out to be useful at the trial, I have at present nothing to do with. That will be for the trial Judge, and depends upon how the case is navigated at the trial.

I think it would be useless to grant leave to appeal.

Motion refused; costs to defendants in the cause.

MABEE, J. APRIL 3RD, 1906.

WEEKLY COURT.

RE REID AND RANDALL.

Will — Construction — Estate of Devisee—Limitations—Fee Simple—Vendor and Purchaser.

Application under the Vendors and Purchasers Act.

Z. Gallagher, for the vendor.

H. H. Shaver, for the purchaser.

MABEE, J.:—Under the will of her mother, Rose Crapper (now Rose Reid), the vendor, was given the dwelling house and premises No. 203 on the east side of George street, in the city of Toronto, provided she has attained the age of 21 years, "to have and to hold the same, together with the appurtenances, to my said daughter Rose Crapper, her heirs and assigns forever." Then follow gifts of other properties to Adelaide Crapper and Joseph Crapper in like terms. Then appears the following clause: "And I will and direct that should any of my said children die before attaining the age of 21 and getting possession of their portions as aforesaid, and not leaving lawful child or children, or after having got possession thereof any of them should die intestate without lawful child or children, in any such event the share of such so dying (if any) shall be equally divided among the survivors. In all cases the lawful child or children of any of them dying shall inherit the share or portion of the deceased parent."

Mrs. Reid has been in possession since the death of her mother in 1882, and is the mother of 5 children, all living.

It was contended for the purchaser that the vendor took only a life estate. I think not. She has complied with the terms, viz., reached 21 years of age, obtained possession, and has lawful children, and I do not think, if all her living children predeceased her, that her estate would thereby be cut down. Nor do I think the latter portion of the above clause has the effect of cutting down all the gifts to estates for life; and, if necessary, the words may be read "in all *such* cases," thereby limiting the effect to the particular events dealt with in that paragraph of the will to such of those as might die before reaching 21, not getting possession, and not leaving lawful child or children, *or*, having got possession, dying intestate without lawful child or children.

I think the vendor can make a good title in fee simple.

It was agreed by counsel that there should be no order as to costs.

CARTWRIGHT, MASTER. APRIL 4TH, 1906.

CHAMBERS.

CAMPBELL v. LINDSAY.

Particulars—Statement of Defence—Pleading—Knowledge of Defendants.

The statement of claim alleged that, commencing with January, 1882, certain syndicates were formed for dealing with lands in the North-West; that to these plaintiff at various times contributed money, which was received by one Cameron as treasurer; that the interests of these syndicates afterwards were secured by T. Long & Bro.; that the purchases were made in the names of John J. Long and Cameron, and as sales were made they received the money for the same; that no account was ever given to plaintiff of the affairs of these syndicates or of the moneys invested by him therein; that he frequently asked for and was promised such accounts; that none, however, were ever furnished before the deaths of J. J. Long and Cameron; and that plaintiff was always in a

position in relation to them which made it difficult for him to press the matter. The action was against the personal representatives of Cameron and J. J. Long, and against T. Long, as surviving partner of the firm of T. Long & Bro., for the usual judgment for an account of the dealings of these syndicates, and to have plaintiff's share of receipts ascertained and paid over to him.

The defendants severed, but put in similar defences. They alleged that if plaintiff contributed any moneys, the whole of his interest was repaid either in cash or by transfer of property, which was accepted by plaintiff in full discharge of his interest, and that a final settlement was thereby concluded between plaintiff and Cameron and the Longs. They also pleaded the Statute of Limitations.

Plaintiff moved for particulars of the alleged payments and transfers of property and of final settlement, stating that he was not aware of anything of the sort, and that such particulars were necessary for reply.

W. D. McPherson, for plaintiff.

R. McKay, for defendant Lindsay, administrator of Cameron.

Britton Osler, for the other defendants.

THE MASTER:—In support of the motion it was contended that the statements of defence do not set out the facts relied on, as required by Rule 268, and are therefore embarrassing and prevent any reply.

The defendants in answer file affidavits stating that they have no knowledge of the transactions in question, nor have they found any intelligible trace of their existence in the books or papers of the deceased whom they represent. They therefore submit that, if anything of the sort occurred, there must have been a settlement in the lifetime of Cameron and J. J. Long. They desire that these defences should be open to them if they can hereafter find evidence to establish them. If, as plaintiff alleges, he has no knowledge of any such settlement, then, they say, he can safely join issue.

When the defendants are being examined for discovery, they can be fully interrogated as to what facts (of any) they are aware of to support their defence. See Eade v. Jacobs, 3 Ex. D. 335.

If they still say they have no such evidence, then it may be that plaintiff, if so advised, can move under Rule 616 to have the issue of partnership only disposed of at the trial; so that, if this is found in his favour, then there can be a reference to ascertain his share.

