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CARTWRIGHT, MASTER. JUNE 24TH, 1907.

CHAMBERS.

RE COLEMAN AND UNION TRUST CO.

Master in Chambers—Jurisdiction—Removal of Arbitrator—Arbitration Act — Reference of Motion to Judge in Chambers.

Motion by Coleman under the Arbitration Act, R. S. O. 1897 ch. 62, sec. 7 (b), as amended by 6 Edw. VII. ch. 19, sec. 13, for an order removing an architect as arbitrator or valuator.

G. M. Clark, for applicant.

J. E. Jones, for the company, shewed cause, and objected that there was no jurisdiction in the Master in Chambers to hear the motion.

THE MASTER:—On consideration of the sec. 2 of the Act as amended, I am of opinion that this objection must prevail.

It was asked that if I was to hold that this was so, I would refer the motion to a Judge in Chambers.

Having no jurisdiction, it does not seem that I can even refer this, not being a matter in any proceeding in the High Court.

Perhaps the respondents will consent to this being done; otherwise the motion must be dismissed with costs fixed at $10.

CARTWRIGHT, MASTER. JUNE 24TH, 1907.

CHAMBERS.

WALLACE v. MUNN.

Costs—Motion for Leave to Discontinue without Costs—Payment of Plaintiff's Money Claim — Injunction—Rule 430 (4).

Motion by plaintiff under Rule 430 (4) for leave to discontinue as against the original defendants without costs.

Grayson Smith, for plaintiff.

W. Laidlaw, K.C., for defendants.

THE MASTER:—The action began on 11th February, 1907. It arises out of a lumber transaction. The writ of summons was indorsed with a claim for payment of nearly $3,000, and an injunction restraining the defendants from taking lumber from the limits in question. On 10th April an order was made dissolving the interim injunction, and allowing the plaintiff to amend by adding the Echo Bay Lumber Company as defendants. The statement of claim was delivered on 2nd May. In this payment was asked only from the lumber company, and an injunction as against all the defendants.

On 13th May the Munns delivered their statement of defence, in the 8th paragraph of which they deny any right of action in the plaintiff as against them.

On 18th May plaintiff received payment in full of the amount claimed, and now says he has no further reason for continuing the action. Such payment was presumably made by the lumber company, and now the present motion has been made to dispose of the action as against the Munns.

The ground on which the plaintiff relies is, that before action the defendant John Munn had written saying he would pay any claim of the plaintiff, and that it was not his intention to remove any logs from the limits until plaintiff was settled with. And this assurance was repeated in the second letter written on 8th January of this year. But it

is to be observed that these letters do not contain any admission of liability, nor does there seem to have been any consideration for any promise to pay. The limit was held by the female defendant, and her husband had no interest therein, and there was no privity between the plaintiff and either of the Munns.

The plaintiff came into the matter only as assignee from the lumber company of the mortgage given to them to secure advances made by them to Mrs. Munn; and it cannot be determined on this application whether or not there was any right of action against Mrs. Munn or her husband, who presumably was acting under her instructions. The statement of defence alleges that Mrs. Munn was acting strictly within her rights under the mortgage given to the lumber company. It denies that anything was due to the lumber company, but, on the contrary, asserts that the company are indebted to her, as will appear in the taking of the accounts between them.

If there was no default by Mrs. Munn, there certainly could not be any right of action. How this is as a fact can only be determined after hearing evidence. The motion must therefore fail on that ground.

It is only in such cases as Armstrong v. Armstrong, 9 O. L. R. 14, 4 O. W. R. 223, 301, that the plaintiff can be allowed to discontinue without costs. To do so is to deprive a successful defendant of costs, which can only be done for good cause

Here the plaintiff abandoned the claim for payment by the Munns, but proceeded with this action as against them for an injunction.

Whether this was warranted or not cannot be determined here. Nor am I satisfied that the letters of John Munn excuse and justify the issue of a writ, not only against him but also against his wife. It looks as if the plaintiff had been needlessly alarmed and had begun proceedings without sufficient consideration of his rights and consequent remedies.

Under these circumstances this motion must be dismissed with costs to the defendants in the cause.

CARTWRIGHT, MASTER. JUNE 24TH, 1907.

CHAMBERS.

ELMSLEY v. DINGMAN.

Mortgage—Action for Foreclosure—Failure to Make Lessees of Owner of Equity with Option of Purchase Parties—Final Order of Foreclosure—Motion by Lessees to set aside after Expiry of Lease—Dismissal without Costs.

Motion by the Toronto Granite Co. to set aside, for irregularity, a final order of foreclosure made in May, 1899.

W. N. Ferguson, for applicants.

J. H. Moss, for plaintiff.

G. H. D. Lee, for the Dominion Bank, subsequent incumbrancers.

THE MASTER:—The notice of motion was given in October last . . . but was not argued until 14th June. . . . The motion was made on behalf of the Toronto Granite Co., acting through Mr. A. E. Osler as assignee for the benefit of the creditors of that company.

It is clear from Scottish American Investment Co. v. Brewer, 2 O. L. R. 369, and cases cited (see especially p. 376), that such motions must be made promptly when relief is asked as an indulgence. If made on that ground, the motion here must fail.

But the substantial question was whether the Toronto Granite Co. should have been made parties, and whether, if that should have been done, the proceedings can now be reopened.

It seems clear from the documentary evidence that the Toronto Granite Co. had a lease from the owner of the equity of redemption for 10 years from 1st October, 1895, with a right of purchase at any time during the term at a fixed price.

Of this lease plaintiff must undoubtedly have had express notice. A memorandum of agreement is produced, signed and sealed by him, which recites that the Toronto Granite Co. "are the owners of the equity of redemption in the said lands and premises," and extends the time for redemption of plaintiff's mortgage on present payment of a

sum of $411.10 on account of arrears—which was paid. This was never apparently registered, and plaintiff has no recollection of having had the duplicate. But in this I think he is mistaken, as the solicitor who was acting for the company wrote to plaintiff's solicitor a letter dated 31st March, 1898, saying he enclosed "copy agreement re Toronto Granite Co. Limited." This is produced by plaintiff on his examination on this motion, but he says he cannot find any copy of the agreement with the papers he got from Mr. English, his then solicitor. . . .

The question then is whether the suit is defective by reason of the omission to make the company party to these proceedings.

I think there can be little doubt that as between the mortgagee and the other parties there was not any binding foreclosure at the time it was made, and if the present motion had been made a year earlier it would have been successful. But the case is different now, because the lease to the company from Thorne of 1st October, 1895, expired on 30th September, 1905, and from that date the company ceased to have any rights in the matter. It is just as if the wife of a mortgagor had not been made a party. Though she might successfully apply, yet if she died no one else could have any right consequent on the omission to make her a party.

It is stated that the property has considerably risen in value in the last 2 or 3 years, which, no doubt, explains the launching of the motion.

In these circumstances, I think the motion should be dismissed without costs. I feel less reluctance in this disposition of the matter because, if successful, the motion would enure not to the benefit of the creditors of the company, but of Mr. Thorne and the Dominion Bank. And it is to be observed that Mr. Thorne, as vice-president of the company, and Mr. Anderson, the president, had ample knowledge of the facts of the foreclosure, even though the company technically had no notice of the proceedings.

On the other hand, there is undoubtedly such a substantial margin in the property that plaintiff may well be left to pay his own costs of a proceeding which has only perhaps failed of success by the delay of a year in moving against a clear irregularity.

RIDDELL, J. JUNE 24TH, 1907.

WEEKLY COURT.

RE ASHMAN.

Executors and Administrators — Notice to Creditors and other Claimants against Estate of Intestate — Publication in Newspaper—One of Next of Kin not Heard of for Many Years—Presumption of Death without Issue—Distribution of Assets.

Application by the administrators of the estate of Albert Edward Ashman, under Rule 938 (g), for the advice and opinion of the Court as to a share of the estate retained for a brother of the intestate, who could not be found.

H. Pratt, for the applicants.

RIDDELL, J.:—Albert Edward Ashman, late of Ottawa, died 19th April, 1906, intestate. On 8th May, 1906, the Royal Trust Company were appointed administrators of his estate. An advertisement was inserted in the Ottawa Citizen of 19th May, 26th May, and 3rd June, 1906, in the following form:—

NOTICE TO CREDITORS.

