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CARTWRIGHT, MASTER, MARCH 17TH, 1909.

CHAMBERS.

SOVEREIGN BANK v. LAUGHLIN.

Judgment—Default Judgment — Setting aside — Summary Judgment for Part of Claim — Proceeding for Whole Claim — Statement of Claim — Irregularity — Judgment Vacated.

Motion by defendants to set aside a judgment entered by the plaintiffs upon default, and also to set aside the statement of claim.

R. C. Le Vesconte, for defendants.

W. J. Boland, for plaintiffs.

THE MASTER:—The defendants move to set aside a default judgment. This will be allowed. Costs of signing judgment and of the motion to be costs to plaintiffs in any event. Defendants to plead in a week.

The defendants also moved to set aside the statement of claim, because, after obtaining an order for judgment against one of the defendants, the husband of the other defendant, on 2 out of the 3 promissory notes sued on, the plaintiffs are now proceeding as if no such order had been made. This, I think, they can do if so advised. But, inasmuch as they thereby treat that order and the motion for it as being for some reason useless, the costs of that motion and of the present motion, so far as applicable to that question, must be to the defendants in the cause in any event. It will be necessary that the order should vacate the judgment pronounced on 21st October, for reasons given in Cranston v. Blair, 15 P. R. 167. The statement of claim would otherwise be irregular, and would have to be set aside.

HFNDERSON, DRAINAGE REFEREE. MARCH 12TH, 1909.

REFEREE'S OFFICE.

MOORE v. TOWNSHIP OF MARCH.

Municipal Corporations — Drainage—Services of Engineer—Remuneration—Audit by County Court Judge—Municipal Drainage Act, sec. 5a.—Jurisdiction—Absence of Written Request by Municipal Council — Condition Precedent—Delegation by Engineer of Clerical Work to Assistants—Ascertainment of Value of Assistants' Services—Quantum Meruit.

Action by an engineer employed by the council of the defendant municipality to make a report on a scheme for the improvement of the Carp river, under the provisions of the Municipal Drainage Act, for remuneration for services rendered and for moneys disbursed in that connection.

H. A. Lavell, Smith's Falls, for plaintiff.

A. H. Armstrong, Ottawa, for defendants.

THE REFEREE:—Before this action was commenced, the plaintiff's account was submitted for audit to Judge MacTavish, Judge of the County Court of Carleton, under the provisions of sec. 5a. of the Act. During the course of the audit it transpired that there had been no written request of the municipal council, or of any person assessed, filed with the clerk of the municipality, as required by that section, and counsel for the plaintiff then objected to the jurisdiction of the County Court Judge. The learned Judge thought fit to complete the audit, subject to the objection as to his jurisdiction, and duly certified the result. It therefore becomes necessary to decide upon the validity of this proceeding, as, if the audit had been properly had under the Act, the plaintiff would be bound by it, and could recover no more than the amount of the certificate.

I am of the opinion, however, that the written request is an essential pre-requisite to the jurisdiction of the County Court Judge, and that, as it was wanting, the audit was ineffective. It is perhaps not improper that I should add that I understand that Judge MacTavish agrees with this opinion, and that he would not have entered upon the audit had he known of the absence of the written request.

Two other questions of law have to be determined before the amount to which the plaintiff is entitled can be arrived at. The first of these is as to the right of the engineer to delegate to qualified assistants matters of detail such as the taking of levels, the preparation of plans, and other clerical work requiring expert knowledge, but not involving the exercise of judicial discretion.

That the engineer can so delegate such parts of the work leading up to the report is settled by authority. In so far as the exercise of judicial discretion is necessary, it must be the judgment of the engineer himself. He must personally examine each piece of property, personally devise the method of bringing about the desired improvement, and personally decide upon the assessments to be imposed, but the clerical work, which in the average case really takes the more time, may properly be delegated to assistants, whose work the engineer himself can check over, consider, and adopt as his own. See Robertson v. Township of North Easthope, 15 O. R. 423, at p. 431; Township of Elizabethtown v. Township of Augusta, 2 O. L. R. 4, 32 S. C. R. 295.

The other question arises out of the fact that the particular assistants to whom the plaintiff delegated the work already referred to were men who are regularly employed by him on monthly salaries, qualified as civil engineers, but in training under the plaintiff while preparing to qualify as provincial land surveyors. The plaintiff claims to charge for their services at $5 a day, as the amount usually charged by an engineer for a day. The defendants contend that he can charge no more than the proper proportion of their monthly salary, there being no more actually disbursed by the plaintiff in respect of their employment.

My conclusion is that plaintiff is entitled to charge for the services of these assistants just what their services are worth in each case, and that is a question of fact to be decided upon the evidence. The usual engineering charge will, of course, be one criterion of the value of their services, but it may be shewn that any one of these men is worth either more or less than the average engineer. I assume that engineers are like other professional men in this respect, and there should be no difficulty in finding out what the services of these particular individuals were worth to the work. Their monthly salaries may be some evidence of their worth, but probably not at all conclusive evidence, if it be the fact that they were in a sense students or appren-

tices under the plaintiff. It is not a question of disbursement, as contended by the defendants, and indeed in such a case, it would be difficult to get at what the actual disbursement of the employer would be. He has the right to delegate parts of the work, and can charge for his delegate upon the same principle as for himself, though not necessarily as much as for himself. No amount is fixed by the terms of employment, even for the plaintiff himself, and it becomes a matter of quantum meruit—what the work is worth in fact.

These questions being determined, the trial is adjourned until a day to be fixed later, for the taking of appropriate evidence. Should the defendants in the meantime again apply for an audit to the County Court Judge, having a written request on file with its clerk, I know of nothing to prevent their so doing.

The question of costs is reserved until the further hearing.

RIDDELL, J. MARCH 22ND, 1909.

WEEKLY COURT.

RE EAGAN AND DAWSON.

Vendor and Purchaser—Contract for Sale of Land—Title—Charge or Lien—Registered Bond—Personal Obligation.

Petition by the vendors for an order under the Vendors and Purchasers Act declaring that they could make title to certain lands, etc.

J. M. McEvoy, London, for the vendors.

F. E. Perrin, London, for the purchaser.

RIDDELL, J.:—In 1870 John Eagan executed a bond in the sum of $1,000 to be paid to Anne Eagan. The condition was: "If the above bounden John Eagan, his heirs, executors, or administrators, do well and truly pay or cause to be paid over to the said Anne Eagan one-half of the price or purchase money which he, the said above bounden John Eagan, his heirs, executors, or administrators, shall receive or be paid for 'Blackacre' now owned by him, the said above bounden John Eagan, when and at such time or times as the said price or purchase money shall be paid to

the above bounden John Eagan, his heirs, executors, or administrators (the amount of such price or purchase money and the time when such sale shall be made being entirely at the option of the said above bounden John Eagan), then this obligation to be void . . ." This bond was registered.

John Eagan died without having made a sale of the land, but leaving a will, made in 1906, devising the land to his wife Isabella Eagan for life, with remainder in fee to his niece Laura Dorothy Eagan. These ladies have made a sale to Ernest J. Dawson, who raises the difficulty that Anne Eagan has an interest in the land. Anne Eagan is dead, but has left next of kin and heirs-at-law. The vendors contend (as appears from their solicitors' letter) that the bond is a personal bond, and that, owing to the death of Anne Eagan, it is no longer of force. She died after John Eagan.

The present is not such a case as Baker v. Trusts and Guarantee Co., 29 O. R. 456, in which a contract was set out in the bond giving the plaintiffs a charge or lien on the land. While it is true that land is mentioned in the condition, and the whole document has been admitted to registry, I think it clear that no title or interest in the land is given by the bond to Anne Eagan, and no charge or lien is to be found in her favour.

It is not necessary to consider whether the bond is still in force between the representatives of Anne Eagan and those of John Eagan; the whole liability, of any, is a personal liability. It appears from the condition of the bond that the "price or purchase money" was intended to "be paid to . . . John Eagan, his heirs, executors, or administrators," and the purchaser is quite safe in so paying it. Whether any part of this sum must then be paid to the representatives of Anne Eagan is a question with which the purchaser has nothing to do.

Admittedly the title is in the devisees of John Eagan, and they can consequently make title.

An order will be made so declaring, and the purchaser will pay the costs of this application.

CLUTE, J. MARCH 22ND, 1909.

TRIAL.

GOLDIE & McCULLOCH CO. v. TOWN OF UXBRIDGE.

Sale of Goods — Conditional Sale — Property Remaining in Vendors — Machinery with Manufacturers' Name Stamped thereon—Conditional Sales Act—Machinery Affixed to Freehold—Rights of Mortgagees of Freehold—Construction of Statute—Registration of Mortgage before Machinery Affixed.

Action to recover possession of certain machinery and for damages for detention.

H. E. Rose, K.C., for plaintiffs.

J. H. Moss, K.C., for defendants.

CLUTE, J.:—The plaintiffs claim certain machinery as vendors under a conditional order for sale dated 6th November, 1907, from the plaintiffs to the Palmer Piano Company. The order provides that the title to the said machinery shall not pass from the plaintiffs until the purchase price is paid. The plaintiffs prepared plans for affixing the machinery to the freehold of the Palmer Piano Company, which was done by preparing a cement bed to receive the boiler, in which four bolts were embedded and passed up through the cement, and upon which the boiler was placed and bolted down. It was further enclosed with brick and cement, and to remove the same it would be necessary to tear down a considerable part of the wall enclosing it. There is still due to the plaintiffs on the said machinery $2,644.94, and default has been made in the payments.

