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HON. SIR G. FALCONBRIDGE, C.J.K.B. FEBRUARY 10TH, 1914.

SMITH v. HAINES.

5 O. W. N. 866.

Fraud and Misrepresentation — Purchase of Shares in Company—Action to Set Aside—Necessity of Clear Proof of Fraud—Evidence—Dismissal of Action—Costs.

FALCONBRIDGE, C.J.K.B., *held*, that where fraud is alleged in a civil action the party alleging it must prove it clearly and distinctly, a slight preponderance of the evidence in his favour not being sufficient.

Mowatt v. *Blake*, 31 L. T. R. (O.S.) 387, referred to.

Action for a declaration that plaintiff was not a shareholder in defendant company; for the removal of his name from the list of shareholders; for repayment of $3,000 by the defendant Haines; for payment by the defendant Haines and the defendant company of all moneys paid by the plaintiff as surety for the defendant company; for delivery up by the defendant Haines of the plaintiff's promissory note for cancellation and for damages; tried at Toronto.

I. F. Hellmuth, K.C., and W. J. Elliott, for plaintiff.

E. F. B. Johnston, K.C., for defendant Haines.

R. McKay, K.C., for defendant company.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—In an ordinary civil case, if the scale inclines one way or the other "but in the estimation of a hair," that way the verdict may go.

But when a man's life or liberty is at stake, a higher degree of proof and a correspondingly high degree of certainty in the conclusion is required.

And so it is even in a civil action, when fraud is charged. The man who alleges fraud must clearly and distinctly prove the fraud which he alleges.

If the fraud is not strictly and clearly proved as it is alleged, relief cannot be had, although the party against whom relief is sought may not have been "perfectly clear in his dealings with the plaintiff." *Mowatt* v. *Blake* (1858), 31 L. T. R. 387. This is a decision of the House of Lords; and the phrase which I have quoted is that of the Lord Chancellor (Chelmsford).

Applying this standard, the plaintiff fails to satisfy the burden imposed upon him. On cross-examination the plaintiff gives the following account of the representations which he says the defendant made to induce him (the plaintiff) to go into the company:—

"Q. I am speaking about the representation you say he made to you to go in; what was one? A. That there was going to be a lot of money in it.

"Q. That was a mere opinion? A. Yes.

"Q. That was your opinion, too, when it was explained? A. I was not after any money in it. I did not care that much for four or five hundred dollars; I went in more than anything else, I said, "That will be a good opportunity for Brodie to make good."

"Q. Was that the inducement that got you into it, to allow Brodie to make good, was that one of them? A. Yes.

"Q. What was the other? A. That Haines was so anxious for me to come in.

"Q. What else? A. That is all I can think of.

"Q. I may take it that the two grounds of representation or misrepresentation were: first, you were willing to go in to help Brodie to make good because he was a friend of yours and you were interested in him in some way? A. Yes.

"Q. Secondly, that this man Haines thought there was a good thing in the company? A. Yes.

"Q. Are these the only two grounds upon which you went in? A. No, he said our own auditor was going to be auditor; he was going to give us a report every month as to how they were doing.

"Q. That was true, their auditor was Mr. Vigeon? A. Yes.

"Q. And he was your auditor? A. He was our auditor.

"Q. There was no complaint about that? A. In a little while he was telling me that Vigeon was no good.

"Q. I asked you what else there was that induced you to go into this company except what you have told me? A. And that it took very little money.

"Q. You knew how much it was going to take? A. He told me $2,000, of which he sold $1,000; then it was a matter of another $1,000.

"Q. What else? A. That is all I can tell you of.

"Q. Was there anything else that induced you to go into the company except what you have told? A. Not that I can think of . . ."

This evidence does not support a charge of fraud, *secundum allegata,* nor generally.

The plaintiff is a man of affairs and by no means unsophisticated as to the organization and conduct of joint stock companies. He is president and general-manager of the J. B. Smith Company, Limited, a company doing a very large business in lumber, and is or has been president or vice-president of several other corporations.

As to what took place about and after the organization of the company, and particularly as to alleged manufacture or falsification of minutes, etc., I acquit the Vigeons, father and son, and Mrs. McMullen (née Lampman) of any fraudulent complicity in anything that may have been wrongly or irregularly done.

As far as their personal actions are concerned, things may have been loosely done as a mere matter of routine, but with no wrong intent, and certainly not in pursuance of any conspiracy with defendant.

I am by no means satisfied either with defendant's conduct or his evidence. It is reasonably plain that he has not been "perfectly clear in his dealings with the plaintiff," to adopt the phrase of the Lord Chancellor; and while I dismiss the action, I do so without costs.

Thirty days' stay.

HON. MR. JUSTICE MIDDLETON. FEBRUARY 11TH, 1914.

BLACKWELL v. SCHEMMAN.

5 O. W. N. 887.

Vendor and Purchaser—Specific Performance—Parties not ad idem —First Mortgage—Provision as to—Fault of Estate Agent—Costs.

MIDDLETON, J., dismissed a vendor's application for specific performance of an alleged agreement to purchase certain lands, holding that the parties were never *ad idem* as to the terms of the agreement relative to the first mortgage.

Action by vendor for specific performance tried at Toronto, 9th and 10th February, 1914.

M. L. Gordon, for plaintiff.

J. C. McRuer, for defendant.

HON. MR. JUSTICE MIDDLETON: — It is not necessary, in my view, to discuss the question of reforming this agreement and directing specific performance of the agreement as reformed.

Gray, the real estate agent, was too anxious to force the transaction through, and, in truth, the parties never were *ad idem*.

Mrs. Blackwell would not undertake the arrangements necessary to increase the first mortgage from $1,500 to $2,500. Mr. Gray assumed that this could be done without trouble, and the only matter of importance was the expense. Mrs. Schemman agreed to bear this expense, but did not agree to "raise the mortgage," and she did not authorise the charge made in the agreement by which the onus of doing this is placed upon her.

On another ground the action fails. The parties both assumed that the first mortgage could be "raised" from $1,500 to $2,500. The mortgagee refuses, and his mortgage has yet two years to run.

When the cash payment was increased from $1,100 to $1,400 the mortgage balance ought to have been reduced from $2,000 to $1,700—this change was neglected.

When the time for closing came a demand was made for a mortgage of $2,000 and $2,072 cash, it being erroneously assumed that the failure to "raise" the extra $1,000 on the

first mortgage imposed a burden on the purchaser to pay more cash.

Taking this view of the case, the action ought to be dismissed without costs, and the defendant ought to recover the $100 paid from the plaintiff.

My regret is that I cannot order the agent whose bungling or worse has brought about all this trouble to pay the costs. Both these ladies trusted him to protect their interests, and in the result he has landed them in a law suit.

HON. MR. JUSTICE KELLY. FEBRUARY 11TH, 1914.

FITZGERALD v. CHAPMAN.

5 O. W. N. 888.

Injunction—Blocking of Lane—Nuisance—Reference as to Damages—Stay of Operation of Order.

KELLY, J., granted plaintiff an injunction restraining defendants from using a lane so as to interfere with plaintiffs' rights therein but suspended the operation of the order to give defendants an opportunity to abate the nuisance.

Motion for an interim injunction to prevent defendants from blocking a lane turned by consent into a motion for judgment.

T. N. Phelan, for plaintiff.

G. Osler, and S. G. Crowell, for defendants Chapman & Walker, Limited.

S. W. McKeown, for the other defendants.

HON. MR. JUSTICE KELLY:—On the return of the motion for injunction an application was made to turn it into a motion for judgment. An enlargement was granted and defendants were given the opportunity to submit further material. When the matter again came on it appeared that all the facts were fully before me, and I disposed of it by way of judgment thereon. A consideration of the material submitted has left no doubt in my mind that plaintiff is entitled to relief, but the parties through their counsel having expressed their readiness to negotiate a settlement, I have delayed judgment to enable them to arrive at a conclusion, if possible. I have not been advised that any definite result has been reached.

The injunction must be granted restraining defendants from allowing horses or other animals, vehicles and other impediments, to stand or remain in or upon the premises described as a lane in the agreement of 14th November, 1906, referred to in the writ of summons so as to impede plaintiff or other persons lawfully using it and from using that part of defendants' building abutting on said lane as a shipping or warehouse entrance, in such manner as to impede, obstruct or interfere with plaintiff or such other persons. To enable defendants to carry this into effect the operation of this injunction is suspended till April 11th, 1914, subject to any right of the plaintiff to damages. Plaintiff in his writ of summons claims damages as well as an injunction. I have not dealt with that aspect of the case, but will hear counsel as to it at any time they so desire.

Plaintiff is entitled to his costs.

HON. MR. JUSTICE LENNOX. FEBRUARY 10TH, 1914.

CARIQUE v. CATTS.

5 O. W. N. 886.

Fraud and Misrepresentation—Supplementary Judgment—Damages—Quantum—Costs.

LENNOX, J., supplemented the judgment herein (*ante* p. 639) by fixing plaintiff's damage at $6,000 and allowing plaintiff full costs of suit.

Judgment herein having been given on January 20th, 1914, (see ante p. 639), with leave to amend, the parties submitted amendments on February 4th, 1914, when judgment was reserved, and the following judgment delivered later.

R. B. Henderson, for plaintiff.

H. D. Gamble, K.C., for defendant Catts.

W. E. Raney, K.C., for defendant Hill.

HON. MR. JUSTICE LENNOX: — Pursuant to notice to the defendants the plaintiff applied on the 4th inst. for liberty to amend his statement of claim and filed the proposed amendments. This amendment is allowed, and amendments asked for by defendants at the trial may be made if they desire them.

The plaintiff, in his amended statement asks judgment, as damages, against the defendants for a sum equal to the $5,000 paid and interest thereon, in addition $1,000 for loss of time, expenses, etc.

The plaintiff had to borrow the money, I think, to make this payment, and if he has been discounting promissory notes since that time to keep it going it has probably cost him $700 or $800. I have no doubt but that his loss would in all amount to as much as he claims, but he cannot expect to indulge in wild dreams of wealth without being subjected to some loss when the rude awakening comes.

I think I will be right in assessing the damages at $6,000; and, as I have already said, with costs. These will include the costs of the commission executed in New York city.

The counterclaim will be dismissed with costs.

HON. MR. JUSTICE MIDDLETON. FEBRUARY 11TH, 1914.

EISENSTEIN v. LICHMAN.

5 O. W. N. 887.

Vendor and Purchaser—Specific Performance—Conduct of Purchaser—Title—Reference.

MIDDLETON, J., gave judgment for plaintiff, a vendor in an action for specific performance of an alleged agreement for the purchase of certain lands, and directed a reference as to title.

Action by vendor for specific performance.

W. Proudfoot, K.C., and J. C. McRuer, for plaintiff.

A. Cohen, for defendant.

HON. MR. JUSTICE MIDDLETON: — I think the document in question was signed with the intention of making it a binding offer, and that there is no foundation for the defence set up.

After the defendant consulted his solicitor his conduct is only consistent with an affirmance of the transaction.

The plaintiff was ready to close on the day named for closing—the defendant was not. In view of the way the matter was carried on between the solicitors, the failure to meet to close on the 5th looks like a trick to avoid the contract. It was as much the defendant's fault as the plaintiff's that a meeting was not arranged for that day.

There is some question as to title which was not ripe for discussion; there will be a reference as to it.

SUPREME COURT OF CANADA.

FRANK JEWELL v. JOHN J. DORAN, JOHN P. COULSON AND J. J. MACKIE.

Appeal—Supreme Court of Canada — Supreme Court Act 1913—Extension of Jurisdiction—No Application to Action Instituted before Amendment—Refusal to Affirm Jurisdiction.

SUP. CT. CAN. *held*, that the amendment of 1913 to the Supreme Court Act extending its jurisdiction did not apply to an appeal in an action brought prior to the said amendment, even though the judgment from which the appeal was sought was of subsequent date.

Williams v. *Irvine*, 22 S. C. R. 408; *Hyde* v. *Lindsay*, 29 S. C. R. 99 and *Colonial Sugar Refining Co.* v. *Irvine*, [1905] A. C. 369, followed.

Motion under Rule 1 of the Supreme Court Rules to affirm the jurisdiction of the Supreme Court of Canada, under the following circumstances.