Notice is hereby given, pursuant to R. S. O. 1897 chapter 129, that all creditors and others having claims against the estate of Albert Edward Ashman, late of the city of Ottawa, in the county of Carleton, agent, who died on or about the 19th day of April, A.D. 1906, are required on or before the 10th day of June next to send to the undersigned solicitor for the administrators the full particulars of their claims and the nature of the securities (if any) held by them. And further take notice that after such last mentioned day the administrators will proceed to distribute the assets of the deceased among the parties entitled thereto, having regard only to claims of which they shall then have notice, and the said administrators will not be liable to any person or persons of whose claim notice shall not have been received by them.

Dated the 17th day of May, 1906.

THE ROYAL TRUST COMPANY,
by Horace Pratt, 104 Sparks Street,
Their solicitor herein.

Such claims of creditors as were received were paid, all the property turned into money, and the accounts passed by the Surrogate Court of the county of Carleton. By that Court also the administrators were allowed their commission. The deceased left a widow; and two sisters and a brother also put in a claim as next of kin. Before the distribution of the assets, by accident the solicitor for the administrators learned, from inquiry following a casual remark of one of the beneficiaries, that the deceased had had another brother. Further inquiry elicited the information that this brother had left Canada in 1876, without, so far as can be discovered, stating where he was going; that not long afterwards it was heard by one of his sisters that he was in Oregon; that an aunt had heard about 1895 that he was dead; and that no word had been received from him by any of his friends, so far as is known, although diligent inquiry has been made from persons who would be likely to have heard from him. Moreover, his father died about 1882, leaving some property, in which he would have an interest if he were alive, but diligent inquiry at that time did not result in finding him. No one had ever heard of his marrying.

There is a small sum amounting to $156.43, to which, were he alive, he would be entitled. The administrators ask the opinion of the Court as to their proper course in the premises.

I think that, in view of the advertisement and the failure on the part of the brother to make any claim, he would be barred if he were hereafter to make any claim.

Our statute R. S. O. 1897 ch. 129, sec. 38, is the same as the English statute 22 & 23 Vict. ch. 35, sec. 29, and that is considered in Newton v. Sherry, 1 C. P. D. 246. In that case the Court held that the statute in referring to "creditors and others" intended to cover next of kin; and that the statute is applicable to claims for distributive shares of the assets as well as to claims for debts and demands in the nature of debts.

Then is the advertisement sufficient? No doubt, if the administrators had any reason to believe that the brother was living in any particular part of the world, or if they had any reason to believe that deceased had left children, they should have advertised where the children might reasonably be expected to be living. But here there was no reason to believe either that he was living or that he had ever married; the estate was a very small one; and I do not

think the administrators were called upon to advertise more than they did.

It was vigorously contended in Re Cameron, Mason v. Cameron, 15 P. R. 272, that an advertisement of this kind should have been made in the Ontario Gazette. But the contention was unsuccessful, and I think rightly so.

I think that the administrators should divide the assets amongst those entitled thereto as though the brother were assuredly dead without ever having had issue. Costs out of the estate.

TEETZEL, J. JUNE 24TH, 1907.

TRIAL.

FARAH v. BAILEY.

Crown Patent — Mining Land — Action for Trespass — Counterclaim to Set aside Patent — Issue by Error or Improvidence—Repeal of Patent—Scire Facias—Review of Legislation—Rule 241—Jurisdiction of High Court—Fiat of Attorney-General — Certificate of Title — Land Titles Act—Bona Fide Purchaser for Value without Notice—Caution—Registration.

Action for damages for trespass and an injunction.

W. Nesbitt, K.C., and A. M. Stewart, for plaintiff Eldridge.

R. McKay and A. N. Morgan, for other plaintiffs.

W. M. Douglas, K.C., and E. J. Hearn, for defendant Bailey.

C. H. Ritchie, K.C., for Attorney-General for Ontario, defendant by counterclaim.

TEETZEL, J.:—Plaintiffs assert title under a patent of a mining claim containing about 17 acres, being part of lot 4 in the 4th concession of the township of Coleman, issued to Farah and Murphy, and dated 21st March, 1906.

The defendants claim under an unpatented mining claim, containing 31 acres, part of the same lot, discovered by one Clark, a licensed miner, who duly filed his application and

claim with the mining recorder at Haileybury on 20th June, 1905, and whose discovery and claim were duly inspected and passed on 2nd September, 1905.

The southern boundary of the lands described in plaintiffs' patent is about two chains south of what the defendants' claim to be the northern boundary of the 31 acres comprised in the said mining claim, and it is in respect of certain mining operations carried on by the defendants within the two chains strip that this action is brought.

That the defendant did excavate and remove a quantity of ore from the strip in question on the 16th July, 1906, is not disputed, but the value thereof is uncertain.

The plaintiff Eldridge is a bona fide purchaser for value of the land covered by the patent, without notice of defendants' claim, and he holds a certificate of ownership issued to him under the provisions of the Land Titles Act, R. S. O. ch. 138.

The defendants assert their right to carry on mining operations on the strip in question under their mining claim by virtue of the provisions of the Mines Act and regulations thereunder, and they allege that by inadvertence, omission, or mistake the patent was drawn and issued to include part of the land affected by their mining claim, and that the plaintiffs had legal notice of the defendants' rights when they acquired title to the strip in question.

The defendants counterclaim to have it declared that the patent should be repealed in so far as it overlaps their mining claim.

When the case was first called for trial, objection was taken that the Attorney-General should be made a party to the counterclaim, and I gave effect to the objection and adjourned the case to enable this to be done. Afterwards the defendants obtained from the Attorney-General a consent, in the following words: "I James Joseph Foy, as Attorney-General for the province of Ontario, do hereby consent to be made a party defendant to the counterclaim, on the pleadings as they now stand, and to waive service and other proceedings up to the trial of this action;" and the pleadings were amended accordingly.

When the case came on again for trial, counsel for the plaintiffs objected that no action in the nature of an attack upon the patent could be taken except upon the fiat of the Attorney-General, and that, consequently, merely making him a party defendant to the counterclaim was ineffective,

and did not entitle the defendants to give evidence to impeach the patent.

I allowed the case to proceed subject to the objection.

At the close of the case Mr. Ritchie appeared for the Attorney-General and joined with counsel for the plaintiffs in making the same objection.

In the view I take of this objection and also of the plaintiffs' rights under the Land Titles Act, it is not necessary for me to determine any of the objections raised by plaintiffs to the validity of the defendants' mining claim, so far as it affects the strip in question, or whether its true northern boundary should not be south of the strip; but I will assume that the defendants' assignor, Clark, had, at the time of the issue of the patent in question, acquired the right to work the mining claim as surveyed by Mr. Holcroft, and that he had at that time complied with all the requirements of the Mines Act and regulations thereunder, up to and including a full compliance with the first year's working conditions.

I am unable to find that when the original patentees obtained the patent they were affected by any legal notice that any part of the land covered by the patent was in the possession of or claimed by Clark.

Conceding, therefore, that but for the patent and transfers thereafter, the defendants would be entitled as against the plaintiffs to possession of the disputed strip, and to work the same as part of their mining claim, it remains to be considered:—

(1) Whether the defendants can by their counterclaim impeach the patent, or so much of it as overlaps their mining claim, assuming it was issued erroneously or by mistake or improvidently; and

(2) Whether in any case, as against the plaintiff Eldridge, his certificate under the Land Titles Act is not a complete bar to defendants' claim.

As to the first question, there is no doubt that under the common law, "if a Crown grant prejudiced or affected the rights of third persons, the King was by law bound, on proper petitions to him, to allow his subject to use his royal name to repeal it on a scire facias, and it is said that in such a case the party may, upon enrolment of the grant in Chancery, have a scire facias to repeal it, as well as the King:" Chitty's Prerogatives of the Crown, p. 331; Blackstone's Commentaries (American ed.), book 3, p. 260.

In this province an additional remedy in such a case was first provided by 4 & 5 Vict. ch. 100, sec. 29, which reads as follows: "Be it enacted that it shall and may be lawful for the Court of Chancery in that part of this province formerly called Upper Canada, and for the Court of King's Bench in that part of this province formerly called Lower Canada, upon action, bill, or plaint to be exhibited in either of the said Courts respecting grants of land situate in the said parts of this province, respectively, and upon hearing of the parties interested, or upon default of the said parties, after such notice of proceeding as the said Courts shal respectively order, in all cases wherein patents for lands have or shall have issued through fraud or in error or mistake, to decree the same to be void; and upon the registry of such decree in the office of the provincial registrar of this province, such patents shall be deemed void," etc.

