THE

ONTARIO WEEKLY REPORTER

VOL. 25 TORONTO, DECEMBER 4, 1913. NO. 5

SUPREME COURT OF ONTARIO.

FIRST APPELLATE DIVISION. NOVEMBER 3RD, 1913.

WATERS v. TORONTO.

5 O. W. N. 210.

Malicious Prosecution — Municipal Corporation—Liability for Acts of Mayor and Board of Control — Arrest of Employe of Power Company—Charge of Disorderly Conduct—Scope of Instructions —Appeal—Dismissal of.

DENTON, Co.C.J., 24 O. W. R. 746, *held*, that neither the Mayor nor the Board of Control of a city have any authority to bind the city by their acts in procuring an illegal arrest, and the city is therefore not liable to the person so arrested in damages therefor. *Kelly* v. *Barton*, 26 A. R. 608, followed.

SUP. CT. ONT. (1st App. Div.) affirmed above judgment with costs.

Appeal by the plaintiff from a judgment of HIS HONOUR JUDGE DENTON, of the County Court of the county of York, dated 14th June, 1913 (24 O. W. R. 746), which was directed to be entered after the trial of the action before His Honour sitting without a jury on the 29th May. 1913.

The appeal to the Supreme Court of Ontario (First Appellate Division) was heard by HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE and HON. MR. JUSTICE HODGINS.

H. H. Dewart, K.C., and N. S. Macdonnell, for appellant.

C. M. Colquhoun, for respondent.

HON. SIR WM. MEREDITH, C.J.O.:—The action is for malicious prosecution and the allegations of the statement of claim are that the respondent on the 30th October, 1912, falsely and maliciously and without any reasonable or prob-

able cause, caused the appellant to be arrested and imprisoned (par. 2) and that on the following day the respondent falsely and maliciously and without any reasonable or probable cause, caused a police constable, named David McKenney, to appear as informant before a Justice of the Peace and to charge that the appellant had been disorderly on the previous day contrary to a by-law of the respondents (par. 3).

Evidence was adduced by the appellant establishing that on the 30th day of October, 1912, he was arrested by Sergeant Martin, a member of the police force of Toronto, and afterwards taken to the police station; that the reason for the arrest was the refusal of the appellant to stop the work which he was superintending of erecting steel poles and putting up transmission wires on a city street for the Toronto and Niagara Power Company. It was also shewn that McKenney acted in obedience to the direction of Sergeant Verney, acting Inspector of No. 7 Division, and that the latter acted under the written instructions of the Chief Constable.

It was proved that on the 31st October, 1912, McKenney laid an information before the Acting Police Magistrate of the city, charging the appellant and eight other men with having been disorderly contrary to a city by-law; that they were remanded from time to time until the 30th of the following December when they were all acquitted, and an endeavour was made to fix the respondent with responsibility for these proceedings.

It appeared in evidence that previous to the arrest of the appellant there had been disputes between the respondent and the power company as to the latter's right to erect its poles in the city streets; that on the 2nd October, 1912, the Mayor had written to the Chief Constable authorizing him "to prevent the erection of certain steel towers by the Toronto Power Company and that an attempt on that day to erect the poles had been stopped owing to the intervention of the police acting under the authority of this letter. On the following day a letter was written by the Chief Engineer of the Power Company to Mr. Harris, the respondent's Commissioner of Works, in which, after stating that owing to a misunderstanding of the company's foreman of construction, he had started to erect the poles, although he claimed that he had no intention of stringing wires, he went on to say: "I trust that you will consider this a misunderstanding

rather than an attempt to put this through without your consent and apologize for the situation that has arisen," and concluded by asking Mr. Harris to forward his consent or advise of his objection.

On the 12th October, 1912, Harris replied to the Chief Engineer advising him that the consent would not be given.

In the meantime, at a meeting of the Board of Control, held on the 8th of the same month, a communication was read from the City Solicitor advising that he had received an application on behalf of the Toronto and Niagara Power Company to erect poles for the purpose of crossing the Hydro-Electric Power line on Davenport road and Bathurst street, and that the drawing, No. 329, accompanying the application, shews the erection of towers instead of poles as mentioned in the application, and recommending that the application should be refused; and there was also read a communication from the Commissioner of Works forwarding a copy of a letter from the Chief Engineer of the Toronto Power Company, Limited, covering the matter of the application referred to in the solicitor's communication, whereupon it was ordered:

"That the City Solicitor and the Commissioner of Works be advised that the Board of Control on behalf of the city refuse to locate the poles mentioned in the application of the Toronto Power Company, and further order that the police department be authorized to prevent the poles in question being erected."

This action of the Board of Control was not communicated to the police authorities nor was it reported to the Council.

On the 17th October, 1912, a letter was sent by the Power Company to the Commissioner of Works, informing him that the city's consent had been asked "as a matter of courtesy only," notifying him that the company proposed to carry out the work with the least possible delay, and asking to be informed of the city's attitude in the matter. To this letter the commissioner replied, on the 25th of the same month, that he had nothing to add to his letter of the 12th October.

There was no evidence of any other communication, written or verbal, from the Mayor to the Chief Constable or the police authorities after the letter of the 2nd October, to which I have referred; and it was assumed at the trial—although

there was not a tittle of evidence to support the assumption —that the action of the police authorities of which the appellant complains was taken under the impression that it was authorized by that letter.

We are of opinion that the letter of the Mayor of the 2nd October did not authorize nor assume to authorize any such action as was taken by the police authorities, and that the resolution of the Board of Control was not a ratification of what the Mayor had done, nor would it have been even if it had been communicated to the police authorities, any authority for their action.

The authority in both cases was to prevent the erection of the poles or towers and was not and cannot by any process of reasoning be treated as an authority to arrest or to prosecute anybody.

What really happened, I have no doubt, was that in carrying out the Mayor's directions to the Chief Constable the appellant resisted the members of the police force and in so doing were, in the opinion of the police sergeant, guilty of disorderly conduct within the meaning of the city by-law, and that the officer, as a conservator of the peace and not under the authority of the Mayor's letter, did the acts of which the appellant complains.

The appellant's case, therefore, failed on the facts; but I agree that if it had been otherwise, and the authority given by the Mayor had been to arrest, he must have failed, for the reasons given by the learned Judge; the case being not distinguishable from *Kelly* v. *Barton* (1895), 26 O. R. 608; 22 A. R. 522.

The appeal should be dismissed with costs.

HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE and HON. MR. JUSTICE HODGINS, agreed.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. OCTOBER 29TH, 1913.

BUELL v. FOLEY.

Conversion — Finding of Jewelry by Mill-hand in Rubbish—Ownership of.

SUP. CT. ONT. (2nd App. Div.) dismissed an action brought by plaintiff, a mill-hand against defendant, another mill-hand for conversion of certain jewelry found in old papers they were sorting, holding that plaintiff had no title either as owner or finder.

Appeal by plaintiff from a judgment of HON. MR. JUSTICE LATCHFORD, pronounced 25th June, 1913.

Action by operator in St. Lawrence Paper Mills to recover from defendant, another operator, possession of diamonds and emeralds, or in alternative for $2,000 damages, alleged by defendant to have been found by her in some old papers she was examining and which she charges were picked up and appropriated by defendant while plaintiff was examining the papers from which they came.

HON. MR. JUSTICE LATCHFORD at trial dismissed the action with costs.

The appeal to the Supreme Court of Ontario (Second Appellate Division), was heard by HON. SIR WM. MULOCK, C.J.EX., HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE LEITCH.

George A. Stiles, for the plaintiff, appellant.

Robert Smith, K.C., for the defendant, respondent.

Their Lordships' judgment was delivered by

HON. SIR WM. MULOCK, C.J.EX. (v.v.):—It is impossible for us to discover how the plaintiff has any title to this property. She was not the owner of it: the owner was some innocent person and it happens to be found in the bale of goods. And even if the custom of the mill entitled the plaintiff to hold it, if she found it, as against the owner of the mill, so that they would not be accountable, that would not give her title, for the evidence is that finders were owners; and though some other holder may have trespassed, the plaintiff did not find the articles. She did not derive

title by finding, so how can she become possessed—how can she be said to own this jewelry.

This appeal will have to be dismissed.

It is very generous of Mr. Smith to allow the Court to intervene; under the circumstances we hope that $50 will satisfy the costs of the appeal.

The appeal is dismissed, with $50 costs.

SUPREME COURT OF ONTARIO.

FIRST APPELLATE DIVISION. NOVEMBER 3RD, 1913.

VANDERWATER v. MARSH.

5 O. W. N. 213.

Building Contract—Action by Contractor — Location of Building—Duty as to—Mistake by Contractor—Power of Clerk of Works to Bind Employers — Certificate of Architect not Obtained — Condition Precedent—Action Premature—No Evidence of Mala Fides on Part of Architect—Work not Performed to Satisfaction of Owners—Appeal—Costs.

KELLY J., 24 O. W. R. 133, dismissed an action by contractors against the owners of certain buildings and the architect thereof, for the price of certain excavations and concrete work done for the said buildings upon the ground that as the contract provided for payment to be made upon the certificate of the architect, which had not been obtained, and as no collusion or improper motives had been shewn to have actuated the latter, the action was premature.

"The power of a clerk of works is only negative, his power being only to disapprove of material and work, and not to bind the owner by approving of them."

SUP. CT. ONT. (1st App. Div.) *held*, that as the work had not been done strictly according to the plans and specifications of the architect and to his satisfaction, plaintiff could not recover.

Appeal dismissed with costs if respondents pay for extras ordered verbally, otherwise without costs.

Appeal by the plaintiff from a judgment of HON. MR. JUSTICE KELLY, dated 26th February, 1913, which was directed to be entered after the trial before him, sitting without a jury, at Belleville on the 15th November, 1912. See 24 O. W. R. 133; 4 O. W. N. 882.

The appeal to the Supreme Court of Ontario (First Appellate Division), was heard by HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE and HON. MR. JUSTICE HODGINS.

E. Guss Porter, K.C., for appellant.

W. S. Morden, K.C., for respondent company.

W. N. Tilley, for respondent Herbert.

HON. SIR WM. MEREDITH, C.J.O.:—The action is brought to recover the contract price for "the excavating, erection of wooden forms and concrete work and supplying the materials therefor for a foundry building" for the respondent company, and the value of extra work done and materials provided by the appellant in connection with the building.

The contract is dated 10th May, 1912, and provides that the work shall be done conformably to the plans, specifications and details prepared by the respondent Herbert, who was the architect of the building, and that it shall be done "in all things to the entire satisfaction of the architect."

The provision as to the payment for the work is made subject to the condition that the covenants, conditions and agreements of the contract have been in all things strictly kept and performed by the appellant; and the contract also provides that no payment shall be made without the production of the architect's certificate "as in the conditions provided."

The contract contains no other provision as to the architect's certificate; and no other document was adduced providing that the production of it should be a condition precedent to the right of the appellant to claim payment.

The appellant has been unable to obtain the certificate of the architect; and in his statement of claim—presumably because the production of the certificate was in the opinion of the pleader a condition precedent to the right of the appellant to claim payment—and to get rid of the supposed effect of that condition, it is alleged that the appellant performed the work and supplied the material as provided by the contract, and that "after all necessary times had elapsed" he requested the respondent Herbert "to issue to him the usual certificate to enable him to receive his payment from the defendants, Marsh and Henthorn, Limited (the respondent company), but the said defendant Herbert refused to grant said certificate and still refuses to grant the same, with the knowledge of his co-defendants, Marsh and Henthorn, Limited, and the said Marsh and Henthorn, Limited, al-

though requested by the plaintiff to pay him the amount of the said contract price, refused and still refuse to do so."

The reason for the refusal of the architect to give the certificate was due to the fact that the appellant had so laid out one of the buildings and done the concrete work that the walls of the foundation were so placed that it was not, and the building to be erected on it would not, have been as they were designed and shewn on the plans and drawings, to be rectangular in form, which necessitated a change in the structural steel work for the building, and other changes, which involved considerable additional expense to the respondent company.

It was sought by the appellant to throw the responsibility for this mistake on the respondent company, because, as it was said, the appellant when beginning his work was misled by stakes which had been planted by the engineer of the respondent company and which the appellant assumed were intended to indicate the position which the building was to occupy. In this attempt the appellant failed at the trial; and we see no reason for differing from the conclusion of the learned trial Judge as to it.

It was also contended that as the respondent company had gone on with the erection of the superstructure upon the foundation which the appellant had constructed, instead of requiring him to rectify the mistake as he contended he could have done at a comparatively small expense, the respondent company was now not entitled to rely upon the departure from the terms of the contract which the mistake involved.

This contention also failed at the trial, and rightly so, we think. What was done by the respondent company was really in ease of the appellant; and the proper conclusion upon the evidence is that the appellant was informed that while the respondent company would not insist upon the foundation walls being rebuilt there would be deducted from the contract price of his work the amount of any additional expense the respondent company should be put to in connection with the work the other contractors were to do, and that the appellant assented, or at least did not object to that course being taken.

No case was made on the pleadings or at the trial of collusion between the respondents so as to dispense with the necessity of the production of the architect's certificate, if, by the terms of the contract, the production of it was a con-

dition precedent to the right of the appellant to claim payment for his work.

The appellant is not, in our opinion, entitled to recover even if the production of the architect's certificate is not a condition precedent to his right to be paid. It was by the contract a condition precedent to the right of the appellant to be paid the contract price that the covenants, conditions and agreements of the contract should have been in all things strictly kept and performed by him, and that the work should have been done conformably to the plans, specifications, and details prepared by the architect and in all things to his entire satisfaction, and neither of these conditions has been performed by him.

It is open to grave question whether the production by the appellant of the architect's certificate is necessary. The provision of the contract as to this is incomplete. The words "as in the conditions provided" qualify the preceding words "but no payment to be made without the production of the architect's certificate." There is, as I have said, no other provision as to it in the contract, and no other document to which the contract refers, containing any provision as to it; and it may be, therefore, that the provision of the contract which the respondents invoke has no effect. It is, however, unnecessary, in the view we take, to decide that question.

The claim for extra work and materials, so far as it is in question on the appeal, is for work done and materials supplied owing to an increase in the size of the building. The contract provides that no claim for any work in addition to that shewn in the drawings or mentioned in the specifications unless it was sanctioned by the architect in writing previous to its having been done, shall be allowed.

There was no written sanction of the architect for the doing of the extra work and supplying the extra materials, payment for the value of which the appellant claims, and the right to recover it is therefore excluded by the contract.

The work was done and the materials were supplied upon the verbal order of the architect and there is no just reason why the appellant should not be paid for it.

If the respondent company stands upon its strict right and will not pay for them it will be proper, in the exercise of our discretion as to the costs, to deprive them of the costs of the appeal.

The result is that the judgment must be affirmed and the appeal dismissed with costs if the respondent company elects to pay for the extras, but otherwise without costs.

We cannot part with the case without expressing regret that the litigation should have been rendered necessary by the refusal of the appellant to agree to what appears to be the reasonable deduction from the contract price which was proposed by the respondent Herbert.

HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE and HON. MR. JUSTICE LEITCH, agreed.

SUPREME COURT OF ONTARIO.

FIRST APPELLATE DIVISION. NOVEMBER 3RD, 1913.

GOODWIN v. MICHIGAN CENTRAL RW. CO.

5 O. W. N. 198.

Negligence — Damages — Death of Superannuated Minister—Estate Passing to Children — Expectation of Life — Beyond Normal—Evidence as to — Benefit from Continuance of Life—Probable Savings from Pension Received by Deceased — Computation of Damages — Present Worth of Five Years' Pension—Appeal—Costs.

BOYD, C., awarded the children of a superannuated minister killed by the negligence of defendants and who was in receipt of a pension from the Superannuation Fund of his church, five times the amount of such annual pension as damages for his death, holding that his reasonable expectation of life was five years and the probability was from his financial position that the whole of such pension would have been saved by deceased.

SUP. CT. ONT. (1st App. Div.) varied above judgment by awarding in place of the sum awarded the present worth of the five annual instalments of pension.

Judgment affirmed with above variation, no costs of appeal to either party.

Appeal by the defendant company from the judgment of HON. SIR JOHN BOYD, C., pronounced 21st May, 1913, after the trial before him, sitting without a jury, at Welland, on that day.

The appeal to the Supreme Court of Ontario (First Appellate Division), was heard by HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE, and HON. MR. JUSTICE HODGINS.

W. B. Kingsmill, for the appellant company.

G. Lynch-Staunton, K.C., for the respondents.

HON. SIR WM. MEREDITH, C.J.O.:—The action is brought by the executors of James Goodwin, deceased, on behalf of his seven children, to recover damages under the Fatal Accidents Act, for the death of the deceased, who was killed owing, as alleged, to the negligence of the appellant company. That the death was caused by the negligence of the appellant company is not disputed, but it is contended that the persons on whose behalf the action is brought have suffered no pecuniary loss by his death, or at all events that the damages should have been assessed at a much less sum than $1,650, the amount awarded by the Chancellor.

The facts, having regard to which the question in dispute is to be determined, are not in controversy. The deceased was a superannuated Methodist minister and was in receipt of an allowance of $330 a year, during his life, from the Superannuation Fund of that church, and he was possessed of property of the value of about $23,000, which, by his will, he left to his children in equal shares. He was eighty-two years old and his expectation of life, according to the mortality tables, was shewn to be 3.90 years, but according to the testimony of Dr. Smith, a medical witness, who was well acquainted with the deceased, and had been his physician for several years, his physical condition was such that he "might easily have been expected to live for ten years."

The Chancellor came to the conclusion that the reasonablbe expectation of life of the deceased was five years, and being of opinion that upon the evidence there was a reasonable expectation that what the deceased, if he had lived, would have received from the Superannuation Fund, would have been saved by him and have passed at his death to his children, he assessed the damages on that basis, allowing as the pecuniary loss sustained by the children five of the yearly payments of the superannuation allowance.

In support of the appeal, it was contended, first, that the children of the deceased had sustained no pecuniary loss by his premature death because his whole estate passed to them at his decease and they had thus been pecuniarily benefited by it; second, that at all events they had benefited by the accelerated enjoyment of his estate more than they had lost by the superannuation allowance having ceased; and third, that

in any case the Chancellor erred in assessing the damages on the basis of a five years' expectation of life and in allowing the sum of the allowance for five years instead of the capitalized value of it.

It is clear, I think, that the first of these contentions is not maintainable. Upon the evidence the proper conclusion is that there was a reasonable expectation that the whole of the estate of the deceased would go to his children at his death and it would therefore be improper, for the purpose of ascertaining their pecuniary loss, to treat the children as being benefited by his premature death to the extent of the value of the estate. They benefited owing to his premature death only by the enjoyment of the estate being accelerated, and had it not been found upon the evidence that there was a reasonable probability that the whole of the income of his estate would have been saved by the deceased and have passed to his children at his death, the second contention would have been entitled to prevail; but that finding is a complete answer to it.

That the Chancellor was right in order to arrive at a conclusion as to the probable duration of the life of the deceased in taking into consideration the fact that his life was an unusually healthy one and on that account in finding the probable duration of it to be greater than that of the average life is, I think, clear upon principle, and if authority for the proposition is needed, it will be found in *Rowley* v. *London & Northwestern Rw. Co.* (1873), L. R. 8 Ex. 221, 226.

For these reasons, we are of opinion that the judgment is right, except as to the computation of the damages. The pecuniary loss to the children on the hypothesis on which the Chancellor proceeded was not the sum of the allowance for five years but the present value of the five yearly payments which, capitalizing them at five per cent. per annum, amounts to $1,428.73.

The judgment should therefore be varied by reducing the damages to that sum and with that variation should be affirmed and the appeal be dismissed.

As success is divided, there will be no costs on appeal to either party.

HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE and HON. MR. JUSTICE HODGINS, agreed.

SINGLE COURT, CORNWALL.

HON. MR. JUSTICE BRITTON. OCTOBER 31ST, 1913.

RE JOHN OUDERKIRK.

5 O. W. N. 191.

Will—Construction of—Provision for Widow—Claim of Dower by—Presumption against — Election—Annuity to Widow—Lien on Whole Estate for — Right to Resort to Corpus for Arrears—Gift to Infant Beneficiary — Discretion of Executors as to Income.

BRITTON, J., *held*, that where there is such reasonable provision made by a testator for his widow as warrants a strong inference that such provision was intended to be in lieu of dower, the widow is put to her election.

Re Hurst, 11 O. L. R. 6, distinguished.

Application by the executors for the construction of the will of the late John Ouderkirk and for the opinion and advice of the Court upon certain matters connected with the estate.

The deceased made his will on the 26th day of November, 1910, and died on the 18th day of February, 1911.

He left an estate of the total value of about $6,500.

His widow, Jessie Ouderkirk, is 42 years of age, and was the second wife of the testator.

The youngest child, Mildred, is the only child of the widow Jessie, and Mildred is an invalid and has been so from her birth.

The will, except the formal part, is as follows:

"I direct all my just debts, funeral and testamentary expenses to be paid and satisfied by my executors hereinafter named, as soon as conveniently may be after my decease.

I give, devise and bequeath all my real and personal estate of which I may die possessed or entitled to in the manner following, that is to say:

"To my wife, Jessie Ouderkirk, my house and lot in the village of Berwick so long as she remains my widow, also the sum of two hundred dollars per annum, payable every six months, so long as she remains my widow, said sum of two hundred dollars shall be a lien on the value of my estate.

"To my son, Simon Ouderkirk, the sum of one thousand dollars absolutely.

"To my son, Isaiah Ouderkirk, the sum of one thousand dollars absolutely.

"To my son, William Ouderkirk, the sum of one thousand dollars absolutely.

"To my daughter, Mildred Ouderkirk, if living at my death, the sum of three thousand dollars, and in the event of my wife, Jessie Ouderkirk, getting married again, my daughter Mildred shall have my house and lot in Berwick.

"And I give my executors hereinafter appointed the right to dispose of any real estate or other property of which I may die possessed of for the purpose of paying the bequests hereby made, and of investing the funds in a chartered bank or in first-class securities. Interest on said trust fund to be used for paying the annual payments to my wife, Jessie Ouderkirk, as long as she remains my widow.

"My son, Simon Ouderkirk, shall pay John McIntyre on or before October 1st, 1911, the sum of one hundred dollars, which said sum my son Simon now owes me.

"To my son, Theodore Ouderkirk, the sum of five hundred dollars, said sum to be invested by my executors hereinafter appointed in trust for my said son, he to receive the interest thereof. In the event of anything happening my said son the said sum of five hundred dollars shall be used for his benefit.

"The devise and bequest of my daughter Mildred Ouderkirk, is expressly subject to the unfettered discretion of my executors. If my executors deem it advisable that to preserve the portion of my estate hereby willed my said daughter, Mildred Ouderkirk, that they should control, manage and invest this portion of my estate in them for the purpose of supporting and sustaining my said daughter, Mildred Ouderkirk.

"In the event of my daughter Mildred dying the property hereby devised to her shall be divided as follows:

"To my son, Arthur Ouderkirk, the sum of five hundred dollars.

"To my daughter, Emma Jane, wife of John McRae, the sum of one hundred dollars.

"To my daughter Ellen, wife of Duncan McPherson, the sum of one hundred dollars.

"To my son, Simon Ouderkirk, the sum of seven hundred dollars.

"To my son, Isaiah Ouderkirk, the sum of six hundred dollars.

"To my son, William Ouderkirk, the sum of six hundred dollars.