The writ in this action was issued on November 26th, 1912. The plaintiff in his statement of claim alleged that he was entitled to recover from the defendants the possession of certain goods and chattels of which he had been wrongfully deprived, and claimed $5,000, their value, and in the alternative, damages for conversion. The action was tried on the 24th and 25th days of June, 1913, and judgment pronounced by HON. MR. JUSTICE BRITTON on 4th July, 1913, in which he held, 4 O. W. N. 1581, that the plaintiff was entitled to return of certain goods and chattels or their value, and directed a reference to the local Master to inquire, ascertain and report with respect to the same and as to their present value and as to the amount of loss, if any, sustained by the plaintiff, by reason of any portion of the said property being lost, damaged or destroyed while in the possession of the defendants, where such loss had not been occasioned by ordinary wear and tear. The trial Judge also held that the defendants were not liable for any default on the part of the previous tenant of the hotel in which the goods and chattels were contained. Further directions and costs were reserved. The plaintiff appealed from this judgment to the Court of Appeal. The appeal was allowed and the judgment below varied by holding that the defendants were guilty of a conversion, and were liable to pay the plaintiff the value of the goods so converted, and made a reference to the Master

to ascertain and state what was due from the defendants to the plaintiff. The defendants were ordered to pay costs up to and inclusive of the judgment of the Court of Appeal. Further directions and the question of subsequent costs were reserved until after the Master had made his report. The defendants being desirous of appealing from this judgment to the Supreme Court of Canada, a motion was made to the Registrar to affirm the jurisdiction of the Court under Rule 1 of the Supreme Court Rules, and after partial argument the Registrar referred the motion to the full Court. The motion was argued on the 21st day of January, 1914.

It was admitted that the judgment of the Court of Appeal was not a final judgment within the definition of that expression contained in the S. C. Act, R. S. C. ch. 135, sec. 1: "(*c*) final judgment means any judgment, rule, order or decision whereby the action, suit, cause, matter or other judicial proceeding is finally determined and concluded." This definition was repealed and a new one substituted by the Act to amend the Supreme Court Act, passed 6th June, 1913, where the following definition was substituted: "(*e*) save as regards appeals from the Province of Quebec 'final judgment' means any judgment, rule, order or decision which determines, in whole or in part, any substantive right of any of the parties in controversy in any action, suit, cause, matter or other judicial proceeding and, as regards appeals from the Province of Quebec, 'final judgment' means, as heretofore, any judgment, rule, order or decision whereby the action, suit, cause, matter or other judicial proceeding is finally determined and concluded."

It was admitted that, unless the amending statute applied, the case was not appealable, in view of the jurisprudence of the Supreme Court. *Clark* v. *Goodall,* 44 S. C. R. 284; *Crown Life* v. *Skinner,* 44 S. C. R. 617; *Hesseltine* v. *Nelles,* 47 S. C. R. 230.

Section 46 of the Supreme Court Act gives an appeal in the province of Quebec, where the matter in controversy amounts to the sum or value of $2,000. Previous to 54 & 55 Vict. 25, sec. 3, the Act did not specify any method of determining the amount in controversy when the sum found due by the judgment differed from the amount claimed in the declaration. The amending Act, however, declared that "whenever the right to appeal is dependent upon the amount

in dispute, such amount shall be understood to be that demanded and not that recovered, if they are different."

In *Cowan* v. *Evans; Mitchell* v. *Trenholme; Mills* v. *Limoges*, 22 S. C. R. 331; *Williams* v. *Irvine*, 22 S. C. R. 108, and other cases, the Court held that the amending statute did not apply to a case in which the judgment of the Court from which the appeal was being brought to the Supreme Court, was delivered on the day or previous to the day on which the amending statute came into force.

W. L. Scott, for the motion, contended that these decisions could be distinguished from the present case, because here all the judgments below were pronounced after the amending statute, although the writ undoubtedly was issued before that date.

Caldwell, contra.

RT. HON. SIR CHARLES FITZPATRICK, C.J.C., and HON. SIR LOUIS DAVIES, J., were of opinion that the motion to affirm should be dismissed with costs.

HON. MR. JUSTICE IDINGTON: — Having regard to the principles upon which this Court proceeded in the case of *Hyde* v. *Lindsay*, 29 S. C. R. 99, and other cases cited therein, and the Judicial Committee of the Privy Council in the case of *Colonial Sugar Refining Co.* v. *Irvine*, [1905] A. C. 369, I do not think this motion should succeed.

HON. MR. JUSTICE ANGLIN: — This motion is concluded adversely to the appellant by the authority of *Williams* v. *Irvine*, 22 S. C. R. 108, and *Hyde* v. *Lindsay*, 29 S. C. R. 99. See *Colonial Sugar Refining Company* v. *Irvine*, [1905] A. C. 369.

HON. MR. JUSTICE BRODEUR: — This is an application to affirm the jurisdiction of this Court.

The whole point is whether the amendment of 1913 to the Supreme Court Act as to final judgments applied to a case in which the action began prior to the amendment but where the judgment appealed against was rendered after the passing of the amendment.

That amendment has virtually created a right of appeal which did not exist before.

This Court has decided in those last years that judgments ordering a reference were not final judgments and could not be appealable. *Clarke* v. *Goodall*, 44 S. C. R. 284; *Crown Life* v. *Skinner*, 44 S. C. R. 617.

The Parliament at its last session declared that those judgments could be brought before this Court.

I would have been inclined to think that the right of appeal should be determined by the law in force at the time of the judgment and not by the date of the action. However, a contrary jurisprudence of this Court exists, and I am bound by it. See *Hyde* v. *Lindsay*, 29 S. C. R. 99; *Williams* v. *Irvine*, 22 S. C. R. 108; *Mitchell* v. *Trenholme*, 22 S. C. R. 333.

The motion should be dismissed.

HON. MR. JUSTICE KELLY. FEBRUARY 14TH, 1914.

EPSTEIN v. LYONS.

5 O. W. N. 875.

Way—Right of Way—Reservation of—Specific Purpose—No Right to Grant for Extraneous Purpose—Action of Trespass—Ascertainment of Boundary Line—Evidence—Ancient Surveys—Descriptions in Deeds—Possession — Mortgage — Foreclosure—Damages.

KELLY, J., *held*, that the benefit of a right of way reserved by a grantor to be used by him as the owner of certain lands could not be granted by him to an owner of other adjoining lands. *Purdon* v. *Robinson*, 30 S. C. R. 64, followed.

Action to restrain defendants from erecting any fence, wall or other obstruction upon the rear of plaintiff's lands, to compel the removal of a wall already built, and to restrain the defendants from using any part of lot 3 on James street, Hamilton, for the purpose of access to the defendant's lands, being part of lot 2 on James street, and for damages. Tried at Hamilton without a jury.

G. L. Staunton, K.C., and W. A. Logie, K.C., for plaintiffs.

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

HON. MR. JUSTICE KELLY:—On February 14th, 1887, Mark Hill, who was the owner of lot 3 on the east side of James street, in Hamilton, mortgaged it to Edward Martin. Lot 3 is in a block bounded on the north by Cannon street

(formerly Henry), on the east by Hughson street, on the south by Gore street, and on the west by James street. This block comprises 6 lots fronting on James street, and 6 lots fronting on Hughson street, the lots on each street numbering consecutively from south to north.

It is admitted by counsel that lot 3 on James street and lot 3 on Hughson street, abut each other.

On September 30th, 1888, Hill obtained a conveyance of lot 3 on the west side of Hughson street. On December 10th, 1888, he made a general assignment of his assets to F. H. Lamb for the benefit of his creditors, the assignment being executed, not only by him, but also by other persons said to be his creditors. On May 9th, 1889, he made another assignment for the benefit of his creditors to one Blackley.

On April 26th, 1890, Blackley and Hill conveyed to Adolphus Farewell lot 3 on James street and a right of way over the southerly 11 feet 4 inches of lot 3 on Hughson street, reserving to Hill, for the use of himself and Farewell and their heirs, etc., a right of way over the easterly 12 feet of lot 3 on James street.

On May 11th, 1899, Farewell granted to Edward Martin a right of way over the southerly 11 feet and 4 inches of lot 3 on Hughson street, and on 16th June, 1899, Martin obtained a final order of foreclosure of lot 3 on James street as against Farewell, the original defendant in the foreclosure proceedings, and F. H. Lamb and others who had been made parties defendant in the Master's office.

On October 22nd, 1904, the executors of Edward Martin's estate conveyed to plaintiffs the southerly 34 feet and 8 inches of lot 3 on James street and a right of way over the southerly 11 feet 4 inches of lot 3 on Hughson street, reserving to themselves for the benefit of the remainder of lot 3 on James street a right of way 11 feet 4 inches in width extending along the northerly boundary of the easterly 68 feet of the land then conveyed, thence southerly along the rear of the lot to its southerly boundary, and thence easterly along the southerly boundary of lot 3 on Hughson street to the west side of Hughson street.

On February 17th, 1905, the executors of the Martin estate conveyed to Jane Burgess the remaining part of lot 3 on James street and the right of way over the southerly 11 feet 4 inches of lot 3 on Hughson street and the right of way (reserved by the above-mentioned conveyance from the

Martin executors to plaintiffs) over the above-mentioned 68 feet and the rear 11 feet 4 inches of the southerly part of the James street lot.

In January, 1912, plaintiffs acquired title to the part of lot 3 on James street so conveyed to Jane Burgess, following which the executors of the Martin estate released to them the right of way over the 68 feet and over the easterly 11 feet 4 inches of that lot.

On 24th December, 1903, the North American Life Assurance Company granted to defendants the northerly 22 feet 7½ inches of lot 2 on James street (being immediately south of lot 3 on James street) and on 29th October, 1910 Mark Hill conveyed to defendants the rear part of lot 3 on Hughson street, by the following description:—

"That part of lot number three on the west side of Hughson street between Gore and Cannon streets according to James Hughson's survey in said city, described as follows: Commencing on the westerly margin of Hughson street and at the south-east angle of said lot number three; thence westerly along the southerly margin of said lot number three one hundred and forty-eight feet, more or less, to the south-west angle of said lot 3; thence northerly along the westerly margin of said lot three seventy-one feet four inches, more or less, to the north-west angle thereof; thence easterly along the northerly margin of said lot three twenty-three feet, more or less, to the lands of one Murphy; thence southerly along the westerly boundary of said Murphy's lands and parallel with the westerly margin of Hughson street thirty feet; thence easterly parallel with the southerly margin of said Murphy's lands ten feet, more or less, to the lands of one Bartman; thence southerly along the westerly margin of said Bartman's lands and parallel with said westerly margin of Hughson street thirty feet; thence easterly along the southerly margin of said Bartman's lands and parallel with the southerly margin of said lot three one hundred and fifteen feet, more or less, to the westerly margin of Hughson street; thence southerly along the westerly margin of Hughson street eleven feet four inches, more or less, to the place of beginning. Together with the right, title and interest of the grantor, if any, over the rear twelve feet of lot number three fronting on the east side of James street in the same block, as reserved in instrument No. 46171 duly registered in the Registry office for the county of

Wentworth, in common with the owners, tenants and occupants of the remainder of said lot number three, and subject also to a right of way over the southerly eleven feet four inches of lot number three fronting on the west side of Hughson street, hereinbefore in part described, from front to rear in common with the owners, tenants and occupants of said lot number three fronting on the east side of James street and the owners, tenants and occupants of the whole of lot number two fronting on the west side of Hughson street between Gore and Cannon streets, and subject also to the use in common with all other parties who may now have a right of way over the same."

On 30th May, 1913, Hill made a further conveyance to defendants of part of lot 3 on Hughson street in which, after referring to the conveyance of 29th October, 1910, from Hill to defendants, it was recited that:—

"Whereas the description of said lands so granted and conveyed did not fully and accurately describe the lands which were intended to be conveyed by the grantor to the said grantees,

"And whereas the said grantees have requested the execution of this deed for more effectually conveying and confirming conveyance of the said lands to them, and more particularly describing the same;" and the conveyance then proceeds to grant the lands by the following description:

"Part of lot three on the west side of Hughson street between Gore and Cannon streets according to James Hughson's survey in the said city described as follows: Commencing at a point on the westerly limit of Hughson street and at the south-east angle of said lot three; thence westerly along the southerly margin of lot three one hundred and sixty feet eleven inches to a point; thence northerly seventy-two feet one inch to and along the westerly wall of a brick stable now erected and standing on lot three fronting on James street; and thence to the southerly limit of lot four fronting on James street; thence easterly along the said southerly limit thirty-four feet five and one-half inches to a point; thence southerly and at right angles to the said southerly limit thirty feet nine inches to a point; thence easterly and parallel to the said southerly limit ten feet to a point; thence southerly parallel to the easterly limit of James street thirty feet to a point distant northerly eleven feet four inches from the southerly limit of lot three fronting on Hughson

street; thence easterly parallel with the southerly limit of said lot three one hundred and sixteen feet four inches to the westerly limit of Hughson street; thence southerly along the westerly limit of Hughson street eleven feet four inches to the place of beginning. Subject as to the southerly eleven feet four inches of the said parcel hereby conveyed to a right of way in common with all other parties entitled to use the same for a right of way."