This enactment was carried through 16 Vict. ch. 159, sec. 21, C. S. C. ch. 22, sec. 25, 23 Vict. ch. 2, sec. 25, R. S. O. 1877 ch. 23, sec. 29, without substantial change; but it was finally repealed by 50 Vict. ch. 8, schedule, and the following substituted:—

"In case of a patent for land being repealed or voided by the High Court, the judgment shall be registered in the proper registry office;" and on the revisions in 1887 and 1897 the substituted section was adopted; and in R. S. O. 1897 ch. 28, sec. 31, reads:—

"Subject to the Land Titles Act, if a patent for land is repealed or voided by the High Court, the judgment shall be registered in the registry office of the registry division in which the land lies."

Up to the present time there has been no re-enactment of the section repealed by 50 Vict. ch. 8. This leads to a consideration of Con. Rule 241, which is a reproduction of Con. Rule 367 (1888), and reads:—

"Notwithstanding the want of enrolment, writs of summons to repeal letters patent, grants, or other matters of record under the Great Seal, shall be issued in the same cases and under the same restrictions, as nearly as may be, as writs of scire facias were on the 5th day of December, 1859, issuable from the Court of Chancery in England; and all the proceedings thereafter shall be the same as the proceedings in an ordinary action; but, before the issue of any such writ, the party making application for the same shall, in addition to the fiat of the Attorney-General, file, in the

Court from which the writ is to be issued, an exemplification under the Great Seal of the province of the letters patent, grant, or other matter of record with respect to which the said writ is to be issued."

The history of this Rule begins with 22 Vict. ch. 97, the recital of which is: "Whereas the writ of scire facias to repeal letters patent or to make void grants or other matter of record under the Great Seal is an original writ which in England is issuable from the Court of Chancery, founded on a record of the letters patent, grant, or other matters of record enrolled in the said Court; and whereas, owing to the constitution of the Court of Chancery in Upper Canada, there is not, as in England, an enrolment therein of the letters patent, grants, or other matters of record under the Great Seal, and the jurisdiction of the Courts of Upper Canada and Lower Canada to issue writs of scire facias is doubtful."

Sections 1 and 2 of this Act are substantially the same as Rule 241, if one substitutes the words "writs of scire facias" in the former for the words "writ of summons" in the latter.

This enactment appeared in the revision of 1877 as ch. 58, secs. 11 and 12, but was repealed in the revision of 1887, Rule 367 having been substituted therefor.

It is to be observed, therefore, that at any rate from 22 Vict. until the repeal of 4 & 5 Vict. in 1887, the law provided two methods of invoking the jurisdiction of the Court to repeal patents, the one by writ of scire facias, under 22 Vict., the fiat of the Attorney-General being first obtained, and an exemplification of the patent filed, and the other upon "action, bill or plaint," without the necessity of obtaining fiat, etc.

All the reported cases in Ontario involving Crown land patents in which the jurisdiction of the Courts has been exercised, were while the provisions of 4 & 5 Vict. were in force. These cases begin with Martin v. Kennedy, 4 Gr. 61, decided in 1853, and are collected in Holmested & Langton, at pp. 24-25.

It does not appear that in any of those cases any objection was raised that a fiat was necessary, but the jurisdiction was assumed to be complete without it, under the provisions of that Act (4 & 5 Vict.).

The effect of repealing those provisions, and leaving Rule 241 as the only mode of procedure provided for invok-

ing the jurisdiction of the Court to repeal letters patent, has not heretofore been discussed in a reported case, and I do not think the cases decided under 4 & 5 Vict. can assist the defendants.

In my opinion, the effect is that the jurisdiction of the Court to repeal and amend letters patent issued erroneously, or by mistake, or improvidently, or through fraud (Judicature Act, sec. 26, sub-sec. 8), can now only be exercised when the action has been brought before the Court after compliance with the conditions contained in Rule 241. In other words, I think they are conditions precedent to be performed by a party aggrieved by a patent before he can have his complaints adjudicated upon by the Court.

Then, is a defendant who counterclaims in any better position than a plaintiff suing? I think not; because it is well settled that a counterclaim can only be set up where an action can be maintained: Birmingham Estates v. Smith, 13 Ch. D. 506, and cases cited in Holmested & Langton, 2nd ed., pp. 450-1.

As to the second question, I am of the opinion that the plaintiff Eldridge is absolutely protected against any claim or right of the defendants by virtue of his certificate of title and the provisions of the Land Titles Act, the scheme of which is to make the certificate conclusive evidence of title against the world.

He was a bona fide purchaser for value without notice of any adverse claim, and when he registered his transfer and obtained his certificate, he came within the protection of sec. 45 of the Act, which reads as follows:—

"45. A transfer for valuable consideration of land registered with an absolute title shall, when registered, confer on the transferee an estate in fee simple in the land transferred, together with all rights, privileges, and appurtenances belonging or appurtenant thereto, subject as follows:—

"1. To the incumbrances, if any, entered on the register; and

"2. To such liabilities, rights, and interests, if any, as are by this Act declared for the purposes of the Act not to be incumbrances (unless the contrary is expressed on the register), but free from all other estate and interests whatsoever, including estates and interests of Her Majesty, her heirs and successors, which are within the legislative jurisdiction of this province."

See Estates Company v. Mere Roihi, [1905] A. C. 176; and Le Syndicat Lyonnais du Klondyke v. McGrade, 36 S. C. R. 251.

The defendants' caution was not registered until after the plaintiff Eldridge obtained his certificate, and I do not think it could be successfully argued that the defendants had any title or lien which would affect the plaintiffs' title under sub-sec. 4 of sec. 26 of the Act.

Judgment will therefore be entered in favour of the plaintiffs against the defendants for damages for the trespass and the value of the ore removed, and for a perpetual injunction and costs; and the counterclaim will be dismissed with costs. If the parties cannot agree upon the amount of damages and the value of the ore, there will be a reference to the Master at North Bay to determine the same; the costs of the reference to be paid by the defendants.

MULOCK, C.J. JUNE 24TH, 1907.

TRIAL.

FREEL v. ROYAL.

Contract—Promise to Convey Land on Marriage—Specific Performance—Statute of Frauds—Intended Marriage—Postponement on Account of Insanity of One of the Parties—Part Performance.

Action to recover possession of certain property consisting of a house and lot in Thorold, which, prior to the conveyance thereof to the defendant McAndrews, was owned by the defendant Rosella Royal and her half brother, subject to a first mortgage thereon to the Security Loan and Savings Company, and to a certain other mortgage to the Quebec Bank.

W. M. German, K.C., and T. F. Battle, Niagara Falls, for plaintiff and defendant McAndrews.

A. C. Kingstone, St. Catharines, for defendant Royal.

MULOCK, C.J.:—The defence is that McAndrews and Rosella Royal were engaged to be married, and that at the time of the engagement it was verbally agreed between them that the property should be sold under the company's mortgage and purchased by McAndrews for the defendant as a home; that McAndrews became such purchaser; and that Rosella Royal was let into possession in pursuance of the verbal agreement, and is entitled to specific performance of the agreement. She also says that the lands were sold and conveyed to McAndrews in trust for her and that she is entitled to possession.

The defendant McAndrews, who is insane, by his committee denies the allegations of the defendant Royal, and pleads the Statute of Frauds.

Mrs. Royal's evidence is to the following effect. She, a widow, and McAndrews, a widower, were old acquaintances residing in Thorold, and on 7th May, 1906, he made to her an offer of marriage. Before its acceptance she informed him that her brother and she owned the property in question, subject to the mortgages thereon, and that beyond the mortgages she was somewhat in debt, and expressed a wish that he should purchase the mortgages. This, she says, he declined to do, but said that he was willing to purchase the property for $900 as a home for her, and that on their marriage it was to become their home, and that the $900 would enable her to pay off her debts. Thereupon she accepted his offer of marriage. Shortly afterwards she requested the manager of the loan company to offer the property for sale by public auction, and this was done, a reserve bid of $900 being fixed. The highest offer at the auction was between $600 and $700, and the property was withdrawn, and subsequently was sold by the company to McAndrews for $900. This amount he paid to the company in cash, and by conveyance dated 27th August, 1906, the company conveyed the land to him in fee simple, and having applied the purchase money in payment of incumbrances and costs, paid the surplus, amounting to $216.16, to Mrs. Royal.

At the time of the engagement Mrs. Royal was in possession of the property, occupying it as a home, and she has ever since continued in such possession and occupation.

On McAndrews acquiring the property, he proceeded to put it in repair, expending for that purpose $457. The con-

tractor received his instructions from McAndrews, Mrs. Royal being present, being consulted by McAndrews, and making suggestions.

On 10th November McAndrews instructed the priest to publish the banns of the intended marriage, and they were accordingly published on Sunday 11th November. On Saturday 17th November he called on the priest, and stated that he was neither physically nor mentally in condition to marry, and directed a dicontinuance of the publication of the banns, and in consequence further publication ceased.