"The sum of three hundred dollars to be laid aside for the purpose of paying the funeral expenses of myself, my wife and my daughter Mildred.

"All the residue of my estate not hereinbefore disposed of, I give, devise and bequeath unto Simon Ouderkirk, Isaiah Ouderkirk, and William Ouderkirk, share and share alike.

"And I nominate and appoint Isaiah Ouderkirk and William Ouderkirk, my sons, to be executors of this my last will and testament."

The questions presented were:

(1). Is the widow entitled to dower out of the lands of the deceased in addition to the provision made for her in the will?

(2). Is the widow entitled to a lien upon the whole estate of testator to secure to her the annuity of $200 a year?

(3). In the event of the income from the testator's property being insufficient to pay the widow's annuity, is she entitled to look to the corpus to make up any deficiency?

(4). Can the executors apply any part of the income for the benefit, or support, or maintenance of the infant mentioned?

As to the first question:

Robert Smith, K.C., for executors.

D. B. McLennan, K.C., for widow Jessie Ouderkirk.

Alex. L. Smith, for official guardian for infant Mildred Ouderkirk.

HON. MR. JUSTICE BRITTON:—The strongest case that I have been able to find in favour of the widow's contention is *Re Hurst,* 11 O. L. R. p. 6.

Unless this case can be distinguished from *Re Hurst,* the widow will be entitled to dower in all the lands except the house and lot in Berwick.

I think this case is distinguishable.

The test seems to be: "Is there such reasonable provision made by the testator for his widow as warrants the inference that such provision was intended to be in lieu of dower."

The inference need not be beyond possible doubt, but it must be so strong as to be beyond reasonable doubt. That is to say, the inference must be so strong as to fully authorize its being acted upon in a contest between the parties claiming under the same will.

To adopt the reasoning in *Re Hurst*: "Am I able to find in this will, or gather from its provisions, that it was the intention of the testator to dispose of the lands, other than" (the lot at Berwick) "in a manner inconsistent with the wife's right of dower in these lands? Do the provisions of the will shew clearly and beyond reasonable doubt that it was the positive intention of the testator, either clearly expressed or clearly to be implied, to exclude his wife from dower?"

The debts and funeral and testamentary expenses were to be paid.

There was not sufficient personalty to pay these.

These executors were given the power to sell both the real and personal estate for the purpose of paying the bequests, and of investing the funds in a chartered bank or in first-class securities—interest on said funds to be used for making annual payments to his wife.

It seems quite incredible to me that such safe and careful provision should be made for the widow unless the testator intended that this provision should be in lieu of dower.

A claim for dower must necessarily tie up the property and prevent that being divided.

The whole estate will not be sufficient to pay all the debts and legacies if the widow is entitled to dower.

1. In my opinion the widow must be put to her election. She is not entitled to dower out of lands of deceased in addition to the provision made for her by the will.

2. The widow is entitled to a lien upon the whole estate of the testator, to secure her the amount of $200 a year.

It will be noticed that the lien is upon the whole value of the estate. As the annuity is only during the widowhood of Jessie, it is difficult to plan an investment safe for the widow and not onerous for the others entitled.

With the assistance of the official guardian acting for the infant, some suitable settlement can probably be arrived at.

3. The widow is entitled to look to the corpus if necessary to make up a deficiency if the income is not sufficient.

4. Having regard to the special provision which the testator made for his daughter Mildred, a full answer to the fourth question had better be deferred until after the widow has made her election, and after the executors have sold, if they intend to sell, the real estate.

If the daughter Mildred is maintained by the widow, the widow will be entitled to interest upon the $3,000 for such maintenance; but to get that, the widow's lien for the annuity should not be enforced in such a way as to interfere with its investment.

No doubt the parties—as to income—can agree, when it is known what that will be. If not, the executors can again apply for a further direction and answer to the question.

Costs of all parties out of the estate. Official guardian's costs fixed at $25.

HON. SIR G. FALCONBRIDGE, C.J.K.B., IN CHRS.
NOVEMBER 11TH, 1913.
MR. HOLMESTED, SENIOR REGISTRAR. OCTOBER 30TH, 1913.

STEWART v. BATTERY LIGHT CO.

5 O. W. N. 195.

Evidence—Foreign Commission — Action to Set Aside Contract as Induced by Fraud—Discretion as to Granting a Commission—Convenience.

HOLMESTED, K.C., *held*, that in some few cases there was a discretion in the Court to refuse a foreign commission and that upon the circumstances of this case an application should be refused, upon the score of convenience.

FALCONBRIDGE, C.J.K.B., dismissed appeal, costs to defendants in any event of the cause.

Appeal by the plaintiffs from the following order of MR. HOLMESTED, Senior Registrar, sitting for the Master-in-Chambers.

The action was to set aside certain subscriptions for stock in the defendant company and to recover payments made in respect thereof, on the ground that such subscriptions and payments were procured by the fraud and misrepresentations of the defendants Wilson and Schabel.

The plaintiffs applied for a commission to take the evidence of one Smith and of two of the plaintiffs who reside in Vancouver, and of another who resides in Seattle—at Vancouver.

The application was resisted as far as the evidence of the plaintiffs is concerned by the defendants, on the ground that they could properly instruct counsel in Vancouver to cross-examine the plaintiffs and that for the proper cross-examination of the plaintiffs, both the defendants Wilson and Schabel, ought to be present.

Coyne, for plaintiff.

W. G. Thurston, K.C., for defendant.

MR. HOLMESTED (30th October, 1913):—Having regard to the nature of the case and the fact that it must inevitably turn on the measure of credibility which the Court may give to the evidence of the plaintiffs and defendants respectively, it seems to me of first importance and in the interest of justice that all parties should be present and give their evidence in open Court, although as the learned Master-in-Chambers has observed, it is almost of right that a commission should issue, yet it is not absolutely so. That there is a discretion to grant or refuse it is undeniable, and this appears to me to be a case in which justice will be best served by refusing it, as far as the plaintiffs' evidence is concerned.

With regard to Smith, the commission may issue as proposed to take his evidence.

J. Grayson Smith, for the plaintiffs, appellants.

W. G. Thurston, K.C., for the defendants, respondents.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B. (11th November, 1913):—After much consideration and with some doubt I am of the opinion that under all the circumstances of the case the learned Registrar's order ought to be affirmed.

Appeal dismissed, costs of appeal to defendants in any event.

SUPREME COURT OF ONTARIO.

FIRST APPELLATE DIVISION. NOVEMBER 5TH, 1913.

HOME BUILDING & SAVINGS ASSOCIATION v. PRINGLE.

5 O. W. N. 226.

Mortgage—Judgment for Redemption or Sale—Appeal from Master's Report — Subsequent Encumbrancers — Who are—Necessity of Adding—Mode of Adding—Neglect to Add Fatal—Equity of Redemption an Entire whole—Con. Rules 16, 404, 433, 468, 469, 490 —Report Remitted to Master—Costs.

BRITTON, J., 24 O. W. R. 889, dismissed an appeal by certain defendants from the report of the Local Master at Ottawa in a mortgage action, holding that subsequent purchasers of portions of the mortgaged property who had given mortgages were not necessarily subsequent incumbrancers within the meaning of the Rules and need not be made parties to the action.

SUP CT. ONT. (1st App. Div.) *held*, that where the equity of redemption is severed, so that different persons are entitled to redeem in respect of different parcels these different persons must be made parties, either by writ or in the Master's office, for the equity of redemption is an entire whole and so long as the right of redemption exists in any portion of the estate or in any of the persons entitled to it, it enures for the benefit of all.

Jones v. *Bank of U. C.*, 12 Gr. 429; *Faulds* v. *Harper*, 2 O. R. 405, referred to.

Appeal allowed without costs and report set aside and reference remitted to the Local Master at Ottawa.

Appeal by the defendants McKillican and Smith from the order of BRITTON, J., 24 O. W. R. 889, dismissing without costs an appeal from the report of the Local Master at Ottawa in a mortgage action. For prior reports of this action see 122 O. W. R. 791; 23 O. W. R. 137.

The appeal to the Supreme Court of Ontario (First Appellate Division) was heard by HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE and HON. MR. JUSTICE HODGINS.

C. H. Cline, for defendants, McKillican and Smith, appellants.

F. A. Magee, for plaintiffs, respondents.

HON. MR. JUSTICE HODGINS:—In this case the mortgagees began their action for sale as to the whole of the lands comprised in the mortgage, except three parcels re-

leased by them and against thirty-three defendants. They discontinued against twenty-two. It is alleged that the thirty-three were not all that were interested in the equity of redemption. The action did not become fatally defective on the discontinuance, for although it is quite clear that all parties interested in the equity of redemption must be parties, they may be made parties either by writ or in the Master's office, *Jones* v. *Bank of U. C.*, 12 Gr. 429; *Buckley* v. *Wilson*, 8 Gr. 566, "where, after a mortgage being given, the equity of redemption is severed, so that different persons are entitled to redeem in respect of different parcels, these different persons must be made parties in a suit to foreclose the mortgage." See also in England, *Peto* v. *Hammond* (1860), 29 Beav. 91; *Caddick* v. *Cook* (1863), 32 Beav. 70; Halsbury's Laws of England, vol. 21, p. 279; *Griffith* v. *Pound* (1890), 45 Ch. D. at p. 567; *Gee* v. *Liddell*, [1913] 2 Ch. 62.

Under Rule 190 (now 490) if it appears to the Court or Judge that, by reason of their number or otherwise, it is expedient to permit the action to proceed without the presence of all, the Court or Judge may give direction accordingly, and may order the others to be made parties in the Master's office. After judgment the Master may order persons interested in the equity of redemption, other than those already named in the writ, to be added in his office. This is the proper practice after judgment. See *Portman* v. *Paul*, 10 Gr. 458.

The reason for requiring all parties to be before the Court, or to have notice, is that the mortgage account may be taken so as to bind all parties and so as to appoint either one day or successive days for redemption, and to enable redemption to be had by any party interested.

As put in *Faulds* v. *Harper* (1882), 2 O. R. 405; "the equity of redemption is an entire whole and so long as the right of redemption exists in any portion of the estate, or in any of the persons entitled to it, it enures for the benefit of all." The Court endeavours to make a complete decree, that shall embrace the whole subject, and determine upon the right of all parties interested in the estate; per Grant, M.R., in *Palk* v. *Lord Clinton* (1806), 32 Beav. p. 58.

If this were not so no one whose land is sold, if sale is asked, as it is in this case, can be sure, if he redeems the mortgage, that all other parties interested are bound by the

account, nor can the Master properly determine whether only part of the property should be sold "as he may think best for the interest of all parties" (rule 716) unless he have all parties before him. Nor can the mortgagor, which term includes all those interested in the equity of redemption, properly perform the duty of seeing to the parcelling out of the land so as to secure that enough and only enough is sold to pay the claim of the mortgagee. *Beaty* v. *Radenhurst,* 3 Ch. Chrs. 344. The importance of seeing that all parties interested in the equity of redemption are before the Court, and the difficulties that arise from any departure from the proper practice, may be seen from the case of *Street* v. *Dolan,* 3 Ch. Chrs. 227, and *Imperial Loan Co.* v. *Kelly,* 11 A. R. 526, 11 S. C. R. 676. It is further objected that all subsequent incumbrancers were not added by the Master.

The respondent, the mortgagee, relies upon the judgment pronounced in this action on the 25th day of February, 1911, which recites the discontinuance against the twenty-two original defendants. This discontinuance, although recited in the judgment, was the respondent's own act, and is not equivalent to an order or direction under Rule 190.

The judgment was proper, as there still remained the right to add these parties in the Master's office before the final order is made, see *Municipality of Oxford* v. *Bayley,* 1 Ch. Chrs. 272.

I have examined the orders and judgments of Hon. Mr. Justice Sutherland, 22 O. W. R. 791, the Divisional Court in appeal therefrom, 23 O. W. R. 137, and the judgment of Hon. Mr. Justice Britton, 24 O. W. R. 889, now appealed from, in order to see whether any of them make any reference to the state of facts which was made clear in this appeal. I do not find that there is anything in these orders or judgments that cures the defects now apparent. Any difficulty caused by the judgment of Hon. Mr. Justice Sutherland disappears in view of the order made by the Divisional Court on appeal therefrom.

The remarks of Vankoughnet, C., in *Portman* v. *Paul,* 10 Gr. 458, seem to express the present situation. "If parties," he says, "will not take the trouble, more or less according to circumstances, to bring the proper parties before the Court, they have only themselves to blame, but they have

no right to cast that labour upon the Court, and turn it into a Court of enquiry for their convenience."

I can see no escape from the conclusion that this matter must go back to the Master, so that he may add all those interested in the equity of redemption as parties. This is not done by serving a warrant, the practice adopted by the Master, as his report of November 6th, 1911, shews, but by formal order making and advising them as parties, see Rule 404. There should be added as well all those having any lien, charge or incumbrance upon the mortgaged premises or any part thereof subsequent to the plaintiff's mortgage. The Master's report of 13th May, 1913, states that this is not necessary, and in this he is wrong. I do not think that Rule 77 as to representation of classes of defendants was intended to apply or can be made use of when the parties, though numerous, have all separate and distinct interests in land, and rights to exoneration and contribution which differ according to their title and the date of its acquisition. But the Master has power to order substitutional service in a proceeding in his office under Rules 16 and 433.

No effective order, in the absence of these parties, can be made in this appeal on any of the other questions argued which will have to come up again, unless those now agitating them can by the exercise of discretion settle them out of Court. Nor have we power to make any order now under Rule 490.

No doubt the plaintiffs thought by their proceedings to save costs; but the result has been otherwise. The Master reports that the abstract brought in before him did not shew all the mortgage incumbrancers, nor the properties sold and discharged by the plaintiff. This is contrary to Rules 468 and 469.

Had the defendants, who are the appellants in this Court, made their position clear instead of clouding the issue before the Master by designating the others interested in parts of the equity of redemption as subsequent incumbrancers (see written argument on this point) and entitled to notice as such, they might have had their costs. But under the circumstances there should be no costs of the appeal to this Court or to Hon. Mr. Justice Britton.

The judgment appealed from, and the Master's report will be vacated, and the action remitted to the Master to be dealt with by him as indicated in this judgment.

HON. MR. JUSTICE LENNOX. NOVEMBER 3RD, 1913.

RE HARRISON.

5 O. W. N. 232.

Will—Construction — Codicils—Gift of Income to Widow—Remainder to Others—Trust for Sale — Subsequent Permission to Encroach on Capital for Maintenance—Estate taken by Widow not fee Simple—No Repugnance.

LENNOX, J., *held*, that where a will and certain codicils had given the testator's widow the income of certain property during her widowhood with remainder to named persons, that a subsequent codicil reciting that whereas the widow has been up to that time restricted to the use of the income alone, but thereafter she shall have "the right in addition thereto to use the principal or so much thereof as she may require according to her own judgment, for her support and maintenance," did not confer upon the widow an estate in fee simple but only gave her a power of encroachment on the capital.

Re Davey, 17 O. W. R. 1034, followed.

Re Jones, Richards v. *Jones* [1898] 1 Ch. 438, distinguished.

Motion by the executors of Martha Cox deceased, for the construction of the will of Henry Harrison, who was the first husband of Martha Cox.

F. F. Treleaven, for the executors.

J. A. Soule, for an adult beneficiary.

J. R. Meredith, for the Official Guardian.

HON. MR. JUSTICE LENNOX:—Martha Cox, the testatrix, who was the widow of Henry Harrison, is a trustee of his estate and the real estate is vested in her amongst other things, expressly for the purpose of sale and distribution. She has an absolute power of disposal and this is in no way affected by her second marriage.

By the will itself, without the codicils, all the real and personal estate of the testator was vested in the testatrix and two others, upon trust, as to the real estate and such part of the personal estate as was not specifically bequeathed, to divide and distribute it amongst certain persons and classes of persons upon the death or second marriage of the testatrix.

It is not necessary to consider whether the devise in trust, coupled with the direction to divide and distribute, conferred a power of sale or not; for, by the first codicil to his will, the testator substituted the testatrix as his sole trustee in the place of the three originally appointed, and consti-

tuted her sole devisee in trust with express power to sell and dispose of the real estate and the personal estate aforesaid.

These provisions of the will and codicil have nothing to do with what the testatrix took beneficially under the will, and are not affected by her second marriage, except perhaps that the marriage accelerates the time for the proper exercise of her powers and duties as a trustee.

I am not able to detect that the third codicil affects the power of sale of the testatrix either way.

What I have said I think disposes of the first and second questions submitted. I will now take up the fourth question, namely, whether the provisions as to the vesting of the real estate are revoked by the third codicil, and with it the formidable proposition submitted during the argument, namely, that the effect of the third codicil is to enlarge the estate of the testatrix to the extent of conferring upon her an estate in fee beneficially. I cannot read this codicil as cutting out the four classes of beneficiaries mentioned in the will or as conferring an estate in fee upon the testatrix. The testator is dealing with the maintenance of his widow, as a widow, and with maintenance alone; and in my opinion he is manifestly dealing with and providing for this maintenance during the period that he already by his will and first codicil provided for and limited, namely, for so long as she shall remain his widow, or until her death, if she does not marry again; and he provides that whereas she has up to that time been restricted to the income she shall not be restricted to the income alone, but shall have "the right in addition thereto to use the principal or so much thereof as she may require, according to her own judgment, for her support and maintenance."

So far it is clear that the testator's sole object was to supplement the provision he had already made; and I can find nowhere an indication that the testator intended to change the character of the provision he had previously made. The argument, if I correctly apprehended it, was based upon the circumstance that in this case the testator does not refer to a second marriage but only to the death of the testatrix.

This clause I take to be mere surplusage, an introductory paragraph to the general confirmation of his will, always to be found in the codicils; and I take it to be clear that all that the testator intended to effect—all he started out to do and was doing—was completed with the language I have al-

ready quoted, ending with "support and maintenance;" and that all subsequent words were introduced for the purpose of making clear what he was not doing, namely, that he was not further or otherwise altering the will. The change is to give his widow a mere power of encroachment upon capital, as in *Re Davey*, 17 O. W. R. 1034. Here absolute estates clearly expressed and defined were conferred upon the testator's son Luke and others by the will itself.

Such estates cannot be cut out or cut down by subsequent clauses or words of equivocal meaning either in codicils or in the will itself. *Re Jones, Richards* v. *Jones*, [1898] 1 Ch. 438.

I am clearly of opinion that the estates or shares of the various beneficiaries vest as and when they would have vested if the third codicil had not been added.

Costs out of the estate.

HON. MR. JUSTICE LENNOX, IN CHAMBERS.

OCTOBER 31ST, 1913.

BIANCO v. McMILLAN.

5 O. W. N. 196.

Costs—Security for—Default in Giving—Dismissal of Action—Reinstatement—Discretion—Terms.

LENNOX, J., ordered that an action dismissed for want of compliance with an order for security for costs be reinstated upon security being given and the costs of the order and the present motion being paid.

Motion by the plaintiff by way of appeal from or to set aside an order of Geo. M. Lee, one of the Registrars dismissing the action for the plaintiff's default in giving security for costs.

J. J. Gray, for plaintiff,

A. G. Ross, for defendant.

HON. MR. JUSTICE LENNOX:—I can see no ground for the plaintiff's application, treated as an appeal from the order of the Master-in-Chambers. The order dismissing the action was properly made.

But the plaintiff is a poor man, and whether he has a cause of action or not, appears to be acting in good faith. I have jurisdiction, I think, to grant him what he asks as a matter of indulgence.

There will be an order that upon payment of the costs of the defendant of and incidental to the order dismissing the action and the defendant's costs of this application and giving the security ordered in this action, that the plaintiff will be at liberty to proceed with the action.

HON. MR. JUSTICE LENNOX. NOVEMBER 3RD, 1913.

RE HAMILTON ESTATE.

5 O. W. N. 230.

Trusts and Trustees—Investment of Estate Fund—Proposed Loan to Beneficiary — Application for "Opinion, Advice or Direction" under Trustee Act, 1 Geo. V. c. 26 s. 65—Scope of—Restraint on Anticipation—Creation of Lien Breach of Trust—Insufficient Security—Costs.

LENNOX, J., *held*, that an executor had no right to loan one of the beneficiaries of the estate the sum of $8,500 upon security worth $11,000 and a lien upon the said beneficiary's interest in the estate as to which she was restrained from anticipation.

Application by the executor of the late Hon. Robert Hamilton, deceased, for the "opinion, advice or direction" of the Court pursuant to sec. 65 of the Trustee Act, 1 Geo. V. ch. 26.

L. M. Hayes, K.C., for the applicant.

B. D. Hall, for Annie Seaborn Hill, a daughter of the testator.

HON. MR. JUSTICE LENNOX:—Annie Seaborn Hill is entitled to a share of the moneys of the estate of the late Honourable Robert Hamilton, under his will. Mrs. Hill's share is said to amount to about $20,000. As to the manner of dealing with this money the testator in his will says: "I wish all my money that my daughter Annie Seaborn may inherit from me should be settled upon herself so that in the event of her marriage it will be impossible for her or her husband to encroach upon the same."

The construction of this will has already been submitted to the Court, *Re Hamilton,* 23 O. W. R. 549; 27 O. L. R. 445; 4 O. W. N. 441, and the Chancellor determined that the provision quoted is binding upon the executor and the beneficiary, and after referring to *Lock* v. *Lock,* L. R. 4 Eq. 122, and its effect, and the form of settlement there approved of, his Lordship adds: "Some such form is applicable to the present case; there should be a trustee of the settlement provided, and proper conveyances settled by the Court or a conveyancing counsel if the parties cannot agree; to whom the trustee of the will may discharge himself by a transfer of the fund."

Nothing has as yet been done in the way of settling the money in question upon Mrs. Hill. The present application is to have it determined whether the applicant, the executor and trustee under the will, "has discretion to advance the above named Annie Seaborn Hill out of her share of the testator's estate" $8,500 upon security of a mortgage upon a dwelling house valued at $8,000 and a building lot valued at $3,000, in Calgary; and the security of a lien upon "the income and corpus of the remaining trust property of the said Annie Seaborn Hill."

It would, perhaps, be enough to say that the thing to be done before these trust funds are otherwise dealt with in any way is to transfer them to a trustee of the settlement as directed by the judgment just quoted. But aside from this I entertain a grave doubt as to whether this is a case for "opinion advice or direction" within the meaning of sec. 65 of the Trustee Act. It can hardly have been intended that the judgment of the Court should be substituted for the judgment of the trustee as to the merits or value, as a security, of the property offered.

However, dealing with it upon the merits, I think I must treat it, so far as the mortgage is concerned, exactly as if it were an application for a loan by a stranger. Much as I regret it, I cannot advise or direct the applicant to make this advance to his sister, Mrs. Hill, out of the trust funds. I quite sympathize with him in his desire to do so, I quite realize that it would be a great advantage to Mrs. Hill, and I believe it would be prudently used and would probably be repaid. But although I can believe that in the result it may be safe, yet having regard to well recognized rules governing investments generally and particularly having regard to

the recognized rules affecting investment of trust funds, I cannot advise or regard this as a prudent or proper investment of trust money.

As to the proposed lien upon the remainder of the trust money, whether principal or interest, this of course is out of the question, as Mrs. Hill is to be restrained by the settlement from anticipation or encroachment and for the trustee to concur in a charge upon the fund would be in itself a breach of trust.