The plaintiffs claim possession of the said machinery and damages for detention. The defendants claim under a mortgage dated 6th December, 1907, of the lands upon which the said machinery was affixed. The machinery was not in fact placed and annexed to the premises until February, 1908. The defendants claim that the machinery in question was affixed by the said Palmer Piano Company to the lands and premises covered by their mortgage in such a manner that the same cannot be removed from the said premises without injury to and disturbance to the said premises.

The defendants' mortgage being in default, the defendants took possession and are now in possession of the mortgaged premises, and deny the right of the plaintiffs to enter upon the said premises or to remove the machinery therefrom.

I find that the articles in question have the name of the manufacturers, the plaintiffs, stamped or engraved thereon as required by the Act respecting Conditional Sales of Chattels, R. S. O. 1897 ch. 149, sec. 1. Section 10 of that Act was amended by 5 Edw. VII. ch. 13, sec. 14, and provides that "where any goods or chattels, which have been sold on special conditions as in section 1 of this Act mentioned, are affixed to any realty, such goods and chattels shall, notwithstanding, remain subject to such conditions as fully as they were before being so affixed, but the owner of such realty or any purchaser or any mortgagee or other incumbrancer on such realty shall have the right, as against the manufacturer, bailor, or vendor of such goods or chattels, or any person claiming through or under them, to retain the said goods and chattels, upon payment of the amount due and owing thereon."

Mr. Moss contends that this section has no application where the machinery is brought on and affixed to the realty after the mortgage is registered, and, at most, that it is a bare right, and plaintiffs have no right to enter and tear down the wall and remove the machinery. He contended that Sealey v. Caldwell, 12 O. W. R. 245, had no application to the present case, as that case refers to a lease. He also referred to Broom's Common Law, 7th ed., p. 214; Cameron v. Hunter, 34 U. C. R. 121; Reynolds v. Ashby & Son Limited, [1903] 1 K. B. 87, [1904] A. C. 466; Hobson v. Gorringe, [1897] 1 Ch. 182; and Ellis v. Glover & Hobson Limited, [1908] 1 K. B. 388.

I do not think the statute as amended should receive this restricted application. The statute provides that where goods and chattels have been sold on the special conditions mentioned in sec. 1 of the Act, and are affixed to any realty, such goods and chattels shall, notwithstanding, remain subject to such conditions as fully as they were before being so affixed. The machinery in question does fall within sec. 1 of the Act, in my opinion, and is therefore subject to the conditions mentioned in the order for purchase.

What are those conditions? One of the special conditions in this case is that by the terms of the order the title

to the machinery shall not pass from the plaintiffs until paid for. But, it is said, the words which follow shew that this can have no application to the case of a mortgage registered after sale. The words are, "but the owner of such realty or any purchaser or any mortgagee or other incumbrancer of such realty" shall have the right to retain the goods and chattels, upon paying the the amount due thereon. This does not, in my opinion, refer exclusively to a future mortgagee, but it refers to all persons within the classes of owner or purchaser or mortgagee or incumbrancer of the realty. It is intended to be inclusive, not exclusive. Sub-section 2 of sec. 10, as amended. provides that the provisions of this section shall be deemed to be retroactive, and shall apply to past as well as future transactions. It is true that the Act was passed before the transaction in question arose, but it shews the wide scope of the Act, and, if it were held to apply only to mortgages made after the goods or machinery were contracted for, this construction would cut down its application probably one-half.

I do not think any such intendment can be gathered from the statute. It is quite broad enough, in my opinion, to cover the present case. Nor am I pressed with the suggestion that the statute gives the bare right, unavailing because the plaintiffs have no right to take possession of the machinery, if to do so it becomes necessary to tear down the wall which encloses it. One of the conditions is that in case of default in any of the payments the vendors are at liberty without process of law to take and remove the said machinery, and that the purchaser agrees to waive all claims for damages that he might sustain from such removal.

Having regard to the scope and application of the statute, I am of opinion that the defendants, as mortgagees of the premises from the purchasers, are in no better position than the mortgagors in respect of the removal of the machinery in question. The statute expressly declares that where it is applicable the goods and chattels shall remain subject to the said conditions as fully as they were before being so affixed. The relief given to the owner or mortgagee is the right to purchase the machinery by paying the balance of the price. If he does not do that, he has no right to prevent the same being removed, the vendor doing no more damage than is necessary.

The plaintiffs are entitled to remove the machinery and to the costs of action.

MEREDITH, C.J. MARCH 23RD, 1909.

WEEKLY COURT.

RE CLARKE AND TORONTO GREY AND BRUCE R. W. CO.

Railway—Expropriation of Land—Compensation — Award—Interest—Powers of Arbitrators—Dominion Railway Act—Moneys Paid into Court by Railway Company—Interest thereon at Legal Rate Payable to Land-owner—Motion for Payment out—Costs.

Appeals by the railway company from the awards, dated 23rd December, 1908, made by John Smith and Duncan McGibbon, two of the arbitrators appointed under the provisions of the Railway Act, R. S. C. 1906 ch. 37, to determine the compensation to be paid to the respondents respectively for the land taken by the appellants for the purposes of their railway, by which the compensation in the case of the respondent Robert Clarke was fixed at $1,570, and in the case of the other respondents (Margaret and Charles Clarke) at $1,500, and in each case interest on the sum awarded at the rate of 5 per cent. per annum from 14th March, 1907, that being the date of the deposit by the railway company of the plan, profile, and book of reference, was awarded to the respondents.

The respondents also moved for payment to them, out of the sums paid into Court by the appellants on obtaining warrants of possession, of the compensation so awarded, with interest from 14th March, 1907.

I. F. Hellmuth, K.C., and Angus MacMurchy, K.C., for the appellants.

B. F. Justin, K.C., for the respondents.

MEREDITH, C.J.:—At the close of the argument I determined that the appellants had not made a case for reducing the sums awarded as compensation on the ground that they were excessive, and reserved judgment on the two other questions argued: (1) that the arbitrators had no authority to award interest; and (2) that the respondents were not

entitled to anything beyond the compensation awarded, except such interest as according to the practice of the Court is payable on the amounts awarded as compensation while they have been in Court.

By sub-sec. 2 of sec. 192 of the Dominion Railway Act, it is provided that the date of the deposit of the plan, profile, and book of reference which a railway company are by sec. 158 required to make is to be the date with reference to which the compensation or damages which the company are by sec. 155 required to pay, are to be ascertained.

The first step to be taken by the company, in case they are unable to agree with a land-owner as to the compensation or damages which he is entitled to receive, is to serve upon him a notice describing the lands to be taken or the powers intended to be exercised with regard to any lands described in the notice, and a declaration of readiness to pay "a certain sum or rent" as compensation for the lands or for the damages: sec. 193.

Section 215 deals with the right of the company to take possession, and is as follows: "215. Upon payment or legal tender of the compensation or annual rent awarded or agreed upon to the person entitled to receive the same, or upon payment into Court of the amount of such compensation in the manner hereinbefore mentioned, the award or agreement shall vest in the company the power forthwith to take possession of the lands or to exercise the right or to do the thing for which such compensation or annual rent has been awarded or agreed upon."

By sec. 217 provision is made for the granting, before an award or agreement has been made, a warrant for possession, on the Judge being satisfied by affidavit that the immediate possession of the lands or of the power to do the thing mentioned in the notice is necessary to carry on some part of the railway with which the company are ready forthwith to proceed; but the warrant is not to be granted until after a prescribed notice, or unless the company give security to the satisfaction of the Judge, by payment into Court of a sum in his estimation sufficient to cover the probable compensation and costs of the arbitration, and "not less than 50 per centum above the amount mentioned in the notice served upon the party stating the compensation offered:" sec. 218.

The plan, profile, and book of reference, as I have mentioned, were deposited on 14th March, 1907.

The notice provided for by sec. 193 was served on 16th July, 1907, and on 1st August, 1907, warrants for possession were obtained in both cases, $2,300 in the first case and $1,800 in the second case having been paid into Court by the company pursuant to sec. 218.

I am of opinion that the arbitrators had no authority to award interest upon the amounts of the compensation awarded; their authority was only to determine the amount of the compensation; and that they were required to fix as of the date of the deposit of the plan, profile, and book of reference: sec. 192.

It may be and has been said that it is most unjust to a land-owner that he should be restricted in his claim to compensation to the value of the land at the date of the deposit of the plan, profile, and book of reference; that when these have been deposited the power of the land-owner to deal with his land is curtailed, and in the case of a farmer the cropping and cultivation of his land is interfered with, and that, if interest be not allowed, he receives no compensation for the injury caused by so tying up his land; but these are considerations to be urged upon Parliament as reasons for a change in the law, and do not justify a Court in straining the language of the statute so as to obviate inflicting injustice.

The question has recently been considered by the Court of Appeal for Manitoba in In re Canadian Northern R. W. Co. and Robinson, 17 Man. L. R. 396, 7 W. L. R. 593, and, after full consideration and discussion of the various provisions of the Railway Act, the conclusion was reached that "interest on the amount awarded should not be added by the arbitrators, especially in a case where the claimant remains in possession of the property until after the date of the award." I entirely agree with the conclusion reached by the Manitoba Court and with the reasons given by Mr. Justice Phippen for that conclusion, and differ, therefore, as that Court did, from the view taken by my brother Riddell in Re Cavanagh and Canada Atlantic R. W. Co., 14 O. L. R. 523, 9 O. W. R. 842.

Mr. Justin contended that, according to the decisions of the Courts of this province, the arbitrators had power to award the interest in addition to the compensation, but with that contention I am unable to agree.

