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HON. MR. JUSTICE LENNOX. MARCH 21ST, 1914.

PATTERSON v. ALLAN.

6 O. W. N. 125.

Costs—Security for Costs—Residence out of Jurisdiction—Property within Jurisdiction—Evidence—Insufficiency of Affidavits—Order for Security Set Aside.

LENNOX, J., set aside an order of the Local Master at Brockville ordering plaintiff to give security for costs upon the ground that plaintiff's residence outside the jurisdiction had not been sufficiently established.

Appeal by plaintiff from an order of the local Master at Brockville requiring the plaintiff to furnish security for the defendant's costs of the action upon the ground that the plaintiff's residence was out of the jurisdiction.

Featherston Aylesworth, for plaintiff.

Fraser Raney, for defendant.

HON. MR. JUSTICE LENNOX:—With great respect I think the learned Local Master erred in directing security for costs. It is not denied that the property conveyed by the defendant to the plaintiff in 1905, has been paid for in full; or that he has been in possession of it, or that he relied upon the defendant, a solicitor, to give him a proper deed, or that there is in fact an error in the description requiring correction. The defendant as a solicitor must appreciate the importance of definite unequivocal language, and in view of this, I cannot read his affidavits as being otherwise than intentionally vague. The deed was registered in September, 1906, upon an affidavit—made, I judge, by a clerk in his own office—stating that the deed was "duly signed, sealed and executed," by the defendant and his wife, and on the face of

this, without something more specific, I cannot give any meaning to the expression "there never was any legal delivery of the deed;" and most of the statements founding this application, or replying to the plaintiff's affidavit, are of this hazy character. This is not unimportant, if the question of the plaintiff's real estate in Ontario had to be considered. But I have come to the conclusion that evidence is decidedly in favour of the contention that the plaintiff resides, and is, permanently residing in Ontario. He is a British subject, so far as appears, he has no interests or property outside, he has held real estate here for nearly ten years, his wife is here, his home in here, for the time being, at all events, and he swears that he intends to permanently reside here.

There will be an order setting aside the order appealed from.

The defendant will have 6 days for delivery of statement of defence.

Costs here and below to the plaintiff in the cause.

HON. MR. JUSTICE BRITTON. MARCH 21ST, 1914.

MOORE v. STYGALL.

6 O. W. N. 126.

Cancellation of Instruments—Deed—Voluntary Conveyance—Grantor Aged Woman—Lack of Independent Advice—Improvidence—Lack of Mental Capacity—Undue Influence—Deed Set Aside.

BRITTON, J., set aside a voluntary deed of certain lands from a widow eighty-six years of age, to her nephew, holding that plaintiff at the time of the execution of the deed, had no independent advice, that she did not appreciate the effect, nature and consequence of her act and that the transaction was an improvident one.

Kinsella v. *Pask*, 28 O. L. R. 393, followed.

Action brought to set aside a conveyance of part of lot A. on the east side of Dunlop street in the village of Bridgeburg. Tried at Welland without a jury.

C. H. Pettit, for plaintiff.

H. A. Rose, for defendant.

HON. MR. JUSTICE BRITTON:—It is alleged that the plaintiff, at the time she executed the conveyance now attacked, was of unsound mind; that the conveyance was obtained by undue influence; that the act of giving it was improvident, and that she had no independent advice.

The plaintiff is a widow of about 86 years of age. She was the owner of the house and lot in Bridgeburg, and also the owner of another house and lot in Fort Erie, each worth about $1,000, and she apparently has about $2,000 in money deposited in a bank. Her husband died about 3 years ago, and since then she has been failing in health, both mentally and physically.