It would not be right to make the beneficiaries, generally, contribute to the costs of this application. The costs of all parties will be paid by the executor and charged against the share of Mrs. Hill.

HOLMESTED, SENIOR REGISTRAR. NOVEMBER 4TH, 1913.

McVEITY v. OTTAWA CITIZEN CO.

5 O. W. N. 237.

Pleading—Statement of Claim—Motion for Particulars—Paragraph Irrelevant—Particulars Refused—Costs.

HOLMESTED, K.C., *held*, that particulars should be refused of an irrelevant allegation in a pleading.

Cave v. *Torre*, 54 L. T. 515, followed.

Stanley Mills, for defendants.

J. T. White, for plaintiff.

Motion for particulars of paragraph 3 of the statement of claim in a libel action.

GEO. S. HOLMESTED, K.C.:—This is an action to recover damages for libel which occasioned, as is alleged, the dismissal of the plaintiff from an office held by him.

Paragraph 3 of the statement of claim is as follows: "3. With the intent to procure the dismissal of the plaintiff from his said office . . . the defendants for several years carried on against the plaintiff, through the columns of their said newspaper, a campaign of falsehood and slander."

The statement then sets out in a subsequent paragraph the alleged libel which occasioned the plaintiff's dismissal. Nothing is claimed in the way of damages in respect of the

allegations in paragraph 3, which appear to me to be immaterial.

The defendants apply for particulars of paragraph 3; they do not apply to strike out the paragraph.

According to the decision of the Court of Appeal in *Cave* v. *Torre*, 54 L. T. 515, particulars ought not to be ordered of immaterial allegations in pleadings.

The motion must therefore be refused with costs to the plaintiff in any event.

HON. SIR G. FALCONBRIDGE, C.J.K.B. NOV. 5TH, 1913.

RE KNOX & BELLEVILLE.

5 O. W. N. 237.

Municipal Corporation — By-law — Motion to Quash—Collection of Garbage—Delegation of Authority—Ministerial Matters.

FALCONBRIDGE, C.J.K.B., refused to quash a municipal by-law dealing with the collection of garbage.
Re Jones v. *Ottawa*, 9 O. W. R. 323, 660, distinguished.

E. Gus Porter, K.C., for applicant.

S. Masson, K.C., for city.

Motion to quash a by-law of defendant corporation.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—The point on which *Re Jones & Ottawa* (1907), 9 O. W. R. 323, 606, turned, was felt by the Divisional Court to be a very narrow and technical one; no costs were awarded and only the objectionable sections of the by-law were quashed.

The present by-law is intended to be, and will be, of great benefit to the citizens from a sanitary point of view, and it ought to be upheld, unless it is contrary to the general law of the land.

The Ottawa by-law assumed to prohibit householders from disposing of their productive refuse to dealers.

The present by-law seems only to contain a direction to the garbage collector as to his duties.

The alleged delegation of authority to the sanitary inspector and the board of health is as to matters which are purely ministerial.

The motion will be dismissed with costs.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. NOVEMBER 10TH, 1913.

BLACKIE v. SENECA SUPERIOR SILVER MINES LIMITED.

5 O. W. N. 252.

Broker — Action for Balances of Commission — Sale of Shares of Mining Company — Evidence—Payment into Court—Appeal—Costs.

LATCHFORD, J., gave judgment for plaintiff for $1,238.75 balance due plaintiff for commissions upon the sale of the capital stock of the defendant company.

SUP. CT. ONT. (2nd App. Div.) *held*, that upon the evidence plaintiff had not earned more commission than that paid him by the defendants together with $10 paid into Court by them.

Appeal allowed with costs, judgment for plaintiff for $10 with Division Court costs up to the time of payment in, costs to the defendants of the action on the High Court scale thereafter.

Appeal by the defendant company from the judgment of LATCHFORD, J., in favour of the plaintiff for the recovery of $1,238.75 and $10 paid into Court by the defendant company, and costs in an action by a mining broker for balances alleged to be due him for commissions upon the sale of the company's stock.

The appeal to the Supreme Court of Ontario (Second Appellate Division) was heard by HON. SIR WM. MULOCK, C.J.Ex., HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE LEITCH.

R. S. Robertson, for defendant company, appellant.

J. W. Mahon, for plaintiff, respondent.

HON. MR. JUSTICE SUTHERLAND:—The defendant company has a capital stock of $500,000 divided into 500,000 shares of the par value of $1.

In the fall of 1911 it was in financial straits and it was necessary to raise money in some way for development purposes or otherwise it would be liable to lose certain rights under a lease.

It was thought best to try and sell some of the stock of the company, and a written arrangement was entered into with the plaintiff on the 15th November whereby if he sold

stock at a fixed price of thirty cents a share he would be paid a commission of 15 per cent. on the stock being paid for.

He apparently never sold any shares under that agreement, nevertheless he says: "I am claiming under that agreement with the exception of the modification, of the modification under which I am taking 5 per cent."

He explains this by saying that by a subsequent verbal arrangement made with the company he agreed to reduce his commission to 5 per cent. upon all shares of the capital stock sold as a result of his efforts, the defendant company at the same time agreeing to reduce the selling price of shares to 17½ cents. He also says that in negotiating with people at Rochester, N.Y., for the sale of stock he was told by them that there was no use making any proposition to them unless it included an amount of stock which would secure the control of the company.

He also says that after some preliminary negotiations with one Dewey, he got in touch with one Worth, already a stockholder, and his representative, Lyman, and after some further discussion the question of his commission finally came up for consideration. He puts the matter in this way:—

(P. 9). Q. Did Mr. Segsworth and Mr. Lyman and Mr. Worth get together? A. Yes. I just have it verbally from Mr. Segsworth that Mr. Worth and he had fixed up everything nice and smoothly, that Mr. Worth was to be the president, Mr. Segsworth to be secretary-treasurer, and he said they were just as fast friends as they used to be.

Q. Did Mr. Segsworth or Mr. Worth tell you what the deal was to be? A. Just the control of the stock.

Q. At the same terms, 17½ cents? A. Yes.

Q. Then you say Mr. Worth left? A. Left Mr. Lyman.

Q. Left to go to Philadelphia? A. Yes.

Q. Left Lyman behind? A. Yes.

Q. Was there anything transpired between Mr. Segsworth, Mr. Lyman and yourself? A. Yes, we went in to supper and sat down, and Mr. Lyman said well, he was pleased to see things going so favourably, and that they were better friends than they were before, the only hitch would be in the proposition as to my commission of 15 per cent.; Mr. Segsworth says: "Well, it is up to Billy, you are the one that has the agreement, what do you think would be fair?" I thought for a moment and said: "Well, I want to

see the deal go through on the strength of Mr. Jackman telling me that I would receive some stock if I would cut my commission, and I said I would take 5 per cent. on the 226,000 shares which we had decided upon as the sale," and Mr. Lyman figured it out with his pencil.

Q. At 17½ cents? A. Yes.

(P. 10). Q. And then what was said? A. Mr. Segsworth said I was very liberal and fair in accepting that amount, and Mr. Lyman sanctioned his opinion, too.

Q. And they both agreed to it? A. Yes.

Q. That you were to get a commission on 17½ cents a share on 226,000 shares, at the rate of 5 per cent.? A. Yes, I was to be treated liberally; that was on account of Mr. Jackman saying that they would treat me liberally with the stock, if he was not sick I could have him here to prove that.

(P. 18) Q. When you did get down to closer quarters the proposition you were interested in, or were discussing rather, was for the out and out purchase by Mr. Worth and his associates of a certain number of shares in the company? A. Yes.

Q. They were to bind themselves to buy that many shares? A. It did not matter who were to take them. They were to take 226,000, and that was all I was interested in.

(P. 19). Q. And you also told me on your examination, what you are claiming a commission on is the out and out sale of 226,000 shares of this stock to Mr. Worth? A. Yes. They may have taken a little more, but that was my proposition, anyway. If they have taken a little more than that, all right; they may have taken 250,000 and got absolute control.

Q. But that was the proposition you were helping to put through at the time, to tie Mr. Worth and his associates up so that they would have the 226,000 shares at 17½ cents each? A. Yes, and I accomplished it.

(P. 20). Q. Do you want us to understand that before Mr. Worth got to be president he must have taken the 226,000 shares? A. Absolutely, he would never have got 226,000 or 250,000 odd shares; I am sure of it, too.

Q. You say your labours were completed when you got this proposition made between them? A. Yes.

Q. At the time you left off I suppose it would be about the date of these two letters? A. Just before that.

Q. You did nothing after those letters? A. No, there was nothing to be done. I got the parties together, and they were to sign the papers.

At the trial his attention was called to the fact that the 226,000 shares on which he said he was to get commission would not give a controlling quantity of stock, and he then said:—

Q. No, but it would give control this way, that there was 150,000 issued, 50,000 to R. F. Segsworth, 50,000 to Mr. Jackman, and 50,000 to W. E. Segsworth, then 226,000, with what they had issued and what was in the treasury would give them control of the stock—a voting control.

The correspondence in connection with the matter is, in part, as follows:—

On the 13th December, 1911, Lyman wrote to the company making the following offer:—

"I hereby offer, subject to the approval of my principals, fifteen cents (15) per share for the majority, or control, of the authorised capital stock of your company. Terms to be, etc."

And again, on the 18th December, 1911, he wrote:—

"I have submitted your proposition to my principals, and beg to advise you that the only basis upon which they will buy into your company is that their money goes into the treasury for the purpose of developing the property. They decline to purchase any outstanding stock, but are willing to buy 251,000 shares of treasury stock at seventeen and one-half cents (17½ c.) The exact terms I am unable to state at present, as all interested are not in Philadelphia at the moment. I have recommended they submit the following proposition, which I believe should appeal to you—to purchase 251,000 shares of fully-paid treasury stock of your company, at seventeen and one-half cents (17½ c.)" On January 10th, 1912, the plaintiff wrote to R. F. Segsworth a letter from which I quote the following:—

"I appreciate the fact that I have not done anything in the stock selling as it was my intention to try and get Lyman crowd to close in bulk, however, apparently I have not accomplished much, according to your point of view."

On the 20th January, 1912, R. F. Segsworth wrote the plaintiff a letter which contains the following:—

"And also drop me a word in your letter that you will be satisfied with a 5 per cent. commission on the money realised from the deal, payable as it comes in. I have a wire from Lyman this morning saying that they are taking up subscriptions, but of course they have made no agreement with us, and until the agreement is signed, we cannot tell whether the deal will go through or not, but you can depend on our doing our part to protect your interests and our own."

On the same date a legal firm, Havens and Havens, wrote R. F. Segsworth stating:—

"It is their intention to enter into a syndicate agreement of which Mr. Worth will be the syndicate manager, and the shareholders of the Kerry Mining Company and others will be the subscribers, which agreement will authorize Mr. Worth to purchase $251,000 of stock of the Seneca Company and when purchased to be turned over by him to voting trustees."

On the 23rd January, 1912, the plaintiff again wrote R. F. Segsworth, and in his letter he says:—

"Re my consent re deal with R. Lyman, would say that I am agreeable to take 5 per cent. on cash as it is paid in as I agreed verbally with you."

On the 29th February, 1912, a written agreement was entered into between Mr. Worth of the first part, the company of the second part, and Mr. Jackman and Segsworth of the third part, under which Mr. Worth bought, and the company sold to him 57,143 shares at 17½ cents or in all $10,003 payment; cash $5,000 and the remaining $5,003 on the 29th March, 1912. Under the agreement Worth also secured an option to purchase all or part of 192,587 shares at the same price, to be paid for as follows; $3,375.05 for 19,286 shares on the 29th April, 1912, and monthly thereafter until January, 29th, 1913. Under the contract the parties of the third part also gave Worth an option to purchase 1,000 of the shares held by them so that Worth under the agreement immediately bought outright 57,143 shares and secured an option to purchase enough more shares to ultimately have altogether 251,000 shares, that is a controlling quantity of the stock. He did not buy outright 251,000 shares or 226,000 shares. On that same date, the 29th, Lyman had telegraphed to plaintiff from Rochester, as follows:—

"Segsworth here insists impossible conditions, don't believe they can finance company, meanwhile we proceeding syndicate subscriptions; can you suggest anything, get busy."

It was apparent, therefore, that at or about the time the final agreement was entered into the plaintiff was still considered a factor in the negotiations. A statement of the shares of the company sold to Worth and others by the company on and after the date of the agreement was put in as exhibit 9, and verified by the oath of R. F. Segsworth, the secretary-treasurer of the defendant company. It covers a period from March 1st to December 18th, 1912, and shews the certificates issued during that period. The following certificates were issued to Worth:—

No. 7, March 1st, 1912.....28,572 shares
No. 8, April 27th, 1912.....28,571 shares
No. 16, July 4th, 1912.....19,286 shares
No. 18, August 17th, 1912.... 3,000 shares
No. 28, October 7th, 1912 .... 4,000 shares

The defendant admits that as to these shares which Worth himself actually purchased under the agreement from the company, and a further 1,000 shares from the parties of the third part, in all, 84,429, the plaintiff is entitled to a commission. The price of that number of shares at 17½ cents is $14,775, and his commission thereon would, therefore, amount to $738.75. In his statement of claim, the plaintiff gives a credit for $250 paid to him by the defendants on March 14th, 1912, which would be the exact commission on the 28,572 shares, which, up to that time, had been issued to Worth himself. He also gives credit for two sums, $425 under date October 18th, 1912, and $53.75 under date February 22nd, 1913. The total commission on the remaining shares, namely, 55,857, issued to Worth as above, would amount to $488.75, and deducting from this the $425 and the $53.75, there would be a balance of $10. In their statement of defence, the defendants say that "the plaintiff never became entitled in any way whatever to commission on more than 84,429 shares, and further, that they have already paid the plaintiff $728.79 for commissions, and bring into Court the sum of $10 as sufficient to satisfy any further claim he may have against them.

The secretary-treasurer of the company, R. F. Segsworth, says about the early negotiations between the parties:—

(P. 24). Q. Then subsequently you entered into an agreement with S. Harry Worth? A. There was an agreement made on the 29th February, which was different entirely to the first proposed agreement.

Q. When did Worth and his associates take control of the directorate? A. I think that was some time in June.

Q. Some time in June following the agreement? A. Yes.

Q. Are they still in control? A. Yes, they have the directorate; I don't know about the control of the stock. There are three of Mr. Worth's representatives on the Board.

(P. 35). Q. What you were dealing with was the sale of the 251,000 shares out and out? A. Yes.

Q. Then you subsequently did arrive at the agreement made in the end of February? A. The 29th.

Q. Was there any material difference in those two propositions, to the company? A. All the difference in the world, in a mining deal.

Q. In what respect? A. Under one we would get $44,000 or $45,000 absolutely, and under the other we would have a certainty of getting $10,000.

He also says, (page 37): Q. In arriving at the number of shares set out in the statement, 84,000 shares and odd. Under whose instructions did you pay Blackie a commission upon those shares? A. Mr. Worth and the Board.

Q. Tell His Lordship exactly what that was based upon, and how you paid that particular amount? A. As I was instructed, there was issued under the option agreement, certificate No. 7 for 26,572 shares; No. 8 for 28,571 shares; No. 16 for 19,286 shares; No. 18 for 3,000 shares; No. 28 for 4,000 shares, and No. 45 for 1,000 shares, making a total of 84,429 shares at 17½ cents."

Q. Mr. Mahon. What is the date of certificate No. 45? A. October 18th, 1912,

Q. Mr. Robertson. That is a transfer certificate from Mr. Jackman to Mr. Segsworth? A. Yes; Mr. Blackie was not entitled to that.

Q. That was some stock the parties agreed to sell to Mr. Worth? A. Yes, it was issued in his name, and I was instructed to pay a commission on it.

Q. Are the shares that went to make up the 84,000 and odd shares the stock which went into the voting trust syndicate? A. That was syndicate stock.

Q. And the other shares are shares that were sold elsewhere and to other people? A. Yes. I have met all these people, with the exception of one or two of them.

Q. The certificates were issued to these people, not to Mr. Worth? A. Not to Mr. Worth, at all.

Q. In this 84,000 is included all certificates issued to Mr. Worth? A. Yes, under the syndicate agreement.

Q. At the end of August, then, Worth was president of the company; is that correct? A. Yes.

Q. And was selling stock, apparently, of the company? A. Yes; he had to get money to enable the company to go ahead; he had gotten in so far that, like the man in the tank, he had to get somebody to help him out.

Q. I suppose most of these shares were sold through Mr. Worth in some way—or do you know? A. I don't know how he induced people to buy them; I know he sold them. I know people bought stock, and I issued the certificates.

Q. And your instructions came from Mr. Worth, the president of the company? A. Yes, I did as I was directed and told.

Q. (His Lordship). Were any shares but the 84,429 sold to Worth. A. No, my Lord; the other stock was sold to other people. Mr. Worth would read the letters and send me instructions to issue so-and-so.

This evidence refers to certificates of stock issued between the 26th of August, 1912, and the 18th December, 1912, to various persons whose names and certificates are set out in the same exhibit number 9; their stock aggregating 153,450. There was, therefore, issued to Worth and the others, between March 1st, 1912, and the end of that year, a total of 236,879 shares.

It is plain, I think, that the plaintiff was in no way instrumental in selling or aiding in the sale of the 153,450 shares.

Segsworth, the secretary, says at page 29 of his evidence: "I never heard the number of shares 226,000 mentioned until Mr. Blackie mentioned it on his examination for discovery as being the control."

While it is perhaps somewhat doubtful whether the plaintiff could, on his own statement as to what the contract

was, properly claim as against the company that he was entitled to any commission, the defendants recognised, and I think properly, that his services in the matter had been useful and that he had been partly instrumental in interesting Worth again in the affairs of the company, and that in this way the latter ultimately was led to purchase 84,429 shares. If there was a contract at all it was that indicated in Segsworth's letter of 20th January, 1912, to the effect that they would pay him a commission at five per cent. "on the money realised from the deal payable as it" came in, and the plaintiff's letter of the 23rd January, in which he says that "he is agreeable to take five per cent. on cash as it is paid in."

It is plain, I think, that any shares sold beyond the 84,429, which Worth got were not sold through the assistance or efforts of the plaintiff, but by the company through the work of Worth, subsequent to the date of the agreement. I think the proper inference from the evidence is that a commission on the 84,429 shares is the best which the plaintiff had any right to claim or be allowed for. He was paid all of this before action, with the exception of the $10 which the defendants brought into Court with their statement of defence.

I think the appeal should be allowed; that the plaintiff should have his costs of the action down to the payment into Court by the defendants of the $10, on the Division Court scale, together with judgment for that sum only; and that the defendants should have their costs, on the High Court scale, of the action subsequently and of this appeal.

HON. SIR WM. MULOCK, C.J.Ex., HON. MR. JUSTICE RIDDELL, and HON. MR. JUSTICE LEITCH, agreed.

SUPREME COURT OF ONTARIO.

2ND APPELLATE DIVISION. NOVEMBER 10TH, 1913.

RE STEWART, HOWE & MEEK CO., LTD.

5 O. W. N. 245.

Company—Contributory — Misfeasance—Payment by Note—Assignment of Note by Company—Evidence — Subscription by Inadvertence—Misleading Government Returns—No Estoppel by—Finding of Referee—Right to Reverse—Appeal.

Appeal by liquidator from decision of Cameron, Official Referee, dismissing an application by the liquidator to place one Meek on the list of contributories of a company in liquidation and to make the said Meek liable in respect of certain alleged misfeasances as an officer of the company.

MIDDLETON, J., 23 O. W. R. 852, *held*, that Meek was not liable in respect of a subscription of 75 shares paid for by note, which note had been assigned to another company, this holding to be without prejudice to the liquidator's right to claim misfeasance on the part of the officers of the company in respect to such note.

That Meek was liable as a contributory in respect of 100 shares subscribed for and unpaid, where the record of the subscription appeared in the minutes and the annual returns to whose accuracy Meek himself swore.

Appeal from Cameron, Official Referee, allowed in part without costs.

SUP. CT. ONT. (2nd App. Div.) *held*, that Meek was not estopped from denying the fact of subscription by reason of his returns to the Government as no one had acted thereon to his hurt and that there was evidence upon which the learned Referee could have reasonably found that there was no subscription of 100 shares by Meek and that therefore this finding of fact should not have been disturbed.

Judgment of MIDDLETON, J., reversed in part and judgment of Cameron, Official Referee, restored with costs.

Appeal by Chas. S. Meek from a judgment of HON. MR. JUSTICE MIDDLETON, 23 O. W. R. 852; 4 O. W. N. 506; 9 D. L. R. 484, allowing an appeal of the liquidator from a decision of an Official Referee in winding-up proceedings, and placing him upon the list of contributors as a stockholder of the company in respect of 100 shares on which nothing had been paid.

The appeal to the Supreme Court of Ontario (Second Appellate Division) was heard by HON. SIR WM. MULOCK, C.J.EX., HON. MR. JUSTICE CLUTE, HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE LEITCH.

H. E. Rose, K.C., for C. S. Meek, appellant.

W. N. Tilley, for liquidator, respondent.

HON. MR. JUSTICE SUTHERLAND:—The company was originally incorporated with a capital stock of $100,000, and up to the 9th December, 1908, only 80 per cent. thereof or 800 shares had been subscribed.

The company desired to increase the capitalization to $150,000. The Companies Act, 7 Edw. VII. ch. 34, sec. 13, sub-sec. a, requires that before such increase can be applied for it is necessary that ninety per cent. of the original stock should have been subscribed.

A meeting of the stockholders was called for the date mentioned, at which Meek made a verbal application for 100 shares of the treasury stock, and a resolution was duly passed directing that a certificate or certificates for the same should forthwith be issued and delivered to him. At the same meeting a resolution was also passed authorising the increase of the capital stock to $150,000. At a meeting of the directors held on the same day the 100 shares referred to were treated as subscribed for as a by-law authorising the increase of the capital stock was passed wherein it was recited that ninety per cent. of the original capital had been allotted and taken up. According to the evidence of Meek before this date, he had been negotiating with the company for the sale of a patent owned by him, but an agreement as to the price had not been arrived at. His evidence is that it was well understood and agreed when he subscribed for the 100 shares that they were to be paid for out of the purchase-price for said patent. The application for the increased capital stock was thereupon made and granted.

On the 23rd January, 1909, at a meeting of shareholders, a resolution was duly passed authorising the purchase from Meek of the patent for the price or consideration of 260 paid-up shares of the common stock of the company and authorising its issue to him upon the patent being duly assigned to the company. On the same day a by-law was passed by the company which authorized that 440 shares of the 500 shares, by which the capital stock had been increased, should be issued as preferred stock. The patent was duly assigned by him and the 260 shares of fully paid-up stock issued to him.

The evidence of Meek is as follows:—

(P. 59). Q. And before you could get your increase of capital you knew that it was necessary to have 90 per cent.

subscribed? A. I knew that it was necessary to have 90 per cent. subscribed, yes.

Q. And you say it was not for that purpose, that is for the purpose of bringing your subscribed capital up to 90 per cent. that you subscribed for this additional 100 shares? A. Not wholly, we knew that this had to take place. We hadn't arrived at a value for the patent, and in order to complete the 90 per cent. I subscribed for that 100 shares, the same to be settled later on when the price of the patent was arranged.

Q. You had to apply for these 100 shares so that you would be in a position to apply for your increased capital? A. That is it.