Re Cavanagh and Canada Atlantic R. W. Co., no doubt, supports his contention, but it may be pointed out that in

that case the railway company had, under the provisions of what is now sec. 178, obtained from the Board of Railway Commissioners authority to take the lands in respect of which the compensation had been awarded, and, by so doing, as my brother Riddell said (p. 530), made it "practically impossible for the owner to do anything with his land except hold it for the company," but I am not at all sure that my learned brother would not have reached the same conclusion if that circumstance had not existed.

My learned brother followed James v. Ontario and Quebec R. W. Co., 12 O. R. 624, which he said decided that "interest is properly allowed to the land-owner on the amount of his compensation from the time of taking," which he interpreted as meaning from the time the land-owner knew that he had to give up the land, "to the time of the award." In the James case the arbitrators had allowed interest from the time of the service on the land-owner of the notice provided for by what is now sec. 193, and all that was decided was that the award was not in that respect open to objection.

There was an appeal in that case to the Court of Appeal, 15 A. R. 1, and one of the objections to the award taken there was that the arbitrators had charged the railway company with interest from the date of the notice to arbitrate, whereas it should only have been charged from the date on which the company took possession of the land. Dealing with this ground of appeal, Osler, J.A., said (p. 10): "The point was somewhat laboured on the argument, but, as the difference appears to be, as one of the learned counsel for the company expressed it, 'so small as to be scarcely worth troubling about,' we may adopt that view, and decline to decide it."

The question, therefore, as far as the Court of Appeal is concerned, is left open for future decision.

In In re Birely and Toronto Hamilton and Buffalo R. W. Co., 28 O. R. 468, the arbitrators had allowed interest on the amount awarded from the time the work was completed and the powers exercised (p. 469), and in dismissing an appeal against this allowance Armour, C.J., held that the arbitrators might in awarding compensation make an allowance in the nature of interest from the time when the right to compensation accrued (p. 470).

The cases of arbitration under the Municipal Act are distinguishable.

In In re Macpherson and City of Toronto, 26 O. R. 558, Street, J., pointed out that the effect of the by-law by reason of which the compensation became payable was to vest the land immediately in the corporation as a public road, and he thought that the land must, therefore, from the date of the passing of the by-law, be deemed to have been taken by the corporation, and therefore that, as declared by authorities binding on him, mentioning Rhys v. Dare Valley R. W. Co., L. R. 19 Eq. 93, In re Shaw and Corporation of Birmingham, 27 Ch. D. 614, 619, and James v. Ontario and Quebec R. W. Co., supra, the land-owner was entitled to interest from the date of the by-law.

The reference by Osler, J.A., in In re Leak and City of Toronto, 26 A. R. 351, 357, is to arbitrations under the Municipal Act, and the observations I have made as to the Macpherson case apply to what was said by him.

As my decision is not subject to appeal to any Ontario or Canadian Court, if indeed it be not absolutely final and without appeal to any tribunal—which must remain an open question until the Judicial Committee of the Privy Council has dealt with an appeal taken to it from an adjudication upon an appeal under sec. 209—I am not bound to follow the decision of my brother Riddell, but I am at liberty to follow that of the Manitoba Court, though not binding on me, in preference to it. I take this course the more readily because the question is one arising on a Dominion statute, and it is important that the same construction should be given to it in all the provinces, and because the Manitoba decision accords with my own view of what the law is.

The result, therefore, of the motions by way of appeal from the awards is that each award must be varied by striking out that part of it which deals with the interest, and that in other respects both motions must be dismissed.

The appellants must pay to the respondents the costs of both appeals, except so much of them as relates to the question of interest, and as to this there will be no costs to either party. I give no costs of this branch of the appeal because I think that, in view of the Cavanagh case, the arbitrators were justified in awarding interest and the respondents in claiming it.

There remains to be considered the question raised on the motions of the land-owners for payment out.

In support of the railway company's contention that the land-owners are entitled only to such interest as according to the practice of the Court is payable on the amounts awarded as compensation while they have been in Court, counsel referred to Re Lea and Ontario and Quebec R. W. Co., 21 C. L. J. 154; Re Taylor and Ontario and Quebec R. W. Co., 11 P. R. 371; and Re Philbrick and Ontario and Quebec R. W. Co., 11 P. R. 376.

In the Lea case the question arose, as in this case, with respect to money paid into Court by the railway company on obtaining a warrant for possession. In the short report of the case it is said that Galt J., "following Great Western R. W. Co. v. Jones, 13 Gr. 355, and Wilkins v. Geddes, 3 S. C. R. 216, made an order for payment to both parties of their respective shares out of the $8,000 with interest thereon at the rate of 4 per cent. from date of the taking of possession of the land by the company."

In Wilkins v. Geddes no such question arose as is presented for decision in this case. In that case the Minister of Public Works for Canada, under the authority of the Public Works Act, paid to the prothonotary of the Supreme Court of Nova Scotia at Halifax $6,180, the amount awarded to a land-owner as compensation for land appropriated to the use of the Dominion, with 6 months' interest added; and the question was as to the liability of the prothonotary to pay interest on the sum so paid to him, his contention being that he was not under any such liability, and all that was decided was that he was not entitled to the interest which the money deposited earned while under the control of the Court, and that an order requiring him to pay to the land-owner interest on the amount deposited, at the rate of 4 per cent. per annum, there being no evidence as to what had been actually earned, was rightly made, and that the Court had jurisdiction to make it.

Great Western R. W. Co. v. Jones, the other case referred to by Galt, J., is reported 13 Gr. 355, but is, I think, quite distinguishable. In that case the question arose owing to a claim by the defendant Jones to land which the principal officers of Her Majesty's Ordnance had agreed to sell to the railway company for £700. Before the purchase money was paid or a conveyance was executed, the railway company took possession. Jones then brought an action of ejectment against the railway company, and the company instituted a suit in Chancery to restrain the action and for other relief.

Jones claimed as mortgagee of Sir Allan McNab, and he and Mrs. McNab and the Principal Secretary of State for the War Department and the Attorney-General for Upper Canada were made defendants to this suit. The Vice-Chancellor held that the plaintiffs were entitled to a conveyance of the land on payment of the £700 sterling with interest, and that Jones was not entitled to any part of that sum, but was unable to decide whether the provincial government or the Ordnance department was entitled to the money, and the Vice-Chancellor therefore ordered that the money be paid into Court, with liberty to the Attorney-General and the Secretary of War to apply as they might be advised. On settling the minutes of the decree a question arose as to the railway company's liability to pay interest. It was contended by the railway company that they had had at their credit with their bankers ever since 2nd August, 1860, more than the amount of the purchase money, and that they had on that day given notice to the War Department of an appropriation of money to meet the sum the railway company were to pay, and all that was decided was, that, in the circumstances of that case, there was no such appropriation as relieved the railway company of liability to pay interest on the purchase price after they had taken possession.

In Fry on Specific Performance, 4th ed., par. 1445, it is said: "It follows from the principles already stated and discussed in this chapter, that, generally, in the absence of stipulation, a purchaser in possession of the estate which is the subject matter of the contract must pay interest on the unpaid purchase money from the time when his possession under the contract commenced until completion;" and in par. 1450 it is stated: "But where a purchaser had been let into possession at the intended time for completion, and afterwards, difficulties having without any fault on his part arisen to delay completion, paid the purchase money into a separate account at a bank, and gave notice to the vendors that the money was appropriated to the purposes of the contract, and that he was ready to complete, Lord Romilly, M.R., held that he was not chargeable with interest after the date of his notice, but must pay to the vendors any interest he had received from the bank in respect of the sum paid in."

The case in which this was decided is Kershaw v. Kershaw, L. R. 9 Eq. 56; and it was upon the principle of it that the railway company in Great Western R. W. Co. v. Jones relied to relieve them from liability to pay interest

after what was claimed to have been an appropriation had been made and notice of it had been given to the War Department.

This principle has, in my opinion, no application to the cases with which I have to deal. Here the payment into Court was a matter entirely for the benefit of the railway company. They desired, in advance of the time when in the ordinary course they would have been entitled to possession, to be let into possession; and the money paid into Court as the condition of obtaining the warrants of possession was paid in only as security to the land-owners for the compensation money to which they were entitled, and the amount of which, through no fault of theirs, had not yet been ascertained; and it would be most unjust to them that moneys so paid in, for which but a very low rate of interest is allowed by the Court, and which they had no means or opportunity of requiring to be invested, should be treated as if it had been paid to them, and that they should be entitled only to the interest payable according to the practice of the Court, when they had been deprived of possession of their land for the benefit of the railway company, and the delay in completing the purchase was in no way due to fault on their part.

The principle upon which appropriation of the purchase money has been held to prevent interest from running, is stated by an eminent text-writer to be extremely unsatisfactory, and the writer adds: "Whether there is or is not an express stipulation for the payment of interest, it is equally difficult to see why any dealing with the purchase money, short of payment to the vendor under the contract, should prevent interest being payable. It must surely be in the power of the vendor to stand upon his legal rights and say non haec in foedera veni, unless in attempting to avail himself of those legal rights he is in substance seeking to take advantage of his own wrong. The authorities, however, appear to establish that appropriation may in certain cases prevent interest from running, though it is believed that these authorities have not been followed in unreported cases by eminent Judges:" Dart on Vendors and Purchasers, 7th ed., pp. 657-8.

Agreeing as I do with the view thus expressed, I am not disposed to extend the application of the rule or supposed rule beyond what is covered by decided cases which it is my duty to follow.