At present I think the motion cannot succeed. The particulars asked for would, no doubt, be very necessary for the trial if the defence is attempted to be proved affirmatively. It does not, however, appear how they are necessary for pleading. The defendants' affidavits shew that at present there is nothing to reply to. Leave will certainly be given to plaintiff to reply later on, if any good ground is shewn hereafter.

The motion must therefore be dismissed with costs in the cause. If at a later step there seems to be any necessity for a further order, the plaintiff is not to be prejudiced by the present refusal of his motion for particulars.

See Kelly v. Martin, 6 O. W. R. 141.

MABEE, J. APRIL 4TH, 1906.

CHAMBERS.

WILLIAMSON v. PARRY SOUND LUMBER CO.

Trial—Postponement—Grounds for Motion—View of Locus in quo Necessary for Defence—Impossibility of View at Date of Proposed Trial.

Appeal by defendants from order of Master in Chambers, ante 532, refusing to postpone the trial of the action until after the next assizes at Parry Sound commencing on 9th April, 1906.

W. R. Smyth, for defendants.

J. E. Jones, for plaintiff.

MABEE, J.:—The facts very fully appear in the carefully considered judgment of the Master. The defendants wish to have their mill in operation that they may apply for a view by the jury, and they say they cannot get it in running

order until, at the earliest, 16th or 20th April. The only object of a view is to enable the jury to apply and understand the evidence. It was said that if the jury saw the machinery in operation at the point where the accident happened, they would see that it could not have taken place in the way plaintiff contends. This can be shewn as well by a small model . . . as by the machinery itself, which consists simply of the ordinary level gear at the end of an upright and horizontal shaft.

I do not think the delay to plaintiff justifiable, and the appeal will be dismissed with costs.

TEETZEL, J. APRIL 4TH, 1906.

WEEKLY COURT.

RE MCNEIL.

Distribution of Estate—Legatee not Heard of for Seven Years —Presumption of Death—Burden of Proof.

Motion by the administrators of the estates of Alexander McNeil, Elizabeth McNeil, Alexander Ryan, and Andrew Ryan, for order for payment out of Court of moneys paid in to the credit of the estate of Finlay McNeil, deceased.

G. E. Taylor, London, for the applicants.

Hume Cronyn, London, for the official guardian.

TEETZEL, J.:—The only question of law involved is whether the administrator of Alexander McNeil is entitled to any share of the estate of Finlay McNeil, who died on 2nd November, 1895, and by his will gave his real and personal estate (subject to his wife's life interest) to his brothers and sisters, share and share alike.

A brother, Alexander McNeil, was living in Detroit in 1885, but, according to the affidavits of a brother and sister filed, had not been heard of for more than 7 years prior to the death of the testator. Letters of administration to Alexander McNeil's estate were granted by the Surrogate Court of Middlesex in May, 1903. I understand that there was no

evidence that he was in fact dead, the Court acting on the presumption that he was dead after an absence of more than 7 years without having been heard from.

Where a legatee has not been heard of for 7 years, his death will be presumed, and the onus of proof that he survived the testator lies upon those who claim under him. In the absence of such proof, the legacy will be paid to the residuary legatee or to the next of kin of the testator, as the case may be: Re Lewes Trusts, L. R. 6 Ch. 356. Lord Justice James, at p. 357, says: "Those who claim under a person who is said to have survived a particular period must prove the fact." This case follows Re Phene's Trusts, L. R. 5 Ch. 139, wherein it is held that the onus of proving that the death took place at any particular time within the 7 years lies upon the person who claims a right to the establishment of which that fact is essential, and also that there is no presumption of law in favour of the continuance of life, though an inference of fact may legitimately be drawn that a person alive and in good health on a certain day was alive a short time afterwards.

In In re Aldersey, Gibson v. Hall, [1905] 2 Ch. 181, a testatrix gave a share of the income of her residuary estate upon trust to be paid half yearly equally to and between the children of her late niece during their lives, with divers trusts over. J., one of the children, survived the testatrix, who died in 1890, but had not been heard from since 31st March, 1895; and it was held that the onus was on J.'s representatives to prove that he survived the period when he was last heard of, and that his share ought to be dealt with on the footing that he died on 31st March, 1895.

See also Re Walker, L. R. 7 Ch. 120; Neville v. Benjamin, 18 Times L. R. 283; Re Rhodes, 36 Ch. D. 586; and Hickman v. Upsall, L. R. 20 Eq. 136.

The result of all these cases appears to be to establish the proposition that those who found a right upon a person having survived a particular period must establish that fact affirmatively by evidence, and, unless such evidence is sufficient to establish that fact, the person asserting title will fail.

There being no evidence whatever in this case that Alexander McNeil survived the testator, his administrator fails to establish any right to share in the testator's estate; but the

order will be without prejudice to any substantive proceeding hereafter taken to establish this fact, if the administrator is so advised.