Mrs. Royal saw McAndrews every day during the week following 11th November, and came to the conclusion that he was insane, but his physician, Dr. Herod, did not discover any mental weakness until 11th December. On 23rd December his physician recommended his being sent to a sanatorium, and shortly afterwards he was, as an insane person, placed in the Hamilton Lunatic Asylum, and as such has been confined there ever since.

On 16th November, 1906, McAndrews purported to convey the land in question to plaintiff, his half brother, the consideration therefor being $1. At this time his mental condition was such that he could not make a valid gift of the property to any one, and it is clear from the evidence of plaintiff that he considers himself, not the beneficial owner of the property, but trustee for McAndrews, and there should be a declaration to that effect.

The first difficulty in Mrs. Royal's way is that, according to her own evidence, the purchase by McAndrews was only to enure to her benefit on the marriage taking place, when it was to become the common home of both of them, but she does not say that irrespective of the marriage or prior to its taking place, McAndrews was either to convey the property to her or to hold it in trust for her. Thus the event has not happened, the happening of which was a condition precedent to her being entitled either to the property or its possession. Nor is McAndrews in default in not yet having married her. No date was fixed for the marriage. In such a case the contract is to marry within a reasonable time after request. At most the publication of the banns would only warrant the inference that the marriage was to take place within three months of such proclamation of the intended marriage, being the limit fixed by the Marriage Act, to which such publication applies.

Evidently the unfortunate man realized on 16th November that he was losing his reason, and since that day has not been in a mental condition to consent to the marriage. Mrs. Royal says he never refused to marry her, and there is no ground for assuming that if he recovered his reason he would refuse. The contract of marriage being conditional on the continuance of the mental ability to give the necessary legal consent, McAndrews's insanity, so long as it continues, is a sufficient excuse for postponement of the marriage.

But, even assuming that the parol agreement between the parties was that prior to the marriage taking place McAndrews was to convey the property to Mrs. Royal, or to hold it for her benefit, there has been no part performance which would take the case out of the statute. The only act relied upon is the retention of possession by Mrs. Royal after the conveyance of 27th August to McAndrews. At this time the parties were engaged to be married, and McAndrews was having the house repaired and altered with a view to its being occupied by them as their home when the marriage took place, which they doubtless expected would happen in the near future. McAndrews's action in thus permitting Mrs. Royal, under these circumstances, to retain possession is what any man of correct feeling and ordinary judgment would have done under similar circumstances, and in the entire absence of any contract to give the intended wife an interest in the property. It is equivocal, not necessarily suggesting the existence of any contract intended to give to her any right in the property, nor unequivocably referable to the parol agreement which she seeks to set up, and which, therefore, because of the equivocal nature of such contract, she is not at liberty to set up. Thus the statute is a bar to her claim: Frame v. Dawson, 14 Ves. 387; Ex p. Hoover, 19 Ves. 479; Jennings v. Robertson, 3 Gr. 513; Magee v. Kane, 9 O. R. 477.

I therefore think the plaintiff entitled to judgment as asked for. The present situation being the outcome of the insanity of McAndrews, it is not a case in which there should be any costs to either party.

JUNE 24TH, 1907.

DIVISIONAL COURT.

RE SHUPE v. YOUNG.

Division Court—Territorial Jurisdiction—Action on Contract—Provision in Contract as to Forum for Action—Waiver of Statute Making such Provisions Illegal—Effect of.

Appeal by plaintiff from order of FALCONBRIDGE, C.J., ante 185.

T. J. Robertson, Newmarket, for plaintiff.

G. H. Kilmer, for defendant.

THE COURT (BOYD, C., MAGEE, J., MABEE, J.), dismissed the appeal with costs.

CARTWRIGHT, MASTER. JUNE 25TH, 1907.

CHAMBERS.

SCOTT v. HAY.

Dismissal of Action—Want of Prosecution—Motion to Dismiss—Statute of Limitations—Leave to Proceed—Terms.

Motion by defendant to dismiss action for want of prosecution.

W. E. Middleton, for defendant.

Frank McCarthy, for plaintiff.

THE MASTER:—The action began on 17th October, 1904. Statement of claim was delivered on 15th November, and statement of defence on 22nd November. The plaintiff was examined for discovery on 9th December, and defendant on 10th February, 1905.

Nothing has been done by plaintiff since that time. He has filed an affidavit, in which he states as follows: "The sole reason why I have allowed the matter to stand, and have not hitherto proceeded to trial with this action, is that I believe the defendant to be financially worthless, and that the costs of proceeding to judgment would be wasted."

There is no affidavit from the defendant, and what the plaintiff says seems to be corroborated by the fact that the cause of action alleged is in respect of certain dealings in mining stocks in April, 1899. This shews that the Statute of Limitations had almost intervened before the issue of the writ, and that plaintiff only took proceedings when it became necessary to prevent the statutory bar.

Under these circumstances, it would seem that the principle of Finkle v. Lutz, 14 P. R. 446, should be applied.

It was pointed out by Mr. Middleton that, as the statute would now apply, the action should all the more be dismissed. He cited Finnegan v. Keenan, 7 P. R. 385, in support of that view. But that was an action concerning land, and a lis pendens had been in force for more than 18 months. This fact appears to have been the important element in that case. It is obviously unfair to allow an apparent owner to be deprived of the power of dealing with real estate at the pleasure of a claimant who has not in the first instance moved with any promptness.

Nothing of the kind, however, arises here; and while I would gladly relieve the defendant from what may seem to be a hopeless claim, yet under the authorities this cannot be done.

The order to be made will provide that the motion be dismissed, on plaintiff paying the costs of the motion (fixed at $30) within a week, and also setting the case down and giving notice of trial for the next Toronto non-jury sittings, and proceeding thereon in due course. In default of any of these provisions, the action will be dismissed with costs.

JUNE 25TH, 1907.

DIVISIONAL COURT.

COLLINS v. TORONTO, HAMILTON, AND BUFFALO R. W. CO.

PERKINS v. TORONTO, HAMILTON, AND BUFFALO R. W. CO.

Parties — Joinder of Defendants — Cause of Action — Joint Liability—Tort.

Appeal by defendants the Dominion Natural Gas Co. from order of FALCONBRIDGE, C.J., ante 115.

G. M. Clark, for appellants.

L. G. McCarthy, K.C., for defendants the Toronto, Hamilton, and Buffalo R. W. Co., respondents.

J. G. Farmer, Hamilton, for plaintiff Collins, respondent.

D'Arcy Martin, Hamilton, for plaintiff Perkins, respondent.

THE COURT (BOYD, C., MAGEE, J., MABEE, J.), dismissed the appeal with costs to all the respondents in any event.

MACMAHON, J. JUNE 26TH, 1907.

TRIAL.

McCANN MILLING CO. v. MARTIN.

Chattel Mortgage—Renewal—Time of Filing—Computation of Year — Validity — Assignment of Mortgage — Bankruptcy and Insolvency—Assignment for Benefit of Creditors—Sale of Stock in Trade by Assignee—Fraud—Delivery of Securities—Costs.

Action by the McCann Milling Co., suing on behalf of themselves and all other creditors of O. W. Martin & Co., against Mary Elizabeth Martin, trading as O. W. Martin & Co., Laura V. Murdoff, and James Barton Murdoff, to set aside a chattel mortgage, an assignment thereof, etc.

W. R. Smyth, for plaintiffs.

A. Abbott, Trenton, for defendants.

MACMAHON, J.:—O. W. Martin prior to February, 1904, carried on business as a grocer in Trenton. Becoming insolvent about that time, he made an assignment for the benefit of his creditors. The assignee sold the estate en bloc, the defendant James Barton Murdoff becoming the purchaser and retaining the premises occupied by Martin.

On 21st April Murdoff sold out to defendant Mary Elizabeth Martin (a sister of O. W. Martin) for $1,983, and took from her a chattel mortgage to secure the purchase money, dated the same day, covering "all that stock of groceries and crockery ware, with all shop fixtures, flour and feed, now contained in the shop and store, and all stock of a similar

kind which may hereafter be brought on the said premises to replace any sold off in the usual course of trade, or to augment the said stock from time to time, the same upon being brought on said premises and placed in stock to be covered by these presents, and subject to the conditions and rights contained therein, being the stock mentioned and set out in the stock sheet as purchased by mortgagor from assignee of estate of O. W. Martin."