In In re Taylor and Ontario and Quebec R. W. Co., by consent of the land-owner and the railway company, $9,000 had been paid into Court on the company obtaining a warrant for possession, and before the amount of the compensation had been determined; and O'Connor, J., held, on the authority of Great Western R. W. Co. v. Jones, In re Lea, and Wilkins v. Geddes, that the land-owner was entitled only to the rate of interest earned by the fund in Court. In In re Philbrick the question was as to the rate of interest to be allowed after the award, and the learned Chancellor, while he said that it was his duty to follow In re Lea, and that he thought he would have reached the same conclusion independently of it, pointed out that when the award was made, as it was not complained of by either party, it was competent for the proprietor to have applied for and obtained the amount then awarded to him.

It may be pointed out that in the cases in which the railway company are authorised to pay the compensation into Court, it is required to pay in, in addition to the compensation, 6 months' interest on it: sec. 210; and that provision is made that where an order for distribution, payment, or investment is made within 6 months after the payment into Court, a proportionate part of the interest is to be returned to the company.

It seems not very consistent with this requirement that the land-owner, where the railway company for their own purposes compel him to give up possession, should not be entitled to interest on the compensation from the time of taking possession, but is to be left to look to the interest which is earned by so much of the fund as equals the amount of the compensation according to the practice of the Court, which may be nothing, and certainly will be much less than legal interest on the amount of the compensation, although the money in Court is in no sense his, but stands only as security for the payment of the compensation, which he has no power to withdraw, and the investment of which so as to earn interest he has no right to require.

In my opinion, the land-owners are entitled to be paid out of the moneys in Court the amounts of compensation awarded to them respectively, with interest at 5 per cent. per annum from the date of the warrants of possession, and there will be an order accordingly, and the railway company must pay the costs of the motions for payment out.

MacMahon, J. March 23rd, 1909.

TRIAL.

WADE v. LIVINGSTONE.

Promissory Note—Liability of Indorser—Release of Security—Discharge of Indorser—Evidence.

Action on a promissory note for $900.

This was the second trial of the action: see 12 O. W. R. 1211.

R. S. Robertson, Stratford, and J. A. Scellen, Berlin, for plaintiff.

W. M. Reade, K.C., for defendant.

MacMahon, J.:—The plaintiff is the assignee of the estate of Aaron Erb, of the town of Berlin, and the defendant was, at the time of the making of the note hereinafter referred to, also a resident of the town of Berlin.

On 3rd May, 1905, Hannah Boehmer and A. O. Boehmer made a promissory note whereby they promised to pay to the order of P. J. Livingstone, 3 months after date, the sum of $900. A. O. Boehmer, one of the makers, took it to the defendant P. J. Livingstone, and obtained his indorsement thereon. A. O. Boehmer said that Livingstone indorsed it for his accommodation. After the note was indorsed, it was transferred to Erb. A. O. Boehmer says that he and his wife were indebted to Erb at the time of the transfer of the note, and he also says that Erb, no doubt, gave him some cash at the time the note was transferred to him, and Erb says that he got the note from A. O. Boehmer as collateral security for an amount owing by A. O. Boehmer and Hannah Boehmer, and that he might have been given a note to A. O. Boehmer to make use of to meet some of their liabilities.

The note was found by the plaintiff amongst Erb's papers, as forming part of his estate.

A statement was furnished by Erb to Boehmer on 6th March, 1905, commencing on 24th October, 1904, and ending on 9th December, 1904, and a settlement was made on 21st March, 1905, shewing a balance due by Hannah Boeh-

mer and A. O. Boehmer to Erb of $19,144.37, for which a 3 days' note was given, dated 20th March, 1905. A. memorandum at the foot of the account, signed by A. O. Boehmer, Hannah Boehmer, and Aaron Erb, stated: "This covers all notes, mortgages, and life assurance policies now held by Mr. Aaron Erb, these notes, mortgages, and life assurance policies held by Aaron Erb as collateral securities."

The note in question was made and indorsed 6 weeks after the settlement referred to.

In order to avoid any confusion in regard to the accounts, I refer to an affidavit made by Erb proving an account, on 23rd September, 1904, against the A. O. Boehmer Company of Berlin, Limited, for $19,273.45, with particulars attached. It appears from the statement attached that Erb had been giving the A. O. Boehmer Company of Berlin, Limited, his notes, which were supposed to be used in connection with that business, and had also assumed payment of some of the liabilities of that company to 2 or 3 creditors, notably to the W. R. Brock Company, of Toronto, an account of $5,000, and to a man named Sweeney, for $2,000.

On 1st June, 1904, Hannah Boehmer and A. O. Boehmer gave to Erb a mortgage on property in the town of Berlin for $25,000, payable at the expiration of 5 years from that date. This was the fifth mortgage on the property covered thereby, the other mortgages being, one to the Confederation Life Association for $52,000, a mortgage for $1,000 to one Pipe, a mortgage to the Bank of Toronto for $17,000, and a mortgage to Senator Merner for $25,000.

On 10th August, 1904, Erb executed an agreement under seal to Hannah Boehmer and A. O. Boehmer, reciting that they (Hannah Boehmer and A. O. Boehmer) had mortgaged certain lands in the town of Berlin to him (Erb) by a mortgage dated 1st June, 1904, for $25,000, and reciting also that the said mortgage was only given to secure the past indebtedness to Erb of the A. O. Boehmer Company of Berlin, Limited, and past indorsations made by him for the said company and any future advances and indorsations that he might make to the said A. O. Boehmer Company of Berlin, Limited, or the said Hannah Boehmer and A. O. Boehmer, and Erb agreed to discharge the said mortgage when all such indebtedness was fully paid.

On 3rd December, 1906, Erb gave an agreement under seal to Roy W. Haines as follows: "I hereby agree to subscribe for $25,000 of 6 per cent. preference stock and $5,000

common stock, non-assessable and fully paid up, in the company to be formed and to be known as the Berlin Hotel Company Limited, provided the company accepts in payment of the said stock an assignment or release of a certain mortgage held by me on the hotel property known as the Walper House in the town of Berlin. This agreement is made on the understanding that the company is duly incorporated without unnecessary delay and also that the company do acquire the said Walper House hotel property. The company to be formed to have a capital stock of $250,000; the preferred stock shall be limited to $100,000."

Erb subsequently subscribed for the stock and released the mortgage. The mortgage was of no value; the property if sold would not pay the prior incumbrances, and the stock also proved valueless.

Counsel for the defendant contended that Erb in releasing the mortgage was releasing a security given by the makers to Erb, and the defendant was therefore released as indorser of the note in question.

There is an equity to which a surety is entitled—that the creditor shall not waste the securities given by the principal debtor, but, if this extends to a security given by a surety, it does not extend further than to exclude such wasteful dealing with the security: Margette v. Gregory (1862), 4 W. R. 630; De Colyar, 3rd ed., p. 448.

The mortgage was given expressly "to secure the past indebtedness to me (Erb) of the A. O. Boehmer Company of Berlin, and any future advances that I (Erb) may make." It formed a security to Erb for the indebtedness of the A. O. Boehmer Company and of Hannah Boehmer and A. O. Boehmer only, for the advances already made and to be made by Erb to the Boehmer Company and to Hannah Boehmer and A. O. Boehmer.

There was no renewal of the note and no giving of time by the holder. The note was protested on the day of its maturity, and was simply held by the transferee amongst his papers. The defendant could have paid it and sued the makers. See Canadian Bank of Commerce v. Woodward, 8 A. R. 347.

There must be judgment for the plaintiff for $900, the amount of the note, $1.25 protest fees, and interest from 7th August, 1905, at the rate of 5 per cent. I do not think the defendant should be called upon to pay the costs of the appeal or of the new trial (see 12 O. W. R. 1211).

MARCH 23RD, 1909.

DIVISIONAL COURT.

MENZIES v. FARNON.

Marriage—Action for Declaration of Invalidity — One Party under 18—Absence of Parents' Consent—R. S. O. 1897 ch. 162, secs. 15, 31 (1)—Fulfilment of Requirements—Collusion — Motion for Judgment in Default of Appearance—Refusal—Rules 586, 593—Trial on Oral Evidence —Discretion —Appeal.

Appeal by plaintiff from judgment of TEETZEL, J., ante 586.

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

Harcourt Ferguson, for plaintiff.

No one appeared for defendant.

RIDDELL, J.:—The Rules relied upon by the appellant are Con. Rules 586, 593, the argument being that, as there is no statement of defence delivered, the allegations of fact in the statement of claim must be taken as true, and that such facts entitle the plaintiff to the relief sought. But this reasoning has two defects at least: first, the non-delivery of a statement of defence is not made proof in fact of the allegations in the statement of claim, but only the equivalent of an admission by the defendant of the truth of such allegations; second, Con. Rule 593 does not entitle the plaintiff to any particular relief ex debito justitiæ, but only to "such judgment . . . as the Court may consider the plaintiff . . . to be entitled to." It is further to be noticed that even the admission which the defendant "shall be deemed" to make by non-delivery of a statement of defence is subject to the provision that this is subject to being modified or entirely abrogated by order of the Court or a Judge: Con. Rule 586.

It is not necessary in this case to discuss the question whether the Act giving the Court "jurisdiction and power," under certain circumstances, "to declare and adjudge that

a valid marriage was not effected or entered into" (7 Edw. VII. ch. 23, sec. 8) obliges the Court to exercise such power —no doubt, the Court would always exercise a jurisdiction and power given for the benefit of the public. Assuming that the Court should exercise such power in a proper case, the inquiry arises whether the present comes within that category.

In strictness, upon a motion for judgment under Con. Rule 593, only the pleading may be looked at: Smith v. Buchan, 36 W. R. 631; Faithful v. Woodley, 43 Ch. D. 287; but, assuming that affidavits may be looked at, I do not think the case is advanced.