The dispute which resulted in the present action is largely traceable to two sources; first, the uncertainty that seems to prevail as to the true location of the boundary line between the lots fronting on James street and those fronting on Hughson street, and secondly, from the contention set up by defendants that even if the location of that line is such that the lands in dispute are really a part of lot 3 on James street, plaintiffs and their predecessors in title have been out of possession for such time as defeats their title.

The only record from the Registry office put in at the trial of any plan of the lots in this block was two maps, or copies of maps, which are and have been for a long time in use in that office. These are not original plans and do not bear the signatures of any surveyor or other person by whom they were made. One states on its face that it is "A plan of the town of Hamilton, Upper Canada, reduced and compiled from various surveys in 1836 by Alxr. MacKenzie, surveyor," and it shews lots in this block in the number and consecutive order mentioned above. It also shews the James street frontage of each of the lots fronting on that street to be one chain and eight links. The other is exactly the same in so far as it indicates the number and order of the lots, but it gives no dimensions. It bears the statement that it is "A plan of the town of Hamilton, Canada West, reduced and compiled from various surveys in 1837 by Joshua Lind, surveyor."

These maps or plans seem to have been, to some extent at least, recognized by conveyancers and surveyors. The evidence of the Deputy Registrar, who has held his present position since 1890, is that there is no registered plan shewing lot 3 on James street or lot 3 on Hughson street. It is contended for defendants that these MacKenzie and Lind maps do not properly establish the location of the lot lines or the size of the lots, and that they are not proper sources

of information. It is quite apparent from surveys and measurements recently made that the distance from the easterly line of James street to the westerly line of Hughson street as these lines now appear on the ground, is several feet in excess of the distance indicated by the earlier conveyance of these lots. The evidence of surveyors who were called at the trial is that there are not to be found any old monuments or fixed points indicating the position of the lot lines or from which the boundary lines can be located with reference to as original surveys. Measurements by these surveyors have been made (as measurements appear to have been made at other times) from the street lines as they appear on the ground. These, as I have said, have been taken generally as the boundary lines of the lots. Conveyances of lots in that block have referred to Hughson's survey, but no one has come forward to say what this survey comprised, or whether it has reference to the MacKenzie and Lind plans or either of them. The Deputy Registrar was unable to give any information about it that was of service.

The first matter to be determined is the location of the dividing line between the lots on James street and those on Hughson street. Earlier conveyances of lot 3 on James street describe that property as containing 39 rods more or less, and then by metes and bounds further describe it as commencing at the north-westerly corner of that lot, running thence southerly along its westerly limit one chain and eight links, more or less, to the south-westerly angle, thence easterly along its southerly limit two chains and twenty-four links, more or less to its south-easterly angle, thence northerly along its easterly limit one chain and eight links, more or less, to its north-easterly angle, and thence westerly, etc., to the place of beginning. Earlier conveyances of lot 3 on Hughson street describe it as containing 38 rods, more or less, but without giving its metes and bounds. So far as is shewn, these two lots are of the same width throughout.

Defendants' contention is that the dividing line between these lots is nearer to James street than is claimed by the plaintiffs. The dividing line, on the ground, between the properties immediately to the south of these two lots, and also between some of the properties to the north, particularly on the south side of Cannon street, is and always has been, so far as any witness has been able to speak, practically in a direct line with what is contended by plaintiffs is the true

dividing line between lot 3 on James street and lot 3 on Hughson street.

On the south side of Cannon street this dividing line is a line running southerly between two old and substantial buildings, and it continues southerly across lots 6 and 5 to the southerly limit of lot 5, its existence between the two properties being of long standing. Surveys made in recent years shew this line as being at Cannon street, 153 feet 6 inches east of the east limit of James street as laid out on the ground, and 150 feet 6 inches west of the west limit of Hughson street as laid out on the ground. The easterly boundary, long existing, of the property to the south of lot 3 on James street is 153 feet and 6 inches from the east limit of that street as laid out on the ground. The conveyance of this property to defendants describes it as running from James street 153 feet and 6 inches, more or less, to the rear of lot 2. The easterly limit of defendants' building on lot 2, erected by them, is that distance from James street. McKay, a surveyor called in evidence for plaintiffs, and Blondie, a surveyor called for defendants, agree on this. McKay located the easterly boundary of the property for defendants. Blondie says the building runs to the line of the old fence at what was said to be the easterly limit of the lot. Reliance has been placed on these old boundaries and the long established street lines. It is quite apparent that the measurements as indicated by the descriptions in some of the earlier conveyances were liberal.

Mr. Armour, for defendants, urged that the earlier conveyances of lot 3 on James street having described the lines running east and west as being 2 chains and 24 links, the dividing line between the two tiers of lots should be placed arbitrarily at that distance from James street, and that the measurements, from east to west, of lot 3 on Hughson street not being given in the old conveyances, the latter lot should be taken to comprise and include all the land east of a line 2 chains and 24 links from James street. The force of that argument is affected by other considerations arising from the form of the descriptions.

It is not disputed that lot 3 on James street and lot 3 on Hughson street are of equal width, and the area of the former being said to be 39 rods, more or less, and that of

the latter 38 rods, more or less, the reasonable inference is that it was intended by those who laid out these lands that the westerly lot should have a greater depth than the other. I think the evident intention was that lot 3 on James street should run back, not an arbitrary distance of 2 chains and 24 links, but 2 chains and 24 links, more or less, to its south-easterly angle and north-easterly angle, wherever those points really were. Dividing the distance from James street to Hughson street on the ground, as ascertained by recent measurements, in the same proportion as the earlier conveyances state the area of lot 3 on James street bore to that of lot 3 on Hughson street would result in locating the line of division at or very near what is now contended by plaintiffs to be the true easterly limit of the James street lot.

In the absence of more positive evidence, and taking the evidence before me of long-established physical boundaries of many of the lots, some to the north and some to the south, long recognition of the dividing lines between these lots by successive owners, the difference between the superficial area of lot 3 on James street and lot 3 on Hughson street, coupled with the evidence of the conditions which existed in these latter lots, I think a reasonable view is that the true line of division between these lots is to be found by continuing the existing boundary line between the old buildings fronting on Cannon street southerly to what was and now is the easterly limit of the property adjoining to the south lot 3 on James street, that is, at the north-easterly angle of defendants' present building, or 153 feet and 6 inches east of the present easterly limit of James street.

It would have been more satisfactory had there been more definite and positive evidence of the earlier surveys, but that not having been presented, I have endeavoured to solve the problem in a manner as consistent as possible with the facts before me.

The question of the rights of the parties in respect of the easterly portion of lot 3 on James street, as I have so defined it, is one involving equal difficulty. Defendants erected on the northerly part of their James street property a building running to the easterly limit of lot 2 as defined upon the ground, and at the east end of the northerly side of this building placed a door leading to the north. In 1913 they erected a wall running from this building northerly to the south-easterly corner of the building now upon the northerly

part of plaintiff's lands. This building of plaintiffs', according to Blondie's evidence, extends 143 feet and 5½ inches easterly from the present east side of James street. The wall erected by defendants has had the effect, not only of severing the rear portion of the southerly part of lot 3 from the land to the west of it, but also deprives plaintiffs of the means of access to the westerly part from the southerly 11 feet 4 inches of lot 3 on Hughson street over which they claim to have a right of way, and it is to restrain defendants from so building and maintaining this wall and to assert the rights of the plaintiffs that the action is brought.

Defendants rely to some extent upon the conveyance of May 30th, 1913, from Hill to them. This conveyance does not, however, purport to grant any part of lot 3 on James street, but is taken on the assumption that the true boundary line between that lot and lot 3 on Hughson street lies to the west of what I find to be its real location; so that the most defendants can claim under that conveyance is the title of Hill, whatever it was, to the westerly portion of lot 3 on Hughson street and his right, title and interest, if any, over the rear 12 feet of lot 3 on James street. Hill had, however, long prior to making this conveyance, parted with all of lot 3 on James street, except any right that might have remained in him to pass over the rear 12 feet thereof.. In the early days of his ownership of that lot, Hill erected on the northerly part of it a stable, the east wall of which was on the line of the east wall of plaintiff's present building. That line is several feet west of what I have found to be the boundary line between the lots. Hill says that he built his stable about 12 feet west of what he then considered was the dividing line between the two lots. What he had in mind in leaving this 12 feet unencumbered by buildings was the prospect of using it for the purpose of a passageway or driveway which he hoped might be continued over the easterly portion of lot 4, owned by Pronguay. Pronguay also appears to have had in mind some such scheme with reference to lot 4.

. This may help to account for the existence, if it did exist, of an old fence or other physical boundary on Pronguay's property on the line of the production of the easterly wall of Hill's stable.

A further position taken by defendants is that Martin's title was not perfected by the foreclosure, inasmuch as

Lamb's interest in the mortgaged property was not properly gotten in by these proceedings. This is based on the contention that Lamb, being a grantee of the equity of redemption, was not the holder of a lien, charge, or encumbrance and was not properly made a party defendant in the proceedings. Whatever may be said in favour of this contention under other conditions, I think the legal estate of which Martin was possessed having become vested in plaintiffs is sufficient to overcome the objection, so far at least as concerns the plaintiffs' right to maintain this action in respect of the easterly part of the James street lot. Lamb made no further conveyance of the mortgaged property, nor does it appear that he was at any time in possession.

Some reliance is placed upon a statutory declaration made by Hill as to his belief, that the east limit of lot 3 was co-existent with the east wall of the stable he erected on the James street property. That declaration he explains in his evidence at the trial. He mortgaged to Martin and afterwards, with his assignee Blackley, he conveyed to Farewell lot 3 on James street, whatever it was. What he says now about his belief about the eastern boundary of the lot it appears to me has arisen from some confusion in his mind by reason of his having reserved the right of way over the easterly 12 feet of the lot. If, as contended by defendants, the east limit of that lot was the easterly limit of the stable, then Hill's reservation in his conveyance to Farewell of a right of way over the easterly 12 feet of the lot, would pass that right of way over the easterly 12 feet of the land covered by the stable, a substantial brick building, a condition of things which would be most unreasonable for a grantor to create, and equally unreasonable for a purchaser to accede to.

There remains to be considered the further contention of defendants that plaintiffs and their predecessors in title have lost, through non-user, their title to and rights over the part of lot 3 on James street which lies east of the east wall of their present building on the northerly part of that lot and its production southerly. Witnesses were called in large numbers to shew that for such a length of time as would be sufficient to deprive plaintiffs and their predecessors of any right in or to this easterly 12 feet, there existed on the ground a fence running southerly from the south-east angle of the stable to a point in the southerly limit of lot 3; that

there was no access or opening through this fence; that the land east of it was cut off from the land to the west. The stable was built by Hill about 3 or 4 years after he conveyed to Farewell. At that time and down to the year 1899 or 1900 there was access to it by a driveway leading from James street; new buildings were then erected on James street which closed up this driveway but left a passage, much narrower, for foot passengers from James street into the rear of stable premises. There is evidence also that this stable, both before and after the closing up of the James street driveway, had been rented to various tenants, some of whom used it as a livery stable, others for the purpose of stabling their own horses. The evidence on all this is very conflicting, and on many points witnesses have materially disagreed.