The mortgagor covenanted to pay "the full sum of $1,983, with interest payable weekly on unpaid principal, from time to time, at 6 per cent. per annum, as follows: said sum to be paid in 4 months from date in full, but in the meantime payments to be made weekly on the Monday morning of each week during said term, of $50 each, and in addition thereto all sums of money taken from the sale of goods each preceding week not required for current expenses and wages and to pay for goods to replace those sold so as to keep the stock up to present value, to be paid to the mortgagee each week, and to be applied with said weekly payments to reduce said principal. The mortgagor to have privilege to pay any sum in addition to said sums at any time to reduce principal. The first of such payments to be made on 2nd May, 1904.

"It is further understood and agreed between mortgagor and mortgagee that no credit is to be given to any person buying goods except on consent of the mortgagee, who may at all times enter upon said premises and examine all books and take general charge in management of said store, may change book-keepers if he is not satisfied with the account of the daily and weekly sales, which are to be kept carefully and correctly.

"It is further understood that the wages to be paid must not exceed in all for the said shop $15 per week, unless the consent of the mortgagee be first obtained to any such condition. It is further agreed that the mortgagee is to be paid each week at same time of payment of said payments 2½ per cent. on the sales of the preceding week as payment for his services in helping to manage said business.

"And the mortgagor covenants with the mortgagee to at all times keep the stock replenished so as to be worth as much as at the present time, and mortgagee may order same at any time, if he choose, to ensure this being done."

Mary Elizabeth Martin carried on the business under the name of O. W. Martin & Co.

The mortgage was filed on 26th April, 1904, at 10 o'clock a.m.; and a renewal thereof was filed on 26th April, 1905, at 10 o'clock, shewing the amount remaining due on 15th April, when the affidavit was sworn to, as being $1,059.93.

In September, 1905, Murdoff assigned the chattel mortgage to his wife, the defendant Laura V. Murdoff.

Murdoff had a key to O. W. Martin & Co.'s shop, and went in almost daily to see how the business was being conducted, examine the books, &c.

About 12th February, 1906, Murdoff took absolute possession and control of the store, and excluded Mary Elizabeth Martin therefrom; and on 19th February O. W. Martin & Co. assigned to Murdoff for the benefit of creditors, and a meeting of the creditors was called for 28th February, at which Murdoff acted as chairman, and a motion was made to remove him from the assigneeship, but, as defendant Laura V. Murdoff voted on the amount payable under the chattel mortgage assigned to her against the motion, there was a majority in value against the motion, which the chairman declared defeated.

Murdoff stated that the assignment was made to him because the local creditors desired it.

At a meeting of the inspectors, they instructed the assignee to advertise and sell. There were 3 or 4 tenders, and the assignee said he accepted the highest for the stock, it being $615, made by the nephew, who paid cash therefor.

A motion was made, returnable in the High Court, on 9th March, to change the assignee, and an enlargement was obtained by Murdoff's solicitor on a telegram which stated: "Wire received. Assets will not be interfered with." The motion was enlarged from time to time, the last enlargement being until 30th March. A second meeting of creditors was held on 28th March, when, upon motion, the assigneeship was changed from Murdoff to George F. Hope, sheriff of the county of Hastings.

On 10th April, 1906, a demand was made by G. F. Hope, the assignee, upon Murdoff and Abbott, his solicitor, requiring them and each of them to deliver to him the goods, chattels, and effects, moneys and securities, and the books, papers, and documents, connected with the insolvent's estate. The demand on Murdoff as to the money realized from the sale of the stock was not complied with, he claiming it on

behalf of his wife by virtue of the chattel mortgage assigned to her. And Mr. Abbott, in whose possession the books were, claimed a lien thereon for costs in connection with the insolvency proceedings.

No question was raised as to the sufficiency of the document filed renewing the chattel mortgage. But it was contended that, as the original mortgage was filed on 26th April, 1904, at 10 o'clock, and as the renewal was not filed until 26th April, 1905, at 10 o'clock, the filing was too late and therefore invalid.

By sec. 18 of R. S. O. ch. 148, every mortgage or copy thereof filed in pursuance of this Act shall cease to be valid as against the creditors of the person making the same . . after the expiration of one year from the day of the filing thereof, unless within 30 days next preceding the expiration of the said term of one year a statement exhibiting the interest of the mortgagee . . is filed in the office of the clerk of the County Court. In Thompson v. Quirk, 18 S. C. R. 696, where a chattel mortgage was filed on 12th August, 1886, and registered at 4.10 p.m. of that day, and a renewal was registered at 11.49 a.m. on 12th August, 1887 (the Ordinance of the North-West Territories No. 5, sec. 9, following sec. 18 of our Act), Mr. Justice Patterson said: "In computing the time mentioned in this section, the day of the original filing should be excluded, and the mortgagee would have had the whole of 12th August, 1887, to file the renewal."

The renewal was filed in ample time by the mortgagee, and he was entitled to apply the amount realized from the sale thereof in reduction of the mortgage.

Goods were shipped by the plaintiffs the McCann Milling Company, and some two or three other creditors, to O. W. Martin & Co., just prior to Murdoff taking possession of the store, and it was alleged Murdoff took possession of these goods, and there was therefore a holding out by him of being interested in O. W. Martin & Co.'s business. Murdoff said goods that came addressed to Martin & Co. after he took possession of the store never entered the premises; that O. W. Martin got them, and, it was understood, put them in cold storage, taking receipts for them. There was certainly no evidence offered of conduct on Murdoff's part that would lead any one dealing with the firm of O. W. Martin & Co. to suppose that he was a partner therein.

Mr. Abbott, the solicitor, refused to deliver the books of

account connected with the insolvent estate to Sheriff Hope, the substituted assignee, claiming a lien for costs thereon. The solicitor was entitled to be paid his costs of the moneys realized from the sale of the insolvent's estate, and James B. Murdoff, the original assignee, is liable to him therefor.

There will be judgment for defendants declaring that the chattel mortgage of 24th April, 1904, made by the defendant Mary Elizabeth Martin to the defendant James Barton Murdoff is valid as against the creditors of O. W. Martin & Co.; and that the assignment thereof by James B. Murdoff to defendant Laura V. Murdoff is a good and valid assignment, and made without any fraudulent intent; that the sale of the stock of Mary Elizabeth Martin, trading as O. W. Martin & Co., by James B. Murdoff, as assignee of said firm, was without fraud; and that defendant Laura V. Murdoff is entitled to the proceeds of the sale thereof.

And I direct that the defendant James Barton Murdoff do deliver to the plaintiff George F. Hope the books of account and all promissory notes or other securities now in the possession of A. Abbott, and held by the latter as his solicitor, subject, however, to the lien (if any) of said Abbott in respect to his costs.

The defendants will be entitled to three-fourths of the costs of the action, and the plaintiffs to one-fourth of the costs thereof, which I direct shall be set off against the defendants' costs.

MULOCK, C.J. JUNE 26TH, 1907.

TRIAL.

REX v. McMICHAEL.

Criminal Law—Conspiracy—Criminal Code, sec. 520—Trade Combination — Illegal Agreements—Prices—Preference — Members of Associations—Preventing Competition — Conduct and Participation in Illegal Agreements—Conviction —Penalty—Fine—Costs.

Indictment of defendants for a conspiracy. Trial without a jury at Toronto.

E. E. A. DuVernet, for the Crown.

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

MULOCK, C.J.:—The defendant Peter McMichael and others are charged by indictment with a conspiracy under sec. 520 of the Criminal Code, the indictment containing counts bringing the charge within sub-secs. a, b, c, and d.

A. A. McMichael, one of the defendants, has since trial died, and the defendant Bush was not proceeded against. I have, therefore, only to deal with the case against Peter McMichael.

The evidence shews that continuously since 1st May, 1902, Peter McMichael has been the manager of the Dominion Radiator Company, an incorporated company, carrying on business in Toronto as dealers in radiators and boilers.

For some time prior to 1903 there existed an association of plumbers and steamfitters called the Master Plumbers and Steamfitters Association, and also another association composed of dealers in goods required by plumbers and steamfitters. Negotiations having been conducted between these two associations, by representatives of each association, with a view to an understanding being arrived at in regard to matters of interest to the members of these associations, in May, 1903, an agreement was reached and reduced to writing, and is in the following words:—

"Memorandum of agreement between the Master Plumbers and Steamfitters Association and the representatives of the undersigned supply houses made this day of 1903.

"Whereas negotiations have been under way for some months between the parties hereto with a view to improving the conditions of the trade generally, and to protect the Master Plumbers and Steamfitters Association by giving the association a preference over non-members on all plumbing and steamfitting goods purchased from the undersigned firms.