For some time prior to the 30th September, last, the plaintiff resided with her brother Henry Clipperton, the next friend in this action, and their sister. The plaintiff missed a small pin—of some value to her—and she became suspicious of her sister. In a moment of pique, she announced her intention of leaving, and going to the house and home of the defendant, he being her nephew. She went, and according to the evidence of the defendant, stated that she desired him to accept the house and lot in question in this action. The defendant did not appear very eager to accept at first, but the plaintiff again and more than once referred to it, and intimated to the defendant that if he did not take it perhaps her brother or sister, or both, "they" would get it away from him, or something to that effect. Thereupon the defendant sent for his attorney, one George Bailey. Mr. Bailey went to defendant's house. The plaintiff had no title deeds with her, but produced a tax paper. Armed with this Mr. Bailey went to the Registry Office and procured a correct description. He then prepared the quit claim, and as he says, read it over to the plaintiff. It does not appear that the plaintiff asked any questions, nor does it appear that she asked to have the gift limited to an estate in remainder. Probably that was suggested by defendant, as he desired to allow the plaintiff the use of the house during her life. It is admitted that the conveyance was voluntary. The words "One dollar and other valuable consideration," mean nothing, as the dollar was not paid, and there was no "other valuable consideration." The defendant does not attempt to support the transaction in any other way than that the plaintiff freely and voluntarily, not influenced in any way by the defendant, but acting upon independent

advice, executed the conveyance in question. The plaintiff did not have independent advice or any advice as to the execution of the deed.

The solicitor was retained and paid by defendant.

The witness was a stranger to plaintiff. The solicitor for the defendant took what was told him and apparently did not think it any part of his duty to advise the plaintiff. The defendant had good reason to at least suspect from the plaintiff's conversation about her brother and sister, that the plaintiff's mental condition was such, that a man ought not to accept a valuable gift from her. A short time after the execution of the deed the plaintiff left the home of defendant.

She realized that she had done something to her prejudice and wanted her brother to find out what she had signed. Upon the trial her memory seemed almost a blank as to this transaction.

I find that the plaintiff when she signed the conveyance was not capable of appreciating, and did not appreciate the effect, nature and consequence of her executing it. The giving away of this property to her nephew, to whom she was under no obligation, and from whom she had no reason to expect favours, was not a deliberate, well-considered act of the plaintiff. The plaintiff was feeble-minded. She was forgetful. Considering that the present alleged gift did not take effect until after death, and, notwithstanding the fact, that plaintiff had another house and $2,000 in money, the act was an improvident one.

The case of *Kinsella* v. *Pask*, 12 D. L. R. 522, is in point, and many cases bearing upon this are there collected. Following that case as I am bound to do, the plaintiff must succeed. The cases are not distinguishable. There will be judgment for the plaintiff setting aside the conveyance and directing the defendant to re-convey to the plaintiff.

In default of such re-conveyance there will be a declaration that the plaintiff is as against the defendant, the absolute owner of the property.

Judgment will be with costs if demanded by plaintiff.

Twenty days' stay.

HON. MR. JUSTICE LENNOX. MARCH 24TH, 1914.

WRIGHT v. TORONTO RW. CO.

6 O. W. N. 119.

Arbitration and Award — Misconduct of Arbitrators — Reception of Unsworn Evidence and Ex Parte Statements—Evidence of Offer of Settlement—Rejection of Proper Evidence—Irregular and Non-judicial Conduct—Motion to Set Aside Award—Award Set Aside.

LENNOX, J., *held*, that unsworn communications to a board of arbitrators, or some of them, in piecemeal fashion by a witness were improper.

That a reference in an arbitration to an offer of settlement is improper.

Award of a board of arbitrators set aside on the above grounds and on the ground of the lax and non-judicial conduct of the proceedings.

The plaintiff was injured in a collision between two cars of the defendant company, and brought this action to recover damages for her injuries.

While the action was pending an agreement was made between the parties for the submission of the plaintiff's claim to arbitration. The plaintiff appointed Dr. W. T. Stuart her arbitrator, the defendants appointed Dr. N. A. Powell, and these two chose Dr. Harley Smith as the third arbitrator.

Dr. Stuart and Dr. Smith agreed upon $9,095 as the amount to be paid the plaintiff for her injuries and awarded that sum, Dr. Powell not joining in the award.

The defendants moved to set aside the award on the ground of the misconduct of the arbitrators.

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

R. McKay, K.C., for plaintiff.

HON. MR. JUSTICE LENNOX:—This was clearly an arbitration and the plaintiff has neither law nor equity to support her contention to the contrary.

But upon the other question—whether the manner in which the enquiry was conducted is ground for setting aside the award—I regret the conclusion I feel compelled to come to, and will be better pleased should an Appellate Court determine that I am in error.