As the learned Judge says, this is a matter affecting the public and not the parties alone; the Act was never intended to effect divorces or to be applied in any but a case proved beyond any peradventure.

Here we have two persons of differing creeds who at one time seem to have been fond of each other, but who have not seen each other for nearly 3 years. She swears she has ceased to care for him, and he swears "I do not care any more for her." Add the fact that he must have sworn to what was untrue upon procuring the marriage license, or some one must be swearing to what is untrue now; and the case appears at once as a most suspicious one.

The matter being one affecting public morality, I think that the Court would not be justified in considering the alleged facts as being true. If necessary, an order might be made that the non-delivery of statement of defence should not be taken as an admission. But that is not necessary. Con. Rule 593 does not make it obligatory on the Court to pronounce judgment as asked. "The Court is not bound to give judgment for the plaintiff, even though the statement of claim may on the face of it look perfectly clear, if it should see any reason to doubt whether injustice may not be done by giving judgment; it has a discretion to refuse to make the order asked for:" per Lord Esher, M.R., in Charles v. Shepherd, [1892] 2 Q. B. 622, at p. 624. "I do not think that we are compelled to give judgment upon the statement of claim, if we see that by so doing we should be dealing with the case in an improper manner:" per Wright, J., in Baker v. Wadsworth, 67 L. T. 301. See also Jenney v. Mackintosh, 61 L. T. 108; Verney v. Thomas, 36 W. R. 398 ad fin.

Without going so far as to say that no case could possibly arise for the exercise by the Court of this statutory power upon a motion for judgment, whether with or without affidavits, such a case must be an extraordinary one. No ceremony of marriage should be declared invalid, as a rule, unless the circumstances establishing the invalidity are proven in open Court, coram populo, by viva voce evidence, which evidence, unless and until provision be made for the representation of the people upon such trials, the trial Judge would no doubt test by searching cross-examination, and which, in any event, he would have an opportunity of testing by seeing and hearing the witnesses.

The circumstances of the present cases, as they are urged upon us, are not such as to take it out of this general rule. The plaintiff and her mother are said to be in England: no reason is assigned for their not coming to Toronto except their alleged poverty. We cannot very well make one rule for the poor and another for the rich, and witnesses are coming every day or so to Toronto at a greater expense.

I quite agree with my brother Teetzel's remarks as to the advisability of the appointment of a public officer having jurisdiction similar to that of the King's Proctor in England under the Acts of 1857 and 1860.

The appeal should be dismissed.

FALCONBRIDGE, C.J.:—Without binding myself by saying that under no circumstances would I pronounce a judgment of this nature in camera, and without evidence viva voce, I think my brother Teetzel was quite right in the view which he took of this particular case.

BRITTON, J., stated reasons in writing for the same conclusion.

CARTWRIGHT, MASTER. MARCH 24TH, 1909.

CHAMBERS.

McLEAN STINSON & CO. LIMITED v. WHITE.

Discovery — Examination of Officer of Plaintiff Company—Relevancy of Question—Conspiracy—Damages—Settlement with some Defendants—Amount Paid.

Motion by the defendants for an order requiring the president of the plaintiffs (an incorporated company doing

an insurance business) to answer a certain question put to him on examination for discovery.

Glyn Osler, for defendants.

Shirley Denison, for plaintiffs and their president.

The Master:—This action is brought by one insurance company against 7 other companies and 5 persons connected with them. The statement of claim alleges a conspiracy by all these defendants to injure the plaintiffs' business, and says that in pursuance of such conspiracy 6 of the 7 defendant companies broke their contracts with the plaintiffs, and formed a new company to enable them to carry on business so filched from the plaintiffs. Damages are asked against all the defendants, except the new company, for the conspiracy, and also damages for the alleged breaches of the several contracts by the other 6 defendant companies.

On the examination for discovery of the president of the plaintiff company, it appeared that he puts the damages for the conspiracy at $25,000 (Q. 182). but that the action has been settled as to most of the defendants and with 3 of the defendant companies. Then at Q. 418 et seq. he states that the whole damages on both branches might have been settled for $35,000, of which $25,000 was referable to the conspiracy. He states the exact amounts, even to odd cents, which is claimed against the remaining 3 companies for breaches of their contracts, amounting in all to $8,691 (or nearly so). He is asked how much the other defendants have paid in making a settlement. On the advice of counsel he refused to answer this question. The defendants move to require him to do so.

It was agreed by counsel to argue the motion before me notwithstanding McWilliams v. Dickson Co., 10 O. L. R. 639, 6 O. W. R. 424.

It was argued that the claim for damages for conspiracy is based on tort, and that a recovery against any of the defendants or a settlement made with them would be a satisfaction. If that is so, then it was said the amount so paid would be immaterial. It was argued by Mr. Denison that the question need not therefore be answered at this stage, referring to Evans v. Jaffray, 3 O. L. R. 327, 1 O. W. R. 29, 158; Bedell v. Ryckman, 5 O. L. R. 670, 2 O. W. R. 86, 148, 280. Those, however, were cases in which the plaintiff was asking discovery which would not be relevant unless his

main cause of action was first established. Here the plaintiff is making a demand for damages against all the defendants; and, in view of the plaintiff's total claim being put at $35,000, and that for the conspiracy branch at $25,000, I think the defendants are entitled to know how much was paid by those who settled, as they may have paid the whole $35,000, or even possibly more, unless the plaintiffs will withdraw any further claim except perhaps that based on the several breaches of the defendants' contracts.

If the defendants were to set up the admitted settlements as a bar to the claim against them for conspiracy, or even for both causes of action, then the question would have to be answered. There seems no reason why this cannot be done now, as the settlements are admitted.

The motion will, therefore, be granted, with costs in the cause to the defendants.

MACMAHON, J. MARCH 24TH, 1909.

TRIAL.

LUCK v. RANNIE.

Fraud and Misrepresentation—Lease of Farm—Representations of Lessor as to Condition — Evidence — Damages—Costs.

Action for damages for false and fraudulent representations alleged to have been made by the defendant which induced the plaintiffs to lease from the defendant his farm in the township of Wellesley, being lot 9 in the 10th concession, containing 185 acres, whereby the plaintiffs sustained large damages.

E. P. Clement, K.C., and E. W. Clement, Berlin, for plaintiffs.

H. B. Morphy, K.C., for defendant.

MACMAHON, J.:—About 16th January, 1908, Samuel Luck saw an advertisement in the Mail and Empire of Toronto, which read: "For sale or to rent, 190 acres adjoining the village of Linwood, known as the 'Maple-Hurst Farm.' On the premises is a good frame house and large bank barn, soil a rich clay loam, well under-drained and well watered

with three wells, one ever flowing. Fall ploughing done. For further particulars apply to Alexander Rennie, Linwood P.O."

The father, Samuel Luck, and his son Norman, shortly after the above date, went to Linwood, arriving at 9 o'clock, and stayed at defendant's house at one end of the farm that night. Early in the morning they were shewn through the large bank-barn, with which no fault was or could be found, and the cow stable in the same building as the horse stable, and they had an opportunity of seeing it, and Samuel Luck told Joseph Rumstedler that he had seen it and it was a good cow stable. The plaintiffs alleged that the defendant said all the stables were as good as that one.

Samuel Luck lived in Dundas, and Norman lived in Hamilton, and they were obliged to leave by the train about 8 o'clock, so their inspection of the buildings was therefore limited. Samuel Luck a day or two after his visit wrote the defendant asking for further particulars and received a reply which both Samuel and Norman said contained these statements: "Farm 200 acres, 185 under plough, all thoroughly under-drained; no noxious weeds; good bank-barn; good stabling under it all; three wells, one flowing; good driving sheds and 3 pig pens; a good frame house. One of the best grain farms in the county."

Samuel H. Luck, a son who lived in Lindsay, said the letter written by defendant was sent to him and was lost, but he repeated almost word for word the contents as given by his father and his brother Norman.

The parrot-like way in which the alleged contents of that letter were repeated by the 3 witnesses led me to suspect that there had been some recitals before the trial.

The defendant, whom I regard as both honest and truthful, said that the advertisement is true in fact; that in the letter he wrote he said the words "thoroughly under-drained" were not used; that what he wrote was "fairly under-drained," which would mean no more than "well under-drained" in the advertisement. In giving his evidence at the trial, he said he did not know of any farm in the township better under-drained than his, considering that his land was low.

A lease was executed on 24th January, 1908, demising the farm to the plaintiffs for a term of 5 years from 1st March, 1908, at $400 per annum.

Almost all the witnesses, both for the plaintiffs and the defendant, said that the farm in question was the best land in the township, and the plan (exhibit 7) shews that at the time of the execution of the lease there were 293 rods of drain in the field respecting which the plaintiffs made complaint.

Samuel Luck said they harvested about 2,500 bushels of grain from 113 acres sown, or 22 1/9 bushels to the acre. He thought they should have had 3,100 bushels, and he blamed the deficiency of 600 bushels to the imperfect drainage of one field, in which he said the principal drain was too high at one point and the water ran the wrong way and did not reach the outlet provided for it.

The evidence as to the quantity of grain harvested by the plaintiffs was not satisfactory. J. W. Briggs said that Samuel Luck told him he had a good crop of barley; that Luck came to his place after the last threshing, in October, and said he had 2,000 bushels; and when the first threshing took place, in August, he understood from Luck he had 1,200 bushels. Thomas Hackett, a farmer in the township, said Luck's crop was good last summer; and Joseph Rumstedler, 42 years old and a farmer all his life, said he saw Luck's crop of grain in the barn on 15th September, and thought there were 3,000 bushels there. Rumstedler had a good farm of 75 acres, but all he got from it in 1908 was 20 bushels to the acre.