The shares payable to adults may be paid out of Court to the other 3 respective administrators, upon an undertaking being given to refund the same should it be established hereafter that Alexander McNeil or his representative is entitled to a share in the estate of Finlay McNeil; but the shares of all infants must remain in Court.

The costs of the motions to be paid out of the adults' shares.

MABEE, J. APRIL 5TH, 1906.

CHAMBERS.

RE WEBB.

Lunatic—Petition for Declaration of Lunacy—Service out of the Jurisdiction—Dispensing with Personal Service—Jurisdiction of Master in Chambers.

Petition by the London and Western Trusts Co. for declaration of lunacy of Genius John Webb, and appointment of committee of estate.

Joseph Montgomery, for the applicants.

MABEE, J.:—The material clearly shews Webb to be a lunatic; he is in the asylum at Selkirk, Manitoba, where he has been confined for 14 years, and now takes a small estate in London under his mother's will.

The only point I wished to consider was as to service of the petition out of the jurisdiction of the Court. The Master in Chambers made an order on 7th March permitting service to be made at Selkirk upon Webb and Dr. Young, medical superintendent of the Selkirk Asylum, but, owing to Dr. Young refusing to permit personal service upon the alleged lunatic, the petition and other papers have been served upon the superintendent only, and I am asked, if necessary, to make an order confirming this service.

Prior to 3 Edw. VII. ch. 8, sec. 13, there might have been trouble as to this, but by that Act power is given to permit service out of Ontario of any document by which any matter or proceeding is commenced, which I think would include a petition in a lunacy matter. There also seems to be authority to dispense with personal service upon the supposed lunatic, upon evidence that such service might prove dangerous or useless: Re Newman, 2 Ch. Ch. 390; Re Weir, ib. 429.

The affidavit states as the ground of Dr. Young's refusal, that service might dangerously excite his patient. There may be ground to doubt, under Rule 42, the jurisdiction of the Master to make the order permitting service in a lunacy proceeding, but, I think, to avoid expense in doing again what has already been done, an order may go declaring lunacy, confirming the service as made, and appointing the applicants, the London and Western Trusts Company, committee of the estate (not of the person).

The order will be in the usual form. Costs out of the fund.

MABEE, J. APRIL 5TH, 1906.

WEEKLY COURT.

RE KENNELL.

Will—Construction — Gift — Restrictions — Investment — Estate—Responsibility of Executors—Defeasance—Executory Devise over.

Application for order declaring construction of will of John Kennell.

J. W. Mahon, Woodstock, for Elizabeth Rupp.

G. F. Mahon, Woodstock, for executors and Annie Bender.

MABEE, J.:—John Kennell, of East Zorra, died on 21st July, 1904, leaving his last will, probate of which has been granted to his executors, by the second paragraph of which he gives the east half of lot 28, concession 15, East Zorra, with his personal property, farm stock, and implements, to

his daughter Annie Bender "upon the conditions" appearing in the following clauses.

3. "My daughter Annie Bender (widow) or issue, or her or their executors, shall, out of my real estate and personal property hereinafter mentioned, pay to my youngest daughter Elizabeth Rupp, or her issue, the sum of four thousand and five hundred dollars lawful money of Canada, in nine equal instalments of five hundred dollars each and every year (without interest) until the full amount is paid."

4. "I further direct that the aforesaid instalments of five hundred dollars each of the said sum of four thousand and five hundred dollars be paid into a standard bank (in the province of Ontario) in the name of my youngest daughter Elizabeth Rupp, or her issue, as the case may be."

5. "I further direct that my daughter Elizabeth Rupp, or her issue, or her or their executors, can (during the natural life of her husband John Rupp) only draw the above said four thousand five hundred dollars and interest for the purpose of investing in real estate, which is to be conveyed and deeded in her own name or that of her isuse; should the said John Rupp die before any such investment is made my daughter Elizabeth Rupp, or her issue, or her or their executors, shall have full control of the aforesaid moneys without restriction."

6. "I further direct that should my daughter Elizabeth Rupp die without issue that the aforesaid four thousand and five hundred dollars and interest thereon accrued, be equally divided among my other children, viz., John R., Christian R., and Annie Bender (widow), or their issue."

The parties propounded a series of questions, to which the following will constitute the answers. These annual instalments should be paid into the bank in the name of Elizabeth Rupp alone, and the executors have no further responsibility as to such moneys. Elizabeth Rupp is entitled to withdraw these moneys or any part thereof from time to time for investment in real estate, if she so desires, and is not bound to wait until the whole sum of $4,500 is paid in, before making any withdrawal. If she makes investments in real estate, the conveyance will be to herself, and the executors have no duties to perform in connection with any such investments, and she may invest the moneys in land either within or out of Ontario, and she takes an estate in fee in such real estate,

subject to defeasance under the conditions appearing in the will, with an executory devise over to John R. Kennell, Christian R. Kennell, and Annie Bender. In the event of investments, and sales being made, and the land converted again into money, the like rights exist to such moneys as attached to them before investment.