"It is hereby agreed between the parties hereto as follows:—

"That the members of the Master Plumbers and Steamfitters Association will endeavour to buy all goods for their work from, and will give the preference on all purchases where prices are equal to, the jobbing and supply houses signing this agreement.

"That the undersigned supply houses will not sell to the general public plumbing goods or steam, hot water, or gas fittings, but when prices are asked from them they may

quote parties wanting an idea of cost not less than 25 per cent. over the association prices.

"That the undersigned supply houses will not sell plumbing goods or steamfitting, hot water, or gas fittings (except steam pipe and fittings) to the trade generally, except at an advance of 20 per cent. upon the prices quoted to members of the Master Plumbers and Steamfitters Association, and that they will give the said members in good standing, unless otherwise notified by the association, a preference of 20 per cent. on all purchases made by said members better than the figures at which they will sell a like quantity and quality of similar goods to persons in the trade who are not members of the Master Plumbers and Steamfitters Association.

"In witness whereof, the undersigned have hereto set their hands and seals, this day of , 1903.

The Canada Radiator Company, Ltd.,
per J. J. Travers, Man. Director.
Jas. Robertson Company, Ltd.,
A. A. McMichael, Vice-Pres.
Stevens Manufacturing Company,
per F. N. Connell.
The Ontario Lead & Wire Company, Ltd.,
per Fred. Somerville, Mgr.
Ideal Manufacturing Company,
per W. S. Jackson.
Dominion Radiator Company, Ltd.,
P. McMichael, Mgr.
Toronto Hardware Manufacturing Company,
per J. H. Paterson.
Gurney Foundry Company, Ltd.
E. Gurney, Pres.
The F. W. Webb Manufacturing Company
have signified their intention of signing
the agreement on presentation to them.
James Morrison Brass Manufac'ing Company,
Chas. E. Morrison, Sec.-Treas."

The Dominion Radiator Company became a party to this agreement, the defendant P. McMichael signing it on behalf of the company. Its terms were arrived at as a result of meetings between a committee of the Plumbers and Steamfitters Association, Mr. McMichael, and others. This agreement continued in force until the autumn of 1904, when the parties entered into another and more rigid agreement, the

nature of which is hereafter referred to, and, in order to carry out its provisions, the Plumbers Association adopted a plan of issuing monthly lists or directories, setting forth the names of plumbers and steamfitters and supply men repectively, which system continued in force well on into the year 1905. In the meantime the Plumbers Association had become incorporated under the name of the Master Plumbers and Steamfitters Co-operative Association, Limited, and took over the books, papers, assets, and liabilities of the unincorporated association, and somewhat later the supply men became incorporated under the name of the Central Supply Association of Canada, and there also sprang up another incorporated company called the Central Supply Association of Canada, Limited, and negotiations were had for agreements being entered into between the latter and the two former named corporations, but, owing to a question as to the legality of the proposed agreements, they were never formally executed, and I refer to these latter efforts and proceedings only as indicating that up to this time, September, 1905, the parties were endeavouring in another form to carry out the common purpose indicated by the agreement of May, 1903.

That agreement, I think, contravenes the provision of sec. 520 of the Criminal Code. Its declared object is to give a preference to members over non-members of the Master Plumbers and Steamfitters Association, such members agreeing to endeavour to buy all goods required for their work from, and to give a preference on all purchases where prices are equal to, the jobbing, trade, and supply houses which sign the agreement. The supply men agree not to sell plumbing goods, etc., to the general public, but when prices are asked to quote prices not less than 25 per cent. over the association purchase price. Further, the supply houses agree not to sell plumbing goods or steamfitting, hot water, or gas fittings, to the trade generally, except at an advance of 20 per cent. upon the price quoted to members of the Master Plumbers and Steamfitters Association, and to sell to such members in good standing at 20 per cent. less than to non-members.

Doubtless, one object of these stipulations was to prevent the general public obtaining goods except from the members of the Master Plumbers Association, and at an extra cost of at least 20 per cent., and to that end to drive out of business all plumbers who would not enter into the combination.

During the continuance of this agreement the various parties endeavoured to live up to its terms, and, in consequence, many plumbers who were not members of the Plumbers Association were greatly hampered in obtaining their necessary supplies, in several instances being actually refused by the supply men for no reason except that of their being non-members of the association. Occasionally some of the supply men sold to non-members in contravention of the agreement, and it was then the practice of the Plumbers Association to endeavour to discipline such offending supply men by fines and otherwise.

In October, 1904, the two associations entered into a further agreement, whereby the supply men again agreed to give a preference to the members of the Plumbers Association, such members agreeing to make their purchases from such supply men, and the latter agreeing to sell to such members only. This second agreement was intended to be more rigid than that of 1903, for, whilst the latter permitted supply men to sell to outsiders at 20 per cent. advance, the new agreement was intended to absolutely prohibit selling to any but members of the association.

In order to give effect to this latter agreement, monthly lists or directories were issued by the Plumbers Association, one of which monthly lists shewed who were members of the Plumbers Association in good standing, and also non-members, and opposite the names of the latter were stars indicating that the supply men were not at liberty to sell to them. There was also published a companion monthly list shewing the names of members of the Supply Association who were parties to the agreement, and it was the understanding that the members of the Plumbers Association should purchase only from the supply men who were parties to this agreement.

The idea resulting in the issue of these lists appears to have originated with the Plumbers Association, but before its adoption the supply men who had signed the agreement of 1903 were consulted on behalf of the Plumbers Association, and informed that the latter had decided to purchase only from those members of the Supply Association who desired their names to go upon the lists, and it became necessary for any supply house that desired its name on the list to agree to confine its sales to members of the Plumbers Association.

The name of the Dominion Radiator Company was on the original and all succeeding lists of supply men in good standing.

The minutes of the Plumbers Association of 13th February, 1905, contain the following:—

"The Dominion Radiator Company were charged with supplying radiators to the York Loan Company. This firm acknowledged the charge, but claimed it was an oversight of their new shipper, and also gave an assurance that this would not occur again. Under the circumstances, the board accepted this explanation. Both companies, the Dominion Radiator Company and the Gurney Foundry Company, gave your board an assurance that they had no further orders to fill for any non-members."

W. H. Meredith, Secretary of the Plumbers Association, stated that to the best of his knowledge Mr. P. McMichael appeared before the plumbers' board on behalf of the Dominion Radiator Company, in connection with the matters referred to in the foregoing minutes, and Mr. McMichael did not contradict the statement.

When the agreement of May, 1903, was entered into, about 85 plumbers' firms out of 125 in Toronto became parties to the arrangement, but the membership increased because of non-members being compelled to pay 20 per cent. extra for their goods. The Plumbers Association from time to time struck off their monthly lists the names of supply men who violated the agreement, but the Dominion Radiator Company's name always remained on the lists. It is, therefore, clear that that company actively assisted in the continuance of the scheme.

Mr. McMichael in his evidence states in effect that his company in only one instance actually charged and collected the extra 20 per cent. from purchasers, in all instances the 20 per cent. being charged and then rebated; that in connection with the abrogation of the agreement of May, 1903, he received a notice from Mr. Meredith, secretary of the Plumbers Association, to attend a meeting; that he attended such meeting, when it was stated by the Master Plumbers Association, or their committee, that they were not satisfied with the results of the agreement in question, and that they had arrived at a point where they were going to compel supply men to sell exclusively to their association; otherwise members of the association would not buy from them.

Mr. Meredith put it that the Dominion Radiator Company, if they had chosen, might have successfully withstood the movement of the plumbers, but Mr. McMichael's evidence was to the effect that if the supply men had united they could have successfully resisted the plumbers, but it was not possible for the Dominion Radiator Company, acting alone, to have done so.

The following are extracts from Mr. McMichael's examination: To Mr. Watson:—"Q. What I want to know is, as a matter of business, of business interests, was it practicable to resist that demand? A. No sir, it was not."

After stating that he could not offer any explanation for his company's name being on the monthly lists, the following examination took place:—

"Q. Did you make any agreement with them on the subject? A. No, I don't. You refer now after the 1904?

Q. Yes? A. No.

Q. Why did you yield to the demand? A. It was not protection of my company's business, because if we had not yielded we certainly would not have got the support.

Q. And after that time what course did you take with regard to sales to non-members? A. We don't press for sales, to tell the truth.

Q. Did you make sales to non-members after that? A. Yes, we made sales to non-members.

Q. After that time did you refuse to give any one goods? A. At a certain time we did: it was some time in February." And further on he says: "There was. This trouble arose between ourselves and the Master Plumbers Association, that if we continued to deliver to Bigley they would take our name off that list."