Q. It was never intended that the subscription should be cancelled after you had got your increase? A. It was never intended that that 100 shares should be issued until the price of the patent had been decided upon.

(P. 74). Q. You originally agreed in respect of your patent to take 100 shares? A. I agreed to take 100 shares in part payment.

Q. 100 shares in respect of your patent. I do not mean the total payment. Was that transaction ever carried out or allowed to remain in abeyance? A. That transaction was allowed to remain in abeyance until the following spring, when the price was decided upon that the company would pay for the patent.

Q. The 100 shares of stock were never issued to you before the date of the transaction with reference to the sale? A. The 100 was never issued to me at all.

Q. And never intended? A. Never intended to be issued as 100 shares.

Q. Then when the patent was actually sold the 260 share transaction, which at that time, on the footing of this 440 shares preferred stock—was all that would be left—that amount was transferred to you in substitution and included the previous 100 share transaction? A. That 260 shares was transferred to me and included the 100 shares originally allotted.

The referee has found that "this accounts for the whole capital stock of the company, namely: Original issue 800 shares issued on the 23rd January, 1909, to C. S. Meek in payment of his patent; 260 shares, preferred stock 440;

total 1,500 shares." And further, that the 100 shares in question are included in said 260 shares.

Middleton, J., in his judgment refers to the subsequent conduct of Meek with reference to a further application for increased capital and in connection with annual statements of the company rendered to the Government as disclosing facts inconsistent with the present contention on his part that the 100 shares were included in the 260 and paid for by the patent. His decision appears to me to be in effect that Meek, in view of these things cannot now be heard to say the 100 shares of stock were ever paid for, and that he is estopped. He apparently declined to accept or give effect to his testimony.

The Official Referee who heard the testimony and saw the witnesses, came to the conclusion that the evidence of Meek that the subsequent and apparently inconsistent statements were the result of oversight and inadvertence and did not truly represent the facts, was to be believed and accepted. The reason for increasing the amount of the capital stock was to "bring in new capital." The company was "in need of more money" (page 58).

It is evident that the expectation and intention was to sell part of the additional stock to outsiders and secure money in that way. It is most unlikely that Meek, under the circumstances, was willing to subscribe for 100 additional shares for which he would be liable to pay in cash. His own statement that he really subscribed for it at the time in order that the amount of stock subscribed would be sufficient to obtain the increase of capital, and on the understanding and agreement subsequently carried out that it should be paid for by the sale of the patent at a later date, appears to me a reasonable one.

I am unable to see that the learned Judge whose judgment is now in appeal was justified in reversing the Referee's finding of fact. I think the latter was warranted in coming to the conclusion he did, if he gave credit to the testimony, as apparently he did. It is true that the books of the company are, under the Statute, *prima facie* evidence for certain purposes, but they are not conclusive; neither do I think the other matters referred to are.

The appellant contends that unless it is a case in which he is estopped, there is no other ground upon which the respondent can succeed. It is not, however, shewn that anyone

acted upon the subsequent statements to his prejudice Indeed, the respondent does not so much as argue that it is a case of estoppel as of election. That is to say, he contends that whatever the appellant's original intention was as to paying for the 100 shares by the assignment of the patent, he, at a date later than its transfer and the issue of the 260 shares given in payment therefor, elected to take the position and state that said 100 shares were unpaid and must now be held to that.

I am unable to agree with this view, and think the Master's finding of fact should not have been disturbed, and that the appeal should be allowed with costs.

HON. SIR WM. MULOCK, C.J.Ex. and HON. MR. JUSTICE CLUTE, agreed.

HON. MR. JUSTICE RIDDELL:—This an appeal from the judgment of Mr. Justice Middleton, 23 O. W. R. 852, in respect of the $1,000 stock held by him to be unpaid.

Chas. S. Meek, the appellant, and his solicitor have done much to obscure the facts of the case in the statements, etc., referred to by my learned brother in his charge—but the books of the company are not conclusive, and reports, etc., even if verified by affidavits, do not in themselves operate as an estoppel, simply by the fact of their being made. These statements all go to credit, and the appellant would have no very great ground of complaint, if the Master had preferred the Report verified by his affidavit to his oral testimony. That was, however, for the Master, and he has seen proper to believe the oral evidence of Meek and his solicitor, and I can find no sufficient ground for saying the Master was wrong.

Where it is a matter of the credit to be given to witnesses, which appear before the Master, it is the well-established practice in Ontario that he is the final judge of the credibility of these witnesses. *Booth* v. *Ratte*, 21 S. C. R. 637, 643, and other cases cited in *Hall* v. *Berry* (1907), 10 O. W. R. 954.

Giving credit to the oral evidence of the appellant and his solicitor it is manifest that while the $10,000 stock was not paid for at the time of the allotment, it was paid for by the appellant by the transfer the following year of his patent. That the $26,000 stock paid up which he was to receive for

his patent included this $10,000 stock is clear, not only from the oral evidence, but also from the undoubted fact that to enable the company to give him $26,000 common stock it was at the time necessary to count in this $10,000 stock.

I think, therefore, the Master's judgment should be restored on this point. But the difficulty has arisen in the determination of the fact through the negligence (to use no harsher term) of the appellant, and he should have no costs here or below.

HON. MR. JUSTICE LEITCH agreed.

HON. MR. JUSTICE MIDDLETON. NOVEMBER 7TH, 1913.

WILSON v. CAMERON.

5 O. W. N. 234.

Contract—Parol Agreement between Father and Son—Care of Farm—Son to be Conveyed Same at Death of Survivor of Parents—Evidence—Statute of Frauds—Part Performance — Acceptance and Fulfilment of Obligations under Contract — Contemporaneous Death of Parents—Duty of Personal Representative.

MIDDLETON, J., *held*, that there was sufficient part performance of a parol agreement between a father and a son by which the latter was to be conveyed a farm from the former in consideration of his living thereon and caring for the same properly and paying therefor an annual rental of $150 during the joint lives of his father and mother, where the son had returned from the city, taken up work on the farm and fulfilled the obligations of the agreement until the death of his parents.

Maddison v. *Alderson*, 8 A. C. 467, distinguished.

Action tried at Guelph on the 5th of November, 1913.

W. I. Dick, for the plaintiff.

C. L. Dunbar, for the defendant.

Action by two of the heirs-at-law and next of kin of the late J. H. Donaven, against his administrator and his son Charles W. Donaven, to have it declared that a certain agreement bearing date the 25th of February, 1911, is not binding upon the estate, and to restrain the administrator from conveying to the son the lands therein mentioned.

HON. MR. JUSTICE MIDDLETON:—There is no serious dispute as to the facts. The late J. H. Donaven had two sons and three daughters, Charles being the eldest of the

family. Charles remained at home to work the farm, the others no doubt doing their part so long as they remained at home. In 1908 Charles married. His father and mother then left the farm, and went to live in a cottage owned by the father. Charles remained upon the farm with his wife, and paid a rental.

A formal agreement was made, bearing date the 25th of February, 1911, which recites the desire of the father to secure and assure to the son "for special and tender services rendered to him" (the father), and to the mother, the transfer to him of the lands in question, after the decease of the father and mother. The agreement then provides for the payment of an annual rental of $150; and the father covenants to convey the lands to the son, upon condition that the son pay the rental stipulated during the life of the father and mother, or the survivor, and properly care for the land, buildings and fences, "in default of which the said lands of the said party of the first part shall forthwith revert to the said party of the first part."

The son unfortunately had some domestic difficulties, the details of which are quite unimportant here. As the result of these difficulties he made up his mind to leave the farm. In January, 1912, he sold the chattel property, paid off a mortgage upon it in his father's favour, and went to Guelph. The father and his son-in-law then farmed the land upon shares. The father endeavoured to sell, but did not sell; and finally entered into some negotiations with another son-in-law, Turner, to rent him the farm. Before this arrangement was completed the father went to see his son Charles, explained to him his desire and the mother's desire that Charles should return to the land; and the son yielded, agreed to go back, and ultimately did return at the end of September or the beginning of October, 1912. In the meantime, at another interview, the son asked the father upon what terms he was to come back, and it was arranged that the terms should be the same as those set out in the formal agreement of February, 1911.

After the son returned he paid rent and lived up to his obligations under the agreement in question. The father and mother were both killed in a railway accident on the 21st July, 1913. The son now claims the land under the written agreement, or, in the alternative, under the verbal agreement made when he returned to the farm.

I accept the evidence of the son in its entirety, and I think it is amply corroborated, if corroboration is necessary, by the other evidence given on his behalf. I think there was part performance of the contract made at the time of the return of the son to the farm, so as to take the case out of the Statute of Frauds.

The plaintiffs rely upon *Maddison* v. *Alderson*, 8 A. C. 467. While in that case it was held that there was no part performance and that the Statute must have its operation, the reasoning appears to me altogether in favour of the defendant. As put by the Earl of Selbourne (p. 476). "So long as the connection of those *res gestae* (i.e., *res gestae* subsequent to and arising out of the contract) with the alleged contract does not depend upon mere parol testimony, but is to be reasonably inferred from the *res gestae* themselves, justice seems to require some such limitation to the scope of the Statute" as that recognized by the equitable doctrine of part performance.

Possession, the payment of the stipulated rent, the making of repairs upon the barn, the removing of the large stones from the land, are all acts, it seems to me, referable to the contract, and not consistent with any other relationship between the parties. See *Hodgson* v. *Husband*, (1896), 2 Ch. 428; *Bodwell* v. *McNiven*, 5 O. L. R. 332; *Williams* v. *Evans*, 19 Eq. 457; *Dickson* v. *Barrow* (1904), 2 Ch. 339.

Here there was undoubtedly a parol contract which could be specifically performed if in writing. There is no uncertainty as to its terms; because the former written document sets them out at length; and the whole conduct of the parties is consistent with the resumption of the former relationship and inconsistent with any other state of facts. This renders it unnecessary to consider any of the other arguments presented by the defendant.

The action fails, and must be dismissed with costs, unless the defendant sees fit to forego them.

HON. MR. JUSTICE LENNOX. NOVEMBER 10TH, 1913.

RE MAIR & GOUGH.

5 O. W. N. 277.

Will—Construction — Vendor and Purchaser Application — Gift to Executors — Power to Use Corpus — Balance if any to go to Nephew—Fee Simple not Devised — Implied Power of Sale—Form of Deed.

LENNOX, J., *held*, that where property was devised by a testatrix to two of her brothers, to be "left entirely in their hands," they to be permitted to "use the corpus for their own benefit, and the balance if any which is left" to go to her nephew, the two brothers did not take an absolute estate in fee in the property but could sell the same as executors, the above words conferring an implied power of sale.

Motion by vendors under the Vendors and Purchasers Act for an order declaring certain objections to title raised by purchasers to be invalid.

C. W. Plaxton, for vendor.

Geo. Keogh, for purchaser.

HON. MR. JUSTICE LENNOX:—Authorities, of course, are often useful, sometimes exceedingly useful, in determining the construction of a will, but before worrying about what has been decided in some other case the initial question to be taken up is what did the testator intend to do with his property, taking his words and judging of them according to recognised rules of construction. Upon a very careful persual of the will of Matilda Elizabeth Mair, I fail to find an intention to confer an absolute beneficial estate in fee simple upon her brothers John and George. There is a gift over in this case —a manifest intention to confer a benefit at least contingently upon her nephew David Lansing Mair, and although the rule is clear that once a defined estate is clearly conferred in the earlier part of a will it cannot afterwards be narrowed or cut except by clear or express words, I cannot find any words anywhere that give a fee simple to these two men.

Then comes the question, not raised upon the argument of the motion however, what rights, if any, beyond the simple specific use or enjoyment of this property for life does the will confer, and although not conferring a fee simple benefici-

ally does the will confer the power to sell and convey a fee simple? With a good deal of hesitation I have come to the conclusion that the vendors have power to convey a fee simple estate to the purchaser, assuming of course as it seems to be conceded, that the testatrix was seized in fee. The vendors in addition to being beneficiaries are the executors of the will. The testatrix says she is leaving the estate "entirely in their hands." She intended to give them more than a mere life estate. She says they may use "the corpus for their own benefit" and that "any balance which may be left," which would be equivalent to "the balance, if any, which may be left," is to go to her nephew. They cannot use the corpus and diminish it as it is clearly intended they may do without effecting a sale; I think a power of sale is therefore to be implied. When a sale is effected they will have a right if they require it, to encroach upon the principal money. Beyond this requirement it is the intention of the testatrix that the residue shall go to the nephew.

This is very similar to, but not so definite as, the will in *Re Davey*, 17 O. W. R. 1034.

If I am correct in this conclusion it becomes immaterial as to the joinder of David Lansing Mair in conveyance, but even if it were otherwise, although I cannot say that a desirable method of conveyancing has been adopted, I have no doubt at all that the devisee releasing and quitting claim in a deed by which the vendors by earlier paragraphs purport to convey a fee will effectually convey the estate and interest of this residuary devisee as well as of the vendors. The recital and release will also be available for the purchaser and those claiming under him as an estoppel against the residuary devisee and persons claiming through him.

For these reasons there will be an order declaring that the objections made by the purchaser touching these matters are not well founded and that the conveyance tendered (with the declaration of David Lansing Mair) is sufficient.

There will be no costs.

HON. SIR G. FALCONBRIDGE, C.J.K.B. NOVEMBER 8TH, 1913.

RE ELLEN McDONALD ESTATE.

5 O. W. N. 238.

Executors and Administrators—Sale by Estate—Infants—Approval of Official Guardian not Obtained—Possession by Purchaser — Improvements — Sale Bona Fide and Fair — Confirmation by Court—Terms.

FALCONBRIDGE, C.J.K.B., confirmed a sale made by an estate without the concurrence of the Official Guardian as required by the Devolution of Estates Act where the sale was a fair one and the purchaser had entered and made improvements.

An application for confirmation of a sale made by the administrator of the estate of Martha Beatty, in which no application was made to the Official Guardian under the provisions of the Devolution of Estates Act.

W. Finlayson, for purchaser.

D. S. Storey, for Mrs. Weir.

F. W. Harcourt, K.C., Official Guardian, for infants.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—It appears that all the adults interested in the estate were agreeable to the sale, having signified their approval by the execution of deeds to the purchaser although it now appears that Kathleen Weir does not desire to carry it out.

The purchaser has been in possession of the lands and appears to have made improvements thereon. While the evidence as to value is somewhat conflicting there is no direct evidence to shew, that at the date when the contract for sale was made the price agreed to be paid for the land was inadequate.

An order may go confirming the sale and authorising the Official Guardian to approve of the deeds on behalf of the infants. The share of the infants in the purchase money to be paid into Court. The sale is approved on condition that the purchaser pay, by way of rent, interest at the legal rate from the date when she went into possession, to the date when the purchase money is paid over. As no application was made to the Official Guardian the administrator shall not be entitled to any commission nor to any costs in

connection with the sale prior to the date when the application was made to the Official Guardian.

There will be no costs of this motion except to the Official Guardian, which costs I have fixed at $15.

SUPREME COURT OF ONTARIO.

FIRST APPELLATE DIVISION. NOVEMBER 3RD, 1913.

ALLEN v. THE GRAND VALLEY RW. CO.

5 O. W. N. 197, 239.

Contract—Guarantee — Goods Supplied Railway Company—Guarantee of Two Directors of Company — Alleged Variation in Amount of Contract—Knowledge of Defendants—Variation Contemplated by Contract—Appeal.

KELLY, J., 24 O. W. R. 850 gave judgment for plaintiffs against defendant company for the price of certain material supplied for railway construction and against the two individual defendants, directors of defendant company, upon a guarantee executed by them, holding that the fact that the later figures of the plaintiffs for a complete job exceeded their earlier figures when the data upon which they were estimating was admittedly incomplete and subject to revision, did not release the guarantors.

SUP. CT. ONT. (1st App. Div.) dismissed appeal with costs.

Appeal by defendants from the judgment of HON. MR. JUSTICE KELLY, 24 O. W. R. 850, of June 30th, 1913, in favour of plaintiffs in an action for recovery of moneys claimed as a balance due for goods supplied by the plaintiffs to the defendant company for use in the construction of their railroad, and payments of which defendants Verner and Dinnick were alleged to have guaranteed.

The appeal to the Supreme Court of Ontario (First Appellate Division), was heard by HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE GARROW, HON MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE, and HON. MR. JUSTICE HODGINS.

J. Grayson Smith, for the defendants, appellants.

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

Their Lordships' judgment was delivered by

HON. SIR WM. MEREDITH, C.J.O.:—Mr. Smith has very fully presented the case from the standpoint of the appellants, and it seems reasonably clear. The letter of the

respondents of the 4th July, 1908, was simply a quotation of prices. In the letter of the 13th July, 1909, from the appellant company's superintendent to the respondents, accepting what is referred to as the tender of the 14th July, 1908, for the supply of points "in general accordance with tracings and sketches then submitted, but to be amended as necessary to agree with the requirements of our own engineer and that of the city engineer of Brantford," it was stated that "as explained to your Mr. Ward and Mr. Hampton, there will be certain alterations and probably additional work in various job numbers, but the details of these alterations and additions can only be arrived at when your engineer comes here to prepare the working drawings." Then, after referring to the shipment of the materials, the importance of getting some of the "jobs" completed quickly, and the terms of payment, the letter concludes with the following statement: "Jobs Nos. 33, 34 and 35 are to be complete layouts, including the manganese steel rails curved to the required radius; prices of these three layouts to be arranged as soon as detailed drawings have been prepared."

It is quite clear from the terms of this letter that a great deal was left open. The work to be done was to depend upon the requirements of the company's engineer and of the engineer of the City of Brantford; and it was also in contemplation that additional work would be required. It is not pretended that what was supplied was not all required for the purpose of carrying out the undertaking with reference to which the contract was made; and it is clear that the statement as to changes, alterations and requirements of the engineers applied to all the work, including jobs 33, 34 and 35.

It is manifest from the terms of the guarantee that it was in the contemplation of the guarantor that more than was mentioned in the list attached to the tender of 14th July, 1908, would be needed to carry out the work that was to be done, for the order is stated to have been for work amounting "to some $60,000," a sum considerably in excess of what the cost of the work would have been on the basis of the tender.

Everything supplied was supplied in accordance with the requirements of the company's engineer, and there is nothing in the correspondence or in the circumstances to

warrant the conclusion that it was intended that it should not be open to the engineer to alter his requirements from time to time as occasion might render necessary.

For these reasons, and agreeing as we do with the reasoning and conclusion of the learned trial Judge, the judgment must be affirmed and the appeal dismissed with costs.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. NOVEMBER 10TH, 1913.

RE NORTH GOWER LOCAL OPTION BY-LAW.

5 O. W. N. 249.

Municipal Corporations—Local Option By-law—Motion to Quash—Passage within one Month of Publication — Deputy Returning Officer Strong Advocate of By-law—Illiterate Voter—Blind Voter —Omission to Take Declaration — Consolidated Municipal Act ss. 171, 204, 338 (2)—Voters' List—Certificate of County Judge as to—Refusal to Go Behind—Costs.

KELLY, J., *held* (24 O. W. R. 489) upon a motion to quash a local option by-law that where no one had been prejudiced thereby the fact that the by-law had been passed within a month from the first publication thereof, by a few hours only, was not a fatal objection to the same.

Re Duncan v. *Midland*, 16 O. L. R. 132, followed, that the fact that one of the Deputy Returning Officers was a strong advocate of the passage of the by-law was not a disqualifying circumstance.

That the omission of an illiterate person to take the declaration provided by section 171 of the Municipal Act is a mere irregularity in the mode of taking the vote and does not avoid the same.

Re Ellis & Renfrew, 23 O. L. R. 427, followed.

That the certificate of the County Judge as to the correctness of the revised voters' list should not be gone behind and the steps investigated by which he arrived at his conclusions.

Ryan v. *Alliston*, 18 O. W. R. 131, followed.

SUP. CT. ONT. (2nd App. Div.) dismissed appeal with costs.

Appeal from a judgment of HON. MR. JUSTICE KELLY, 24 O. W. R. 489; 4 O. W. N. 1177, dismissing a motion to quash a local option by-law of the township of North Gower in the County of Carlton. The six grounds of attack upon the by-law are therein set out.

The appeal to the Supreme Court of Ontario (Second Appellate Division) was heard by HON. SIR WM. MULOCK, C.J.EX., HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE LEITCH.

F. B. Procter, for applicant, appellant.

C. J. Holman, K.C., for township, respondent.

HON. MR. JUSTICE SUTHERLAND:—The vote on the by-law as stated in the declaration of the Reeve was as follows:

"297 for and 192 against (total 489) and the by-law on that shewing was apparently passed by four and one-fifth votes beyond the necessary three-fifths. A recount and scrutiny of the ballots followed before the County Judge with the result that the figures were altered to 295 for and 192 against the by-law (total 487). The Judge also decided that four persons who had voted had not the necessary qualifications and he deducted these four votes making the final count, according to his certificate, dated 19th February, 1913, to be, for the by-law 291, against 192 (total 483).

The first and second grounds are of a general character.

1. That the by-law did not receive the necessary three-fifths majority of votes.

2. That the voting was not conducted in accordance with the Acts in question, and that persons were allowed to vote whose names did not appear upon the last revised voters' list.

The third ground is to the effect "that unauthorized names were entered upon the list of voters of the said municipality used in voting upon the said by-law, which names had not been entered upon the said lists of voters in accordance with the provisions and requirements of sec. 17 and subsequent sections of the Ontario Voters' Lists Act."

The evidence as to the way in which names of two men, namely, Dalgish and McQuaig, appeared upon the list of voters used at the elections is shortly put in the judgment appealed from in this way:

"Their names not appearing on the original list, an application was made to the Judge of the County Court to have them added, and they were so added by him after which he certified to the revised list as required by sec. 21 of the Act."

He then proceeds to say: "I do not think I am required to go behind this certificate and examine into the sufficiency of the various steps by which the Judge arrived at his results."

It does not appear that the County Judge held any formal Court for the purpose of adding these names to the list. The men had made a written application to the clerk to have their names added and the clerk informed the Judge of the fact. Their names then appear to have been added. It was apparently admitted, or at all events, not disputed that in any event the two men were persons who were entitled to have their names on the list. If their votes had been disallowed, this in itself would not have affected the result as it would be necessary to disallow at least four votes to do this. I agree, however, with the trial Judge in his view that he was not called upon to go beyond the certificate of the Judge as to the voters' list. *Re Ryan & Alliston* (1910-11), 21 O. L. R. 583, affirmed, 22 O. L. R. 200.

The fourth ground of objection is: "That illiterate voters were allowed to vote on the by-law without first having taken the declaration required by sec. 171 of the Consolidated Municipal Act." Two of the voters were unable to read or write and the third was blind. As to this objection the learned Judge, whose judgment is in appeal, was right in holding, under the authority of *Re Ellis and Renfrew*, 23 O. L. R. 427, that: "The omission to take the declaration is merely an irregularity in the mode of receiving the vote, and so covered by the curative clause of the statute, sec. 204."

The fifth objection is that the by-law was finally passed within one month after its first publication in a public newspaper contrary to the provisions of sec. 338 (3) of the Consolidated Municipal Act.

Sub-section 2 of sec. 338 refers to the publication of the by-law and sub-sec. 3 is as follows: "Appended to each copy so published and posted, shall be a notice signed by the clerk of the council stating that the copy is a true copy of a proposed by-law which has been taken into consideration and which will be finally passed by the council (in the event of the assent of the electors being obtained thereto) after one month from the first publication in the newspaper, stating the date of the first publication, and that at the hour, day, and place or places therein fixed for taking the votes of the electors, the polls will be held."