Other evidence goes to shew that there was always access to the stable from Hughson street over the rear part of lot 3 and over the southerly 11 feet 4 inches of lot 3 on Hughson street (called by many of the witnesses the Hughson street alleyway), and particularly that from the time the James street driveway was closed the stable had been in actual use for the purposes mentioned above, and that the only means of access to and exit from it for horses and vehicles was to the east. Taking the evidence of those who were the tenants and occupants and who actually used the stable, and who are, therefore, better able to speak of the prevailing conditions than those who were not occupants and whose evidence is based on observations made at times when they were at the property or in sight of it, I think the reasonable view is that from the time the James street driveway was closed at least, there was no such cessation of use or occupation of the rear portion of lot 3 as to debar the plaintiffs and their predecessors in title from their interest therein and their right to pass over the Hughson street alleyway. I have reached the same conclusion with regard to the time prior to the closing of the James street driveway. These conclusions I have arrived at after carefully weighing the whole evidence, voluminous as it is, and from a consideration of the means of knowledge of the various witnesses and the conditions which prevailed throughout the many years covered by the evidence, as well as forming the best opinion I have been able as to what witnesses are most worthy of belief. Hill's evidence was transparently honest. He is better able to speak of the conditions during his ownership

than many of the other witnesses. It is a circumstance of some importance that it was only the rear part of lot 3 on the west side of Hughson street which he purchased in 1888, it did not extend to Hughson street, and the only means of access to it which he then acquired was by the right of way over the southerly 11 feet 4 inches of the lot; it is also of importance that when he made that purchase he was the owner of the equity of redemption in lot 3 on James street, and it is not an unreasonable inference to draw that he acquired this property because of its contiguity to the James street lot enabling it to be used with that lot, the two thus forming practically one block. He says that when he bought the James street lot there was a fence between it and the Hughson street lot, and that it continued there until he purchased the rear part of the Hughson street lot; that soon after he sold to Farewell (which was in April, 1890) he built a stable on the rear part of lot 3 on Hughson street, the west wall of which is on the line of that fence. That stable still stands, and its westerly wall approximates the line I have found as the dividing line between these two lots.

The evidence of Hill's son, who resided on the James street property with his father during all the time the latter occupied it, bears out his father's statements about the existence of the fence on the line of the west wall of the Hughson street stable and of its having been removed when that stable was built.

D'Arcy Martin, son of E. Martin, the mortgagee who foreclosed the Hill mortgage in June, 1899, and who is an executor of his father's will, says that after the foreclosure he entered the James street property from the Hughson street side and that there was no fence between the two lots.

Pennell, a tenant of part of the James street property beginning in 1893, and who bought out the livery business carried on in the stable on the James street lot, says that during his time access to the stable was by the alleyway leading from Hughson street as well as from James street.

Mittenthaul, who, beginning in 1896, occupied part of the building on the James street lot, and who for nearly four years previously had been accustomed to visit another tenant of the property, speaks of going from that property by way of Hughson street, and that there was no such fence as is claimed by the defendants.

Hines, who in 1890 and 1891 worked in this livery stable, says there was access to it from Hughson street, and that he used that means of access many time (hundred of times, he says), and saw Hill's waggons using it.

Halton, Hill's son-in-law, who visited the place from 1878 until Hill left it, says that the fence in the rear was about 12 feet east of the James street stable.

Another witness who worked for Pennell in this livery stable for about 10 months, and who for about 2 years previously worked for the former tenants of the stable, says that vehicles went to and from the stable, both through the James street driveway and by way of the Hughson street alleyway.

Siderski, whose evidence impressed me, rented the stable from Farewell in 1895 or 1896, and drove thereto by way of the Hughson street alleyway.

The evidence of other witnesses who either resided on the property or made use of or worked at the stable, or whose business brought them there at times, corroborates all this.

Elizabeth Cole, who for 16 or 17 years ending in 1912 used this stable, having rented it from the agent of the owner, swears that for 10 or 12 years after Martin built the new stores on the northerly part of the lot—in 1899 or 1900—her only means of access to the stable with her horse and vehicle was from Hughson street, and that during that time there was no fence running from the south-east corner of the stable southerly to lot 2. This class of evidence is supplemented by that of the agents, who for several years collected the rents of the stable and other buildings on the James street lot, and who by their books of entry, as well as from memory, corroborated other witnesses as to the occupancy and use of the stable, including the time after the driveway therefrom to James street had been done away with.

Witnesses called for the defence say otherwise with regard to the occupancy of the rear part of lot 3 and the existence of the fence running southerly from the south-east corner of the stable and the access to the rear of the property by what is known as the Hughson street alleyway, but on the most careful consideration I have been able to give the whole evidence, I must accept that offered for the plaintiffs. As I have said, many of these witnesses are in a position to speak of the conditions, and what they say is consistent with other circumstances which one cannot overlook. I have to

conclude that the defendants have failed to prove that plaintiffs, who have the paper title, have forfeited through want of use or failure to occupy it.

Plaintiffs also ask an injunction restraining defendants from using any part of lot 3 on James street for the purpose of affording access to lot 2 on James street, part of which is owned by defendants. No such right is expressly given defendants by the conveyance to them of that lot or as appurtenant thereto. Any right they possess to pass over the rear part of lot 3 on James street was acquired in the conveyance from Hill to them of the rear portion of lot 3 on Hughson street by which they also acquired: "the right, title and interest of the grantor" (Hill) "if any, over the rear 12 feet of lot number 3 fronting on the east side of James street in the same block, as reserved in instrument number 46171, duly registered in the Registry office for the county of Wentworth, in common with the owners, tenants and occupants of the remainder of said lot number 3."

What was reserved by instrument number 46171 was "a right of way 12 feet wide along the easterly boundary of lot 3 on James street, such right of way to be used as right of way for" Hill, who then purported to be the owner of lot 3 on Hughson street, and Farewell, to whom Hill was then conveying lot 3 on James street, subject to the right so reserved. It is evident that whatever easement was created over the rear 12 feet of the James street lot was intended for the use and benefit of the owners of that lot and of the westerly portion of lot 3 on Hughson street, and was so confined.

That it cannot be used by defendants as incident to their ownership of lot 2 is, I think, established by authority: *Purdon* v. *Robinson*, 30 S. C. R. 64, and cases there cited.

Entertaining this view, I have not thought it necessary to consider the proposition put forward that Lamb, the assignee of Hill, was a necessary party to any conveyance by Hill made after the time of his assignment.

Judgment will be in favour of plaintiffs in accordance with the above findings and for $5 damages and costs.

HON. MR. JUSTICE KELLY. FEBRUARY 12TH, 1914.

TOWNSHIP OF NIAGARA v. FISHER.

5 O. W. N. 881.

Way—Highway—Original Road Allowance—Impossibility of Ascertainment—By-law Defining and Accepting Highway—12 Vict. c. 81, s. 31—18 Vict. c. 156—Subsequent Declaratory By-law—Railway—Trespass—Injunction—Costs.

KELLY, J., *held*, that plaintiffs, a municipal corporation were entitled to restrain the obstruction of a 50 foot strip of land accepted as a public highway by by-law of the corporation but not a further 16 feet which had not become a public highway as aforesaid.

Action for an order restraining defendants from obstructing what they claim is a road allowance running between lots 8 and 9 in the township of Niagara, extending from the Queenston and Niagara road to the west limit of the road allowance between the first and second concessions; and requiring the defendants Fisher to give up possession of the same, and restraining the defendant company from continuing to maintain its fences across this road allowance and compelling their removal; and a declaration that this road allowance is a public highway.

A. C. Kingstone, for plaintiffs.

Armour, K.C., and F. C. McBurney, for defendant Fisher.

D. W. Saunders, K.C., for defendants Michigan Central Rw. Co.

HON. MR. JUSTICE KELLY:—The facts upon which the action rests date back to the year 1787, when that part of the township of Niagara was surveyed by Augustus Jones, a deputy Provincial Surveyor, under the superintendence of Phillip R. Frey, also a surveyor.

On October 31st, 1893, lot 9, above mentioned, was patented to James Durham, the description by metes and bounds in the patent shewing in effect that the lot ran from a line distant one chain from the Niagara river, westerly 50 chains, more or less, to within one chain of lot number 38 (a lot in the adjoining concession), with a width from north to south of 20 chains, more or less, no mention being made therein of a road or allowance for road.

There was uncertainty about the location of what is referred to as the side line roads between some of the lots, and which are mentioned in documents at present on file in the Surveys Branch of the Provincial Department of Lands, Forests and Mines. One of these documents is a certificate of Augustus Jones, dated July 24th, 1804, in which he states that this township was surveyed in 1787, "beginning at the north end of the township at the Garrison line, and the survey extended to the south with an allowance of one chain on the south said of every second lot through the said township;" and again in a communication of 20th January, 1825, from Jones to Thomas Ridout, Surveyor General, it is said, "the survey of this township commenced at the western line, called the Garrison line, and extend from the deep hollow above the Navy Hill, . . . and was surveyed and numbered from the aforesaid line and beginning with lot number 1 at the said line," and "there was an allowance of one chain posted off for a road (and included in the survey) on the south side of every second number or tier of lots from the aforesaid Garrison line through the township, etc." This description does not accord with the plan made in 1787, which shews the lots nearest to the Niagara river as numbering from the south to the north; this plan, though it shews the location of side roads to the south of some of the lots, does not shew any such road to the south of lot number 9. Some explanation, however, is given of this upon the plan, where it is stated that the regular survey of the township differs a good deal in the front from lot number 4 down to lot number 13, that these lots were settled prior to any survey, and that a memorial of all the owners concerned to the Land Board stated that their improvements would be much hurt should the original lines be changed; and "the Board consented to grant their lots conformably to their possessions." So far as shewn, this continued to be the state of affairs down to the year 1853, when, as appears from the minutes of the proceedings of the Municipal Council of the Township of Niagara, petitions were presented in January of that year asking the council to petition the Legislature for the passing of an Act for the definite settlement of the side line roads in the township. Other meetings were afterwards held, and as a result, an application was so made to the Legislature; and on 19th May, 1855, an Act was passed (18 Vict. ch. 156) declaring that the allowances for roads as laid out and

established by the original survey (that made by Augustus Jones) should be and they were thereby declared to be the true and unalterable allowances for roads between the said east and west line and the said Queenston and Grimsby macadamized road in the said Township of Niagara, and imposing on the Municipal Council of the township the duty of planting stone monuments under the direction of a deputy provincial surveyor, at the several angles of the several alternate lots at the points of intersection of the lots with the road allowance of the township so established as nearly as may be in the exact position indicated by the original survey. The preamble to the Act throws some light upon the conditions theretofore existing where it states that the petition of the municipal council represented that in the original survey by Jones he commenced at the east and west line at the Township of Niagara and ran along the river to the Township of Stamford leaving an allowance for road "between every second lot," and that many of the said roads were then opened and used in accordance with the original survey "but that notwithstanding the said survey it happened, at the time the letters patent from the Crown for the land in the said township were issued, that the lots were numbered from the said Township of Stamford to the east and west line of the said Township of Niagara, the effect of which would be to establish the road allowance between other lots than those between which they were established by the original survey." The aim of this Act was to remove the uncertainty which up to that time had existed.

Following upon the passing of the Act the township engaged the services of E. DeCew, a provincial land surveyor, who proceeded to establish the location of the roads as required by the Act, and made his report on December 19th, 1855, and it was ratified and adopted by the council. Copies of this report and of the field notes and plan which accompanied it are submitted in evidence. The report shews that DeCew was able to locate the proved boundaries at the south-east and north-east corners of lot 9, thus defining the location and width of this lot, the field notes shewing the distance between these two corners to be 23 chains and 43 links. The report goes on to say that the question as to the proper position of the allowance for roads in that portion lying between lots 4 and 13 is one of much per-

plexity and that on mature consideration he had come to the conclusion that there was ground left for roads in lots 6, 7, 8, and 11, that there was no clear evidence as to the precise locality of such roads, that roads were required in these lots and that as he had concluded that it would be unwise for him to lay out roads in localities where doubt existed as to their accuracy, every desired end would be accomplished if roads were established by by-law of the township council and anticipating such action he marked out roads for that purpose. The report adds that the proprietors of lots 9 and 11 wished to have the roads laid out on the south side of these lots. On the same date, December 19th, 1855, at a special meeting of the township council, called to receive the report and map, a by-law was passed that a road or highway of the width of 50 feet be established along the south side of lots number 9 and 11 extending from the 2nd concession to the river, etc. James Durham, then the owner of lot 9, petitioned to have a road 50 feet in width taken from the south side of that lot. From the minutes of other meetings of the township council it is also learned that Durham in 1860 made a request that the council "accept of a road on the north side of his lot instead of on the south side, as formerly intended" but the council, adhering to their original action in the matter, refused the request. The minutes also record that between 1855 and 1860 directions were given that the occupants of the lots comprising these roadways be required to vacate the same and that the Erie and Ontario Railway Co., (the predecessors of the defendant company) be required to have crossings constructed on these roads.