Costs out of the estate.

MABEE, J. APRIL 6TH, 1906.

WEEKLY COURT.

RE RUTTAN AND DREIFUS AND CANADIAN NORTHERN R. W. CO.

Railway—Expropriation of Land—Valuation by Arbitrators —Improvements—Fixtures Placed on Land by Company —Amount of Compensation—Appeal from Award.

Appeals by the railway company under sec. 168 of the Dominion Railway Act from two awards made by arbitrators duly appointed for the purpose of valuing certain lands in Port Arthur, $8,500 and interest from 23rd March, 1905, being given under one, and $1,135 and interest from the same date under the other.

W. H. Blake, K.C., for the railway company.

C. H. Ritchie, K.C., for the land-owners.

MABEE, J.:—By notice dated 11th June, 1904, the Canadian Northern Railway Company made application to the Board of Railway Commissioners under sec. 139 of the Railway Act for authority to take additional lands in O'Brien's Survey, being lots A. and B. and 110 and 111, for the purposes of "rights of way of the main line and sidings of the Canadian Northern Railway Company and for engine houses, yard space, and appurtenant terminal structures now erected and hereafter to be erected thereon." By an order of the Board dated 7th March, 1905, the application was granted. The plan, under the Railway Act, was filed on 23rd March, 1905.

The parties, not being able to agree as to the compensation to be paid, proceeded, under the machinery of the Act, to form a board of arbitrators, which board, after taking a large amount of evidence, awarded the above mentioned sums; the arbitrator named by the company dissenting and refusing to join in the awards.

The award dealing with lots A. and B. states that the sum of $4,500 is given "for the land taken without any improvements thereon, and the further sum of $4,000 for rails, ties, water tank, turn-table, buildings, and all other improvements which are on the lands on the 23rd day of March, 1905," which two sums make the $8,500. The award dealing with lots 110 and 111 in like words gives $1,000 for the land and $135 "for the rails, ties, buildings, and all other improvements" on the lands on 23rd March, making the total for these lots of $1,135.

The principal argument upon these appeals was addressed to the right of the land-owners to obtain payment of the two sums of $4,000, for rails, ties, water tanks, turn-table, buildings, etc., upon lots A. and B., and $135, for rails, ties, buildings, and the like, upon lots 110 and 111, it being admitted that the railway company or their predecessors in title, the Ontario and Rainy River Railway Company, had made these improvements, probably as to the most of them the Canadian Northern, before these expropriation proceedings were commenced. It appears from the evidence and documents filed that in November and December, 1899, Mr. Marks, acting as purchasing agent for the Ontario and Rainy River Railway Company, had correspondence and personal interviews with the owners looking towards agreeing upon a price for these lands; on 19th November, 1899, he wrote Dreifus asking him to put a price on lots A. and B.; on 8th December, 1899, he wrote again referring to an offer of $500 he had made; just how this was made does not appear; he points out that Dreifus only holds under a tax deed, that the railway company can expropriate, but that they would prefer an amicable settlement, that while the proceedings were then being taken in the name of the Ontario and Rainy River Railway Company, it would be amalgamated with the Canadian Northern, as the same people owned both. Nothing came of these negotiations.

On 13th December, 1899, Henry O'Brien, who had been the owner of lots A. and B. prior to the tax sale under which

Dreifus acquired title, gave a quit claim deed of those lots to Annabella Ida Burk, and this lady on 25th October, 1900, began an action to set aside the tax sale; the railway company on 16th October, 1900, commenced driving piles for their round-house; on 7th November commenced work for turn-table; on 8th commenced laying track over lots A. and B.; and on 17th November drove piles for their tank; and from that time down to 23rd March, 1905, when the plan was filed, had expended, as shewn by a memorandum filed, in which all details are given, $10,537 on lots A. and B. and $670 upon lots 110 and 111, in all $11,207. Block A. has erected upon it 1,165 feet of track and two turn-outs, spikes and fish plates, 582 ties, two sets switch ties, and 20 8-10 tons of steel; the other lots have the like sort of railway plant and operating appliances.

On 18th September, 1900, Ruttan, to whom Dreifus had conveyed an interest after the purchase at the tax sale, telegraphed to Messrs. McKenzie and Mann, a copy of telegram being produced in these words: "Hear you are going to put round-house on block A. or B. If this is so, I as owner will get out an injunction to restrain you from doing so. Answer." It does not appear that any answer was given nor was any injunction applied for.

The action of Burk v. Dreifus et al. dragged along, and was tried on 25th May, 1905, when it was dismissed, and, it is said, upon a technicality, the validity of the tax sale not having been adjudicated upon. Mr. Mills, a solicitor at Port Arthur, says he was acting in 1900 for the railway company, and also for the plaintiff in the Burk v. Dreifus action; that the title was in dispute; and that Mrs. Burk, claiming to be the owner under the deed from O'Brien, through her husband, made an arrangement with the railway company permitting them to take possession of the lands and proceed with their works. At that time a number of Finlanders had squatted upon portions of the property, and the railway company paid some 13 of them sums ranging from $50 to $150 each to move off, taking deeds from some of these 13 persons in April, 1901; at about the same time Mr. Ruttan told Mr. Mills that the railway company would have to settle with him after they got through with the Finlanders, and, speaking of the Burk action, said the company would have him to settle with and not Burk.