After the threshing, the defendant asked Samuel Luck about his crop, and he said it was a good crop and he had more than he expected. And many of the farmers noticed the immense stack of straw after the threshing.

It was in evidence by many witnesses that the summer of 1908 was exceptionally wet, and as a consequence the crop on the low lands was light. The high lands in that township, which were not affected by the wet weather, produced much larger crops than the low-lying lands—some yielding 35 and 40 bushels to the acre.

The field of which the plaintiffs made complaint was about 20 acres in extent, and is the one already referred to as having 293½ rods of drain pipe in it. Evidence was given by James Bennett, a ditcher, that there was more tile entering the drain than he found on any farm he ever dug, and that the field of which Samuel Luck complained was the best drained field he ever worked in; that the drain of

which Luck complained as being too high at one point, he had built with a spirit level and had made it with a proper fall, and it was not too high, as Luck had stated. That Luck's statement was incorrect is manifest from the rapidity with which the water rushed out when the mouth of the drain was opened.

A number of farmers who lived in the neighbourhood and knew the farm, considered it was well drained. I think that the trouble with the drain arose while the plaintiff was ploughing near the mouth of the drain, causing the mouth of the tile to be filled with earth; Luck, according to Ranney, ploughed against the mouth of the drain; and, as a witness said, as soon as the tile was cleaned the water rushed out. Another cause attributed by a number of witnesses to the killing of some of the plaintiffs' crop in a part of the 20-acre field, was his neglect, immediately after the crop was sown, to run a furrow or furrows to carry off the surface water in these low lands, and as a consequence the crop soured.

As to the cow stable, it formed part of the large bank-barn which the witnesses agree in saying was faultless. Samuel Luck says he had no objection to make to the bank-barn, and, as he saw the cow stable which formed part of it, when he paid his first visit to the defendant's farm, and as I find it will accommodate 50 head of cattle and keep them comfortable, he has nothing which can be reasonably complained of as to that. He owned but few cattle so far during his tenancy, and his grievance is imaginary. He turned part of the cattle stable into a root house.

The complaint as to the well is that the platforms were out of repair. They were in repair when the plaintiffs entered into possession, but the plaintiffs and their servants chopped and split wood thereon, and the platforms became out of repair in consequence.

The dwelling-house was built when the defendant purchased the farm 35 years ago. It was warm and comfortable and in fairly good condition, although requiring some slight repairs after Mr. Hargrave, a former tenant, left it, shortly after the plaintiffs took possession of the farm.

On 22nd July the plaintiffs consulted Clement & Clement, solicitors of Berlin, who wrote the defendant referring to the advertisement, stating that defendant had represented that the "farm was well under-drained and well

fenced," and saying: "They (the plaintiffs) now find that the farm is scarcely fenced at all, that the buildings are in a very bad condition, and that the under-draining is so bad that they have absolutely lost the crop on 10 acres."

The defendant replied on 31st July saying: "I had a carpenter at work making gates and men putting a wire fence along the road; in a few days more I will have everything in order. I told Mr. Luck that I would repair everything to suit him, and he said that was all he wanted. And in regard to the draining he was sowing his grain 10 days before others, and he has the best crops around here. I will have everything in first class order in a few days. Mr. Luck bought his cattle, and some of them were breachy, and they broke down the fences; and I think that vexed him."

After the letter of 22nd July, received by the defendant from Clement & Clement, Samuel Luck wanted Ranney to grant him an extension of the lease, so as to make it 10 years, saying if Ranney would give him a 10-year lease they would get along all right. This Ranney refused to do; and Ranney said Luck had been ugly ever since.

Joseph Ament, a carpenter, was employed by the defendant to make repairs about the farm, and the sum of $443 was expended on the different works. In addition, some new drains were put down in the spring. The driving shed Ament said was fully repaired, and is good for 8 or 10 years without further repairs. The hog-pens he rebuilt with brick and good lumber. On 19th December the defendant directed Ament to repair the cow-stable, and was about to do so when Luck came and ordered him off the premises. Ament paid Luck $10 for cleaning out stables, and $4.50 for repairing fences on the farm.

Coming now to the fences, which were made a serious ground of complaint. Good wire fences were around most of the farm, but the rail fences dividing the fields were in some instances blown down during the winter, but the rails were on the farm for convenience of rebuilding, and could have been placed in position by the work of a couple of men in 2 or 3 days.

Luck pastured 9 or 10 head of cattle in a field on the farm, for which he received $9 and $10 a head for the season, so that his income from that source alone amounted to between $90 and $100.

There was no false representation made as to the farm or the buildings.

The alleged shortage of the crop—if there was such shortage—was not due to the want of under-draining, as that was ample; but to the manner in which the plaintiffs ploughed near the mouth of the drain, causing the tile to be filled up; and also by their neglect to make the necessary furrows with the plough after ploughing, so as to carry off the surface water in the low ground.

Walter Hargrave was the tenant in possession at the time plaintiffs leased the premises, and with the plaintiffs' consent occupied the dwelling-house for a few days after the plaintiffs took possession of the farm. When a tenant leaves premises, some repairs are sure to be required, of which the landlord is not likely to be cognisant until the tenant quits. But in the present case the defendant more than remedied any disrepair left by Hargrave by the expenditure of $443—more than a year's rent.

Doubtless, the defendant, in making repairs on such an extensive scale, designed that the buildings should be placed in such a state as would preserve them for some years without further expenditure.

The plaintiffs may have been put to some inconvenience by the blowing down of the fences, which could have been put up in a few days; and they will be amply compensated for all losses and inconvenience by a verdict for $40 and costs on the Division Court scale. The defendant will be entitled to set off costs on the Superior Court scale.

BRITTON, J. MARCH 25TH, 1909.

WEEKLY COURT.

SHORTREED v. RAVEN LAKE PORTLAND CEMENT COMPANY.

Company—Winding-up—Manufacturing Company — Plant and Chattels—Claim by Mortgagee—Order upon Liquidators for Delivery.

Motion by plaintiff for an order directing the delivery up to plaintiff, by the liquidators of the defendants, of the

chattels and plant removed by them from the premises mortgaged to the plaintiff and covered by the plaintiff's mortgage.

A. E. H. Creswicke, K.C., for plaintiff.

A. E. Knox, for defendants and liquidators.

BRITTON, J.:—Prima facie the plaintiff is entitled to the possession of the so-called chattels and plant, specially mentioned in the mortgage.

The liquidators are officers of the Court, and the application is for the purpose of enabling the plaintiff, by the possession of these chattels and plant, to maintain and operate the mortgaged premises in the manufacture of cement. The liquidators ought not, by taking possession of these chattels, to interfere with the right of the mortgagee to the benefit of what was intended to be, and what was, in my view of it, in fact, the property given by the defendant company as security to the plaintiff.

On principle the case of Pound v. Hutchins, 42 Ch. D. 402, seems to me in point: see pp. 420-422.

If the parties cannot agree as to what articles are specifically covered by the mortgage (as to that I think there should be no difficulty), the plaintiff may have leave to bring an action for those in dispute, or on application an issue may be directed as to such articles.

The following cases were cited: In re Rainy Lake Lumber Co., Stewart v. Union Bank of Lower Canada, 15 A. R. 749; Canada Permanent Loan and Savings Co. v. Traders Bank, 29 O. R. 479; Haggert v. Town of Brampton, 28 S. C. R. 174; In re Canadian Camera and Optical Co., A. R. Williams Co.'s Claim, 2 O. L. R. 677. I have read and considered these. No one of them is authority against or presents any difficulty to my making the order.

Costs of all parties to this motion to be paid by the liquidators out of the estate of the defendants.

MEREDITH, C.J. MARCH 25TH, 1909.

TRIAL.

DINEEN v. YOUNG.

Vendor and Purchaser—Contract for Sale of Leasehold Interest in Land — Action for Specific Performance — Vendor Holding Lands under Sub-lease — Objection of Purchaser —Waiver—Time—Approval of Assignment—Existence of Easement or Right of Way not Known to Purchaser — Inaccurate Description of Property — Materiality — Validity of Objection — Dismissal of Action — Unfounded Charges of Fraud — Costs.

Vendor's action for the specific performance of an agreement for the sale to and purchase by the defendant of the plaintiff's leasehold interest in land on King and Pearl streets, in the city of Toronto.

C. Millar, for plaintiff.

C. J. Holman, K.C., for defendant.

MEREDITH, C.J.:—The agreement is contained in an offer dated 18th June, 1907, addressed to the plaintiff, and signed by the defendant, and the property to which it refers is described as "your leasehold interest in and the buildings on that certain parcel of land being composed of part of the easterly portion of town lot number 8 situate on the north side of King street, in the city of Toronto . . . described as follows, that is to say: commencing at a point in the northern limit of King street distant 148 feet 8½ inches easterly from York street, at a point which is the centre of a party wall between street numbers 126 and 128 King street west, in the city of Toronto; thence northerly following the said centre line of the said party wall 186 feet 7½ inches, more or less, to Pearl street; thence easterly along the southern limit of Pearl street 30 feet 3½ inches; thence southerly parallel to the eastern limit of said lot number 8 and along the west face of a brick wall 186 feet 7½ inches, more or less, to a point in the northerly limit of King street 31 feet 1½ inches from the south-westerly angle of said lot number 8; thence westerly along the northern limit of King

street 31 feet $1\frac{1}{2}$ inches to the place of beginning; as shewn on page 3 in lease number 7304S."

Among other provisions the offer contains the following:—

"The vendor shall not be bound to produce any abstract of title or any title deeds or evidence of title except such as he may have in his possession, nor to furnish a surveyor's plan or description or proof that the buildings stand wholly within the limits of the said lands."