So far as the records and the evidence shew the matter appears to have rested at this until the early part of the year 1913, excepting only what is revealed in the evidence of James Shepherd given at the trial. Shepherd, a man of 69 years of age, has lived in the Township of Niagara since he was 5 years old, and for 15 or 16 years he resided on the broken part of this lot 9, that is between the part now in question and the Niagara River. He recollects the survey being made by DeCew, and says that less than a year after the survey a stone was placed between lots 8 and 9, lot 8 being the lot immediately to the south of lot 9; that Durham, then the owner of lot 9, 4 or 5 years after the survey, built a brush fence about the width of a roadway

to the north of the boundary lne between lots 8 and 9; and that that fence remained in its place for 2 or 3 years. He states also that he remembers that the stone monument placed between lots 8 and 9 was in its position in the year 1865 when he removed from that lot. This is all quite consistent with what was done by the surveyor, the township council, and the owner of the lot in establishing the roadway along the southerly limit of lot 9.

The position of the defendant company is this. On July 21st, 1853, James Durham conveyed to the Erie and Ontario Railway Company for the purposes of its road two acres and twenty-hundredths of an acre being the westerly end of lot 9 adjoining the concession line in front of the 2nd concession, the length of the parcel across the lot being 1,553 feet. It is alleged and not disputed that by various conveyances and statutes that land became vested in the Canada Southern Rw. Co., and that the defendant company as lessee of that company is now in possession thereof.

On March 10th, 1913, plaintiffs passed a by-law declaring that certain lands in the Township of Niagara "being composed of the road allowance between lots numbers 8 and 9 in the first concession of the said township," describing the lands by metes and bounds, are a public highway and that the same be opened up forthwith for the use of the public and that any person or persons, corporation or corporations occupying or in possession of these lands should give up possession immediately on the passing of the by-law. The lands as particularly described are the southerly 66 feet of lot number 9 and running from the west limit of the River road to the east limit of the next concession road (being the west limit of the lands occupied by the defendant company). Some negotiations then took place between the owners of lot 9 and the plaintiffs with a view to an amicable arrangement for the opening up of this road, but unfortunately that result was not accomplished.

Defendants Fisher set up that they and their predecessors in title have been in uninterrupted possession of the lands in question from the grant from the Crown and that no highway has in fact existed upon these lands, and they claim the benefit of the Statute Law Revision Act (1902), 2 Edw. VII. ch. 1, secs. 17, 18, 19 and 20.

The defendant company takes the position that there is no allowance for road reserved between lots 8 and 9;

that the survey made in 1855, in pursuance of 18 Vict. ch. 156, and the by-law of December 19th, 1855, were subsequent to the conveyance to their predecessors; that they are under statutory obligation to maintain fences dividing their railway lands from the adjoining lands of their co-defendants; and also set up that no leave has been obtained from the Board of Railway Commissioners for Canada authorizing the opening of the claimed highway across their lands and that such highway cannot be opened by by-law without an order of that Board.

It is clear that the true location and size of lot 9 are as shewn by the report, field notes and plan of DeCew, who appears to have gone very thoroughly into the whole matter. Though his view was that in the original survey an allowance was made of the land necessary for a roadway through this lot he was unable to fix its location and the expedient which he recommended or suggested was resorted to, of establishing the road along the south limit of the lot, which was done by by-law of the plaintiffs on the petition of the owner of the part of the lot now owned by defendant Fisher.

Under the authority of 12 Vict. ch. 81, sec. 31, then in force, plaintiffs had power to pass by-laws for the opening, constructing, maintaining, etc., of any new or existing highway, road, street, sidewalk, crossing, alley, lane, bridge or other communication within the township, etc.

It cannot be said, however, that the 50 foot road established by the plaintiffs is an original road allowance or that it was an "existing highway" prior to the passing of the by-law. What the Act of 1855 declared was that the allowances for roads as laid out and established by the original survey (that made by Jones) should be and were thereby declared to be the true and unalterable allowances for roads. It did not give authority to establish roads not laid out or established by the original survey. DeCew was unable to say where the road allowance through lot 9 was to be found (if, indeed, such allowance was really made by the original survey), and the uncertainty which existed in that respect prior to the passing of the Act was not removed by his exhaustive and careful survey and report. The location of this roadway along the south side of the lot rests, therefore, not on the original survey, but on the action of the plaintiffs under their general statutory powers to pass by-

laws to open any new or existing road. The evident intention of the council was that, such roadway being necessary, and provision having been made for it in some part of the lot, and Durham, the owner of part of the lot, having petitioned to that effect, the southerly 50 feet of the lot should, so far as they were concerned, be established as a public highway and thereafter be recognized as such. Subsequent action of the plaintiffs in requiring persons occupying the land comprised in this roadway to vacate, and in refusing Durham's request in 1860 to have the road placed at the north side instead of the south side of the lot, and the recognition of the roadway by Durham, implied from his making that request, are all consistent with an intention to continue this as a roadway. The time that the brush fence was built a short distance to the north of the south limit of the lot (4 or 5 years after the survey) coincides generally with the time of plaintiffs' refusal to allow the location of the road to be changed from the south to the north.

Plaintiffs' by-law of March, 10th, 1913, in express terms declared the lands therein described (that is the southerly 66 feet in width for the whole length of the lot) to be a public highway and that it should be opened for the use of the public. It was not a case of establishing a new road—the by-law does not mean that—but of declaring that a public highway did already exist and that it should then be opened. It operated only on what was already a highway, namely, the southerly 50 feet of the lot extending as far west as the lands of the defendant company and it did not affect the remaining 16 feet in width, which had not previously been established as a public road.

I am of opinion that the plaintiffs are entitled to succeed as to this southerly 50 feet, but not otherwise; as against the defendant company plaintiffs altogether fail; the southerly 66 feet of the company's lands not having at any time been a part of a public highway.

The declaration, therefore, will be that the southerly 50 feet extending as far west as the defendant company's lands is a public highway, to possession of which plaintiffs are entitled as against defendants Carl E. Fisher and Howard Fisher, who are restrained from obstructing it; the operation of the order for possession and against obstruction being suspended for three months from this date to enable

these defendants to comply with the terms now imposed.

The defendant company is entitled to its costs against the plaintiffs; success as between the plaintiffs and the other defendants being divided, there will be no costs as between them.

HON. MR. JUSTICE LENNOX. FEBRUARY 17TH, 1914.

CHRISTINA CATHERINE HEDGE v. CHARLES MORROW.

5 O. W. N. 903.

Deed—Conveyance by Husband as Attorney of Grantor—Alteration in Power of Attorney—Forgery — Authority — Presumption—Death of Grantor—Presumption—Expiry of Seven Year Period—Date of Death of Wife—Interest of Husband—Alleged Murder of Wife—Evidence—Will of Grantor—Revocation by Marriage—Alleged Bigamous Marriage—Evidence—Claim as Heir-at-Law—Administration not Obtained—Outstanding Interests—Settlement of Action—Costs.

LENNOX, J., *held*, that those who allege death at a particular time must prove it.

Re Lewes' Trusts, L. R. 6 Ch. 356, referred to.

That administration can be obtained by a party to an action before the case comes for trial, and when granted the administration relates back to the date of the death.

Dini v. *Fauquier*, 8 O. L. R. 712 and *Re Pryse*, [1904] P. 301, followed.

Action for possession of the west half of lot A in the 6th concession of the township of Roxborough, for a declaration of the plaintiff's ownership thereof, for damages for the unlawful cutting of wood and timber thereon and for an account of rents and profits.

Geo. A. Stiles, for plaintiff.

D. B. MacLennan, K.C., for defendant.

HON. MR. JUSTICE LENNOX:—Isabella Gilchrist was lawfully married to Lehondus Johnston, commonly called Leo H. Johnston, at Nome, in the District of Alaska, on the 15th day of June, 1905. The plaintiff admits that a marriage was in fact duly solemnized between these parties and that they afterwards lived together as man and wife, but contends that at the time of the ceremony Johnston could not contract a lawful marriage with Isabella Gilchrist as he had previously married Cora Tosh, who was then and

is still alive. It would be sufficient to say that there is no evidence of a previous marriage, but I may add that the evidence of Cora Tosh and Mr. Warren makes it clear that whatever deception may have been practiced upon this woman she was not legally married to Johnston and she does not now claim or think that she was.

The defendant obtained what purported to be a conveyance of the land in question from the owner in good faith and paid for it the sum of $2,700 in cash on the 8th day of December, 1906. At that time the defendant was in possession of the land as tenant, and has remained in possession as owner. He should not be disturbed until the plaintiff has clearly established her title. In consideration of the purchase, the rent for the part of the current year which had elapsed was abated, and I find that with this abatement counted, the $2,700 paid by the defendant was the full and fair value of the property at that time.

The plaintiff alleges that the power of attorney under which Leo H. Johnston purported to execute the deed to the defendant was a forgery in so far as it refers to land in Canada and that in any case it was revoked by the death of Isabella Gilchrist Johnston before the execution of the defendant's deed.

I think there is evidence to support the allegation of forgery: I am not satisfied that the authorities referred to by defendant's counsel meet this case. It is easy enough to argue that crime is not to be, and good faith is to be, presumed, where there is nothing more than the fact that an alteration appears upon the face of an instrument without explanation—but there is, to my mind, the clearest evidence that at the time this power of attorney was executed and registered there was no provision in it for sale of land in Canada. It is argued that if she subsequently authorised or consented to the additional clause this would be sufficient in law. Possibly it would. The difficulty I have is with the question of fact. I cannot find any evidence that this was done with Mrs. Johnston's knowledge or approval. It is a question however, upon which an Appellate Court will have the same means of forming an opinion that I have. If I have come to a proper conclusion upon this point the question of revocation by death is of no importance. There is, perhaps, no evidence upon which I could find

as a matter of fact, that Isabella Gilchrist Johnston is dead. The statement attributed to Johnston after he was arrested may or may not have been made, and if made, may or may not be true; but, in any event they are not evidence of his wife's death at a particular time or of his wife's death at any time. Even with the assistance of the presumption which has arisen since, through lapse of time, and drawing any inference which I may be justified in drawing from the discovery of the remains of a human being in the fall of 1908, I cannot find that there is any evidence that Mrs. Johnston was dead when the deed was executed in December, 1906. Those who allege death at a particular time or before a specific event must prove it. In *Re Lewis Trusts* (1871), L. R. 6 Ch. 356. Phipson on Evidence, 4th ed. 626-7. Taylor on Evidence, 9th ed. cases collected, pars. 198 to 202. *Re Thompson,* 39 Ir. L. T. J. 372.

But Mrs. Johnston's relatives were in the habit of writing her and receiving letters from her from time to time. How frequently was not stated. The last communication from Mrs. Johnston, in her own handwriting was in October, 1905. I have no faith in the letters written by the husband's "nephew" or the typewritten letters. It was not stated in evidence, that I remember, whether Mrs. Johnston was known to be rheumatic. There is no evidence of any person seeing Mrs. Johnston later than towards the end of 1905—but there is amazing little evidence of any kind upon this point. For the purpose of dealing with her estate seven years unexplained absence and silence raises an inference of death of which the next of kin can avail themselves. Of course in the absence of actual evidence of death they must wait the full seven years. The inference may be always growing or ripening, but it is never ripe until every moment of the seven years has run. Until then the answer, whether early or late in the period, is the same: "Wait, she may yet be heard of, she may be yet alive." No one can administer then until the seven years have gone by; the three years during which the personal representative retains the estate begin at the end of the seven years; and at the end of this period, subject to statutory exceptions, the estate vests in the heirs at law.

The plaintiff claims the property in question as devisee of her sister Mrs. Johnston, under a will dated and executed on the fifteenth day of December, 1897, and she com-

menced this action on the 14th day of March, 1912. At that time her sister had been lost track of for something over six years. Leo H. Johnston had also disappeared and not heard of since the autumn of 1908. The officials who are blameable for his escape from custody suggest, argue in fact, that he must be dead. There is no evidence that he is dead, and, of course, no presumption that he is dead has yet arisen. I have no idea that he committed suicide. The preparations were not of the class to facilitate drowning—manacles, and handcuffs would have been aids to such end; but getting rid of them was the promise and initial stage of freedom. He escaped where the waters were narrowest and a friendly boat would be within easy reach of shore. I am very far from sure that the last has been heard of Mr. Johnston. At all events, if either side desired to establish Johnston's death, and I am not sure that either party did, I have only to say that what has been shewn does not satisfy me that he is dead.