Q. You had up to that time been furnishing him, although a non-member? A. Yes.

Q. And they came to you? A. Yes.

Q. What was the result of that coming to you at that time? A. We had to yield to their demand.

Then further on he states that Mr. Meredith called at the company's office and went through their books, and stated that he would report the Bigley matter to the association, and the company could abide by the consequences. Mr. McMichael says: "I told him not to be in such a hurry

about it; it would take some time to look at it; and he got what he wanted." Further on Mr. McMichael says: "He (Mr. Meredith) has been there (meaning the office of the Dominion Radiator Company) several times—half a dozen times; in fact I myself have had to spend a whole day and follow up some radiators that were delivered to a jobber in this city, and which were turned over to a non-member, and I had to prove the delivery of these radiators; how they had come to get into that man's hands; otherwise they were going to take action against us."

To Mr. DuVernet: "Q. I think you have told us very frankly, you signed this agreement of May, 1903, and you honestly tried to live up to it, that is right? A. Outside of those contracts which I refer to.

Q. In the same way, I think you told us quite frankly that so far as the agreement or arrangement of 1904 in October, that that was put very plainly before you, and you were told just exactly what the conditions were, that is right? A. We were advised as to what the policy of the Master Plumbers Association would be from that date out.

Q. And you were told what the consequences would be? A. Yes.

Q. And did you accept their conditions? A. I accepted nothing. I do not see I could have anything to accept. I certainly could not go out single handed and fight; if by my acts I accepted, I must have done so.

Q. And you have said there was an outside position and an inside position? A. Yes.

Q. And you preferred the inside? A. On account of the business that was there.

Q. I am assuming you had the very best reasons for accepting their proposition? A. I had certainly very good reasons, or otherwise we would have gone out; we would not have gone out of business, but our business would have dropped off to a great extent and we could not carry it on.

Q. At the same time you did accept their conditions? A. If that is the way you put it, yes.

Q. You say Mr. Meredith would check you off from time to time to see whether you were living up to your agreement? A. He certainly did."

The fair deduction from Mr. McMichael's examination is that he yielded to the pressure of the Plumbers Associa-

tion, and that his company, through his action, became a party to the agreement of October, 1904, and to the methods adopted in order to give effect thereto.

What I have said as to the illegal nature of the agreement of 1903 is equally applicable to that of 1904. The goods, the subject of each agreement, are articles or commodities which are properly the subject of trade or commerce. The agreement of 1904 was also one to unduly limit the facilities for supplying or dealing in them; to restrain or injure trade or commerce in relation thereto; to unreasonably enhance their price; and to unduly prevent or lessen competition in their purchase, sale, and supply.

The question is, whether the defendant Peter McMichael's participation in these illegal agreements or conspiracies was such as to make him liable. From a careful review of the evidence, I find the following facts as regards McMichael's conduct in connection with the making of each of those two agreements and with certain events flowing therefrom. As manager of the Dominion Radiator Company he conducted the negotiations with representatives of the Plumbers Association which culminated in the agreement of May, 1903. On behalf of that company he personally signed the agreement. Thereafter as manager of the company he endeavoured to have his company live up to the terms of the agreement. As representative of the company he took part in negotiations which led to the making of the agreement of October, 1904, and the issuing of the lists or directories, with a view to his company carrying out the terms of the latter agreement, and he endeavoured to cause his company to live up to the terms of this latter agreement. His conduct was not merely that of acquiescence, but of personally promoting the agreements in question and of causing his company to carry out their terms.

Having thus actively aided in the bringing about of these illegal conspiracies or agreements, he is, under sec. 61 of the Code, liable as a principal, and I find him guilty of the offences charged against him under sec. 520 of the Code, and impose on him as a penalty a fine of $250, and the costs incurred in and about his prosecution and conviction, and in default of payment within one month after the amount of the costs is ascertained, then I order his imprisonment for three months.

Moss, C.J.O. JUNE 27TH, 1907.

C.A.—CHAMBERS.

WADE v. ELLIOTT.

Appeal to Court of Appeal—Leave to Appeal from Judgment at Trial — Amount in Controversy — Action to Set aside Mortgages.

Motion by plaintiff for leave to appeal direct to the Court of Appeal from the judgment of TEETZEL, J., at the trial, ante 206, dismissing the action as against defendant Elliott.

A. C. McMaster, for plaintiff.

F. M. Field, Cobourg, for defendant Elliott.

MOSS, C.J.O.:—Mr. Field, for defendant, did not contend that the case was not a proper one in which to make the order, assuming that there is jurisdiction. That depends on whether an appeal would lie as of right from the decision of this Court to the Supreme Court of Canada: 4 Edw. VII. ch. 11, sec. 76 (a).

The action is by the assignee of one James H. Drinkwalter, under the Assignments and Preferences Act, R. S. O. 1897 ch. 147, and amending Acts, to declare void two instruments of mortgage, one of chattels and the other of realty, made by the defendant Drinkwater to his co-defendant Elliott, for securing the same debt, the plaintiff alleging that they were made by way of preference with intent to defraud Drinkwalter's other creditors.

It is admitted that at the time of the commencement of the action the amount of the indebtedness secured by the mortgages exceeded $1,000, but the defendant Elliott contends that, pending the litigation, moneys have been realized by him which have reduced his claim below $1,000.

As to this there is a dispute, the plaintiff alleging that the moneys so received represent part of Drinkwalter's estate, for which Elliott must account to the plaintiff, if the mortgages are avoided.

Upon the material before me, and for the purposes of this application, I think I should conclude that the matter in controversy in the appeal exceeds the sum or value of $1,000, exclusive of costs, and that there is jurisdiction to make the order asked for.

I make the usual order, giving leave under the statute. It should contain a recital as in Mathewson v. Beatty, 8 O. W. R. 869. Costs as usual.

RIDDELL, J. JUNE 28TH, 1907.

CHAMBERS.

RE CANADIAN PACIFIC R. W. CO. AND BYRNE.

Railway—Purchase of Lands for Railway—Power of Tenant for Life to Convey — Order of Judge — Railway Act, R. S. C. 1906 ch. 37, secs. 184, 185—Infant Remaindermen—Payment of Purchase Money into Court.

Application by the widow of James Byrne for an order giving her the right to sell certain land to the railway company.

A. D. Armour, for the applicant and the company.

F. W. Harcourt, for infants.

RIDDELL, J.:—James Byrne died in 1897, leaving a will which had the effect of vesting in his widow an estate for life in certain lands, with remainder to his children.

The Canadian Pacific Railway Company desiring to purchase a right of way across this land, it was agreed by the widow with the railway company that they should pay the sum of $30 per acre for such land as they required. All the children are infants, but the price has been approved by the official guardian, and seems reasonable.

An application is now made under secs. 184 and 185 of the Railway Act, R. S. C. 1906 ch. 37.

The provisions of these sections are precisely the same as those of the Railway Act, 1903, secs. 144, 145. Section 144 of the Railway Act, 1903, is totidem verbis sec. 136 of the Act of 1888, 51 Vict. ch. 29, and sec. 145 is the same

as sec. 137 of the Act of 1888, with trifling and unimportant verbal changes.

The case is covered by Re Dolsen, 13 P. R. 84, which should be followed.

Under the provisions of sec. 184 of the Railway Act, I give power to the widow to sell and convey to the Canadian Pacific Railway Company the land mentioned and the rights of the infants therein; this power, joined to her legal power as tenant for life, will enable her to sell and convey the fee.

The purchase money will be paid into Court, and the interest thereon paid out to the widow for life; after her death the money will be equally divided amongst the children. If for any reason it be desired that the money should not be paid into Court, the matter may be mentioned.

As in Re Dolsen, the railway company will pay the costs.

RIDDELL, J. JUNE 28TH, 1907.

TRIAL.

CALVERLEY v. LAMB.

Limitation of Actions — Real Property Limitation Act—Title by Possession—Arrangement as to Working Land—Time of Commencement of Statutory Period — Payment of Rent—Onus—Actual Payment—Gift of Land—Evidence — Costs — Plaintiff Relieved from Liability — Right to Recover Costs against Defendant—Lien for Improvements.

Action to recover possession of land and for an injunction, etc. Defendant set up ownership by gift or under the Statute of Limitations.

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

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

RIDDELL, J.:—William Stewart, the owner of the lots in question, executed a mortgage on 8th September, 1893, to one McClinchy for $400: McClinchy, 15th November, 1895, assigned to Barbara Heyden; the executors of Barbara Heyden, 25th April, 1900, to Laurence Heyden.