"The purchaser shall search the title at his own expense, and shall have 10 days from said date of acceptance (i.e., of the offer) to examine the same, and, if no written objection be made within that time, shall be deemed to have accepted the title."

Then follows a provision enabling the vendor to cancel the contract in the event of a valid objection being made to the title, which he is unable or unwilling to remove.

This offer was accepted on 19th June, 1907.

The defendant relies upon various grounds which, as he contends, entitle him to refuse to carry out his contract; and among these are certain alleged misrepresentations set out in paragraphs 5, 6, and 7 of his statement of defence, none of which, as I find, was established.

I find also that there was no intentional concealment by the plaintiff or by his solicitors of the existence of the easement or right of way to which I shall afterwards refer.

The land described in the agreement was in fact subject to this easement or right of way, and the plaintiff had not in fact a lease from the owner in fee of the land, but was a sublessee only.

The only grounds of defence which it is necessary to consider are two:—

(1) The effect of the fact that the plaintiff held the lands under a sublease.

(2) The effect of the existence of the easement or right of way.

There was upon the land at the time the agreement was entered into a 3-storey brick building, composed of 2 tenements numbered 124 and 126 King street west, which included one-half of a stairway on the east immediately adjoining tenement 122 King street west. This stairway extended from the sidewalk in front to a landing on the

storey above the ground floor. The other half of this means of access was upon the land of the adjoining owner to the east, and the whole was owned and used in common by this owner and his tenants, and the plaintiff and his tenants, and is the only means by which access can be had by the plaintiff and his tenants to the upper storeys of his building.

In other words, there exists over the one-half which is built on the plaintiff's lands an easement or right of way for the purposes of the building to the east and its occupants, and the plaintiff is entitled to a similar easement or right of way for the purposes of his building and its occupants over that part of this means of access which is built on the land of the adjoining owner.

The description of the interest of the plaintiff as a leasehold interest imports, I think, that his interest is that of lessee under a lease granted by the freeholder, and it seems to be settled that under an agreement to sell such an interest the purchaser is not bound to accept an interest under a sub-lease: Madeley v. Booth, 2 DeG. & Sm. 718; In re Beyfus and Masters Contract, 39 Ch. D. 110; Broom v. Phillips, 74 L. T. N. S. 459; Dart on Vendors and Purchasers, 7th ed., p. 1086; though in Camberwell and South London Building Society v. Holloway, 13 Ch. D. 754, the Master of the Rolls seemed to think otherwise, and in Waring v. Scotland, 57 L. J. Ch. 1018, North, J., seems to have decided otherwise.

I am, however, of opinion that the defendant is not entitled now to raise this objection. By the terms of the agreement he, as has been seen, was required to make his objections to the title within 10 days, and he was to be deemed to have accepted the title if no written objection to it was made within that time. Not only was no objection made within the 10 days, but on 22nd June, 1907, the plaintiff's solicitors sent to the defendant's solicitors a draft of the assignment of the lease to the defendant, which was returned approved on 11th July following, and in this draft assignment it is shewn that the plaintiff held under a sub-lease from one John D. Irwin, and that Irwin held the land in question and other land under a lease from the owner of the freehold, Augusta Elizabeth Ross. In addition to this, the defendant's solicitors in their letter to the plaintiff's solicitors of 19th July, 1907, answering a contention of the latter that the time had long passed for objection to the title, and that they were therefore not entitled to ask for "a

survey of the property shewing the lands to be wholly within the metes and bounds of the lands described in the assignment of the lease," say: "We had certain objections to the title which our Mr. Drayton saw you personally about, and which were all disposed of to his satisfaction, with the understanding that a survey was to be produced for his inspection."

It is clear, I think, that, having regard to these circumstances, it is not now open to the defendant to raise this objection.

The remaining objection to be considered is that as to the effect of the existence of the easement or right of way.

I am unable to find that the defendant was aware of the existence of it at the time the contract was entered into, and the fact is, I think, that he had no knowledge of its existence until a survey was made in the latter part of July. Nor had anything that had taken place the effect of waiving the right of the defendant to refuse to complete on the ground that the plaintiff was unwilling or unable to procure a release of the easement or right, if the existence of it entitled the defendant to refuse to complete.

The correspondence between the solicitors down to the time of the discovery of the existence of the easement took place, as far as the defendant and his solicitors were concerned, in ignorance of there being any such easement; but the plaintiff knew of its existence, and did not disclose it to the defendant, though I acquit him of any intention to mislead or of any improper motive in not disclosing it. See as to this Heywood v. Mallilieu, 25 Ch. D. 357.

This contract does not contain the usual condition as to compensation, but, even where there is that condition, it will not entitle the vendor to enforce the contract against an unwilling purchaser where there is misdescription upon a point material to the due enjoyment of the property: Dart, 7th ed., pp. 151-2, and cases there cited.

The description of the property as contained in the agreement was, in my opinion, owing to the existence of the easement or right of way, inaccurate upon a point material to the due enjoyment of the property, and the defendant is not, in my view of the law, bound to take, instead of that which the plaintiff contracted to sell to him, the land described in the agreement subject to this easement or right of way, although there would pass with it an easement over a part of

the adjoining owner's land equal in area to the part of the plaintiff's land which is subject to the easement. It may be that most purchasers would prefer to have what the plaintiff can convey, but the defendant is within his right in answering the claim that he is bound to do so by saying, non haec in foedera veni.

The action must, therefore, be dismissed, but I dismiss it without costs, because the defendant has made charges of fraud against the plaintiff and his solicitors, and has entirely failed to establish them.

RIDDELL, J. MARCH 26TH, 1909.

TRIAL.

McKIM v. BIXEL.

Partnership—Mining Syndicate—Liability of Members for Debt Incurred after Applications for Membership, but before Effective Acceptance—Costs.

Action to recover from the defendants, as members of a syndicate, the amount of an account for advertising.

C. P. Smith, for plaintiffs.

W. E. Middleton, K.C., and J. Baird, K.C., for defendant Bixel.

E. C. S. Huycke, Cobourg, and W. T. J. Lee, for defendant Hardcastle.

RIDDELL, J.:—On 27th November, 1906, a declaration of co-partnership was registered in the registry office for East Toronto, signed by George Cass Campbell, of New York, manager, Albert Ferdinand Dexter, of Chicago, miner, and Charles W. White, of New York, "Esq." The partnership was for the acquisition, development, and operation of mines, mining locations, and all business incidental thereto, the promotion and incorporation of other syndicates or joint stock companies in connection therewith, and the acquisition and purchase of stocks, bonds, or other securities in connection with the purpose or objects aforesaid, and under the name and firm of the Cobalt Nipigon Syndicate.

. They advertised extensively. One advertisement in its material parts read thus:—

"COBALT.

"The Cobalt Nipigon Syndicate (registered).

"The above syndicate has been formed to buy, develope, locate, and exploit properties in the Cobalt region and elsewhere in Canada. It already owns over 700 acres of patented mining lands. Special memberships in this syndicate are $120 each, or $10 per month for 12 months. Those who become full paid members by Dec. 5th will share immediately in the distribution of 40 per cent. of the stock in the Nipigon Mines Company Limited, which is just being incorporated.

"Title to all mineral lands is and will be vested in the Trusts and Guarantee Company Limited . . in trust to dispose, pro rata, the above stock among special full paid members under the direction of the syndicate.

"Fill in appended application for membership and mail to the Trusts and Guarantee Company Limited, Toronto, Canada, who will send you receipts for each payment, or, if paid in full, a non-assessable membership certificate.

"All applications must be accompanied by draft payable to our order.

"Geo. C. Campbell,
"Syndicate Manager."

"To the Trusts and Guarantee Company Limited, register and transfer agents, Toronto, Canada.

"I hereby apply for ...... memberships in the Cobalt Nipigon Syndicate and enclose draft for $........ payable to the syndicate.

"Name ....
"Address ...."

In an adjoining column the incorporation of the Nipigon Mines Company Limited was advertised, and it was said:—

"No stock will be offered for public subscription . . .

"To share in the above corporation, applications for fully paid special memberships in the Cobalt Nipigon Syndicate must be accompanied by payment in full (certified cheque or

draft) and mailed to the Trusts and Guarantee Company Limited, Toronto, Canada, Register and Transfer Agents, on or before December 5th, 1906. Cheques or drafts to be payable to the syndicate."

It is written: "Surely in vain the net is spread in the sight of any bird:" but this does not extend to men. Two pesons at least, these defendants, were found to apply for "membership," the defendant B. from Brantford and H. from Hamilton township. Their applications upon the blank form of the advertisement, and accompanied with a draft or cheque for the full amount, $120, were received by the Trusts and Guarantee Co. on 6th December, 1906. The receipt of these applications was not acknowledged.

On 14th February, 1907, the Trusts and Guarantee Co. countersigned and registered and then sent to the defendants a membership certificate, which read as follows:—

"No. 1116. Special Membership No. 1.

"The Cobalt Nipigon Syndicate (registered).

"This certifies that O. B. is the holder of one fully paid and non-assessable special memberships (sic) of the Cobalt Nipigon Syndicate (registered), transferable only on the books of the syndicate by the holder hereof in person or by attorney, upon surrender of this certificate. This certificate shall not become valid until countersigned by the Trusts and Guarantee Company Limited, Transfer Agent and Registrar of Transfers.

"This certificate of special membership entitles the holder hereof to share pro rata with other special memberships 40 per cent. of the net proceeds or profits from sales or other disposition of the properties of the syndicate under the direction of the syndicate.