The by-law was first published on the 13th December, 1912, and given its third reading on the 13th January, 1913.

The case of *Re Duncan & Midland,* 16 O. L. R. 132, has application to this ground of appeal and is, I think, conclusive against it. At p. 155, Osler, J.A., says:

"Here the carriage of the by-law by the electors is not attacked, nothing is complained of, or rather, nothing could be set aside but the faulty third reading or formal passage of the by-law, leaving the council free (and obliged) to give it another and now unobjectionable one. It appears not only that no attempt was made to obtain a scrutiny of the ballot papers, but that they were, in fact, inspected and examined, and that only one was found to be defective. There is no evidence, in short, that a scrutiny would have had any effect in altering the result or that those opposing the by-law were in any way deterred from applying for one by the improper action of the council. We could not set aside or quash the by-law simply, as there is nothing wrong but its third reading, and to set aside that would now be a useless and futile proceeding."

The present case is really on the facts a stronger one as a recount and scrutiny of the ballots was actually had.

The sixth ground of objection is to the effect that a Deputy Returning Officer was disqualified by interest from holding that office. It is unsupported by any evidence that could properly sustain it.

Upon all grounds the appeal fails and should be dismissed with costs.

HON. SIR WM. MULOCK, C.J.EX., HON. MR. JUSTICE RIDDELL, and HON. MR. JUSTICE LEITCH, agreed.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. NOVEMBER 10TH, 1913.

PRESSICK v. CORDOVA MINES.

5 O. W. N. 263.

Negligence—Master and Servant—Fatal Accidents Act—Fall Down Uncovered "Winze" of Mine—Statutory Duty—Use of Defective Wrench—Liability for the Supply of—Contributory Negligence—Finding of Jury—No Evidence to Support—Rejection of Finding by Trial Judge—Appeal.

LATCHFORD, J. (24 O. W. R. 631) in an action for damages for the death of one of the defendants' employees killed by a fall down a "winze" in defendants' mine through their alleged negligence, refused to accept a finding of contributory negligence, holding that there was no evidence to support it, but *held* that a finding of negligence upon the part of the defendants was justified, and entered judgment for the plaintiff for $1,750 and costs.

SUP. CT. ONT. (2nd App. Div.), RIDDELL and LEITCH, JJ., *dissenting, held*, that there was a clear breach of statutory duty on the part of the defendants in neglecting to guard the "winze," but that in any case the finding of the jury as to contributory negligence was too vague to be understood and should be disregarded.

The Court being equally divided the appeal was dismissed with costs.

Appeal from a judgment of HON. MR. JUSTICE LATCHFORD, in favour of the plaintiffs for $1,750 damages, with costs.

H. E. Rose, K.C., and J. W. Pickup, for defendants, appellants.

F. D. Kerr, contra.

The action was brought by Mrs. Lily Pressick, widow of John Arthur Pressick, deceased, on behalf of herself and the infant children of the deceased, for damages because of the death of her husband who was killed by falling down a winze or shaft in a gold mine which the defendant company was working.

The deceased and one James Steinberg were, by orders of the defendant company's foreman, working on a drill in a horizontal drift, or tunnel, about 200 feet below the level. One hundred feet below this tunnel was another drift, or tunnel, and an open vertical shaft or tunnel, in size about 12 by 18 feet, connecting the two tunnels.

It was the duty of the deceased and his helper Steinberg to work a drill near the edge of this shaft, drilling across the floor of the tunnel a row of holes which were to be charged with dynamite and exploded, whereby a section of rock would be separated from the mass, and caused to fall down the shaft. To accomplish this end the drilling had to be conducted reasonably close to the edge of the shaft, which ran almost across the tunnel. The drilling machine consisted of a tripod having a drill, or steel, in the centre. To operate it properly, the tripod required to be so placed that two of the legs were within 12 or 14 inches of the edge of the shaft. This would enable the steel to drill a row of holes across the floor of the tunnel about two and a half feet away from the opening. On the top of the machine was a nut which, at times, in the course of the operation of the machine required to be tightened or loosened by a wrench supplied for such purpose to the deceased by the defendant company.

On the night of the accident, the deceased, along with Steinberg, set up the machine close to one of the hanging walls of the tunnel, with two of the legs placed within 12 or 14 inches of the open shaft, one of these two being near the hanging wall in order to permit drilling as close as possible to the side of the tunnel.

Just before the accident, the helper, Steinberg, saw the deceased pick up the wrench and put it on the nut, saying he was going to loosen it. Steinberg then leant over to remove the drill, and, hearing the wrench slip, looked up, when he saw the deceased fall over the edge into the shaft and disappear, falling about 100 feet, and sustaining fatal injuries.

The following were the questions submitted to the jury with their answers:

"1. Was the death of the plaintiff's husband caused by any negligence on the part of the defendants? A. Yes.

2. If so, in what did such negligence consist? A. The opening through which the man Pressick fell should have been guarded, or protected, in some manner.

3. Was the accident caused by any defect in the works, ways, machinery, plant or premises of the defendants? A. Yes.

4. If so, what was such defect? A. That wrench used was defective, also the opening being unguarded or unprotected.

5. Was the opening through which Pressick fell dangerous by reason of its depth? A. Yes.

6. Was it practicable to cover or guard that opening, having regard to the work of breaking down the pillar of ore on which Pressick was engaged at the time of the accident? A. Yes.

7. Could Pressick, had he exercised reasonable care and diligence, have avoided the accident? A. Yes.

8. If so, in what did such negligence consist? A. Should of used more care in using a defective wrench.

9. What damages have the plaintiff and her children sustained by reason of the accident? A. $1,750."

(Sgd.) "Samuel Taylor."

The place where the work in question was being carried on was a mine within the meaning of the Mining Act of Ontario and the Mining Amendment Act, 1912. Section 18 enacts as follows: Sub-section 24. "The top of every shaft shall be securely fenced, or protected by a gate, or guard rail; and every pit or opening, dangerous by reason of its depth, shall be securely fenced, or otherwise protected." Sub-section 25. "At all shaft and winze openings, on every level, a gate or guard rail, not less than 3 feet, or more than 4 feet, above the floor, shall be provided, and kept in place, except when the cage skip or bucket is being loaded or unloaded at such level."

The language of these two sub-sections is very clear and they made it the duty of the defendant company to guard the shaft. Their failure to do so was a breach of a statutory duty, and, if the cause of the accident, the defendant company is liable.

At the trial much evidence was directed to the question of the reasonableness or practicability of guarding. This was treating the omission to guard as a question of negligence. It may be; but there was also a statutory duty to guard, and if failure to guard was the ultimate cause of the accident then, irrespective of the question of negligence, the defendant company is liable.

Groves v. *Wimborne* (1898), 2 Q. B. 402.

The question whether the wrench was defective admits of no doubt. Uncontradicted evidence shews that it was too large to fit snugly on the nut of the machine, and was too short in the jaw to take proper hold of the nut. It was the defendants' duty to supply a reasonably proper

wrench, proper not only because of the actual use to be made of it by the deceased, but also because of the dangerous nature of the place where he was required to use it.

I therefore think the jury's finding with regard to the wrench cannot be disturbed.

The next question is whether the jury's answers to questions 7 and 8 relieve the defendants of liability.

At the trial the defendants, as one ground of contributory negligence, sought to shew that the deceased should have so set up the machine that when loosening the nut by pulling on the wrench he would be at the side of the machine farthest from the opening, and, therefore, in a less dangerous position; but that he set it up in such a manner that when loosening the nut by pulling on the wrench he was between the machine and the opening. And as another ground of contributory negligence they endeavoured to shew that, assuming that the machine was properly set up, the deceased, instead of standing in front, and pulling on the wrench, should have stood behind the machine and pushed.

The evidence as to both of these contentions was conflicting, but, so far as its perusal enables one to have an opinion as to where the merits lie, I am far from convinced that it shews any negligence on the part of the deceased, and it is most improbable that the jury had either of these alleged grounds of contributory negligence in their minds when framing the answers to questions 7 and 8.

In his charge to the jury, the learned trial Judge gave the defendants the full benefit of their contentions, and if the jury had intended to find both, or either, of them, in favour of the defendants one would have expected them to have made such intention clear. Under these circumstances their omission to do so negatives the view that they intended to find negligence of the nature thus charged.

The learned trial Judge also made it clear to the jury that they were at liberty to deal with any other acts of contributory negligence. Thus, in their deliberations, they were not limited to considering the mere question as to how the deceased should have set up the machine, or where he was standing when loosening the nut, but were free to deal as invited by the Judge, with any act of contributory negligence of which the deceased might have been guilty.

The jury had seen the machine, or a similar one, in Court, also the defective wrench, and witnesses had illus-

trated before them the work of loosening and tightening the nuts. Thus it was made clear to their minds how easy it was, with the defective wrench, for the accident to happen. They knew from the evidence of Steinberg that the accident had happened because of the wrench slipping, and it may properly be assumed that they recognized the importance of such care being exercised in the use of the defective wrench that it would not slip. But it is the merest speculation to say what act of contributory negligence the jury intended. Does the answer to question 8 mean that the deceased had negligently fitted the wrench to the nut, and that in consequence it slipped? Does it mean that though there was no negligence in fitting the wrench to the nut, yet the deceased was negligent in the manner of applying it, viz., pulling it violently or carelessly, or in such direction as to cause the wrench to lose its hold on the nut? Does it mean that if he had exercised reasonable care in pulling on the wrench the accident would not have happened? Does it mean that he should have been standing elsewhere? Does it mean that he should have operated in some different way? It is open to any one of these, and doubtless many other, interpretations, but to say which would be mere guess work.

It was the jury's duty to specify the particular act or acts of negligence. Then the Court would be in position to determine whether there was evidence to support such finding.

But in the absence of any definite finding of specific negligence, no effect can be given to the general finding.

I therefore think that the answers to questions 7 and 8 must be set aside as meaningless, and constituting no defence.

Further, there is, I think, another fatal objection to the answer to question 8, worded thus: "Should of used more care in using a defective wrench." The finding of negligence in this answer is predicated upon the supposition that the deceased knew that the wrench was defective. There is no evidence that he knew the wrench was defective or had ever before seen or used it. Wrenches of different makes and types were used at the mine, some made by the manufacturers of drilling machines, others by local blacksmiths. For all that appears, the wrench furnished the deceased to be used with the machine when he was

ordered to set it up on the night of his death may have been one that he had never before seen.

The finding of the jury may be paraphrased thus: "Inasmuch as deceased knew the wrench was defective, he should have exercised more care in its use." This is a mere conditional finding of negligence, merely meaning that if deceased knew, then he was negligent, and if he did not know, then they make no finding of negligence.

There being, as already observed, no evidence of knowledge, the answer to question 8 is not a finding of contributory negligence, and I think the learned Judge was right in disregarding the answers to questions 7 and 8.

For these reasons the appeal should be dismissed with costs.

HON. MR. JUSTICE SUTHERLAND agreed.

HON. MR. JUSTICE RIDDELL (*dissenting*):—The husband of the plaintiff was in the employment of the defendants, who own and operate a gold mine. On the 31st May, 1912, he was engaged in operating a drill, with the assistance of one James Steinberg. The mine had at least two drifts, at the two hundred feet and the three hundred feet levels, and these drifts were connected by a vertical opening. In the two hundred feet drift they were blasting off from the floor at the end of the drift into, and consequently down, the opening the rock forming the floor of this drift. The holes for the explosive were drilled by a drilling machine, supported on three legs forming approximately an equilateral triangle on the supporting surface. Above and between these was the cylinder above and the drill or bit below. The bit was about two and a half feet from the edge of the opening; the legs being arranged so that the line between the feet of two of them was substantially parallel to the edge of the opening. This line came within a foot or fourteen inches of the edge, while the other foot was about four feet away from the edge. The shaft in which the work was going on was about fifteen feet wide and ten of twelve feet high.

The drill had been used in the lower level by the day shift, who had, on finishing their work, brought the drill up and left it on the surface. The deceased was on the night shift; and when he went to work at seven p.m., he

was set by the foreman to drill a row of holes along the front and then drill back. There was some question at the trial about the position of the tripod; and the defendants contended that Pressick made an error in judgment in placing the machine. It was taken for granted at the trial that Pressick placed the machine where it was, although I do not find it anywhere specifically so stated. The charge of the learned trial Judge proceeds on that assumption, and the charge was not objected to on that ground.

The deceased had been drilling, with the assistance of his helper, for some four or five hours, and had got down about three feet when he found it necessary to loosen a certain nut in the machine. On this drill there were at least seven nuts, to loosen which there was supplied a spanner-wrench with a jaw on each end. The jaws of this wrench were not only too shallow to cover the whole nut but also too wide apart to catch the nut snugly. The wrench was the kind of wrench always used with such a machine—"the regular standard wrench"—and it had been used on this machine because it was "all the wrench the men could get;" and it was a very poor one.

The helper saw Pressick pick up the wrench, as he (Pressick) said to loosen a nut on the machine, put the wrench on the nut, and having been standing between two of the legs of the tripod and between the drill and the opening, the next thing the helper saw was Pressick falling down the opening; the cause of the accident the witness does not know.

An action was brought by the widow. This was tried before Mr. Justice Latchford with a jury in Peterborough, April 8th, of the present year.

In answer to questions, the jury found as follows:—

1. Was the death of the plaintiff's husband caused by any negligence on the part of the defendants? A. Yes.

2. If so, in what did such negligence consist? A. The opening through which the man Pressick fell should have been guarded or protected in some way.

3. Was the accident caused by any defect in the works, ways, machinery, plant, or premises of the defendants? A. Yes.

4. If so, what was such defect? A. That wrench used was defective, also the opening unguarded or unprotected.

5. Was the opening through which Pressick fell dangerous by reason of its depth? A. Yes.

6. Was it practicable to cover or guard the opening, having regard to the work of breaking down the pillar of ore on which Pressick was engaged at the time of the accident? A. Yes.

7. Could Pressick by the exercise of reasonable care and diligence have avoided the accident? A. Yes.

8. If so, in what did such negligence consist? A. Should have used more care in using a defective wrench.

9. What damages have the plaintiff and her children sustained by reason of the accident? A. $1,750.

The learned Judge reserved a motion for judgment, and May 23rd directed judgment to be entered for the plaintiff for $1,750 and costs. The reasons for judgment appear in 24 O. W. R. 631; 4 O. W. N. 1334.

The defendants now appeal.

It will be seen that there are two grounds of negligence found: (1) the non-guarding of the opening, and (2) the defect in the wrench. That the wrench was defective and under the circumstances dangerous is quite clear from the evidence. As it was the wrench that was supplied for the purpose, I think that the finding must mean that there was negligence in the person who supplied it; the defect was patent and no one could have supplied this wrench, too short in the jaws and too large in the opening, using reasonable care. This being so, I think we are bound by authority to hold that the finding is sufficient to justify a verdict for the plaintiff. Markle v. Donaldson (1904), 7 O. L. R. 376, 8 O. L. R. 682, holds that any person whose duty it is to get ready for workmen an appliance necessary for their safety is a person entrusted by the employer with the duty of seeing that the condition . . . of the plant is proper. Under sec. 6 (1) of the Act the reasoning is sufficiently wide to entitle—and I think compel—us to hold that anyone who is required by the master to furnish any tool, etc., to the workman, a defect in which may bring about an accident, is a "person entrusted by him with the duty of seeing, etc."

If that conclusion be sound we need not consider whether the opening was a "winze," whether the Mining Act required it to be guarded or whether the jury were justified in finding its non-guarding actionable evidence.

The learned Judge, it is argued, has read the answer of the jury on contributory negligence in too narrow and literal a manner.

In determining what is the meaning of a jury's finding we are entitled to look at the whole case as made at the trial and also the charge of the trial Judge.

There are apparently two kinds of negligence alleged against the deceased; these are not always clearly discriminated, but I think they may fairly be stated thus:—

1. The set of the machine with the swing nut on the side of the machine nearest the opening was negligent.

It is said that it should have been set with the swing nut on the other side and away from the opening. See cross-examination of James Steinberg the helper, pp. 11 and 12; Charles Steinberg cross-examination, p. 34; McInoy, in chief, pp. 43, 44; Kirkgarde, pp. 55, 56. cross-examination p. 60, re-examination p. 64; Caldwell, p. 66; Kemsley, p. 71, cross-examination, p. 73; Linnell, cross-examination, p. 78.

2. Pressick, it is said, should have turned the nut from the other side of the machine, pressing forward instead of pulling backward. See cross-examination of James Steinberg, pp.12 and 13, re-examination, p. 14; Thomas Sampson, in chief, p. 17, Charles Steinberg, cross-examination, pp. 31, 32, 33; Goodwin, cross-examination, pp. 38, 39, 40; McInroy, cross-examination, pp. 48, 49; re-examination, pp. 51 and 52; Cowell, re-cross-examination, p. 69.

In the charge to the jury the learned Judge says:

"The tripod was set with this swinging nut farthest away from the hole. Now, it is said that this was not a proper way to set up the machine. Several of the witnesses on the one side swear it was the proper way. The witnesses called by the defence say it was not. You heard the various witnesses on that." . . . "Now, it is said that Pressick was negligent because he did not set up the machine the other way, that is, with the tripod turned so that the swing bolt would be near the opening; the swing nut was set back towards the drift, and not out towards the opening; is that the fact?

"Mr. Kerr—No, I thought it was the other way.

"Mr. Cowan—Yes, he had to go on that of the machine.

"His Lordship—You heard the evidence of Mr. Kemsley and Mr. Linnell who said that the swing nut should be set next to the drift; that is the evidence of Linnell, and I think also the evidence of Mr. Kemsley. The evidence of Mr. Cowell is that the nut should be set the other way,

and that is also Mr. Kirkgarde's opinion, and Cowell said he thought Pressick made an error of judgment in placing the machine." . . . "Then, having set up the machine in that way, was he negligent in not standing on the safe side, but instead of that, going on the side next the opening and pulling the wrench there. It is said that had be been using the wrench—suggested rather—he would have carried it with him when he went. Well, perhaps he would, and perhaps he would not. He might have dropped it and reached for something else, as he went down the glory hole and lost his life. I ask you to find in what did his negligence consist, if you find he was negligent. If there is any other ground of negligence on his part I want you to mention it."

It is plain that both the alleged grounds of negligence were brought before the jury and only these two were suggested. With very great respect, I must differ from the learned Judge when he says: "The machine might have been more safely placed for the loosing of the nut if the valve had not been on the side on which it was at the time of the accident. This was the contributory negligence which the defendants sought to prove Pressick guilty of."

There was the other, viz., standing in a wrong and dangerous position, with the machine set up as it was.

And I think it cannot be fairly said that the jury have negatived either one or the other negligence; and particularly not the negligence of standing in the wrong place.

The finding of a jury must receive a reasonable construction, and one in view of all the circumstances of the case. A finding of contributory negligence is entitled to as much respect as a finding of negligence on the part of the defendants, and that always receives a liberal interpretation. Where this finding in favour of a workman, with particulars of negligence as in the eighth answer, the Court would strive and rightly strive, to support—and in my view would succeed in supporting—the finding of negligence; and the defendants have the same rights as a workman when before the Court, to a reasonable view being taken of the whole matter; if the findings of negligence in their favour can be fairly supported, it should be.

The answer to the 8th question can mean the deceased should have stood in a different position—that is what I

think the jury did mean. I do not think that the jury meant to say "knowing the wrench to be defective, the deceased should have used greater care than he did in putting it on the nut;" that kind of negligence was not alleged. If they intended to find that the deceased knew the wrench was defective, there is ample evidence from which, to put it mildly, they might so find. He had been working on the machine for four months (p. 9), almost every time the drill was to be changed the nut had to be loosened (p. 71), and this was the only wrench that was supplied for the purpose. It is manifest Pressick must have known all about the wrench.

It was surely open to the jury to find as negligence that the deceased stood where he must almost certainly fall down the opening if the wrench should slip—that, I think, is what they meant.

The jury should, perhaps, have been asked to state more definitely what they did mean; and it is possible that all the trouble has arisen from the omission to do so.

But I am unable to follow the learned trial Judge when he says: "The jury found none of the grounds of contributory negligence sought to be established by the defendants, but evoked by some obscure process of reasoning on ground which is in my opinion unsupported by any evidence."

This, as it seems to me, is treating the jury with much less respect than they are entitled to; we should treat a jury as being reasonable men until the contrary is manifest, and I see nothing to indicate any obscure processes of reasoning or anything else than a finding in accordance with their views of the evidence and wholly supported by satisfactory evidence.

As I have already said if the negligence so found had been the negligence of someone, who by his negligence would have made a master liable to a servant, the Court would endeavour to support the finding, and a verdict, and a judgment based thereon; and the defendants should be in no worse condition than the plaintiff workman would have been in such a supposed case. So long as contributory negligence is a defence in law, so long should it be given full force and effect. If any change is to be made in the law, the Legislature must make it.

I think the judgment should be set aside and the action dismissed, both with costs if demanded.

HON. MR. JUSTICE LEITCH:—I agree.

NOTE. In view of the fact that in the result the appeal was dismissed the dissenting Justices withdrew their judgment as to costs, and agreed that the dismissal of appeal directed by the Court should be with costs.

HON. SIR JOHN BOYD, C. NOVEMBER 10TH, 1913.

DAVIS v. LOCOMOTIVE ENGINEERS.

5 O. W. N. 279.

Insurance—Accident Insurance—Death of Insured—Delay in Making Claim—Disputed Cause of Death — Defendants' Tribunal not Satisfied that Death Caused by Accident—Evidence—Refusal to Permit of Autopsy—Non-compliance with By-laws of Defendants —Dismissal of Action.

BOYD, C., dismissed an action brought against the defendants upon a policy of accident insurance, holding that the finding of the defendant's own tribunal that the plaintiff had not proven that the death of the insured was caused by an accident was warranted by the evidence.

Action by the widow of Frederick Davis, to recover $2,000 upon a policy of accident insurance, the plaintiff's husband, the assured, having died, as the plaintiff alleged, as the result of an accident.

C. St. Clair Leitch, for plaintiff.

L. F. Heyd, K.C., and R. H. McConnell, for defendants.

HON. SIR JOHN BOYD, C.:—The defendants are a fraternal benefit society, incorporated in the United States, but doing business in Canada, made up of policyholders with certificates of membership and confined to locomotive engineers who are in the brotherhood.

Policies are issued for life insurance and accident insurance and the deceased Davis was insured in both kinds.

He died on 15th November, 1910; proof of death by disease certified by the physician as "disease of the heart and vessels causing heart failure" was sent in by the local

secretary of his division, 132, on printed form furnished and used by the defendants and the claim was promptly passed and ordered to be paid by the home or head office at Cleveland. Payment was to be made of the amount insured, $3,000, out of the fund raised for that purpose, in the following February.

In the case of "accidental death" the procedure of the association is that the local secretary must notify the home office and thereupon a form will be furnished for "proof" of death to be made, also full particulars as to the cause of death."

Claims for the principal sum because of accidental death must be approved by the local secretary and three members of the division, with seal attached, also a statement from the attending physician, before they can be entertained by the home office, and officially approved by the president and general secretary and treasurer; the latter being authorised to determine whether or not any claim is valid. By-law 17 (1908).