It was contended successfully before the arbitrators and strongly argued before me that the railway company were

trespassers upon these lands, and all these expenditures made by them, being fixtures, became part of the land itself and the property of the land-owner, and that, as sec. 153 requires the board of arbitrators to assess compensation as of the date of filing the plan, viz., March, 1905, the fixtures must be included in such compensation. I do not think the company were trespassers upon these lands; they honestly attempted to arrange with Dreifus for a price to be paid; then, when Mrs. Burk set up claim under her deed from O'Brien, they obtained permission to enter. The company were always clothed with authority to obtain a title by using the expropriation clauses of the Railway Act, and in all probability their delay in putting the matter under way was the dispute as to who should be paid by the company. It is inconceivable that the law can be in such a condition that this company must pay to these land-owners, either in whole or in part, for the improvements the company themselves have made upon the lands. It was argued that, unless the award stood, the land-owners would not be paid for the use and occupation of the land during the time the company had possession, the assessment of compensation being as of March, 1905, and the arbitrators having no power to consider this use and occupation as an element in fixing the amount. In the award it is stated by the arbitrators that they have not taken that into account in arriving at their figures.

It has, however, been held that interest may be allowed upon the compensation fixed from the date of taking the lands: James v. Ontario and Rainy River R. W. Co., 12 O. R. 624, 15 A. R. 1; so that, if the arbitrators had allowed interest from that date, such sum would have been in lieu of any allowance for use and occupation.

I do not think the railway company stand in the same position as an ordinary trespasser going upon lands; they have what the ordinary trespasser has not got, namely, a statutory right to acquire a title; it can be obtained in spite of the owner, and without any conveyance from him; it is only a question of compensation, and I do not think that the common law rule that the trespasser, who builds upon the lands of another, dedicates his structures to the owner, has any application to a situation such as the present. The structures are erected with the view of the acquisition of the title; provision is made in the Act for a company obtaining possession before the arbitration is had, it is true upon the observance of certain preliminaries; the company taking possession

in the manner shewn here does so irregularly, but I think not as a trespasser within the old common law rule, which had its existence long before these and similar statutory powers were conferred upon corporations. If an action of ejectment had been brought against the railway company, it could not have succeeded; the Court doubtless would, upon proper terms, stay the trial of such an action until the company could acquire title under the Railway Act, applying the principle of such cases as Hendrie v. Toronto, Hamilton, and Buffalo R. W. Co., 26 O. R. 667, affirmed in 27 O. R. 46. Many cases were cited upon the point as to these improvements being fixtures, and I presume they are, within the authorities, affixed to the freehold, and if the company abandoned entirely the use of the land, tracks, and buildings, they possibly might not have been entitled to remove them, but I think that is not at all conclusive of the proposition that they must pay their value to the land-owners in these proceedings. There was always the intention of the company to acquire the ownership of the land; their rights under the Act to expropriate were pointed out in Mr. Marks's letter before they entered, and the land-owners knew from the first that the entry, and construction of their works, all had reference to acquiring the title either by agreement or proceedings under the Act, and upon these facts no dedication of the improvements to the land-owner can be inferred; indeed a directly opposite inference exists.

No case at all in point was referred to either in England or Canada, but the case cited by Mr. Blake of Justice v. Nesquehoning Valley R. R. Co., 87 Penn. St. 28, is, I think, applicable in principle, and is not distinguishable as contended by Mr. Ritchie upon the ground that there the company was acquiring only an easement and not the fee in the roadbed.

Another view of the matter may be presented as follows. Section 173 of the Railway Act provides that "the compensation for any lands which may be taken without the consent of the owner shall stand in the stead of such lands, and any claim to or incumbrance upon the said lands, or any portion thereof, shall, as against the company, be converted into a claim for compensation, or to a like proportion thereof." Under this section it has been held that, where a railway company took lands without the leave of the owner, taking no arbitration proceedings, and obtaining no order for leave or

right to enter upon the lands, the claim to the land was converted into a claim for compensation, that this claim retained its character of real estate and descended to the heir-at-law: Essery v. Grand Trunk R. W. Co., 21 O. R. 224.

It has also been held that this claim for compensation arises the moment the land is taken by the company, and that this right is not against the land but against the company: Ross v. Grand Trunk R. W. Co., 10 O. R. 447.