Communication with Dr. St. Charles, the attendant physician, for the purpose of getting the history of the case,

is not, I think, complained of, but beyond this unsworn statement by Dr. St. Charles should not have been listened to; and even the history of the case, if given piecemeal to the arbitrators individually, would be distinctly improper. The communications made by Dr. St. Charles to the arbitrators who made the award, including as they did his unsworn opinion, practically an argument, as to the character, extent and permanency of the plaintiff's injuries, in my opinion, clearly vitiates the award.

Even if he had made similar statements to Dr. Powell, and I am of opinion that he did not, the result would be the same.

An equally formidable objection to the award is the *ex parte,* and unfounded reference to an offer of settlement. Even if founded upon fact, and even if made to the board as a whole, a disclosure of this kind would be improper. The wrong here began when the plaintiff's solicitor discussed this phase of the question with the arbitrator of his choice, before his actual appointment. From this alone it might with some force be argued that this arbitrator *ipso facto* became disqualified. But there is a great deal more than this. It is difficult to believe that the subsequent communication to the third arbitrator of the alleged offer of $7,500, or that it had been suggested by anyone to the plaintiff and rejected as inadequate, was purely casual, and it is impossible to believe that it was not calculated to affect the decision. The evidence shews too that these two arbitrators were then discussing the case in a general way in the absence of the other arbitrator. I do not see how this method of investigation can be upheld. I am of opinion too, that a physical examination and subsequent evidence, by Dr. Beemer, should have been permitted. Admitting that the plaintiff was not *prima facie* bound to submit herself for physical examination, it is a question whether the objection in this instance was taken in good faith, seeing that it is accompanied by the meaningless proposal that instead she should be examined by the arbitrators for the third time. I can find nothing in Mr. McCarthy's letter of the 28th of October, or in anything that subsequently happened, to preclude him from introducing this evidence at the time it was proposed by the three arbitrators at a properly constituted meeting of the board. It was at least injudicious for the plaintiff's solicitors to write to the arbitrator of their

own appointment, the long argumentative refusal of the 24th of December. It was of the essence of a fair investigation, if this letter was justifiable at all, that it should come into the possession, and remain under the control, of the board and be of record in their proceedings, and it was not enough to leave to this arbitrator to shew the letter to the other arbitrators or not as he might think fit; it was for the solicitors to see to it that the letter would be available for all and an open record on the case. The reference in this letter to the probable action of counsel for the plaintiff should not have been made, and a copy of the letter should have been furnished if the original was lost.

Dr. Powell alone seems to have fully realized the judicial character of the duties imposed by the submission, and the arbitrator for the plaintiff, I should say, not at all.

It is true that the arbitrators have not the right to say what evidence shall be given, but they have not the right to reject competent evidence offered by either counsel. They come to the conclusion that the evidence of a specialist was necessary to a proper understanding of the matters in issue, and one of the counsel having adopted this view, they should not have rejected it at the instance of the other.

I need not take up other grounds of objection. The first two are, I think, fatal to the validity of the award. Subject to the question of physical examination, a question which I think plaintiff's counsel was hardly in a position to raise, the exclusion of Dr. Beemer's evidence is an equally strong objection to the award. The defendants were to pay the costs of the arbitration. The attitude of the defendants' counsel in the early stages of the enquiry and his omission to directly insist upon the board admitting the evidence contributed I think to the conspicuous irregularity of the proceedings in this case; and the costs now incurred in straightening the matter out may well be added to the costs covered by the agreement.

The award will be set aside, but in the circumstances the defendants will pay the plaintiff's costs of and incidental to the motion.

References: *Livingstone* v. *Livingstone,* 13 O. L. R. 604, and *Campbell* v. *Irwin,* 5 O. W. N. 957, where the cases are collected.

MASTER-IN-CHAMBERS. MARCH 25TH, 1914.

GREEN v. UNIVERSITY ESTATES.

6 O. W. N. 128.

Process—Writ of Summons — —Service out of Jurisdiction—Action of Deceit — Agreement for Purchase of Western Lands—Con. Rule 25 (e)—Tort Committed in Ontario—Conditional Appearance—Function of.

MASTER-IN-CHAMBERS, *held*, that an action to set aside an agreement for the purchase of certain lands upon the ground of fraud upon and misrepresentation to plaintiffs resident in Ontario was an action founded upon a tort committed in Ontario and therefore the defendants resident out of the jurisdiction were properly served with the writ of summons under Con. Rule 25 (*e*) and they should not be permitted to enter a conditional appearance.