"Countersigned and registered.

"The Trusts and Guarantee Co. Limited,

"Toronto, Canada. The Cobalt-Nipigon Syndicate.

"H. W. . . . . per G. C. Campbell,

"Transfer Agent and Registrar. Syndicate Manager."

Mr. H.'s certificate was numbered 1119, but he had, along with Mr. B., the proud distinction of having his certificate also "Special Membership No. 1."

With a large red seal in the corner and the word "Preference" printed in large red letters across the face of the certificate, it looks truly imposing and captivating.

The agreement between Campbell, Dexter, and White, forming the syndicate, had provided that they should be entitled to 60 per cent. of the assets of the syndicate, and the holders of memberships to 40 per cent: "(11) applicants for memberships may be of two classes, namely, cash memberships and instalment memberships. Applicants for cash memberships shall be liable to pay to the syndicate the full amount of the purchase price of their membership upon the acceptance of their application. . ." And sec. (15) provides for a certificate on the form already set out. Section (29): "No person shall be entitled to a membership in the syndicate unless he receives a certificate thereof signed by the manager and countersigned by the registrar."

On 14th December, 1906, after receipt of the two applications, but before the issue of the certificates, the syndicate, through Campbell, the manager, entered into a contract with the plaintiffs for advertising. The syndicate did not pay: whereupon the plaintiffs sued the syndicate and Campbell, and on 21st December, 1907, recovered judgment against both defendants in that action for $2,868.14. No part of this has been paid, and now the plaintiffs in that action sue the two applicants, B. and H., for the amount, having, it would seem, discovered that they had sent in their applications and their money before the date of the contract for advertising, the subject matter of the previous action.

The case was very fully and learnedly argued by counsel for all parties: in the view I take, it is not necessary to consider the many and somewhat intricate points argued.

It is beyond question that, unless in exceptional classes of cases, of which the present is not an example, "an incoming partner can neither sue nor be sued in respect of a liability of the old firm, unless there is some agreement, express or implied, between himself and the person or persons suing him or being sued by him:" Lindley on Partnership, 6th ed., p. 295. Nothing of the kind appears here. The application for membership, assuming that membership of this peculiar kind can constitute a partnership, does not at once, even accompanied by the purchase price, constitute the

applicant a partner. He must get a certificate according to the syndicate contract, or, at the very least, he must have his application accepted. The only acceptance is in the form of a certificate which does not become effective until 14th February, 1907. It cannot, I think, be held that the defendants were in fact members until that day. And there is nothing incongruous in the applicants being entitled to a share in the new company's stock upon sending in application and money by a fixed day and being benefited as though they were members from that day, but still not becoming members till a subsequent day. They are, therefore, not liable in this action.

As at present advised, I do not think that membership in the peculiar manner of this membership renders the member liable as a partner. No doubt, Mr. Campbell would have been much startled to be informed that B. or H. could make the syndicate liable for anything.

The action should be dismissed. I am sorely tempted to refuse the defendants their costs, but on a careful consideration of all the facts I do not think I should do so. They are not to blame for this action being brought, and should not suffer more than they have already done, for their lack of foresight.

RIDDELL, J. MARCH 27TH, 1909.

TRIAL.

STITT v. ARTS AND CRAFTS LIMITED.

Partnership—Firm of Real Estate Agents—Registration of Certificate of Partnership—Moneys Paid to Manager of Business—Moneys Paid to Firm as Agents for Lessee of Premises Desiring to Procure Substitute as Lessee — Liability of Firm — Liability of Persons Registered as Partners, but not in Fact Partners — No Necessity for Registering Partnership, not Being a Trading Partnership —Liability of Principals.

Action to recover the sum of $325 paid by plaintiff to defendant Sherman T. Sutton, in the circumstances mentioned in the judgment.

R. S. Robertson, Stratford, for plaintiff.

A. J. Russell Snow, K.C., for defendants the Arts and Crafts Limited.

W. H. Garvey, for defendant Carscallen.

G. W. Holmes, for defendant R. W. Menzie.

H. W. Mickle, for defendants Sutton & Co., S. T. Sutton, and Grace Sutton.

RIDDELL, J.:—This action, reported upon a question of practice in 11 O. W. R. 589, 645, came on for trial before me at the non-jury sittings, Toronto.

I find the following facts. In January, 1907, Grace Sutton, R. W. Menzie, and H. M. Carscallen, 3 of the defendants in this action, formed a co-partnership under the name and firm of S. T. Sutton & Co., to carry on the business of real estate and insurance agents, and a certificate was registered in the registry office. No other certificate was ever registered in respect of the partnership so formed; but in May, 1907, Menzie and Carscallen withdrew from the firm, assigning to one Charles E. Boyd, who took their place with the consent of Grace Sutton, the other partner. Sherman T. Sutton had been from the beginning of the partnership manager for the firm, and he continued as such throughout all the time of importance in the present inquiry.

The Arts and Crafts Limited, being tenants of certain property, employed S. T. Sutton & Co. to procure some one to take their place as tenant, and the plaintiff called upon S. T. Sutton & Co. All his dealings were with Sherman T. Sutton, and he did not know and never considered who constituted the firm. On 14th October, 1907, he made an offer in writing to S. T. Sutton & Co., and at the same time made a deposit by cheque "of $325 to be applied on the rent, providing this offer is accepted." The offer was not accepted, but another was substituted for it; this was not accepted until after the plaintiff had withdrawn it, which he did on 22nd October, 1907. The cheque had been deposited to the credit of S. T. Sutton & Co., and most, if not all, of the proceeds thereof shortly thereafter withdrawn by Sherman T. Sutton for his own use. Sherman T. Sutton promised to repay the money several times, but did not do so. The plaintiff never took possession.

The plaintiff sues (1) the Arts and Crafts, (2) Sherman T. Sutton, (3) Menzie, (4) Grace Sutton, (5) Carscallen, and (6) Sutton & Co. The Arts and Crafts in their statement of defence and counterclaim set up an acceptance of the second offer; that the plaintiff took possession; that they have never received the sum of $325 sued for, "but their agents the . . firm of S. T. Sutton & Co., by their manager . . Sherman T. Sutton, received the same on their behalf." They counterclaim for damages for the non-acceptance by the plaintiff of the premises. Sherman T. Sutton sets up that he is a mere employee of S. T. Sutton & Co.; S. T. Sutton & Co. and Grace Sutton, that the offer had been accepted, and therefore the plaintiff had no claim; and Menzie and Carscallen say that Sherman T. Sutton had no right to act and did not act for them.

Upon these facts the plaintiff is entitled to a judgment against the firm S. T. Sutton & Co. and the members thereof for $325, with interest thereon from the day upon which the return was demanded and promised, 22nd October, 1907.

Admittedly Grace Sutton was a member of the firm at the time; the judgment will, therefore, be against her, as well as the firm.

The plaintiff does not press for judgment against Sherman T. Sutton; the action will therefore be dismissed against him, but without costs.

Boyd not being a party to the action and no amendment being asked, he cannot be dealt with here.

The position of the Arts and Crafts being that the offer was accepted and the money properly was retained by S. T. Sutton & Co., they must also pay the costs of action, and their counterclaim must be dismissed with costs. I cannot give judgment against them for the $325, as they did not receive it, even by implication, though they narrowly escape from placing themselves in an awkward position by their pleadings.

The other defendants, Menzie and Carscallen, now must be dealt with. If the statute R. S. O. 1897 ch. 152, secs. 1, 7, apply, there can be no escape for them, but does it apply? Section 1 (1) provides that "all persons associated in partnership for trading, manufacturing, or mining pur-

poses, shall cause to be delivered to the registrar of the registry division in which they carry or intend to carry on business, a declaration in writing signed by the several members of such co-partnership." The form is given in schedule A; and sec. 7 provides that "until a new declaration is made and filed . . . no person who shall have signed the declaration filed shall be deemed to have ceased to be a partner . . ."

The test as to whether a given partnership is for trading purposes, within the meaning of the Act, seems to be the same as that determining whether the partnership should be called a trading partnership for other purposes: Pinkerton v. Ross, 33 U. C. R. 508. The test, speaking broadly and in general terms, is whether the partnership is intended to carry on business buying or manufacturing for sale and selling: ib.

In the present instance this was not in contemplation, the whole business being to act as middlemen between the vendor and purchaser of real estate, and as intermediary between insurer and insured: see Royal Bank v. Maughan, 12 O. W. R. 899, for the case of an insurance agent. I do not think, therefore, that the statute required the registration of this co-partnership. The registration of the co-partnership not being required, I do not think that the effect of such a registration is the same as though it had been a co-partnership which came within the Act. No doubt, had the plaintiff here been misled by the registered document so as to give credit to the firm on the strength of the various names appearing, these defendants would have had great, if not insuperable, difficulty in avoiding responsibility. But I do not think the rigid, if salutary, rule of the statute applies to change the ordinary law in cases in which the registration of the co-partnership is not required by the statute, but is a mere act of supererogation. The ordinary law is that, while "the retirement of a partner in no way affects his rights against or obligations to strangers in respect of past transactions," yet "if . . one not known to be a partner retires, the authority of his late partners to bind him ceases on his retirement, although no notice of it be given:" Lindley on Partnership, 6th ed., pp. 295, 223.

The action, therefore, cannot succeed as against Menzie and Carscallen, and must be dismissed. Having registered

a certificate of partnership, they should have corrected it by causing a new certificate to be registered. Not having done so, they invited just such an action as this. The dismissal, then, will be without costs.

CORRECTION.

On p. 513 ante, the name of the case reported should be MILLIGAN v. TORONTO R. W. Co.