The method provided by the association, which is binding on its members, is that all claims for insurance should be made to and worked out by the secretary of the local division and its members, and should be presented in completed form for ultimate determination by the head office. This was observed in the case of the death claim, but was disregarded in the case of the accident claim.

The course pursued by the insured and his beneficiary the plaintiff was throughout, of unusual character and not in conformity with recognized procedure. Manifestly the scheme of insurance was that the validity of each claim should be canvassed by the members of the local brotherhood, who would know or learn of the accidents or ailments of their comrades, and be better able to judge of its truth and honesty than any outside body.

The peculiarity of this claim is that it was not made till over a month after the death, and then by lawyer's letter to Cleveland (the head office), and further, the fact of there being an accident or accidents as now claimed was not disclosed by the deceased or known to his fellow-workmen during his life; one accident said to be on 28th April, 1910, and a second on 21st May, 1910. The death was on the 19th November, 1910, and the first claim was by letter of the 16th December. The sole proof offered at the trial that the

deceased had been injured rested on what he is said to have told his wife, and is evidenced by her alone.

The course provided for by the by-laws is that the member in case of accidental injury must at once notify the local secretary, giving full particulars, and the latter must then immediately forward the notice to the head office, whereupon proper forms will be furnished by return mail on which the injured member must make his claim for weekly indemnity. (By-law 16).

The deceased had another accident and benefit policy besides this in question, and from both he would have drawn a larger monthly payment than his regular wages when on duty. The excuse given for his not giving notice of the injury and making claim for weekly benefits was that he was afraid of having to pass a medical examination, and that he would be pronounced physically unfit for service on the railroad.

The evidence generally, from his companions, is that he was an ailing man, a sick man in his last years; and proof is given of the various claims made by him: first, he was laid aside for five weeks and three days in September and October, 1906, because of his back being sprained while running an engine, when his physician, Dr. Miller (the same who gave the physician's statement in this case) reports that he had "ruptured some of the muscles of the lower part of the back."

(Canadian Accidents Policy). Again he was laid aside from the 12th to the 26th of February, 1907, on account of a severe pain in the bladder, and vomiting, which Dr. Miller reports as "renal calculus." And a third claim is made and allowed in March, 1909, when he was afflicted from the 14th February till the 24th March with pain in stomach and vomiting, similar to an attack which he had in 1907 that Dr. Miller calls "hepatitis." This insurance was with the Canadian Mutual Accident Insurance Co. His accident policy with defendant begins in April, 1910.

Reverting again to the by-laws, there is an important provision in number 21 that no claim for the principal sum of any policy-holder will be recognized when loss of life has been incurred because of "injuries, fatal or otherwise, when there is no external contusion unless certified to by a medical expert designated by the association."

There was absence of external marks in the case of these alleged injuries, and no opportunity has been given to the officers of having an autopsy—a measure of protection which was specially called for in the case of this claim.

It is now needful to take up the way in which this claim was brought before the brotherhood, and endeavour to unravel its complications.

The claim begins with a letter from the plaintiff's solicitor to Cleveland, stating that Davis had died from an accident, and asking for blank forms of proof (16th December). The answer of 19th December was that the records shewed that the man had died from disease, as stated by the physician. The solicitor on the 7th January, 1911, writes "that the statement of the physician is not inconsistent, as the immediate cause of death was heart failure, brought about by an accident;" then a further request for forms. The defendant's answer on 10th January, 1911, informs the solicitor that business of this kind is done through the local secretary at St. Thomas, and that the papers received from Division 132 do not agree with the statement made as to the manner of death. A desire is expressed that if there is any positive evidence to bear out the solicitor's statement, it should be sent to head office.

I think that all the correspondence has been put in. Each side has made selections, and I draw from the letters, etc., according to dates, without being sure that there may not be an occasional hiatus.

Nothing of proof appears to have been sent by the solicitor to the head office; and, by direction of the head office investigation of the case was begun by the local secretary, Eli Cowles. He called upon the widow on the 20th January, 1911, and writes the result to Shay, the head secretary. He writes that she says the real cause of death was an injury Davis received while reversing his engine *some time ago*, but could not tell the exact date, which injured something near his heart. He did not put in any claim for indemnity when this happened, as he did not want any one to know about it; he thought the officials might require him to pass a physical examination before going to work. "This is the information I got from the widow, and to-day is the first I heard he was injured, although I knew he had been sick for some time."

"I called on Dr. Miller, who was called in to attend him at the time of the injury, and he states that he found him spitting blood, and he thought that Davis had ruptured an artery near the heart. This was on April 30th, but could not say if this was the immediate cause of death, as he did not attend Davis in his last illness, being away, and Dr. Tufford being called."

The home office acknowledges the letter of Cowles on 23rd January, and the claim is regarded as "far-fetched."

The next letter before me is of 15th April, 1911, in which Cowles informs Shay that the solicitors of Mrs. Davis, at St. Thomas, had an interview with Cowles, and informing head office (what was already known there) that the plaintiff had placed the matter in a solicitor's hands. The head office's letter refusing to allow claim was shewn him, and the solicitor asked for a blank claim, so that the claim might be filed in a proper manner. Cowles tells Shay that he has just heard that Davis had an accident policy in the Canadian Accident Insurance for $2,000, and also copy of application made for indemnity in that company (I have not seen this).

The only date of accident up to this time was the 30th April, supplied by Dr. Miller, as is said, from his books; and Cowles was seeking for information on this footing. His next letter is 15th May, 1911, forwarding statements made by Flynn and Folland, the latter Davis, fireman and the other a master mechanic, both of whom saw Davis on the 30th April. Cowles had been making enquiries and looking up data, and reports that there was no difficulty in working or reversing the engines then in use and on that day particularly. Folland's statement is dated 4th May, 1911, and is as follows:—

"In regards to condition of Mr. Fred Davis on trip of April 30th, 1910, I do not recollect of him complaining about the engine reversing hard, although he might have said so, as this is a common occurrence and would pay no attention to it. I did not notice him spitting blood until after we arrived at coal dock at St. Thomas. He was then on the ground, and to the best of my recollection Mr. Flynn called me down off the engine, and he had been spitting considerable blood. At some considerable time previous to this we had a hot engine truck at Cornell, and he got down to dope it, and complained of hurting his back, and I believe he was

off duty for some length of time, and when he came back to work he still complained of his back."

Flynn's contribution is a letter dated the 15th of May:—

"When Mr. Davis came in on his engine, April 30th, I noticed him coughing up very red blood, and advised him to go home at once. I have no recollection of him making any complaint about the engine reversing hard."

On the 19th May President Futch writes to Cowles in answer, and says all this information "tends to convince me that there is no indemnity claim for the principal sum on the policy." He goes on to say that he had hoped to go into a still better investigation, personally, and meanwhile asks Cowles to furnish the solicitor with proof of death form, and to tell him that, while they feel satisfied there is no valid claim, they are open to conviction, and will consider any statement or evidence that there is.

Next before me is an isolated letter from the president to Cowles, dated 31st May, which acknowledges letter of May 9th, and also states receipt of a letter from Mrs. Davis in reference to new evidence, at which he is surprised because of statements that Davis had applied to Duffy for papers to fill out for his indemnity insurance. (This letter of plaintiff, and the president's reply, I have not seen).

Next is a letter from the president to the solicitors, dated June 15th, 1911, saying that Mrs. Davis had seen him and complained of no proof papers being sent, and he encloses same, though he had before authorized Cowles to furnish them. Referring to information procured by Mrs. Davis, he asks that all information on both sides may be submitted, that the justice of the claim may be fully and fairly considered.

The solicitor's answer is dated 17th June, and says that the declarations of Mrs. Davis and George Folland are being sent, and that the blank form will be filled up and sent in as soon as possible.

Mrs. Davis' statutory declaration is dated the 15th of June, 1911, and states that "on or about the 28th of April, 1910, my husband came in from his trip on the M. C. R., and he told me that he had been injured at Cornell, and from that date on he complained of said injury, and when he again came in from his trip on the 21st May, 1910, he was covered with blood, and dropping into a chair he said that he was done for, and when I asked him what the trouble

was he said that, when reversing his engine, something gave way within him, which he said was the result of the injury he received at Cornell. That I believe the injury at Cornell eventually caused the death of my husband."

Folland's statutory declaration of 17th June, 1911, is at variance with his earlier statement given to Cowles. I quote the variations and extensions:—

"On or about the 28th April, 1911, Davis was injured, being strained when doping engine truck near Cornell."

"Davis was out again with me on the road on the 31st day of May, 1910, and on that trip said he was sorry he came out, owing to his weak condition."

"When we reached the roundhouse at St. Thomas on our return trip on the 21st May he was bleeding internally, and he went home, at the instance of the master mechanic, without reporting."

"That Davis had complained to me several times of his said injuries received at Cornell."

"That the engines being used by the Michigan Central Railroad Company, on the said dates, were new and were hard to reverse, and I had on several occasions to assist Davis in reversing them."

The local secretary writes to the president on the 20th June, 1913, saying that he had filled out the claim blank as the law requires, and got the brothers to sign as witnesses, although they knew nothing as to the injury. He says: "I find that Davis worked up to May 21st, instead of April 30th. He came in with engine 7916, on April 20th which I believe is the trip that his fireman says they had the hot engine truck, and he complained of hurting his back, and was off duty until April 28, and worked until April 30th, when he had the engine 8428. He again returned to work on May 6th and worked up to May 21st, which is the trip that he came in and was spitting blood; he had engine 8411 on this trip . . . this engine had been in service for a considerable time, with only a round-house overhauling in April. He was then off duty until September 15th, when he worked for three days more. . . . I left the claim with Mr. Crothers' clerk."

On the 22nd of June, 1911, proof of death properly filled in was acknowledged by the president as received on June 20th from solicitors.

On the same day, June 22nd, the president acknowledges letter of Cowles, and says that if the claim cannot be recognized he will submit the case to their board of trustees, now in annual session.

The papers next in date before me are the statutory declaration of Dr. Miller, and a further declaration by Folland, both made on the 31st August, 1911.

Folland now fixes the date of the injury by strain as on the 28th October, 1910, and he adds this: "Though I do not remember particularly the engines used on the said dates, I know that the engines being used at those times by the company were new and were hard to reverse, and on many occasions I had to assist Davis in reversing, and the effort necessary for him to put forth in so reversing them was well calculated to aggravate the strain so received at Cornell."

Dr. Miller sets forth:—

"I have an entry in my book shewing that I visited Davis on 30th April, 1910. When attending him, I learned from him of his having been injured at Cornell on the 28th April, when engaged in duty."

"On said visit I found Davis coughing violently and spitting blood, which continued up to the 10th day of October, 1910, when I ceased attending him."

"I am satisfied, and verily believe, that the injury received at Cornell, as described by him to me, primarily led to his death, and that his general state of health was such that he would have lived for years, had he not met with the said accident."

"I spoke to Davis several times about apply'ng for indemnity insurance, but he would always say that he would have to undergo a severe physical examination, and he was afraid he would not pass the examination and would lose his position on the railroad."

These statements appear to be the result of an interview between the president, the solicitor, Mrs. Davis and Folland, referred to in the letter of 2nd September to Cowles. The president told the others that, with the exception of one or two members, the general opinion of division 132 was against the claim.

The president, in view of the facts brought out, asks that sworn statements be got from Folland and Dr. Miller, which would be submitted to the division.

The president canvasses the chances of success if litigation arises, and thinks that the defendants would lose in the fight.

These new papers were submitted to the division; and on the 19th September, 1911, they resolved that they thought they were fully qualified to settle the case (i. e., decide on it). This result is communicated to the president by letter of September 22nd, and he is told that Brother Duffy was in conversation with Brother Davis nearly every morning, he was coming in on number 14, and Brother Davis was going out on number 9, and Davis complained of not feeling well, but said nothing about being hurt. The secretary adds: "Of course, in the first place it was stated that he hurt himself reversing the engine, and nothing about the back."

On the 29th of September, 1911, the president advises the solicitors that he is surprised that the division refuses to do anything, and he will go to the next meeting. Then on the 10th of October, 1911, he writes to the solicitors that he had met with division 132, that a vote on the claim was taken, and by a large majority it was decided to fight it.

On November 1st, 1911, Cowles asks for instructions from the president as to a letter sent to the chief engineer of division 132 by the plaintiff's solicitors, as to action taken on the claim. He says: "I was talking with Dr. Curtis, and I asked him if a person could hurt their back and several days after cause a hemorrhage, and he said he did not think it was possible, and he stated that if a person hurt themselves to cause a hemorrhage it would happen right away after."

On the 15th of November the solicitor writes the president that it is said the members have changed their views; and in consequence another special meeting is convened, and the result is given to the solicitors by the president on December 18th, 1911, and the position was affirmed that in their judgment there was no claim.

On the 11th November, 1912, the writ issued.

I am satisfied that the brotherhood took the utmost pains to get at the facts of the case, and honestly reached the conclusion that no valid claim on account of death by accident was made out. After perusal of all the papers, and with the further light cast upon the claim and the proceed-

ings by the evidence at the trial, I am constrained to say that I do not disagree with the result arrived at by the domestic tribunal.

The conduct and inaction of Davis and the beneficiary increased the difficulty of making satisfactory proof of the claim, even if it was a *bona fide* one. After the lapse of time allowed to pass, before the claim assumed its final shape, it was no easy matter for the associates of the deceased to get clear information as to the essential matters that ought to have made perfectly plain by those who had the means of accurate knowledge, assuming the reality of the alleged injuries on the dates finally fixed upon.

Though the deceased may, without infringing the letter of the by-laws, have been able to waive his claim for weekly indemnity, yet his abstention from making such a claim under the circumstances must have caused suspicion of its *bona fides* in the minds of those so closely associated with him, who had not the slightest inkling of his injured condition until death and burial had removed all means of verification by autopsy or other personal examination. The widow objected to the body being exhumed.

The claim as finally presented does not hang together. The claim now is not that there was any bleeding as the result of an injury to the back, said to have occurred, after some fluctuation, on the 28th of April. The widow says nothing of hemorrhage until the 21st of May. Dr. Miller's book, which is not in evidence, as he was not called, has entry of copious hemorrhage on 30th April. The comment of Dr. Curtis on this is well founded, that the bleeding of the 30th could not be taken to indicate an accident two days before. All the indications are that his death was occasioned by the weakening of the system through severe and repeated hemorrhage; but this is not in any way satisfactorily connected with a prior or contemporaneous accident.

Transfer the bleeding to the date fixed by the widow, on 21st May, and assume that there was some difficulty in reversing the lever, yet blood did not come from the mouth till the man was on the ground at the station. The statement of the widow that the complaint made was of a "new big engine" hard to reverse, is negatived by the fact, well proved, that no such engine was in his hands on that day. It is very significant of the way in which the claim had developed that the statutory declaration of Dr. Miller

places the gravamen on the alleged ruptured artery and the hemorrhage of 30th April, and the continuing hemorrhage which followed till his visits ended in October. That has all to be reconstructed for the final proof, so that the ruptured artery is attributed to May in the statement signed by Cowles and prepared by Dr. Miller (as I think).

I cannot but comment on the extraordinary way in which both associates and doctors prepared the proof of death of 17th of June, 1911. The first part, entitled "Proof of Death," was signed in blank by the local secretary and three of the brotherhood as witnesses, all of whom knew nothing of what was afterwards filled in, in response to the printed questions. These written answers are, I should say, in the hand-writing of Dr. Miller. The internal evidence is very great, comparing it with his writing in the part below headed: "Physician's or Coroner's Statement." To the query: "Cause of death giving full particulars," the doctor writes:—

"On 21st May, 1910, was called to see him, he had severe hemorrhage, caused by a ruptured artery, after hurting himself while reversing the lever of the engine."

This information on the face of the document appears to be authenticated by the local secretary; but he explains, and I believe him, that he merely signed this form in blank and got the signature of witnesses to it in blank in order to give the claim a proper starting point, according to the by-laws, for the due consideration of those who had to pass upon it, and that he in no way approved of it.

Then the physician's statement is thus expressed:—

"Injured on April 28th, 1910, while under an engine I was called to see him on April 29th, 1910, had a severe hemorrhage (*sic*) from right lung, and a second attack on May 21st, 1910, the hemorrhage (*sic*) continued up until his death."

This is signed by the two doctors, one of whom attended only from the 12th of October to his death. Dr. Tufford, when confronted with his signature, had to admit that he knew nothing of what was contained in this statement, and that he had signed it without reading and on the strength of Dr. Miller having already signed it.

As Dr. Miller did not appear at the trial, though several opportunities were afforded, there was really no medical evidence to verify the cause of death as being by accident.

Folland also failed to appear, and one is left to reconcile, if possible, his varying statements. There is evidence that he was offered $200 if he could help the beneficiary to succeed, which she contradicts.

I have dealt with the facts only, and do not deem it needful to discuss the legal and other questions relating to the applicability of the statutes and the by-laws to this case.

The cause of death was hemorrhage; but how occasioned? The one apparently certain datum would seem to be that this condition began or existed on the 30th of April; but this is not coupled with any accident, except a vague statement that the man was strained in some way some time before, in getting under an engine to oil it. My impression is, from all the material, that the man was in a critical state of physical deterioration, sufficient to cause his death as and when he died, without any accident. If any intervening accidental cause induced or accelerated his end, that should have been indicated, with some reasonable certainty, by the evidence of competent physicians or experts. At present, all is, to my mind, vague, confused and unsatisfactory.

I may add that several respectable witnesses gave evidence before me to the effect that the deceased did not regard himself as suffering from the effects of an accident, but from some chronic stomach trouble. I refer to Duffy, Geddes, Wilson and Blanchard.

I may also recommend the defendants to revise their by-laws and forms of policy, and to correct many blunders or errors, some of which were pointed out at the trial.

I agree with the Local Division that the claim fails; and I dismiss the action—with costs, if asked.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. NOVEMBER 12TH, 1913.

BROOM v. ROYAL TEMPLARS.

Trial—Unreadiness of Party for—Order for Payment of Opponent's Costs Occasioned by Default—Dismissal of Action in Default of Payment—Costs.

LATCHFORD, J., dismissed plaintiff's action at the trial where plaintiff was unready to proceed with the same in default of his payment of the defendant's costs occasioned by such unreadiness.

SUP. CT. ONT. (2nd App. Div.), dismissed appeal with costs.

Appeal by plaintiff from order of HON. MR. JUSTICE LATCHFORD, dismissing the plaintiff's action, with which he was not ready to proceed when brought to trial unless, he should pay to the defendants the costs occasioned by his unreadiness.

The appeal to the Supreme Court of Ontario (Second Appellate Division) was heard by HON. SIR WM. MULOCK, C. J. Ex., HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE LEITCH.

Plaintiff, appellant, in person.

Lyman Lee, for the defendants, respondents.

Their Lordships' judgment was delivered by

HON. SIR WM. MULOCK, C.J.Ex. (V.V.) :—If the plaintiff were able within a reasonable time to pay these costs, we would be disposed to give him all the time he wanted, in order to relieve him from the position in which he has got his case. But when he tells us he will never be in a position to pay these costs, then to simply enlarge the time for trial until he can pay them would be just the same as dismissing the action.

Therefore, we have to deal with the case now according to the well-established practice, that if the payment of costs to-day is a condition precedent to his being allowed to proceed with his action, in the end they must be paid.

The order of the Court is very explicit; and here the costs were incurred because of the plaintiff's default. It is the duty of the plaintiff to watch his case, and to be ready when it is called.

Either he must pay these costs or they must be paid by the widows and orphans, and the other dependents of the Order. Here it is not merely a question concerning some defendant with ill-gotten gains that may, perhaps, by some straining of justice be taken from him without any great injustice being done, but we are dealing with dependents of the Order as much in need of the money as Mr. Broom is. Now, who should lose that money. Mr. Broom or these people? The practice of the Court required Mr. Broom to be ready when the case was reached. He was not watching for his case, and by mere accident learned, by notice of motion served on him, that he was required in Court. But he was not prejudiced by the notice of motion being served on him, but rather helped thereby because it secured his

attendance. His case was placed on the list, the notice of motion did him no harm. The learned trial Judge granted him leave to proceed, upon payment of the costs. Ordinarily the Judge would have dismissed the action with costs; instead of that he gave the plaintiff an opportunity still to pursue his cause of action, but only upon paying the costs which had been occasioned to the defendants.

This appeal will have to be dismissed with costs.

SUPREME COURT OF ONTARIO.

FIRST APPELLATE DIVISION. NOVEMBER 11TH, 1913.

RE KETCHESON AND CANADIAN NORTHERN RW. CO.

5 O. W. N. 271.

Appeal—To Supreme Court of Canada—Judgment of Appellate Division on Appeal from Award of Arbitrators under Railway Act (Dom.)— Right of Appeal—Railway Act, s. 208—Supreme Court Act, s. 36 — Undertaking to have Supreme Court Decide Jurisdiction under Rule 1—Approval of Security.

HODGINS, J.A., approved of the security tendered by the proposed appellants in a proposed appeal to the Supreme Court of Canada from the Appellate Division of the Supreme Court of Ontario, which had disposed of an appeal from an award made by arbitrators under the Railway Act (Dom.), holding that it was possible that such an appeal lay and that therefore the Supreme Court of Canada should decide the question.

Motion to approve of security on proposed appeal to Supreme Court of Canada, from a judgment of the First Appellate Division Supreme Court of Ontario (25 O. W. R. 20).

F. Aylesworth, for Canadian Northern Rw. Co.

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

HON. MR. JUSTICE HODGINS:—If I were clear that no appeal lay, it would be my duty to refuse to approve of the security: see *Townsend* v. *Northern Crown Bank*, 24 O. W. R. 516; 4 O. W. N. 1245. Appeals in cases of awards under the Railway Act, originating in other provinces have reached the Supreme Court, but I am unable to find any instance from this province. But in the present state of

the decisions, I do not think I ought to prevent the appellants from testing their right to appeal, as they undertake to do, under Rule 1 of the Supreme Court, leaving that Court to decide the point involved.

Under sec. 208 of the Railway Act (R. S. C. ch. 37), an appeal from the arbitrators may be taken to a Superior Court in Ontario. The appellants had no choice but to appeal to the Supreme Court of Ontario, and, having chosen a Divisional Court of the Appellate Division, are, therefore, saved from the difficulty pointed ont in *Birely* v. *Toronto Hamilton & Buffalo Rw. Co.* (1898), 25 A. R. 88; *Ottawa Electric Rw. Co.* v. *Brennan* (1901), 31 S. C. R. 311; *James Bay Rw. Co.* v. *Armstrong* (1907), 38 S. C. R. 511; C. R. [1909] A. C. 285.

But none of these cases seem to me to involve any negative of the proposition that an appeal lies, under sec. 36 of the present Supreme Court Act, to that Court, from the highest Court of final resort, in any province, where such Court is either a Court of Appeal, or, if of original jurisdiction, is a Superior Court.

The right to revise, if necessary, the decision of the statutory Appellate Court, should exist, in view of the extensive power given to it "to decide any question of fact upon the evidence taken before the arbitrators, as in a case of original jurisdiction."

I therefore approve of the security.

HON. MR. JUSTICE MIDDLETON. NOVEMBER 17TH, 1913.

COOK v. GRAND TRUNK Rw. CO.