Coming back then to the plaintiff's claim as devisee. The will was revoked by the marriage of the testatrix on the 15th of June, 1905, as above stated, and the plaintiff fails.

Alternatively the plaintiff claims as an heiress at law and as assignee of four other heirs and heiresses at law of her sister; and if, as I have found, he cannot protect himself as *bona fide* purchaser for value under the power of attorney, the defendant claims that he is at all events entitled to hold the one-half share of the property which descended to Leo H. Johnston from his wife; and to this the plaintiff rejoins that Johnston did not inherit anything because, as the plaintiff alleges, he murdered his wife.

I will dispose of this last point at once. There were a lot of newspaper clippings deposited with the exhibits. I am prepared to assume that they make out a clear case against somebody. I have not opened the envelopes containing them. Whether there is good ground for suspicion or not I do not know, but this much is clear that there is no evidence whatever that Johnston murdered his wife—if in fact she is dead. On the contrary, a statement attributed to Johnson —most improperly insisted upon and elicited by the plaintiff's counsel, one of a long list of transgressions of this kind—if it were evidence at all, but it is not, would establish that Mrs. Johnston died by her own hand. Warren's

evidence: Accepting and acting upon the presumption of Mrs. Johnston's death I find and declare that when the property is administered in Canada the defendant will be entitled to be allowed one half the value of the farm—to be increased or decreased by rent, improvements and other items of account.

What is the position of the plaintiff? On the facts as they are in evidence before me she was not entitled to either probate or administration at the time she issued the writ. As it turns out she was not entitled to a grant of probate at all, and the sealing in Ontario, if desired, will be annulled. It is true that contrary to the view at one time entertained, it is sufficient now if administration is procured before the case comes on for trial. *Trice* v. *Robinson* (1888), 16 O. R. 433; and *Dini* v. *Fauquier*, (1904), O. L. R. 712, where the cases are discussed. And when granted the administration relates back to the date of the death. *In Re Elizabeth Pryse* (1904), P. 301. And where steps have been taken promptly and administration applied for, the Court may even grant an injunction so as to preserve the property until administration can be obtained, as was done, at the instance of the sole heir at law, in *Cassidy* v. *Foley* (1904), 2 Ir. R. 427. But here administration has not even been applied for and the plaintiff has been fighting against the suggestion of intestacy. Two of the heirs at law are not before the Court but this in itself is not a serious objection. But the other questions are and the plaintiff is not in a position to maintain this action.

But on the other hand, further litigation should be avoided if possible. To dismiss the action is not going to benefit the defendant in the end. The parties should get together and with or without my assistance come to a settlement. In the interest of all parties a reference and judicial sale should be avoided.

If the two outstanding shares can be got in—the defendant's title confirmed and he pays to the plaintiff and other parties entitled, one half the value of this part of the estate —the rent and improvements being taken into account, that is what will yield the best net result for all parties concerned. If the two shares cannot be got in the matter is not so simple, but by administration, or in some other way, the difficulty can be met. If an adjustment along these lines is come to it would be a case of divided success—and

the usual result should follow—each party should bear their own costs. Even if I should conclude to find for the plaintiff in the action as it is in proportion to the five-sevenths of one-half which she appears to represent—either with or without amendment or administration—the costs would be disposed of, I think, in about this way. I have gone into this matter fully so that parties may know just about what to expect. I will hear counsel upon any point in connection with a settlement or determine any question in that connection if they desire it, but it will be better still if the counsel and parties can settle it themselves.

If no arrangement is come to, the view I entertain at present is that the action should be dismissed, but I will be glad to have it pointed out that this need not, or should not, be done. If I dismiss the action, unless the failure to settle is owing to the unreasonable attitude of the defendant, I will probably dismiss it with costs. But if I am compelled to do this, in the end, it will be a loss to both plaintiff and defendant.

HON. MR. JUSTICE MIDDLETON. FEBRUARY 17TH. 1914.

MAROTTA v. REYNOLDS.

5 O. W. N. 907.

Vendor and Purchaser—Specific Performance—Default of Solicitor —Liability of Client for—Rescission — Notice of—Reasonableness—Conditional Waiver — Condition not Performed—Final Cancellation—Personal Liability of Solicitor.

MIDDLETON, J., *held*, that a vendor of lands who had given reasonable notice that the purchase must be closed on a stated day but who agreed afterwards to close on a day shortly thereafter, had only waived his right to rescind conditionally and that where the purchaser failed to complete upon the day agreed upon, the vendor's right to rescind revived.

That a party to an agreement for the purchase of lands is bound by the conduct of his solicitor.

G. Grant, for plaintiff.

J. C. MacBeth, for defendant.

Action tried at Toronto on Thursday, 12th February, 1914.

Action by a purchaser for specific performance of an agreement for the sale of certain lands, bearing date 28th February, 1913.

HON. MR. JUSTICE MIDDLETON:—There is no dispute as to the sufficiency and validity of the contract. It provided for a purchase of the land in question for $5,700; $100 paid as a deposit, the balance by the assumption of certain encumbrances and the giving of a second mortgage. The time called for completion on the 1st of April, 1913, time to be of the essence of the agreement.

The parties placed the matter in the hands of their respective solicitors for completion; Mr. McBrady acting for the purchaser. Mr. McBrady had in his hands, as the result of some previous transactions, more than sufficient money belonging to his client to complete this transaction; and his client instructed him to use this money for the carrying out of the contract. The vendor needed the money for the purpose of enabling him to carry out another contract entered into upon the faith of its receipt. This fact was known to Mr. McBrady and his client, not merely from oral notice but by a letter sent by the vendor's solicitor, Mr. Wherry, on April 3rd.

Matters proceeded in the ordinary way between the solicitors, conveyances being prepared and approved, title being searched, requisitions made and answered; and Mr. Wherry was ready to close by the time named. Mr. McBrady failing to close, the letter already referred to of April 3rd, was written, followed by others pressing for closing. In the meantime, the vendor met the purchaser and complained of the delay. Mr. McBrady had made the excuse that his client had not placed him in funds. On learning this, the purchaser stated, as the fact was, that Mr. McBrady had always been in funds, and that there was no possible reason why the transaction should not be closed.

Nevertheless, it seemed to be impossible to bring matters to a focus. The purchaser stated his plight to the vendor's solicitor. Communication was had with the Crown Attorney, and the result was that the money was supposed to be forthcoming. On the 17th April a letter was sent to Mr. McBrady by Mr. Wherry, pointing out the delay, that Mr. McBrady had now stated that he was in funds, and appointing Saturday the 19th to close the transaction, otherwise the whole matter would be called off and the deposit forfeited, and stating that no extension would be allowed. This letter was delivered at Mr. McBrady's office on the 18th.

The appointment for the 19th was not kept. On the 21st McBrady came, said he was ready to close, and the vendor and his solicitor proceeded to close the transaction. It was then stated and believed that Mr. McBrady had the funds required for this purpose. The closing did not take place until after banking hours and until after the Registry Office was closed. Mr. McBrady then gave his cheque for the amount payable on the adjustment, $845.43, and also paid some small correction in the computations, $1.60. The cheque was handed to Mr. Wherry, who also received the mortgage for the purchase money. The deed was handed to Mr. McBrady. A memorandum was made embodying the understanding that the deed should not be registered until the cheque was marked on the 22nd, and that the cheque should not be used until the necessary search at the time of registration was made.

Upon returning to his office Mr. Wherry communicated with the bank and learned that only a small amount stood to McBrady's credit. He then realized that he had been imprudent in parting with the deed for a cheque which he believed to be worthless, and, returning to McBrady's office, accused him of defrauding him by giving a cheque for which there were no funds, as McBrady knew. McBrady did not deny the condition of his bank account, and surrendered the deed, receiving back his cheque. In the confusion Mr. Wherry forgot to hand back the second mortgage, although he had taken it to McBrady's office for that purpose. Later on, he returned it.

On the 22nd McBrady made no deposit in the bank, and his cheque still remained worthless and would have been rejected had it been presented instead of being returned. Mr. Wherry then wrote the letter of April 22nd, definitely and finally stating that the transaction was at an end and that nothing further would be done.

On the 23rd McBrady wrote letters seeking to re-open the matter, which were ignored by Mr. Wherry; and on the same day McBrady procured the bank to mark his cheque as good. There is nothing to indicate that he ever communicated this fact to the vendor or his solicitor. There was some unsatisfactory evidence looking towards tender, but no tender was made. The cheque that was marked on the 23rd April was re-deposited and cancelled on the 25th, so that it could not have been a factor in these supposed

tenders. The purchaser apparently accepted the situation, and entered into negotiations looking for some salvage from the sale deposit. Unfortunately these came to nothing. Mr. McBrady registered the agreement and brought this action, which has dragged its weary way through the Courts ever since, notwithstanding an order made on the 2nd of June, 1913, to expedite the hearing.

It is argued that although time was of the essence of the contract in the first place, the parties treated the contract as subsisting after the date fixed, and that the notice of the 17th, delivered on the 18th, to close on the 19th was not reasonable. If necessary to determine this, I would hold that the notice was reasonable, having regard to the circumstances. The purchaser had said that the money was in his solicitor's hands. The solicitor said that he had the money. Nothing remained to be done except to make some minor adjustments and to hand over the papers. But, quite apart from this, when the parties met on the 21st, any default that had then been made was waived. The inadequacy of any notice theretofore given was also waived, and the parties then undertook to close the transaction. All this was predicated upon the statement that the money was there, ready to be paid over, and that there were funds for the cheque. The waiver by the vendor of the delays that had therefore taken place was conditional upon the truth of this. The waiver by the purchaser of any further notice was unconditional, for he then accepted that time as being a reasonable time for the payment over of the money.

I am sorry for the unfortunate purchaser; but he is in law answerable for the conduct of his solicitor. The solicitor's fault is his fault, and I think he cannot succeed in obtaining specific performance under the circumstances outlined, and that the action must be dismissed.

In case the matter is carried further, I think I should say that the plaintiff Marotta is an Italian, not too familiar with the English language. He impressed me with his entire honesty and his endeavour to tell the truth. Owing to his unfamiliarity with English, he made many slips in attempting to answer questions; but this is in no way against him, for any such errors were, I think, due to misunderstanding and were not intentional. He is a victim, much to be pitied. The whole litigation was unwise, as the land had been sold to another purchaser at a $100 advance, which the vendor

offered to divide with him to compensate in some way for the loss of the deposit, which had been retained by the agent, who claimed and was no doubt entitled to commission.

The case is one in which Mr. McBrady ought to pay the costs of both parties. If he does not see fit to do so, possibly Marotta may be able to compel him. In the meantime I can see no course open but dismiss the action with costs.

HON. MR. JUSTICE LATCHFORD. FEBRUARY 19TH, 1914.

RE DOYLE ESTATE.

5 O. W. N. 911.

Will—Construction—Bequest in Favour of Possible Future Temperance Hotel — Charitable Bequest — Conditions — Approval of Bishop—Uncertainty of Fulfilment—Vagueness—Invalidity.

LATCHFORD, J., *held*, that a bequest to trustees to pay the income to any future hotel to be established in Guelph, where no intoxicating liquor should be sold, subject to the approval of a certain bishop was too uncertain to be valid, as no such hotel might ever be established and in any case such approval might never be given.

Re Swain, 1905, 1 Ch. 669, and *Re Jarman*, 8 Ch. D. 584, referred to.

That a trust for the promotion of temperance or abstinence from liquor might be considered charitable.

Farewell v. *Farewell*, 22 O. R. 573, referred to.

Motion for the construction of certain clauses in the will of Michael Patrick Doyle, late of the township of Puslinch, in the county of Wellington, gentleman, deceased.

G. C. Campbell, for executors.

J. A. Mowat, for residuary devisees.

P. Kerwin, for the trustees of the fund.

HON. MR. JUSTICE LATCHFORD:—The testator bequeathed $1,000 to his trustees and executors to be invested by them until a hotel where no intoxicating liquor is kept or sold should be established in the city of Guelph. Then the interest is to be added to the principal and "the interest of the accumulated sum shall be paid towards the establishment and maintenance of said hotel so long as it remains a hotel where no intoxicating liquors are kept or sold, and no longer." If this hotel is closed, the fund is "to remain at interest and accumulate until a hotel as I have described herein shall be established. The said hotel shall in all respects be required to have accommodation for the public equal to requirments in this re-

spect of a licensed hotel under the law. No payment of money shall be made by the said trustees for the purpose of the said hotel until the approval of the Roman Catholic Bishop of the diocese of Hamilton shall first have been obtained."