Applying the principles of these cases, the land-owners here, or Mrs. Burk, if she had succeeded in establishing her title, acquired a statutory right against the company to be paid compensation for these lands, and that right accrued at the date the lands were taken, not in any way as money charged upon them, or as a vendor's lien, for the relation of vendor and purchaser did not exist, but the liability of the company to pay was the statutory liability imposed upon them consequent upon their taking the land, and the statutory right of the owner to be paid this compensation "stands in the stead of the lands," so it is difficult to see how these improvements can be said to have been put upon the lands of these claimants, and I do not think that sec. 153, which provides that the date of the deposit of the plan shall be the date with reference to which the compensation or damages shall be ascertained, means that all the company's improvements put upon the lands after taking possession and before depositing the plan go to the land-owner. I think "the lands" dealt with in this section are the lands as the company obtained them, in the condition they were at the time they entered into possession—valued as of the date of the filing of the plan. I see no difficulty in working the matter out this way. The arbitrators ascertain what lands were taken at the time of entry, then ascertain the value of those lands as of the date of filing of the plan; in this case the only question being what would these 4 lots have brought in the market on 23rd March, 1905, in the condition they were in when the company took possession. I think the land-owners are not entitled to the $4,135 allowed under this head.

The railway company also contended that the arbitrators had been too liberal in assessing compensation for the value of the land at $4,500 and $1,000 under the respective awards. The evidence of value varies greatly, and I am unable to say there is error in the sum fixed—it is doubtless liberal—but

I must treat the findings as those of a court, acting upon widely differing evidence, arriving at a sum which is found as a fact to be the land value.

The notice of appeal of the company complains of allowance for interest, but this was not argued, and I treat it as abandoned.

In the result, therefore, the amount payable by the railway company is reduced by the sum of $4,135. The land-owners also appealed, complaining of too small a sum being allowed for the land. That appeal is dismissed.

The land-owners must pay to the company one-half the costs of the appeal.

CLUTE, J. APRIL 7TH, 1906.

WEEKLY COURT.

MURPHY v. CORRY.

Judgment—Report of Master—Reference for Trial—Necessity for Motion for Judgment—Costs—Practice.

Motion by plaintiffs for judgment upon the report of the local Master at Ottawa upon a reference for trial of the action and counterclaim. The Master found (ante 363, 392) that plaintiffs were entitled to recover from defendants $1,227 with interest and costs.

The motion for judgment was made at the Ottawa Weekly Court.

C. J. R. Bethune, Ottawa, for plaintiffs.

W. J. Code, Ottawa, for defendants.

CLUTE, J.:— . . . No ground was shewn why the report should not be confirmed and judgment entered for the amount as found by the Master, but defendants' counsel urged that, inasmuch as the Master was to try the case and dispose of the costs, the judgment might be entered without motion for judgment. I find that this is not the practice at Toronto, nor do I think that it is provided for by the Rules. There is no order for judgment, but an order simply to try the issues, and I think a motion for judgment is necessary.

The report is confirmed, and judgment may be entered in terms of the report with costs of this motion to plaintiffs.

APRIL 7TH, 1906.

DIVISIONAL COURT.

DRULARD v. WELSH.

Crown Patent—Construction—Trespass to Land—Boundaries—Evidence—Surveys and Plans—Lands Bordering on Detroit River—French Settlement—Historical Review of Land Tenure.

Appeal by defendant from judgment of BRITTON, J., ante 87, in favour of plaintiff in an action for trespass to land and for a declaration of boundary and for damages, etc.

S. White, Windsor, for defendant.

A. St. George Ellis, for plaintiff.

The judgment of the Court (BOYD, C., MAGEE, J., MABEE, J.), was delivered by

BOYD, C.:—The facts are somewhat meagrely given, and much information is lacking as to the precise nature of the holding of land in the locality in question, which is now a part of the town of Windsor, in the county of Essex. Historically it is known that all the land bordering on "the Strait" (Detroit) was occupied by a settlement of habitans, kindred to the French population occupying the region of the St. Lawrence in old Quebec. These were clustered along and on both sides of the river around and in the neighbourhood of the French post established there in the early history of the colony, and were possessors of the land and cultivators of the soil under the French régime. These settlers were there prior to 1774, when the Quebec Act was passed, by which all these "new subjects" were secured in the holding and enjoyment of their property and possessions as fully as they had enjoyed them under the former government: 14 Geo. III. ch. 83, sec. 8 (Imp.)