5 O. W. N. 347.

Negligence—Railway — Inquiry to and Death of Brakesman—Improperly Going between Cars while in Motion to Uncouple — Held Accident Direct Result of Deceased's Misconduct — Action Dismissed.

Action to recover damages under Lord Campbell's Act, tried at Hamilton on the 27th October, 1913.

J. L. Counsell, for plaintiff.

D. L. McCarthy, K.C., for defendants.

HON. MR. JUSTICE MIDDLETON:—The deceased was a brakesman employed upon the railway. A train was being

made up in the railway yard. The deceased improperly went between the cars while in motion for the purpose of uncoupling them. At the moment when he was between the cars they came in contact with cars already standing upon the track. As the result, he was crushed by logs projecting over the end of one of the cars and instantly killed.

The jury have found that although the logs were properly loaded in the first place, the railway was negligent in not discovering earlier that the logs were in a dangerous position. Upon these facts I think the plaintiff fails. The accident causing his death was the direct result of the plaintiff's misconduct in going between the cars while in motion.

ONTARIO DRAINAGE COURT.

G. F. HENDERSON, K.C., REFEREE. SEPTEMBER 20TH, 1913.

CULLERTON v. TOWNSHIP OF LOGAN.

Water and Watercourses — Drainage — Improper Construction of Drainage Works — Evidence — Continuing Damage—Effect of Statutory Limitation on—Non-Repair — Necessity of Notice to Municipality — Municipal Drainage Act, s. 80 (a)—Damages—Quantum of—Costs.

HENDERSON, K.C., DRAINAGE REFEREE, *held*, that a municipality is not liable for damages caused by the non-repair of drainage works unless and until a notice specifying the non-repair is served upon it.

That an action can be brought upon a continuing damage, even though two years have elapsed from the inception thereof.

Wigle v. *Gosfield*, 7 O. L. R. 32, followed.

Thackeray v. *Raleigh*, 25 A. R. 226, distinguished.

Action for damages caused the plaintiff's lands by reason of the alleged improper construction of a drain by the defendants and their neglect to keep it in repair.

J. C. Makins, K.C., for the plaintiff.

F. H. Thompson, K.C., for defendant.

HENDERSON, K.C., REFEREE:—Prior to the passing of by-law 448 by the township of Logan, which was provisionally adopted on the 14th May, 1906, the waters from that portion of the drainage area in question in this action, lying to the northwest of the property of the plaintiff, were collected into a drain on what is known as Logan road, at a

point lying on that portion of the road which divides the Cullerton lot 15 from the Cullerton lot 16. I do not say "the plaintiff's property" because there is some question as to the exact ownership of the three lots 15, 16 and 17, or parts of these lots. The road drain to which I have referred then was supposed to take these waters down the Logan road in a southerly direction and to an eventual outlet in the Thames river. By reason of the continued construction of lateral drains that road drain became insufficient for the purpose. Individual efforts were made by individual owners to protect themselves, with apparently varying results, but on the whole there was considerable damage done by overflow of water, not only to the private owner but to the road, which was under the jurisdiction of the township council. By means of the provisions of by-law 448 the council sought to do away with that condition of things, the engineer in charge of the work provided by that by-law, Mr. Rogers, hoping to be able to successfully take water up at the point on the Logan road, to which I have referred, opposite the Cullerton property, to carry it a short distance westerly across the Cullerton lot 16, thence southerly across the concession road between lots 10 and 11, through the Gloor property, and then in a southerly direction to the same outlet which the road drain had had. Except as regards the improved conditions of the upper drains which naturally take place from year to year in the ordinary course of the improvement of the farms, the waters brought down or sought to be brought down the new scheme are the same as the waters which previously had been sought to be brought down the Logan road drain. The outstanding difference is that the township, which itself had assumed the burden of carrying these waters along its road, chose deliberately to take these waters up and carry them through private property. In doing so the township assumed the responsibility of taking these waters through that private property in such a way as to do no damage to it. Always when I refer to the "township" in this action, I mean the township as representing the body of ratepayers who are interested in this particular drainage scheme. The evidence is altogether unanimous (I was going to say practically unanimous but I fail to recollect a single witness who has substantially differed from those who were definite on the point) that the drain has from the very commencement overflowed at the bend on the Cullerton lot 16, in other words the drain has never

at any time succeeded in carrying the waters (and I mean the waters at the time of flood or in heavy rains when drains are needed) from the Cullerton land. Witnesses differ somewhat as to the cause of this. One particularly intelligent witness thought a mistake had been made in not carrying the water down a natural watercourse which exists to the west of the present course. Several others thought that the difficulty was occasioned by the bend on the Cullerton lot 16. My understanding of the evidence of Mr. Rogers, the engineer in charge, was that the difficulty was caused by an obstruction in the drain on the Gloor lot, a short distance below the Cullerton property. On the whole, if I were forced to accept one version in preference to the others I would naturally accept that of Mr. Rogers. In any event his theory in that regard is of the utmost importance to the parties in this case. I find that he made proper calculations and provided a drain of proper capacity, assuming that the soil conditions were what I might call normal.

If it had not been for the fact, as afterwards discovered, that there was a bed of quicksand on the Gloor property and that the course of the drain happened to run through that bed of quicksand, the dimensions of the drain, the capacity of the drain, would have been sufficient. Mr. Rogers frankly concedes the existence of that bed of quicksand and the drain running through it, and that the capacity of the drain was not sufficient; although in this connection we must understand that the capacity, or lack of capacity, was not so much a question of cubic contents as a question of gradient. The best evidence of Mr. Rogers's opinion is the fact that quite recently he has brought in another report to the council which is before me now and in which he says that owing to the long stretch of flat lands from stake 90 to stake 137, which caused the current in that portion to become sluggish, it is obvious that the deposit of sediment in said portion would be great. He then points out how he proposes to widen the drain from stake 50 to the outlet, covering the plaintiff's property in that section, and to increase the gradient very materially. He does not specifically mention quicksand but he tells us in the box that that was a very serious element in the matter, that he knew of its existence before he took over the work from the contractor, but that he did not think it proper to make any change in his plans, notwithstanding the fact that he then

knew that in the ordinary course of affairs there would be an accumulation of that material in the bottom of the ditch sufficient to cause an overflow. As a matter of fact there was an overflow there as soon as the water came down the drain, and I agree with Mr. Rogers that the cause of that overflow was the accumulation of this sand which had already occurred, following previous accumulations which had occurred while the contractor was doing his work and which had been removed by the contractor.

The specifications under which the work was being done gave the engineer power to change minor details in the work as it progressed. The contractor says that he and Mr. Rogers spoke of this material, that he was doing the work by the cubic yard, and that he had his scrapers and other plant there and that he would have been very pleased indeed to have lowered the grade of the ditch if the engineer had so instructed him. It was a matter for the engineer whether or not to give any such instructions before he consulted the council and obtained further authority from them. I would not have thought it necessary to do so in this case, where the cost would have been comparatively trifling.

I am satisfied upon the evidence that had the engineer then lowered the grade of the ditch as he proposes to lower it now the parties would not be in litigation, that by the expenditure of a comparatively trifling amount all this trouble could have been obviated.

The engineer knew that the drain was not going to work. As a matter of fact the drain was not of sufficient capacity, having regard to the soil at that particular point, and the extent of that particular class of soil there. These being the facts, I find that there was that kind of negligence on the part of the township in the original construction of the drain which is referred to in the several cases collected by Mr. Proctor in his book at pp. 170 and 171, and that the township is responsible for damages occasioned to the plaintiff by reason of such negligence in the original construction of the work.

Mr. Thompson argues that the plaintiff cannot recover for damages for original construction because of the fact that the work was completed more than two years before the commencement of the action, and he refers to *Thackeray* v. *Raleigh*, 25 A. R. 226. The distinction between that case and this is, that the *Thackeray Case* was one for damages for the taking of land and its injury and severance by the

construction of the drain itself. That is not this case. This case is for my present purposes identical with *Wigle* v. *Gosfield*, 7 O. L. R. 32. There it was held that the damages in a case such as this are re-current and not only may but must be paid for as sustained from time to time, each claim for damages within a period of two years before action brought. Therefore I am satisfied that the plaintiff is entitled to claim for such damage as he has sustained by reason of the defect in the original construction of the drain within two years of the time of the bringing of the action, and his claim being confined to the year 1912, is in time.

The difficulty in my mind is that there seems no doubt whatever but that the damage caused to the plaintiff was in part the result of this original defect in construction and in part the result of the non-repair of the drain, which has avowedly become defective and out of repair since the time of its completion.

In the year 1907 and again in the month of February, 1908, the plaintiff caused notice to be served upon the township council but in each of these notices his complaint was as to the method of construction, he being always satisfied that the drain was not of sufficient capacity to carry the water past his lands. He did not at any time notify the township of any lack of repair and there is no evidence that anyone else notified the township of any lack of repair.

My understanding of the present section 80a, of the Municipal Drainage Act, is that it is the duty of the land owners along the course of the drain to keep track of its state of repair, and that when any one finds that the drain is becoming out of repair to such an extent that he as an owner may reasonably anticipate damage to be caused to him, it is his duty then to notify the council of the lack of repair and of the probability of damage.

The council is not obliged in this respect to watch a drain from month to month, and the council does not become liable in pecuniary damages to any owner of land whose property is subsequently injuriously affected by reason of non-repair unless and until after service by or on behalf of such owner of a notice in writing describing with reasonable certainty the lack of repair which it is anticipated may subsequently cause damage to the owner. It seems to me that the intention of the Legislature is clearly expressed. The new section of the Act may work a hardship in an occasional case such as referred to by Mr. Makins, but my experience

throughout the province would lead me to believe that on the whole it is in the interest of the drainage of the province that that interpretation, which I am satisfied the Legislature intended, should be given to this section of the Act.

There was no notice of non-repair given to this township by the plaintiff or by anyone else prior to 1912, and therefore in so far as the plaintiff's damages for 1912 were due to non-repair, as distinguished from a defect in original construction, the plaintiff can not succeed. Then arises the difficulty of severing the damages. Some of the witnesses have stated, what is obvious, that it is impossible to accurately sever the amount.

The plaintiff puts his total damages for the year 1912, at $540. He was not able to give specific details as to how he arrived at that amount. I am inclined to think that it is to his credit that he was not able to do so in the circumstances in this case. The action was not brought until the following season and he does not appear to have contemplated the bringing of the action until the time when it was brought or about the time when his notice of a few weeks previously was served upon the council. He impressed me as giving his evidence fairly and honestly, but my difficulty is that it was altogether opinion evidence on his part; not guesswork, but a matter of recollection and opinion.

I must treat the matter just as a jury would do. The farmers on a jury would be pretty well able to form a reasonable estimate of what damage the plaintiff would suffer under similar circumstances. I have had a great many of these cases and in many of them have had questions of damage gone into very specifically and I can fairly consider myself now in the position of a farmer in the jury box.

While I am satisfied with the plaintiff's honesty I can not overlook his position of claimant. There is in almost all of these cases an exaggeration, although usually unintentional, and on the whole I am satisfied that as a matter of common sense $450 is probably much nearer to the actual total of the plaintiff's damage for the season of 1912 than the amount which he claims in his pleadings. Then I must separate that amount between the defect in original construction and the non-repair. In doing so, I remember the evidence of the plaintiff and of several others, that he was flooded in the very first year when there was not a question of non-repair, because I still insist, whether rightly or wrongly, in treating the accumulation of quicksand which

may have been there in the first spring as due to defective construction and not non-repair, in the ordinary sense of the term. If he suffered damage not only in the spring and fall but at different times throughout the summer of 1909, and he did, it was by reason of defective construction and he would have suffered probably more damage from the same cause in the year 1912 than in the year 1909, because the year 1912 was a wet year. I know there was a great deal of evidence about the unusual condition of 1912, but there was no evidence that the conditions were so extraordinary as to make that year other than a very wet season, just the kind of season that brings about the construction of many of the drains of the province.

Even as I speak now I am under difficulty as to just how much of the total, $450, to apply to each cause, but I am satisfied that the bulk of the trouble was caused by the original construction. Looking at the plaintiff's particulars I find that there is serious damage, for instance, to lot 17 in the 11th concession, a lot which is altogether outside of the drainage area and as to which the township, by the means of this drain, had no business to bring down one drop of water, if the matter is forced to a logical conclusion. Part also of lot 16, one would say pretty nearly one-half of it, is outside the drainage area, and there again very substantial damage was caused according to the plaintiff's story.

On the whole I do not think I am going very far wrong if, of the $450 which my mind has reached, I fix $350 as due to defect in original construction. In doing so I realise much difficulty, but I am thoroughly satisfied on the evidence that this man has suffered substantial damage because of the defect in the original construction of the drain. In the result, he is entitled to judgment for the sum of $450 and to his costs of the action. Costs on the scale of the County Court; no set-off.

The township costs as between solicitor and client together with the damages and costs payable to the plaintiff may be chargeable to the new drainage work which is now being launched.

The plaintiff will pay to the clerk $8 as for his two days' attendance and will affix the sum of $8 in stamps to these reasons, and charge these amounts as portions of his disbursements. A 30 days' stay will be granted.

SUPREME COURT OF ONTARIO.

FIRST APPELLATE DIVISION. NOVEMBER 7TH, 1913.

DAHL v. ST. PIERRE.

5 O. W. N. 230.

Vendor and Purchaser—Specific Performance—Attempt to Rescind—Time of Essence—Waiver—Account—Reference.

LENNOX, J., 24 O. W. R. 705; 4 O. W. N. 1413, *held*, that where time is made the essence of the contract, this provision is waived by recognition of the contract by the party entitled to insist on such provision after the expiry of the time provided for by such contract and thereafter in order to cancel the same reasonable notice must be given of a time within which the contract must be completed.

Webb v. *Hughes*, L. R. 10 Eq. 281, referred to.

SUP. CT. ONT. (1st App. Div.) affirmed above judgment.

Appeal by the defendant from a judgment of HON. MR. JUSTICE LENNOX, 24 O. W. R. 705; 4 O. W. N. 1413.

The appeal to the Supreme Court of Ontario (First Appellate Division) was heard by HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE and HON. MR. JUSTICE LEITCH.

F. D. Davis, for the defendant, appellant.

M. K. Cowan, K.C., and J. W. Pickup, for the plaintiff, respondent.

THEIR LORDSHIPS' judgment was delivered v. v. dismissing the appeal with costs, being of opinion that there had been a waiver of the condition that time should be of the essence of the contract.

HON. MR. JUSTICE MIDDLETON. NOVEMBER 17TH, 1913.

KREUSZYNICKI v. CANADIAN PACIFIC RW. CO.

5 O. W. N. 312.

Negligence — Railway—Yardman Injured in Shunting Operations—Bar of Action under Workmen's Compensation Act — Alleged Defect in System—Pleading—Sufficiency of—Findings of Jury—Piece of Work Temporary in Character — Work in Charge of Foreman—Fellow Servant—Defendants not Liable at Common Law.

MIDDLETON, J., *held*, that where no allegation was made against the defendants' general system of operating their railway that where there was negligence in a purely subsidiary and accidental piece of work such as shunting placed by the defendants in charge of a foreman, the same must be attributed to the foreman, a fellow workman of the plaintiff, and not to the system employed by the defendants so as to make them liable at common law.

Action by plaintiff, a yardman in the employ of the defendants, for damages for personal injuries caused by being run down by a shunting car, while engaged in such employment. The plaintiff was barred by lapse of time from an action under the Workmen's Compensation Act and the action was brought at common law.

The action was tried at Toronto, 6th and 7th October, 1913, with a jury, and questions of law arising were argued 8th November, 1913.

W. H. Price, for plaintiff.

A. MacMurchy, K.C., for defendant.

HON. MR. JUSTICE MIDDLETON:—In this case many of the facts were not disputed, and it was agreed by counsel that certain questions only should be submitted to the jury, all other matters of fact being determined by myself.

The railway company has an extensive yard at West Toronto. Part of this yard consists of a ladder track with six weigh leads and a switching lead. On these leads cars are brought in from the east end lead, and are there weighed and sorted ready for distribution to their various destinations in West Toronto, Parkdale and Toronto; the trains brought in being entirely rearranged to facilitate distribution. This necessitates at times great traffic upon these leads.

At the time of the happening of the accident, March 14th, the snow and ice upon the ground would thaw during the day and freeze at night. A ditch crossed the yard for the purpose of conveying away water that had accumulated upon the tracks. It was necessary to have this ditch opened by pick and shovel. A gang of yardmen, including the plaintiff, were detailed to attend to this task. The position of these men while actually upon any of the tracks was dangerous, as cars might at any time be shunted along the tracks. The plaintiff was run down and injured. No action was brought within the time limited by the Workmen's Compensation Act; and this action, if it can succeed at all, must be found to be maintainable at common law.

The plaintiff in his statement of claim sets out that the cars were shunted along the tracks where he was working, without any warning to him of their approach, and that this failure was a "defect in the ways, works, machinery, plant, or the condition and arrangement thereof, and was negligence," which entitles him to recover.

At one stage of the trial—I think after the close of the plaintiff's case—some suggestion was made that the system of the operation of the defendants' line was defective. The defendants' counsel objected that this was not the case made upon the pleadings and that if the system was to be investigated he would require a postponement. I ruled against the admission of evidence of this kind without an amendment, which would involve a postponement, and the case proceeded.

The defendants' case upon the evidence was that the man in charge of the shunting gave ample warning by word of mouth to the men upon the track. The plaintiff denied this warning, and denied the sufficiency of the warning alleged. I therefore asked the jury whether they accepted the evidence of these witnesses. In their answer to the third question they say they do not; so that it must be taken that the warning said to be given was not actually given.

In answer to the other question submitted, the jury found negligence because of the failure of the company's servants to give reasonable warning; and the answer to the question submitted as to the existence of defects in the ways, works, etc., was that there was a defect, it being "a lack of arrangement to reasonably warn men working on tracks of approaching danger." Neither counsel desired me

to ask the jury to amplify or supplement these answers. The failure of the men in charge of the shunting train to warn is, I think, negligence of fellow servants, and imposes no common law liability.

The plaintiff relies on the lack of arrangement whereby warning would be given, as constituting a defective system importing common law liability. Mr. MacMurchy contends with much force that upon the record it is not open to enter into this enquiry. He may be right in this, although para. 7 of the statement of claim may be read thus: "The said failure (i.e., the failure to give notice) was negligence for which the defendant company are responsible;" and this may be regarded as a sufficient allegation that the failure to give notice amounted to something making the company liable at common law.

I do not think it can be regarded as a defect in the works, ways, etc.; and, rather than rest the case upon the narrow ground of the pleader's allegation, I prefer to consider the situation upon the assumption that the finding of the jury is properly before me for consideration.

This being so, I have arrived at the view that this does not constitute common law liability. The railway, as a railway, was perfect. The system of operation as a railway was entirely satisfactory. The work which was undertaken formed no part of the general system. It was a mere piece of work which had to be undertaken on that particular occasion, quite subsidiary, although ancillary, to the operation of the road; and all work of that class was entrusted to a gang of labouring men under a competent foreman. He had the right to send them anywhere in the yard to do any work required to be done and the particular mode of carrying out an individual task was a matter for which he was responsible. If he ought himself to have stood guard over those men while working in this position of peril, or if he ought to have taken precautions to see that no shunting was done upon the track where the men were actually working, or if he ought to have detailed one of their number to watch for the rest when he himself was called to another part of the yard, and he failed to discharge these duties, this was the negligence of a fellow servant.

In no aspect of the case can I find common law liability.

In the event of any other Court being of a different opinion, I would assess the damages at $1,500.

HON. MR. JUSTICE MIDDLETON. NOVEMBER 17TH, 1913.

PIGOTT v. BELL.

5 O. W. N. 314.

Contract — Opening of Highway — Agreement between Adjoining Owners—Refusal of Municipality to Accept—Agreement at End —No Cloud on Title.

MIDDLETON, J., *held*, that where owners of adjoining lands agreed with each other to open up a street across the end of their lands and the municipal corporation in which the said lands were situate refused to accept the same, the agreement was at an end and constituted no cloud upon the title of either owner.

Action tried at Hamilton on the 1st of November, 1913.

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

C. W. Bell, for the defendant.

HON. MR. JUSTICE MIDDLETON:—The facts in this case were not disputed. The plaintiff owned a block of land at the corner of Wentworth street and what is now known as Rutherford avenue; having a frontage on Wentworth street of 275 feet by a depth of 320. The defendant owns a parcel of similar dimensions immediately to the north, having its northern boundary on Delaware avenue. South of the plaintiff's land is a tract formerly owned by the Bank of Hamilton, which has been subdivided and sold to numerous persons. This last-named block included Rutherford avenue.

By an agreement of the 9th January, 1909, between the bank, the plaintiff, and the defendant, it was agreed that the bank would, on or before the 1st April, 1909, consent to the strip of land now constituting Rutherford avenue being laid out as a street running easterly from Wentworth street and would make the usual application to the city of Hamilton for its consent; consent being necessary not only as to acceptance of the proposed dedication but because of the narrow width of the street.

The plaintiff then agreed that within two years from the 1st of April, 1909, he would consent to the opening of a street, 50 feet wide, along the easterly side of his parcel of land, extending northerly from the proposed Rutherford avenue across the rear of his parcel, and that he would make the usual application to the city for that purpose; he having the right to a foot reserve on the east side of the proposed

street; for the purpose, it is apparent, of preventing the owners of the adjoining lands to the east from obtaining access thereto. The defendant on her part agreed in similar terms that she would within 2 years from the 1st of April, 1909, consent to the opening of a street, 50 feet wide, across the rear of her lands to Delaware avenue; thus making a continuous street from Rutherford avenue to Delaware avenue. She agreed within that time to make the usual application to the city of Hamilton; and she was in the same way to be entitled to a one foot reserve. If the proposed Rutherford avenue was accepted by the city, and grading was required, then the plaintiff and the bank agreed to pay half of the cost of grading that portion between their respective parcels. These are the only provisions of the agreement now material.

Application was made to the city by the bank, and Rutherford avenue was accepted and has been laid out and opened up; the bank has sold all the land, and counsel on its behalf stated in Court that the bank had no longer any concern in the matters in difference between the parties to the action.

No application was made with reference to the proposed street at the east of the lands of the parties until long after the period named in the agreement; but an application was made in March, 1912. The city refused to accept the dedication or to approve the opening of the proposed street.

The agreement in the meantime was registered, and the plaintiff, desiring to dispose of his lands, is met by an objection that it is a cloud on his title. This action is brought to have it declared that the agreement is spent and forms no cloud upon the title.

Before the action, application was made to the defendant to release any claim she might have, but she took the position now indicated by the defence filed in the action.

"5. The defendant submits that under the terms of said agreement the said street can be opened without the approval of a plan by the said corporation and that said agreement is not conditional upon the consent of said city corporation.

"8. The defendant submits that neither plaintiff nor defendant can successfully refuse to open said street over their said lands when called upon so to do by the said Bank of Hamilton or any purchasers from it as aforesaid or from the Cumberland Land Company, which was incorporated to

take over the said lands of the said bank fronting on the south side of Rutherford avenue."

At the trial objection was taken that those purchasing from the Bank of Hamilton were concerned and ought to be parties to the action. I do not think that this is so, but the plaintiff's counsel stated his readiness to accept judgment without prejudice to the rights of any persons claiming under the bank. No person other than the plaintiff has ever made any claim, and it appears to me that under the circumstances it would be entirely unnecessary to put the parties to the expense incidental to the joining of these owners.