William Stewart by his will made 18th February, 1887, devised all his real and personal property to Mary Stewart, and died in August, 1895. Mary Stewart granted in fee simple 15th November, 1895, to Laurence Heyden, and 20th December, 1905, Laurence Heyden and Mary Stewart executed a deed whereby, after reciting that Laurence Heyden was the owner, Mary Stewart quitted claim to Laurence Heyden, and Laurence Heyden leased to Mary Stewart for life. Laurence Heyden dying intestate, letters of administration were, 25th October, 1906, granted to Barbara Heyden, his sole next of kin, and she, 25th March, 1907, granted by deed to the plaintiff.

The property in question consists of two lots about 3 acres in all in extent, upon which is built a house; adjoining it is another lot of about one acre in extent, the property of the defendant, and upon this is another house, in which defendant lives and was living during all the time to be considered in this matter.

William Stewart having admittedly been in possession of the land before the defendant, the paper title of the plaintiff is made out as against the defendant.

William Stewart continued to reside upon and be possessed of this property until the time of his death. After his death, which, as has been said, took place in August, 1895, his widow continued to reside as before; and her possession was not interfered with, notwithstanding the deed she made 15th November, 1895. Precisely upon what terms she was permitted to continue in occupation does not appear; and it is plain that by the lease and quit claim of 20th December, 1905, she admitted the ownership of Laurence Heyden.

The defendant lived in his house upon the property adjoining. He says that 3 or 4 days after the death of William Stewart, his widow was talking of going to Ireland, but that he recommended her to remain in her own house, telling her that she would never want for anything so long as she lived. And then, he says, she said: "Michael, if you can do anything with the place, take it and do what you can with it for yourself and family: all I want is my little house." He says that in 1895 Mrs. Stewart had it in crop: and in the fall he ploughed 1½ acres and in the winter or

the following spring he took away the fence between the two places, and thereafter continued to work the whole 4 acres (with the exception of a small plot by the house) as one. Mrs. Stewart continued to reside in her house until the autumn of 1906. She died in February or March, 1907.

He claims either by this alleged gift or by the Statute of Limitations.

The defendant, I judge by his demeanour and conduct in the witness box, is not worthy of credence, and nothing is to be taken or accepted as proved in his favour by his evidence. So far as any matter in favour of the defendant is concerned, his evidence is to be entirely disregarded. The evidence called to corroborate the defendant in respect of the alleged gift of the land, I am not satisfied with. For example, Howell, though he says that Mrs. Stewart told him that she had given the piece of land to Mike and his little family, also says that he understood that Mike had the place rented from her. His recollection I do not rely upon, and Mrs. Lamb, wife of the defendant, I do not credit. None of these witnesses by their demeanour impressed me favourably, very much the reverse indeed.

I find that no such arrangement has been proved. But that there was a contract between Mrs. Stewart and the defendant, I think is proved.

In a conversation with Martin Sears, which I find did take place substantially as Sears gives it, the defendant said that he had the place rented from Mrs. Stewart at $12 a year. Taking all the evidence, I find that Mrs. Stewart rented to defendant the land in question, all but the house she continued to occupy and the small piece of land adjoining, for a rental of $12 per annum. I find that this arrangement was not made until the autumn of 1897. My reasons for so holding, amongst others, are as follows. I believe that the defendant made an arrangement with Mrs. Stewart, but not that for which he contends, and that this arrangement was made in the summer or autumn immediately before he removed the fence between the two lots.

The evidence as to the time at which the fence was so removed is conflicting. Upon full consideration of the evidence, and notwithstanding the evidence called to corroborate the plaintiff, I remain of the same opinion as I was at

the close of the case, that is, that the fence was not removed until after 1897. I give credit to the evidence of Sears, Maynard, and Mrs. Sollett, and do not credit the evidence of the defendant and those called by him to corroborate him. I think, therefore, that the arrangement was come to some time in the autumn of 1897. If this be the case, the statute does not begin to run until some time in 1898: R. S. O. 1897 ch. 133, sec. 5 (6).

The right of Mrs. Stewart is in the plaintiff, at the least by the deed of 1905, and I think the defence fails.

If the contention made on behalf of the defendant were true, namely, that he came in as a trespasser, I think the statute did not begin to run at all till the removal from the property of Mrs. Stewart. She having the legal title, being in possession of part of the property, was, in contemplation of law, in possession at all times of the whole.

My finding of fact relieves me from considering the question as to the onus of proof in respect of payment of rent. As at present advised, I think that where a claim is made to property under the Statute of Limitations, it is incumbent upon the person so claiming to prove affirmatively the non-payment of rent. I find that defendant has not proved that he did not pay rent to Mrs. Stewart; that, for all that I find proved, he may have paid rent each and every year that he worked the property, down to and including 1906. If the arrangement between Mrs. Stewart and the defendant, I had been able to find began in 1895, as at present advised I should have held that the defence was not made out. Section 5 of the Act provides that the right of the landlord to bring an action "shall be deemed to have first accrued at the determination of the first of such years or other periods or at the last time when any rent payable in respect of such tenancy was received, whichever last happened." As at present advised, I think the person claiming by the statute must, as part of his case, prove that "the last time when any rent payable in respect of such tenancy was received" was 10 years before the teste of the writ. Some support is to be found for this proposition in the judgment of Malins, V.-C., at p. 290 of In re Allison, 11 Ch. D. 284. I do not find a decision upon this point, though there are some cases, as e.g., Doe dem. Spence v. Beckett, 4 Q. B. 601, in which the plaintiff actually did prove affirmatively that

rent was paid. The cases cited by Mr. Creswicke from Lawson on Presumptive Evidence, 2nd ed., ch. 15, do not, I think, assist. The last edition of Best on Evidence (10th ed., 1906), p. 339, moreover lays down that "the fact of payment may be presumed from any . . . circumstance which renders that fact probable."

I think that the impoverished circumstances of Mrs. Stewart, the fact that all she had in the world was this small property, and the facts that the defendant admittedly gave her pork when he killed once a year, meat of other kinds when he bought from the butcher, apples when she wanted them, and money at least once, entitle me to presume, as I do, that in each year at least some of the rent for that year was paid, and that substantially all the rent to which she was entitled was received from the defendant, and that notwithstanding the fact (if it be a fact) that once or oftener she complained that she had not got a dollar or was not getting a dollar of his rent from him. I think that the defendant intended his pork, etc., as in part payment at least of the rent.

I do not consider the effect of the transaction between the defendant and Heyden; that may be found another barrier in the defendant's way.

I think the defence is not made out, and that judgment must be entered for the plaintiff as asked, and an injunction granted as in the order made by my brother Britton: 9 O. W. R. 926.

As to costs, they will follow the event; the taxing officer will consider whether the letter of indemnity, dated 2nd April, 1907, relieving the plaintiff from all liability for costs, does not disentitle him to costs from the defendant. I do not adjudicate upon that point.

I do not think that any improvements made by the defendant were made under such circumstances as to entitle him to a lien, but were made by him as tenant and to increase the value to him as such tenant.

Moss, C.J.O. JUNE 28TH, 1907.

C.A.-CHAMBERS.

MOOR v. CITY OF TORONTO.

Appeal to Court of Appeal — Leave to Appeal from Order of Divisional Court — Absence of Special Grounds — Non-repair of Highway — Injury to Pedestrian — Action not Brought in Time—Misfeasance—Nuisance.

Motion by plaintiff for leave to appeal to the Court of Appeal from order of a Divisional Court affirming judgment at the trial dismissing the action.

J. W. McCullough, for plaintiff.

F. R. MacKelcan, for defendants.

MOSS, C.J.O.:—In this action, which is for injuries alleged to have been received by plaintiff owing to a plank in a sidewalk on the east side of Bathurst street having given way under him while walking upon it, the trial Judge assessed the damages at $300, but dismissed the action because it was not brought until after the lapse of more than 3 months from the occurrence of the accident. A Divisional Court unanimously affirmed the decision of the trial Judge, and plaintiff now asks leave to appeal to this Court.

Upon consideration, I do not find in the case any special reasons for treating it as exceptional, and compelling defendants to submit to a further appeal. Miller v. Township of North Fredericksburg, 25 U. C. R. 31, seems very much in point. It appears to have stood unquestioned during the many years that have elapsed since it was decided, and if it is to be reviewed it should be in a case involving greater interests than the present.

The point that the accident was due to misfeasance on the part of defendants does not strike me as even plausibly maintainable upon the evidence, and the same may be said of the suggestion that the maintenance of the defective sidewalk was a public nuisance causing special damage to plaintiff.

Motion dismissed without costs.