One man in particular is conspicuous on the Canadian side of the settlement, Jacques Dupera Baby (the friend of Pontiac), who had a large holding of property, including the land in dispute. His family were still in occupation in 1791, when the old province of Quebec was divided into Upper and Lower Canada. The recognition of the rights of the French population was preserved by sec. 33 of the Constitutional Act of that year, whereby all laws, statutes, and ordinances

then in force shall remain operative as if Quebec had not been divided. These might be varied by subsequent action of the new local legislatures, but meanwhile the old laws continued: 31 Geo. III. ch. 31, sec. 33. Before this Act became operative on 26th December, 1891, the land in dispute was vested in Jacques Dupera Baby (son of the former, who died in 1789): see Donation from Charles Baron and wife to him of 19th November, 1791. Whatever the nature of Baby's title, he had rights which would be assured and respected under the Imperial legislation. In Mr. Lymburger's evidence before the House of Commons, pending consideration of the Act of 1791, he calls attention to the small settlement of French farmers about Detroit, whose tenures were on the feudal system. He distinguishes between the royal tenure in fief and seigneurie from the Crown and landed estates held by grant and concession from a subject, which are called base tenures (1 Christie's Canada, p. 95.) But either way the right of possession was practically proprietorship of the land. The scheme of the Imperial legislation was to protect the French settlers and give facilities as time went on to turn the feudal tenure into one recognized in English law. By the Constitutional Act of 1791 all lands in Upper Canada thereafter to be granted were to be in free and common socage (sec. 43), but as to earlier rights under certificates of occupation derived under the authority of the Governor and Council of the province of Quebec, these might be surrendered as provided by secs. 44 and 45. There has been no subsequent legislation, so far as I am aware, which has derogated from the privileges secured to the new Canadian subjects by these Imperial statutes of the 18th century as to the beneficial enjoyment of their landed property.

The first statute of Upper Canada introduced English law, but by sec. 2 this was not to affect rights or claims to lands, etc., within the province which existed under the old French law of Canada (1792.)

Another Imperial statute of 1822 provided for His Majesty commuting with any person holding lands at "Cens et Rentes" in any "Censive" or fief within either of the provinces (Upper Canada and Lower Canada): 3 Geo. IV. ch. 119.

At the beginning of the 19th century a large tract of land (1,000 acres, of which 200 were farmed—Baby "Memoir," p. 8), covering the present site of Windsor, was owned

by the Baby family, which had been acquired or conceded before the conquest of Canada. This tract has been from time to time laid out in subdivisions and lots and disposed of to various purchasers under the old title—irrespective of any grant from the Crown. This tract is not to be regarded as falling within the "waste lands of the Crown" referred to in sec. 42 of the Act of 1791. It was land under French settlement, of which the Crown respected the rights of the settlers and others in possession pursuant to the policy of the Imperial Parliament. Patents were always granted to the occupants upon application being made and proper proof of ownership furnished—and this at nominal fees. I do not know that the beneficial title to the land was enhanced by the patent—but it facilitated proof of legal ownership, and supplied more convenient means of transfer. This commutation or enlargement of title was taken advantage of by many proprietors, but till this day there is much unpatented land situate in Windsor, which is held under a steady continuation of the old French occupancy.

The Crown grant was, when made, an acceptance and confirmation of the old title, and that is an important consideration in the application of the law to this case. As to this land held by old tenure, the Crown was really trustee of the legal estate for those occupants or owners who were beneficially entitled to possession and long enjoyment, and the grant and effect of patents so bestowed are not to be measured by rules applicable to grants which are made by the grace and bounty of the Crown. Before any patents issued in this Essex county bordering on the river, the land was occupied and practically possessed by the early French population and their descendants and those holding under them; so that, in making the title of any one completer by patent, the Crown was limited by the prior valid titles of that one and his neighbours—on whose borders the grant might not infringe.

Plaintiff's title to his lot is derived from Baby through the Janettes to Stover and then to Laforge in 1886. Laforge paid taxes on the lot and fenced it in, but enclosed more than he had a right to. When plaintiff purchased in 1903 he removed the fence to the right place, and was in possession till he was disturbed by the action of the defendant taking down his fence. Taxes had been paid upon it by Starr and others from 1886 down. I have no doubt that the prior possession of plaintiff gives him a right to sue the defendant, who disturbed his possession by his act—unless defendant can

establish that the locus in quo is covered by and included in her patent. And that is the question in controversy, whether the place in dispute is or is not patented land.

Defendant claims under patent issued to one Post on 13th February, 1874, but that issued upon proof being made to the Crown Lands Department that the claimant was entitled to the place under French title. A lot, being about three-fourths of an acre, was set apart from the Baby estate by deed of 30th June, 1823, by James and Francis Baby, sons and heirs of Peter Baby, to Louis Normandieu, and contains this accurate description: "Commencing at the water's edge of the Detroit river at the north-east angle of lot No. 77 and at the limits between lots 77 and 78; thence south 28 degrees east along the boundary between the said lots 5 chains 75 links more or less to a cedar post being the south-east corner of the fence enclosing the garden of said Louis Normandieu; thence along a palisade fence south 61 degrees 45 minutes west 1 chain 38 links; thence north 28 degrees 15 minutes west 3 chains 50 links; thence north 59 degrees 15 minutes west 78 links; thence north 28 degrees west 1 chain 46 links more or less to the Detroit river; thence along the said river against the stream easterly to the place of beginning."