It was conceded upon the argument that if the purpose of the bequest was not generally charitable the gift must fail as offending against the rule regarding perpetuities.

It seems to me that the promotion of temperance is more truly a charitable public purpose than many which have been so considered by the Courts, such as teaching shooting, encouraging good domestic servants, preventing cruelty to animals or promoting vegetarianism. See 4 Halsbury's Laws of England, 116, where cases in which many similar purposes were held charitable are cited.

A gift to promote the adoption by Parliament of legislation prohibiting the manufacture or sale of intoxicating liquor has been held in our own Courts in a considered judgment to be for a lawful purpose of a public character proper to be ranked under the head of "charitable." *Farewell* v. *Farewell* (1892), 22 O. R. 573.

But on another ground the gift fails. It is dependent upon conditions which may never be fulfilled—the establishment in Guelph of a hotel where no intoxicating liquor is kept or sold; the existence of a certain standard of accommodation in such a hotel if established; and, finally, when these conditions are satisfied, the approval of any payment by the Bishop of Hamilton.

In *Re Swain*, [1905] 1 Ch. 669, one of the principles flowing from *Chamberlayne* v. *Brockett* (1872), L. R. 8 Ch. 206, is stated to be that a gift in trust for a charity conditional upon a future or uncertain event is subject to the same rules as an estate depending on its coming into existence upon a certain event.

Such a hotel as the testator had in mind may never be established in Guelph and even if it should, the approval made a prerequisite to payment may not be given. The bequest is too vague and indefinite to be supported and fails. *Re Jarman* (1878), 8 Ch. D. 584.

Costs out of the fund.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. FEBRUARY 13TH, 1914.

STOCKS v. BOULTER.

5 O. W. N. 863.

Damages—Fraud and Misrepresentation—Rescission of Sale of Farm —Damages Suffered by Purchaser — Loss of Income from Investment—Allowance of—Quantum—Occupation Rent—Appeal—Costs.

On a reference to the Local Master to assess the damages suffered by plaintiff by reason of misrepresentations leading to the rescission of a contract for the purchase of certain farm land, the Master found the damages at $9,041.38 and allowed defendant for plaintiff's use and occupation $1,425.

MIDDLETON, J. (*ante* 93) varied above report, reducing damages to $458.05 and allowing for rent, use and occupation $2,000. Plaintiff to have right to further reference as to any increased value of land by reason of matters included under the head of outlays.

Chaplin v. *Hicks*, 1911, 2 K. B. 786 and *Goodall* v. *Clarke*, 44 S. C. R. 284, discussed.

Held, that an allowance for loss of interest upon capital withdrawn from a 10 per cent. investment to put into the purchase of the land in question improper as being too remote a damage.

SUP. CT. ONT. (1st App. Div.) *held*, that the Master was correct in principle and that the loss of interest as above could be recovered but reduced the amount of the damages from $9,041.38 to $3,541.38 and restored the Master's findings as to occupation rent.

Costs of appeal to plaintiff..

Appeal by plaintiff from the judgment of MIDDLETON, J., *ante* 93, varying the report of the Local Master upon an assessment of damages herein. See for previous reports of case; 20 O. W. R. 421, 22 O. W. R. 464; 47 S. C. R. 440.

The appeal was heard by HON. SIR JOHN BOYD, C., HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE and HON. MR. JUSTICE HODGINS.

R. McKay, K.C., and D. I. Grant, for plaintiff.

A. W. Anglin, K.C., and C. A. Moss, for defendant.

The judgment of the Court was delivered by

HON. SIR JOHN BOYD, C.:—In a difficult and unusual case the Master has fairly considered and applied the law as to the items allowed by him with one exception, i.e., the item $7,500. This should be reduced to $2,000, representing the value of interest at 5 per cent. lost on the moneys paid by him to Boulter, i.e., as found by the Master, $16,109, which was withdrawn from British Columbia, where it pro-

duced 10 per cent. The repayment of the part of the price paid with statutory interest at 5 per cent. does not satisfy the claim for damages which the plaintiff has for the fraudulent misrepresentations which induced him to withdraw the money from British Columbia. He was assured by the defendant that the investment in the farm would yield at least 10 per cent., and that is to be made good, on the rescission of the contract.

As to the allowance for occupation rent at $1,425 no appeal has been taken from it by the plaintiff, and it has to stand, though it errs on the liberal side, for Stocks gets no allowance for his personal toil, and the farm from its run-down condition was worked at a loss.

The net result as to damages and occupation rent stands thus by this appeal:—

Allow as damages—Travelling expenses ...		$	458 05
Outlay on factory			410 49
Outlay on house			272 84
Injury by change of circumstances			2,000 00
Losses in operating property			400 00
			$3,541 38
Deduct chattels	$ 323 25		
Occupation rent	1,425 00		$1,748 25
Balance			$1,793 13

payable by defendant.

To this extent the Master's report is to be modified.

We do not regard the occupation of the plaintiff as a voluntary act; he was induced to go on the place by the misrepresentations of the defendant, and when he found out the full extent of the fraud he was in a quandary what to do—whether to stay on or to leave; arrangements for farm work had been entered upon, and he could not expect to get another farm at that time of the year; he had a right to hold the place as a lien for his money. The defendant could have solved the difficulty by agreeing to take back the farm and repay the money; but this he refused till ultimately compelled to do so by the highest Court in the Dominion. The occupation of the plaintiff was also precarious all the while because at any time the defendant

might have ended the strife and acknowledged that he was wrong. Failing that, the plaintiff was driven to do the best he could. The defendant has no reason to complain nor is he to be put in a better position than if he himself had occupied the land for the two seasons the plaintiff had it; in which case he would have suffered approximately the same loss.

We have endeavoured to reach a fair conclusion as far as possible, and the case is not one in which "golden scales" should be used in estimating what the defendant should pay for his tortious conduct.

As to appeal and cross-appeal to Middleton, J., there should be no costs to either party; as to this appeal the defendant should pay the costs.

HON. MR. JUSTICE BRITTON. FEBRUARY 14TH, 1914.

GOLDBERG v. GROSSBERG.

5 O. W. N. 845.

Mortgage — Foreclosure — Parties to Action—Action against Executors—Beneficiaries not Joined—Will — Power to Sell Land—Vendor and Purchaser Application.

LATCHFORD, J., *held*, that in the case of executors or trustees the persons ultimately entitled need not be joined in foreclosure proceedings.

Emerson v. *Humphries*, 15 P. R. 84, followed.

Application for an order declaring that the objection to the title of vendors to the land in question, made by abovementioned purchaser, on the ground that the children of one Julius Breterwitz were not joined as defendants in foreclosure proceedings taken by the Hamilton Mutual Building Society after the death of the said J. Breterwitz, under a mortgage made by the said J. Breterwitz in his lifetime, has been satisfactorily answered by the vendors, and that the same does not constitute a valid objection to the title, and that a good title has been shewn in accordance with the conditions of sale.

F. F. Treleaven, for vendor.

C. E. Burkholder, for purchaser.

HON. MR. JUSTICE BRITTON:—I am of opinion that the vendor is entitled to the declaration.

Under rule 74 the executor might properly be sued on behalf of or representing the property or estate.

This rule is clear, that in the case of executor or trustee the persons ultimately entitled need not be joined in foreclosure proceedings.

In *Roberts* v. *Brooks*, 10 O. L. R. p. 395, in discussing the right of executors to sell, it was held, that the question there was not one under the Devolutions of Estates Act, because by the will express power was given to the executor to sell the entire estate.

Here, J. Breterwitz was the absolute owner of the entire property. By his will he devised the land in question to his wife for life, and then used the following words: "I direct that after the death of my said wife, my said executors shall sell said real estate, as soon as they conveniently can, and divide the proceeds thereof equally among all of my children." There is an absolute power to sell. Under these circumstances it is the same as if the property was devised to the executors with the usual power to sell, and divide the proceeds.

In *Emerson* v. *Humphries*, 15 P. R. 84, the head-note is:

"In an action upon a mortgage made by a deceased person, who died in 1889, payment, foreclosure and possession were claimed and the executors, to whom the real estate had been devised, were the only defendants."

Judgment for possession, *inter alia*, was recovered and a writ of possession placed in the sheriff's hands.

The widow, who was one of the executors, and the infant children of the deceased mortgagor, had an interest under the will in the mortgaged lands, and were in possession when the sheriff attempted to execute the writ.

The infants and the widow as their guardians, made claim to the possession as against the writ, based on the ground of the infants not having been made parties to the action:

Held, also, that the action, as regards the claim for possession, was properly constituted, and the infants were bound by the judgment against the executors.

No costs.

HON. MR. JUSTICE MIDDLETON. FEBRUARY 16TH, 1914.

BECK v. LANG.

5 O. W. N. 900.

Solicitor—Action for Bill of Costs—Services Performed for Wife of Defendant—Guarantee not Proven—Liability of Husband—Dismissal of Action.

MIDDLETON, J., dismissed an action brought by a solicitor upon a bill of costs as rendered, holding that the services were performed for the wife of the defendant and no guarantee by the defendant had been proven.

Action tried at Toronto, 13th February, 1914.

H. T. Beck, plaintiff, in person.

A. B. Armstrong, for the defendant.

HON. MR. JUSTICE MIDDLETON:—The action is upon a bill of costs incurred in an action of *Lang* v. *Williams*. It appears that some time prior to the transactions giving rise to this action, Mr. R. S. Lang was in financial difficulty. He had undertaken to carry on business in his wife's name. A declaration had been registered under the Partnership Act by which the wife was put forward as the sole member of the firm of R. S. Lang & Co. With the merits or demerits of this device it appears to me I am not concerned.

The situation was known to Mr. Beck. The action was brought in the name of R. S. Lang & Co., and later on, some objection being taken to the right of an individual to sue in the firm name, Mrs. Lang was added in her own name as a plaintiff. The action appears to have been long drawn out and expensive. In the result it was unsuccessful, the counterclaim succeeding to an amount largely overtopping the claim of the plaintiffs. This disaster put an end to the wife's trading. All the business was in fact carried on by the husband under a power of attorney from the wife. The healing hand of the Statute of Limitations has now removed Mr. Lang's financial troubles, and, if anything, he is a better financial mark than his wife. Mr. Beck now sues the husband; and the husband, no doubt with his wife's consent, takes the position that the liability is hers, not his.

There was no retainer in writing for that action, although there had been a retainer in writing, in respect of other business in which Lang, and possibly his wife, were parties defendant. That was the personal retainer of Lang,

and he contends that it refers to his business only. The question is, upon whose credit was this work done? If on the credit of the wife, there is no pretence that the husband guaranteed payment, quite apart from any defence that the Statute of Fraud would afford.

I cannot help thinking that the question of credit was not present to the mind of either party at the commencement of the litigation. Mr. Beck knew the husband's financial position, and knew the scheme that had been devised of his trading as agent for the wife, and I think that in truth credit was given to this trading company and not to the husband individually. He was then known to be impecunious. The wife was supposed to be of some financial substance.

Prima facie, when litigation is undertaken it is undertaken upon the credit of the party in whose name and on whose behalf the litigation was instituted; that is, in this case, the wife. If it is sought to hold any one else liable, it is incumbent upon the solicitor to take adequate steps to protect himself by receiving a formal written retainer from the party to whom the solicitor intends to look for payment.

I have no doubt that in undertaking this expensive and troublesome litigation Mr. Beck expected the husband, as a man of honour and honesty, to see that his bill was paid; and although I am unable to give judgment in Mr. Beck's favour, I still hope that the husband will feel sufficient moral obligation to do his best to make some reasonable payment for the services rendered.

At the hearing I did all I could to bring about a settlement, but the parties were so far apart that I was unable to accomplish anything.

The action fails, but it is certainly not a case in which costs should be awarded.

HON. MR. JUSTICE BRITTON. FEBRUARY 20TH, 1914.

RE WESTACOTT INFANTS.

5 O. W. N. 924.

Infants—Custody—Application of Father—Custody of Mother—Circumstances Leading up to Separation—Discretion—Welfare of Infants—Dismissal of Application.

BRITTON, J., refused the application of the father of certain infants for their custody as against the mother, having regard to the circumstances of the case and the welfare of the children.

Application by George W. Westacott for a writ of *habeas corpus* directed to Margaret M. Westacott, mother of the children, and asking that the custody of the children be given to their father, the present applicant.