All that the agreement called for was an honest application by the parties to the city to accept the proposed street and to consent to its being opened. This application, according to the terms of the agreement, ought to have been made on or before the 1st of April, 1911. The application was not in fact made until March, 1912. The city then refused its consent; and the result of that refusal was, I think, to bring the agreement to an end and to leave the title as it was in the respective owners. It was not intended by this agreement to tie up this 50 feet of land forever. Upon the city rejecting the overtures the agreement was spent and at an end.

The judgment may, with the reservation that I have indicated, declare that the agreement forms no cloud upon the title of either plaintiff or defendant and now confers no right to either in the lands of the other. I think the agreement might well have more clearly provided for the event which has happened, and this justifies me in refusing to award costs to either party.

HON. MR. JUSTICE MIDDLETON. NOVEMBER 11TH, 1913.

JONES v. HAMILTON RADIAL ELECTRIC Rw. CO.

5 O. W. N. 282.

Negligence—Electric Railway—Opening in Footboard on Open Car—Passenger Falling through — Invitation to Alight—Damages—Quantum of.

MIDDLETON, J., *held*, that where the running-board of an open electric car was down and the side of the car was open and unbarred it was an invitation to alight, and where a passenger so alighting was injured by stepping into a hole in such running-board she was entitled to recover damages by reason of such injury fixed at $2,000.

Action by passenger to recover damages for injuries sustained in alighting from the defendants' street car. Tried at Hamilton, October 30th, 1913.

W. S. McBrayne, for plaintiff.

D. L. McCarthy, K.C., for defendant.

HON. MR. JUSTICE MIDDLETON:—The cars operated on the defendants' railway are open cars, to which access may be had from a running-board on either side. Part of the line in question was operated as a double track line. These 2 tracks merged into a single track, extending some considerable distance. The cars run to the end of the line and are not then reversed, but when the direction is to be changed they are operated from the other end of the car.

For the purpose of preventing passengers alighting from the side adjacent to the opposite track, the cars are provided on each side with bars which can be placed along the sides of the car, thus preventing the passengers from alighting at that side. When not in use, these bars are lifted to the top of the car, where they are hooked up.

At the time of the happening of the accident a portion of the double track was flooded. This necessitated the passengers alighting, crossing over the obstruction resulting from the flood, and then continuing their passage in another car beyond the obstruction. When the car in question reached this transfer point there was much confusion, owing to the alighting of all the passengers in the car and the embarking of passengers coming in the opposite direction. When the car reached this point the bar was raised, probably by some of the passengers; and the plaintiff, attempting to alight, was injured.

As an additional means for the protection of passengers and to secure the use of the proper side of the car while operating upon double tracks, the running-board or step along the side of the car is hinged, and when not in use is turned up against the side of the car and hooked in that position. When the car in question started upon its journey this running-board was turned up and hooked; but it had been unhooked and turned down long before the point of transfer was reached.

Mrs. Jones, the plaintiff, was seated nearest to this side of the car. She waited until most of the passengers had alighted, and other passengers were embarking, when she

followed others in getting off the car at this side. In the running-board there was a hole, 4 inches by 10 inches; cut, it was said, to allow access to some parts of the truck; more probably cut for the purpose of allowing a freer motion to the truck on rounding a curve. This hole the plaintiff did not notice; and, putting her foot into it as she stepped down, her leg passed through it, and she fell forward, injuring her knee. She was suspended there until extricated. From the injury then sustained she suffered much, and may possibly have yet to undergo an operation, the cartilage of the knee being broken.

The defendants contend that there is no right to recover, as the accident happened while the plaintiff was getting off the wrong side of the car. I do not think this is a defence, because the fact that the step was down and the bar raised amounted to an invitation to alight. It is true that while the company is clearly responsible for the fact that the step was down, the reason of the bar being up may be attributed to an officious act by a passenger; but I think it was the duty of the company's officers in charge of the car to see that the bar was not raised or that the bar was so fastened as to prevent its being readily interfered with by any intermeddler.

The object of closing the one side of the car was to avoid danger to the passengers from a car approaching on the other track; and when the car was used on a single track line both sides were left open. The portion of the road where the accident happened was at this time used as a single track line, because the car had to return for some distance upon the track on which it came, before it could reach any cross-over. The accident did not result from an occurrence such as the company's regulation was intended to guard against.

The existence of this unguarded opening in the step was entirely improper, and finding as I do, an invitation to alight, the plaintiff's right to recover is, I think, clear.

The amount to be recovered has given me much anxiety. It is always difficult to assess damages when the exact extent of the injury and its permanence cannot be ascertained. I have concluded to allow $2,000, to be apportioned $1,600 to the wife and $400 to the husband.

HON. MR. JUSTICE MIDDLETON. NOVEMBER 17TH, 1913.

MILLER v. COUNTY OF WENTWORTH.

5 O. W. N. 317.

Negligence—Municipal Corporation — Automobile Accident—Alleged Defective Guardrail—Contributory Negligence—Recklessness on Part of Driver of Car — Right of Passenger to Recover—Knowledge of Passenger—Assumption of Risk.

MIDDLETON, J., *held*, that where the driver of an automobile was killed in attempting to descend a steep road with sharp turns at night and with an automobile whose head lights were injured so as to give little light, the accident was attributable to his own negligence and not to an insufficient guardrail upon the road.

That a passenger in the automobile, a brother of the driver, could not recover for injuries sustained in the accident, as the facts were all known to him and he, as much as his brother, voluntarily incurred the risk.

Plant v. *Normanby*, 10 O. L. R. 16, distinguished.

Two actions tried at Hamilton on the 31st October, 1913, arising out of an automobile accident which happened on the 23rd of July, 1913.

W. S. McBrayne, for plaintiff.

J. L. Counsell, for defendant.

HON. MR. JUSTICE MIDDLETON:—The late Duncan Miller, the plaintiff Fred Miller, and his wife and three daughters left Hamilton on the evening in question at 7.15, driving along the Guelph road, ascending what is locally known as the Clappison Mountain. They returned well on in the evening, and, while on the road before turning to descend the mountain, the automobile ran into a ditch from which it was extricated with some difficulty. The result of this mishap was that the searchlights of the automobile were in some way rendered useless and could not be lit. The automobile is not shewn to have been otherwise injured. It was then very dark and raining and manifestly most dangerous to descend the road. The remaining lights upon the car were so small and dim as to give no useful light. Nevertheless, Mr. Duncan Miller decided to make the attempt.

Dr. McClenahan had arrived upon the scene while the automobile was yet in the ditch, and it was arranged that he should go down the hill first, Miller following. The road takes three turns as it descends the hill and the grade is

very steep, about eight feet in a hundred, the total descent being about 80 feet in a short distance.

After successfully passing two curves, Miller arrived at a place where the road turns abruptly, practically at a right angle. At this point Dr. McClenahan was about 150 feet in front, and well round the surve, when Miller, failing to turn, but continuing in a straight course, broke through a guard rail and ran over a steep embankment. The automobile fell some 12 feet; Duncan Miller was killed and Fred Miller severely injured. The other passengers fortunately escaped. The automobile was badly wrecked.

These actions are brought against the county, the road being a county road, the allegation being that the guard rail was inadequate and insufficient to afford reasonable protection at the place of the accident. The defendants set up that the accident was the result of the negligence of the plaintiffs in attempting to descend the hill in the darkness and making the descent at too high a rate of speed.

I think the defendants are right, and that the action must be attributed to the negligence of the plaintiffs. Miller had ascended the hill and knew the danger. Manifestly, the undertaking to descend was most difficult and dangerous. The speed of the automobile was given as at from 8 to 12 miles an hour, and to take a vehicle of that weight down the grade in question, having regard to the sharp curves and high embankments on a dark, rainy night, was suicidal. The automobile travelling in front would necessarily be of little assistance. Duncan Miller and Fred Miller were warned of the danger and advised against making the attempt in the darkness; yet they took the chance.

At the request of both parties I viewed the place of the accident, which is well shewn in the photographs. The photographs, however, fail to give any adequate idea of the peril of the situation arising from the steepness of the grade; and neither they nor the plan put in give any indication of the difficulty arising from the curves in the road higher up on the mountain.

It is sought to distinguish the case of Fred Miller upon the ground that he was a passenger in the car and that the negligence of the late Duncan Miller would not interfere with his right to recover if negligence on the part of the municipality could be shewn. Reliance is placed upon the case of *Plant* v. *Normanby*, 10 O. L. R. 16; but I do not think that this can help him. It is true that the driver's

negligence is not necessarily to be attributed to the passenger; but here the whole situation was as much known to the one brother as to the other. Each consented, I think improperly, to take the risk of making this descent in the darkness, and this negligence precludes either from recovering.

The action, therefore, fails, and must be dismissed with costs, if costs are asked.

HON. MR. JUSTICE MIDDLETON. NOVEMBER 17TH, 1913.

MERCANTILE TRUST v. STEEL CO. OF CANADA, LTD., & GRAND TRUNK RW. CO.

5 O. W. N. 307.

Negligence—Railway — Operation of Cars on Siding—Negligence of Those in Charge of Cars—Damages—Quantum—Apportionment —Allowance for Maintenance.

MIDDLETON, J., in an action for damages for the death of a foreman employed by the defendant steel company by reason of the operation of cars upon a siding upon the property of such company, found the railway company guilty of negligence in connection with such operation and awarded the plaintiff $2,500 damages.

Action brought under Lord Campbell's Act by the administrator of Walter Dynski, to recover damages for the death of Dynski on the 14th February, 1913, while engaged in removing ice from the rails of a spur upon the premises of the steel company. Tried at Hamilton, 30th October, 1913.

W. S. McBrayne, and Brandon, for plaintiff.

E. F. B. Johnston, K.C., for steel company.

D. L. McCarthy, K.C., for Grand Trunk Rw. Co.

HON. MR. JUSTICE MIDDLETON:—The line in question is a curved line used for the purpose of bringing cars upon the steel plant to a convenient position for loading and unloading. A gang plank was placed across the track for the purpose of enabling cinders, scrap, etc., to be conveniently moved by men with wheelbarrows. This plank ran from a platform at the works, across the track, to a bank on the opposite side of the tracks, and was from 2 to 3 feet from the rails. It consisted of two 3-inch boards, 1 foot wide and

about 14 feet long. Much material was taken over it daily, it being almost constantly in use. When the cars were placed upon the siding, either to be loaded or unloaded, they were uncoupled and a space was left for the gang plank. On the day in question there was a car about a foot away from the plank on either side.

Water flowed down the hill and on to the tracks; and ice formed and accumulated to a considerable extent. All through the severe weather this ice had to be chopped away from the tracks and the wheels of the standing cars to enable them to be moved. The custom was to shift the cars during the forenoon of each day. They would then remain until the following forenoon. Instructions would be sent from the steel company to the railway yardmen indicating the cars that were to be handled, and instructions were given by the steel company as to the precise placing of the cars.

On the day in question there were several cars upon the track which had to be moved. These included the cars on either side of the gang-plank. Dynski was what is known as a gang foreman, and it was his duty, among other things, to supervise the gang having the work of clearing the track. On the morning in question he was engaged in this work. His duty was not himself to work with pick and shovel, but to see that those under him worked intelligently and accomplished satisfactory results. He was under the orders of the yard foreman, Slater.

At the time of the happening of the accident notice had been given to the railway men of the cars to be moved, and the engine proceeded along the track for the purpose of removing these cars. Dynski was at that moment upon the ground between the gang-plank and the end of the car. The engine moved the cars, with the result that Dynski was crushed between them and the gang-plank, and instantly killed.

The cars should not have been moved until the gang-plank had been taken away. Those in charge of the engine were unable to see that the gang-plank was still in position, owing to the curve in the line, and they relied they say upon the statement of the foreman, either that he had the plank removed so that the cars were ready, or that he would have it removed in time for the engine to take the cars out. Those in charge of the engine knew that the gang-plank was

always across the track except when removed for the purpose of allowing the cars to be moved; they also knew that this gang-plank was in almost constant use, so that it would be almost certain to cause danger, if not actual injury, if due care was not taken.

The engine approached these cars with some speed and violence, intending to free them from ice yet remaining and to make a coupling. This was not in itself negligent or improper.

I have come to the conclusion that the employees of the railway in charge of the engine were negligent in not themselves seeing that there were no men in a position of danger before actually moving the cars. In my view they were not justified in relying upon the statement of the foreman, but should have seen that all was right before undertaking to move the cars, particularly when they knew that men might be working around them, or around the gang-plank, who could not be seen from the engine.

I find it difficult to assess the damages upon any satisfactory principle. Viewing all the contingencies as best I can, I fix the damages at $2,500, which I apportion equally between the widow and the infant child, and I would allow maintenance to be paid to the mother out of the infant's share at the rate of $125 per annum, for the next 5 years, payable half-yearly.

On no theory of the case does it appear to me that there is any liability on the part of the steel company.

I may add that I prefer the evidence of the steel company's foreman to that of the train crew, if this is found to be of importance.

HON. MR. JUSTICE MIDDLETON. NOVEMBER 17TH, 1913.

GUEST v. CITY OF HAMILTON.

5 O. W. N. 310.

Municipal Corporations — By-law Expropriating Lands — Power of Corporation to Repeal—No Entry Authorised—Trifling Entry in Fact Made — Lesser Quantity of Land Taken — Consolidated Municipal Act 1903, s. 463.

MIDDLETON, J., *held*, that where an expropriatory by-law of a municipality did not authorize or profess to authorize an entry to be made upon the lands expropriated that a trifling entry upon one corner of the said lands for the purpose of constructing a drain did not preclude the municipality from repealing the by-law.

Grimshaw v. *Toronto*, 28 O. L. R. 512, discussed.

Action tried at Hamilton on 21st October, 1913.

Counsell, for the plaintiff.

Waddell, for the defendant.

HON. MR. JUSTICE MIDDLETON:—The plaintiff owns a block of land at the corner of Valley and Hunt streets, in the city of Hamilton. On the 29th January, 1912, by by-law 1242, the corporation passed an expropriation by-law purporting to take the greater portion of the plaintiff's land for municipal purposes, in connection with certain sewage works. In pursuance of this by-law, notice of expropriation was served on 8th July, 1912. On the 12th July, Guest served notice claiming compensation at the rate of $5,000 per acre for lands taken and injuriously affected. A year later, on the 15th July, 1913, an amending by-law was passed, number 1492, providing for the expropriation of a much smaller portion of the plaintiff's lands; and pursuant to this a notice of expropriation was served on July 30th, along with a notice abandoning and withdrawing the former notice of expropriation. In the meantime, on the 20th June, 1913, Mr. Guest had obtained an appointment from the official arbitrator to proceed with the arbitration, returnable on the 7th July, which was enlarged until the 30th July; when the arbitrator refused to proceed with the arbitration under the earlier and cancelled notice.

The plaintiff in this action sues to recover $29,250, being the value of the lands proposed to be taken under the original notice: 5.85 acres, at $5,000 per acre; setting out the expropriation by-law, a notice given by the corporation contemporaneously offering $2,040.50, as damages and compensation, his claim, $5,000 per acre; and then alleging that the defendants proceeded with the construction of the work in question on or about the 3rd July, 1913, and entered upon and took possession of the plaintiff's property in the carrying out of the work.

At the trial it was proved that certain officers of the defendant corporation went upon the lands and constructed a small ditch a few yards long across the corner for the purpose of draining water which accumulated in an excavation being made on other lands in connection with the sewage disposal plant, to watercourse flowing from the lands in question. This work was done on the 3rd July, 1913, a year

after the original expropriation by-law, and almost a fortnight before the amending by-law.

There is no foundation whatever for the assumption that this entry constitutes the municipality purchasers of the land at the price named in the claim put in.

The more serious contention is that there was no right to repeal the existing by-law and that the municipality is now bound to proceed with the expropriation proceedings under it.

Grimshaw v. *Toronto*, 28 O. L. R. 512, deals with a somewhat similar situation. Section 463 of the Municipal Act of 1903, in force when the original by-law was passed, does not preclude the repeal of the expropriating by-law or compel the municipality to take up the award if "the by-law did not authorize or profess to authorize any entry or use to be made of the property before the award has been made."

This by-law contained no such provision. It may be that the entry for the purpose of constructing the twenty feet of ditch was entirely unauthorized, and that the municipality may be rendered liable for what was then done. That is not a matter of moment, as the municipality is now and always has been ready to proceed with the arbitration respecting the smaller parcel, which covers the land upon which the ditch is.

No claim was made for damages sustained by the plaintiff by reason of the passing of the by-law. His counsel did not contend that sec. 347 of the Act of 1913 applied, nor would this action be the proper remedy if any such claim exists; as in the absence of an agreement, damages are to be dealt with upon arbitration.

The action fails, and must be dismissed with costs.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. NOVEMBER 15TH, 1913.

GORDON v. GOWLING.

5 O. W. N. 269.

Contract—Purchase of Hay—Delivery—Purchaser's Duty to Notify Vendor of his Readiness to Receive—Counterclaim—Account—Appeal—Costs.

SUP. CT. ONT. (2nd App. Div.) varied judgment of Co. Ct. Welland by reducing the damage awarded defendant upon his counterclaim by $50, proven to have been paid by plaintiff and as to which he was not given credit at the trial.

Appeal by the plaintiff from a judgment of His Honour the Judge of Welland County Court, dismissing his action with costs.

The appeal to the Supreme Court of Ontario (Second Appellate Division) was heard by HON. SIR. WM. MULOCK, C.J.EX., HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE LEITCH.

F. W. Griffiths, for the plaintiff.

No one contra.

HON. MR. JUSTICE RIDDELL:—The plaintiff brought his action in the County Court of the County of Welland, but failed, and now appeals.

The facts as found by the trial Judge are as follows—the defendant sold to the plaintiff all his timothy hay and lucerne (except what he needed for his own use), at $12 per ton F. O. B. The plaintiff was to have notified the defendant when he wanted the hay delivered, but failed to do so. Some 22¼ tons of lucerne were delivered to and received by the plaintiff and a draft for $268 given in payment therefor. The plaintiff complained (1) of non-delivery of the timothy; and (2) of the alleged failure of the lucerne delivery to fill the contract. At the trial the County Court Judge found, and rightly found, against the plaintiff, holding that he should have given notice of the time at which delivery was required of the timothy, and further that the lucerne delivered was such as was contracted for. So far as these findings were concerned we dismissed the appeal on the hearing. But the plaintiff also complained on this appeal that the trial Judge did not take into consideration the payment by him of $50 at the time of the purchase. The point is specifically taken in the notice of motion and we must therefore examine the proceedings as best we may without the assistance of counsel to determine the fact. That $50 was paid by cheque enclosed in the letter of 13th September, 1912, is quite clear; it is sworn to and not denied. The sight draft for payment of the lucerne was also paid before receipt of the lucerne. Therefore all the goods received were paid for and $50 more was paid by plaintiff to defendant.

The Court below gives $60 being "damages to the defendant for 30 tons of timothy, *i.e.*, damages for non-acceptance of timothy sold; and also for "$16 for damages with reference

to the lucerne." This $16 is shewn by the reasons for judgment to be $2.00 per ton for 8 tons of lucerne sold to the plaintiff but not accepted. The $50 is not taken into consideration at all as it should have been.

Accordingly the damages awarded the defendant should be reduced by $50; and the judgment on the counterclaim will be for $26 in all with costs on the County Court scale.

"The costs of a counterclaim should be on the scale of the Court in which the action is brought by the plaintiff unless the Judge . . . makes a different order." Court of Appeal in *Foster* v. *Viegel* (1889), 13 P. R. 133. The appeal should be allowed to that extent.

As to costs, we cannot give the defendant costs—he did not appear on the argument. There is a double reason why the plaintiff should not have costs, he succeeds only in part and he should have applied to the trial Judge to correct what is a mere oversight. There will be no costs of appeal.

HON. SIR WM. MULOCK, C.J.Ex., HON. MR. JUSTICE SUTHERLAND and HON. MR. JUSTICE LEITCH, agreed.

MASTER IN CHAMBERS. NOVEMBER 17TH, 1913.

LOVE v. LOVE.

5 O. W. N. 345.

Pleading—Particulars—Alimony Action—Party not Obliged to get Particulars from an Examination for Discovery.

HOLMESTED, K.C., *held*, that it is no answer to a demand for particulars of a pleading to suggest that the other party can get the information desired from an examination for discovery.

An alimony action.

The defendant demanded particulars of the allegations contained in the 4th, 9th, 10th, and 11th paragraphs of the statement of claim; an answer was made pending the motion refusing particulars of paragraphs 4, 9, and 11, but purporting to give particulars as to paragraph 10.

G. R. Roach, for defendant.

J. I. Grover, for plaintiff.

MR. HOLMESTED, K.C.:—After a careful consideration of the statement of claim, the demand and the answer, I am of

the opinion that the defendant is entitled to the particulars which he asks, and that the answer which has been given is insufficient.

It has been urged that the defendant might get the information he seeks by an examination for discovery, but I do not think that is any answer to the application. The plaintiff makes certain accusations against the defendant on which she bases her claim to alimony. The defendant is entitled to have these accusations stated so specifically that he may know what he has to meet at the trial: see *Rodman* v. *Rodman*, 20 Gr. 428. It is needless to say that an examination for discovery can be an efficient substitute for particulars. A party is no way bound to confine his case at the trial to the matters to which he has testified on his examination for discovery, whereas the object of ordering particulars is that the party may be confined at the trial to those matters of which he has given particulars. The statement of claim is in too general terms and probably under the old system of pleading would have been demurrable.

The particulars demanded should therefore be given. In an ordinary case the plaintiff should pay the costs in any event, but as it is an alimony action, I direct that the costs be to the defendant in the cause, to be set off *pro tanto* against costs, if any, which he may be ultimately ordered to pay.

HON. MR. JUSTICE LATCHFORD. NOVEMBER 14TH, 1913.

REX v. McELROY.

5 O. W. N. 284.

Intoxicating Liquors—Liquor License Act—Conviction for Selling without License—Evidence that Defendant a mere Messenger—Motion to Quash—Existence of Evidence to Support Conviction—Dismissal of Motion.

LATCHFORD, J., *held*, that in order to quash a conviction there must be no legal evidence of an offence, it is not sufficient that the weight of evidence is against the conviction.

Motion to quash a conviction, made by the Police Magistrate of Collingwood, for unlawfully selling liquor without a license.

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

J. R. Cartwright, K.C., for Crown.

HON. MR. JUSTICE LATCHFORD:—A witness named McDonald deposed that he bought a bottle of whiskey from McElroy, paying $1.25 for it. This is the only evidence of the purchase. On cross-examination McDonald put the matter in quite a different way. He said: "I gave $1.25 to McElroy to get me a bottle. . . He got the liquor.'

It is contended on behalf of McElroy that the two statements must be taken together—the first as explained by the second—and accordingly that McElroy was but the agent or messenger of McDonald and not liable to conviction: *Rex* v. *Davis* (1912), 23 O. W. R. 412. Before the magistrate such an argument would no doubt have great force, and it might be effective before me were I sitting in appeal from his decision, but as I have to be convinced before I can quash the conviction that there was no legal evidence of a sale, the contention fails. There was undoubtedly some evidence of a sale. The magistrate believed that evidence, and rejected all evidence to the contrary. He did not credit what the witness said on cross-examination, and accepted his evidence in chief—and that evidence warranted the conviction.

The motion must be dismissed with costs.