Next comes a conveyance from Normandieu to Port dated 21st March, 1864, of part of this three-fourths of an acre, leaving out the water front and bounding the lot conveyed by the highway along the river front, with this description: "Commencing on the south-easterly side of the highway on limits between lots 77 and 78; thence south-easterly 28 degrees east 3 chains 79 links to where a post has been planted; thence south 45 degrees west 1 chain 28 links; thence north 28 degrees 15 minutes west 3 chain and 50 links; thence north 59 degrees 15 minutes west 78 links to the highway; and thence north-easterly following the highway to the place of beginning." It contains the ear-mark, "which piece of land hereby conveyed is included in the description of a deed from James and Francis Baby to Normandieu dated 30th June, 1823, and registered in the register of Essex," etc. It is to be noted that there are two errors in the description of the second course; it should be rightly, "south 61 degrees 45 minutes west 1 chain and 38 links"—but the copyist has blundered by leaving out "61 degrees" and turing the "45 minutes" into "45 degrees" and by making the distance "1 chain and 28 links" instead of "1 chain and 38 links."

In January, 1874, Port made application for patent, and transmitted affidavits and papers upon which it was ruled by the Commissioner: "Possession has always gone with the title as shewn; let patent issue for the land as described in the deed to Port (if consistent with the patents for the other portions of the lot.)" Thereupon the patent issued, with a description reproducing the above errors in the deed from Normandieu to Port.

Now, the evidence, oral and documentary, consisting of plans and maps registered and unregistered, shews conclusively, and with uniform consistency as to the paper evidence, that at and before the issue of the patent the limits on the ground of Port's lot and his occupation of it were as between the highway in the front and a lane or alley-way at the rear, along which was placed Normandieu's garden palisade. A fence (probably the same) was also the boundary of Port's garden at the rear of his lot—that fence formed always the north boundary of this old lane, which had been laid out on the ground and plans and divisions of lots made with reference thereto before 1852. It is delineated on the plan of the division of property by the Janettes, made by Wilkinson, P.L.S., and registered as plan No. 76 on 14th October, 1852. It is also shewn in the same place on Wilkinson's plans of 1854 and of 1856 and of 1858. There is also no manner of doubt that the "post" referred to in the first course south in the patent is "the cedar post" at the south-east corner of the fence enclosing Normandieu's garden, and along which fence as the southerly boundary of the lot the next course runs.

The evidence is simply overwhelming as to the true and actual site and boundaries of the Port lot. In 1898 defendant stated to Mrs. Shepherd that this fence formed the boundary of her lot (2). Difficulties arise from the description in the patent, which have to be solved by evidence; for, as the description is actually given and applied to the present site of Sandwich street, the courses will not enclose any piece of land down to the highway, and what they partly enclose will be on a different area from the lot now and always occupied by defendant, which is as a whole unquestionably on the site of the old Normandieu lot.

By one method of survey the rear boundary of the courses in the patent will take in the whole of the old lane and come upon nearly all of the land held by plaintiff. That was manifestly not the intent of the Crown, and the patent can be so considered and construed, in the light of the evidence and the state of affairs on the ground, as to harmonize with the real

title of the litigants. There is strong inferential evidence that the old site of the public highway as it existed prior to 1860 has been changed in making Sandwich street so as to run further from the river in front of this lot, and indeed there is direct evidence to that effect from the surveyor Newman . . . who says that the "old road ran by the red line" in his map. With that line of old road as the public highway recognized in the Crown lands office (and no more modern one is known there), the survey of to-day agrees accurately with the description of the Normandieu lot as conveyed to Port, and with the description given in the patent.

The Port patent was to be "consistent with patents for other parts of the lot." In the Crown lands office it appears that a patent was issued to Mrs. Caron and Mrs. Salter on 17th November, 1859, according to Wilkinson's plan, wherein the old public highway and the lane in the rear appear. These form the front and rear boundaries of that part of lot 77 which adjoins the part of the lot claimed by Port immediately to the west, and this lane is mentioned in the patent. This again confirms the conclusion as to the boundaries on the ground which the Crown recognizes and acts upon. What was so definitely described in the boundaries of the patent of 1859 is also to be intended to be done by the boundaries in the subsequent patent of 1874 in regard to a part of the same lot with the same original French boundaries. Effect is thus given to every word in the patent, and right is done as between the litigants.

If the patent was manifestly irreconcilable with this method of treatment, I should not hesitate to hold that any legal estate granted by the patent in respect of land owned by plaintiff could not be made use of in a court of equity to displace the beneficial title of the true owner under the French occupation. As to such legal estate defendant would be trustee, as was the Crown, for the rightful owner. . . . I may refer to two cases as shewing what evidence is proper to explain a patent in like conditions: Van Diemen's Land Co. v. Marine Bank of Trade, [1906] A. C. 92, and Conn v. Pew, 1 Peters C. C. 496. . . .

The decision should be affirmed with costs.

[The Chancellor adds an interesting "supplementary note" on the French settlement at Detroit in reference to the legal character of land-holding.]