Notice of this application was served upon the mother, and she appeared by counsel on this motion.

R. H. Holmes, for applicant.

E. W. S. Owens, K.C., for Mrs. Westacott.

HON. MR. JUSTICE BRITTON: — An affidavit made by Hannah Webb was filed in opposition to the present application. Mrs. Webb is the mother of Margaret M. Westacott, and she states that on one occasion not very long ago, the present applicant denied the paternity of the younger child and doubted being the father of the older one. It appears that Marshall is about the age of six years, and Edward only seven months old. An affidavit is also made by the mother.

It appears that beyond reasonable doubt the children are being well cared for. Marshall is with the deponent Mrs. Webb, and Edward is in charge of a Mrs. Paddon at Milton. The mother is paying Mrs. Paddon.

I must assume that the children are so far in the custody of their mother that the mother could get and produce them in Court if so ordered, so that the custody of them could be given to the father, but I would not, considering the welfare of the children, the age of each, and having regard to the facts leading to the separation of the parents, make the order as asked.

Motion dismissed. No costs.

HON. MR. JUSTICE BRITTON. FEBRUARY 14TH, 1914.

BARNETT v. MONTGOMERY.

5 O. W. N. 884.

Division Court—Motion for Prohibition—Action for Return of Deposit on Purchase of Land — Rescission of Contract—Title to Land not in Question—Dismissal of Motion.

BRITTON, J., dismissed a motion for prohibition to the First Division Court of the County of York in an application for the return of moneys paid as a deposit on the purchase of certain lands, holding that no question as to the title to land arose.

Crawford v. *Sevey*, 17 O. R. 74, referred to.

Application by defendant for order for prohibition to the First Division Court of the County of York.

M. Lockhart Gordon, for defendant.

R. G. Hunter, for plaintiff.

HON. MR. JUSTICE BRITTON:—The plaintiff agreed with the defendant to purchase property, and paid as a deposit $100. The sale was not carried out, but no question of title arose in the negotiations for purchase. There was delay and plaintiff assumed to cancel the agreement, or withdraw his offer, and he demanded a return of the sum of $100 which he had paid when he made the offer to purchase. As defendant refused to return the deposit the plaintiff sues for it in the Division Court, and defendant disputes jurisdiction, alleging that the title to land will come in question. Upon the facts disclosed upon this application the title to land does not, nor is there any reason why it should come in question.

The plaintiff did not refuse to accept the property by reason of any defect in title.

Crawford v. *Seney*, 17 O. R. 74 seems in point. In an application for prohibition it is not what the ingenuity of counsel can suggest as a defence in order to succeed at the trial, but, as was said by Armour, C.J., in the case cited: "In prohibition we have to be satisfied that the title really comes in question, before we can prohibit." See also *Waring* v. *Picton*, 2 O. W. R. 92, and *Moberly* v. *Collingwood*, 25 O. R. 615.

As counsel for defendant produced a decision of the learned County Judge at variance with his decision in the present case there should be no costs in present application. Motion dismissed without costs.

HON. MR. JUSTICE MIDDLETON. FEBRUARY 17TH, 1914.

RE WOLFENDEN AND GRIMSBY.

5 O. W. N. 901.

Municipal Corporations—Bonus By-law—Industry Established Elsewhere in Ontario—Proposed Branch—Municipal Act 1913, sec. 396 (c)—Quashing of By-law.

MIDDLETON, J., *held*, that sec. 396 (c) of the Municipal Act 1913 (3-4 Geo. V. c. 43) forbids a municipality to grant a bonus to an industry established elsewhere in Ontario proposing to establish a branch in the municipality in question.

Markham v. *Aurora*, 3 O. L. R. 609, referred to.

Argued 16th February, 1914.

Motion to quash by-law 296 of Grimsby, being a bonus by-law to aid The Pelee Island Wine and Vineyards Company, Limited, a company which now has a plant at Pelee Island and a warehouse, etc., in Brantford.

D'Arcy Martin, K.C., for applicant.

A. Lynch-Staunton, K.C., for the town.

HON. MR. JUSTICE MIDDLETON:—Those who have heretofore grown grapes in the Pelee Island district are now growing tobacco, and the company now desires to establish a branch at Grimsby, near which place grapes are grown in abundance, and the intention is to remove part of the plant to that place.

Under the statute 3-4 Geo. V. ch. 43, sec. 396 (*c*), a bonus may not be granted "in respect of a business established elsewhere in Ontario."

Mr. Staunton argues that this only prevents a bonus being granted to aid an industry established in another municipality and has no application to a bonus in aid of a branch business to be established in the bonusing municipality.

The wording of the statute has been changed to some extent since the decision in *Markham* v. *Aurora*, 3 O. L. R. 609, but it serves to indicate that the legislature intended to prevent any municipality from granting any aid to an industry which is in fact established elsewhere. There is no exception made to the wide words of this prohibiting clause.

Mr. Staunton's argument is met by what is said by Mr. Justice Osler in answer to a somewhat similar argument based on the words of the old statute, p. 618.

"No municipality ever had authority to grant a bonus in aid of an industry to be established outside its own limits, and the Legislature never meant to enact anything so absurd as to forbid them to do so."

In this view I do not need to consider any of the other formidable objections to this by-law—it must be quashed with costs.

HON. R. M. MEREDITH, C.J.C.P. IN CHRS. FEB. 18TH 1914.

MURPHY v. LAMPHIER.

5 O. W. N. 924.

Trial Jury—Motion for—Surrogate Action—Enlargement of Motion—Determination by Trial Judge.

MEREDITH, C.J.C.P., enlarged a motion for an order for a trial by jury in an action transferred from a Surrogate Court to the Supreme Court of Ontario to be disposed of by the trial Judge.

Motion by defendants for an order for a trial by jury in an action transferred from a Surrogate Court to the Supreme Court of Ontario.

A. Ogden, for defendants.

J. G. O'Donoghue, for executors.

HON. R. M. MEREDITH, C.J.C.P.:—The defendants now ask for a trial by jury. They are not entitled to that; it is a matter in the discretion of the Court, and the onus is upon those who seek it to shew that it would be the better mode of trial.

There is not sufficient evidence before me now upon which the question can be best determined; the trial Judge will be in a better position to deal with it, and I can perceive no good reason for saying that anyone will be prejudiced by the delay necessary in having it considered by him.

The parties failed to get down to trial as was expected, at the Toronto non-jury sittings last week; and there is no certainty when they could now get the case tried there; in addition to that it is not a York, but is a Peel case.

The provision of the order made on transferring the case into this Court, that the case should be tried at the York Assizes, is an error.

The venue will be changed back to Peel; the action will be set down for trial there at the next ensuing assizes; and this motion will be enlarged to be brought on before the presiding Judge at such assizes at the earliest moment possible after they are opened; costs of the motion to be costs in the action.

SUPREME COURT OF ONTARIO.

FIRST APPELLATE DIVISION. DECEMBER 1ST, 1913.

MOORE v. MODERN SKIRT COMPANY.

Sale of Goods—Action for Price—Alleged Error in Bookkeeping—Appeal—Dismissal of.

SUP. CT. ONT. (1st. App. Div.) dismissed an appeal by defendants from the judgment of the County Court of the County of York in favour of the plaintiffs in an action to recover $213.22, the price of certain goods sold and delivered to defendants.

Appeal by the defendants from a judgment of York County Court pronounced 2nd July, 1913.

This was an action to recover $213.22 alleged to be the balance due for goods sold by the plaintiff and delivered to the defendants.

At trial judgment was given plaintiff for amount claimed with costs.

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.

M. Lockhart Gordon, for the defendants, appellants.

C. A. Moss, for the plaintiff, respondent.

Their Lordships' judgment was delivered by

HON. SIR WM. MEREDITH, C.J.O. (V.V.):—This is an unfortunate case if, in the result, injustice is done because the appellants have been careless and to blame for the loose way in which they conducted their business.

We think, as Mr. Moss has pointed out, that his case was made out when he proved that the goods for which he is suing were received by the appellant, and he was credited with the price thereof.

The answer of the appellant to the claim for the balance of the money that they were charged for these goods is that Demetre (Moore's principal in France), had sent an invoice for five other parcels of similar goods at a later period, and by a mistake of the bookkeeper for the appellant thought that they had relation to the goods which were received as the previous purchase, and the money was sent to France to pay that invoice.

According to the appellants' contention they did not owe it at all, and should not have paid it.

What they have done, is if they are right, to pay for something which they never received—something they did not owe, and they ask for a commission to examine Demetre as to this.

If the transaction was between Moore and the Skirt Company they have no right to set off that payment to Demetre against the goods delivered by Moore.

Now, there was evidence from which the trial Judge could have come to the conclusion, as he must have, that the transaction was between Moore and the Skirt Company. If that is the case, that ends the matter.

It may be unfortunate that some information was not obtained from Demetre as to what connection they had with Moore, and how they came to send a second lot of goods, and to bill the Skirt Company for it. But that evidence was not adduced by either side.

I think it would be a calamity almost, to yield to Mr. Gordon's motion in this small matter which has probably cost already the whole amount in dispute, and to grant a commission in order that the whole case may be tried over again.

The appeal will be dismissed with costs, Mr. Moss undertaking that no claim shall be made by Mr. Demetre in regard to these goods.

Appeal dismissed with costs.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. DECEMBER 4TH, 1913.

BLAIS v. BIGOVAISE.

Contract—Sale of Goods — Possession in Vendors till Payment—Rescission of Contract — Consent to — Recovery of Purchase Price—Appeal—Variation in Judgment—Costs.

SUP. CT. ONT. (2nd App. Div.) varied a judgment of the County Court of the County of Carleton in favour of plaintiffs for $229.20, moneys paid for goods of which possession was resumed by defendants, holding that plaintiffs were entitled to possession and defendants to the balance of the unpaid purchase money as the contract had not been rescinded.

Appeal by the defendant from a judgment of HIS HON. JUDGE MACTAVISH of Carleton County Court, pronounced 11th October, 1913.

This was an action to recover $275 which plaintiffs alleged they paid as part payment of certain goods and chattels purchased from defendant, which goods and chattels defendant took back and refused to deliver to plaintiffs, and also refused to return the $275 paid.

HIS HON. JUDGE MACTAVISH, at trial entered judgment for plaintiff for $229.20 without costs, and dismissed defendant's counterclaim for $120.80, without 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 MACLAREN, HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE LEITCH, on the 3rd December, 1913.

H. M. Mowat, K.C., for the defendant, appellant.

Augustè Lemieux, K.C., for the plaintiffs, respondents.

Their Lordships' judgment was delivered by

HON. SIR WM. MULOCK, C.J. EX. (V.V.): — We are not able to see this case as Mr. Lemieux has put it.

The learned trial Judge has reached the foundation of the case when he has found that the plaintiffs are not to be entitled to the goods until they have paid the $100.

That is his judgment, adopting the defendant's version of the transaction, viz., there was a binding bargain of sale;

but the possession of the goods was to remain in the defendant until the purchase money was paid.

That is the real meaning of the finding of the learned trial Judge; and that being the case, the defendant's conduct in insisting on the vehicle being put into his yard is not a repudiation, but an affirmation of the contract, as he says it was.

It is clear that the conduct of the plaintiffs, subsequent to that action, in proceeding to the Police Court, did not imply rescission by the defendant, but was charging him with violently taking what he had no right to take.

As my brother Maclaren, J.A., has pointed out, it takes two to break a contract, as it takes two to make it, so that the conduct of the plaintiff in saying "we want back our goods," is a complete answer to the plea of rescission by the defendant.

There is still a balance of $100 to be paid, and also a sum of $20.80.

Thereupon, the plaintiffs will be entitled to the goods, and the goodwill; and the order will direct that an injunction be granted, if necessary, entitling them to the goodwill, and preventing the defendant, if he is carrying on a similar business, from interfering with them.

If the defendant should so interfere, we may alter the order, as full protection to the plaintiffs in the exercise of the goodwill, will be a considerable item in the matter.

We will have to give the defendant the costs of this appeal.

We will not disturb the disposition the learned trial Judge has made of the costs below. For reasons cogent to him, he gave no costs of the trial, and we don't disturb that finding.

If the business has been sold, it would completely change the aspect of the case.

If the defendant is not in a position to deliver over the business to the appellant, then we will hear Mr. Lemieux again in the case. It may completely alter the disposition of the case.