Standard Construction Co. v. *Wallberg*, 20 O. L. R. 649, and *Anderson* v. *Nobels Explosives Co.*, 12 O. L. R. 650, referred to.

Motion by the defendants for liberty to withdraw appearance and defence; for liberty to enter a conditional appearance, and for liberty to move to set aside service of writ of summons and statement of claim.

Grayson Smith, for defendants.

J. A. Hutchinson, K.C., for plaintiff.

CAMERON, MASTER:—The plaintiff's claim is to set aside an agreement for the purchase of certain lots in Tuxedo Park, Parish of St. Charles, in the province of Manitoba, and to recover all moneys paid to the defendant company on the ground that the agreement was obtained by fraud and misrepresentation.

The appearance was filed and the statement of defence entered according to the material filed by the defendants on this application inadvertently. Admitting this to be the fact, they are in no way prejudiced, if on this application I deal with the matter as a motion to set aside the service of the writ of summons. There is no object at this stage for allowing the defendants to enter a conditional appearance. Such an appearance would simply be entered for the purpose of enabling them to dispute the jurisdiction, and it will serve the interest of the parties more satisfactorily if I deal with the application on its merits. The only question then to be decided is whether this is a proper case to allow the issuing of a writ for service out of the jurisdiction. I think that there can be no doubt that the plaintiffs, on the material

filed, bring themselves within Rule 25 (e), i.e., the action is founded on a tort committed in Ontario. There is, therefore, no reason for allowing conditional appearance to be entered.

Mr. Justice Middleton in *Standard Construction Co.* v. *Wallberg*, 20 O. L. R. 649, says: "The power to allow a conditional appearance should only be exercised where it is doubtful if the plaintiff can bring himself within the rule by reason of the facts being in issue." Mr. Justice Anglin, in *Anderson* v. *Nobels Explosives Co.*, 12 O. L. R. 650, says: "It is only when the tort for which the plaintiff brings action has been committed in Ontario that Rule 162 (e) entitles him to ask the Court to entertain an action against a non-resident defendant who is to be served with process abroad."

The present rule 25 (e) is identical with old Rule 162 (e).

The motion will be dismissed with costs to the plaintiff in any event of the cause: *Warren* (*A.*) v. *University Estates, Warren* (*W. F.*) v. *University Estates, Halliday* v. *University Estates, Elliott* v. *University Estates, Taylor* v. *West Rydal Ltd.*

The motions in these actions will also be dismissed with costs to the plaintiff in any event of the causes, for the reasons given in *Green* v. *University Estates.*

HON. SIR G. FALCONBRIDGE, C.J.K.B. MARCH 27TH, 1914.

BIRCH v. STEPHENSON.

McDOUGALL v. STEPHENSON.

6 O. W. N. 124.

Negligence — Master and Servant — Death of Employees—Alleged Breach of Statutory Duty—Factories, etc., Act—3 and 4 Geo. V. c. 60—Death of Employees in Burning Building — Cause of Death Unknown — Lack of Causal Connection between Alleged Negligence and Deaths.

FALCONBRIDGE, C.J.K.B., *held*, that where two employees were killed in a burning building which had many safe exits and which had been approved by the fire chief of the town, that defendant, the owner of the building, was not liable in damages because of alleged non-compliance with certain statutory regulations where it was not shewn how the deceased came to their deaths and no causal relation established between such alleged non-compliance and the deaths of such employees.

Review of authorities.

Actions by the widows of two men employed by defendant in the Chatham "Planet" building owned by him, which was

destroyed by fire on the 9th of May, 1912, to recover damages for their deaths respectively, they having lost their lives in the fire.

The plaintiffs alleged negligence and neglect of statutory duty on the part of the defendant.

I. F. Hellmuth, K.C., and J. G. Kerr, for plaintiffs.

O. L. Lewis, K.C., and W. G. Richards, for defendant.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—I am of the opinion that the causal connection between the alleged negligence or breach of the duty of the defendant and the death of the plaintiffs' husbands has not been established. The alleged want of fire-escape appliances and non-compliance with the provisions of the Factory, Shop and Office Building Act, is not proved to have been the proximate cause of their deaths. Exactly how the unfortunate men were killed is purely a matter of conjecture.

There was more than one easy, safe, and sufficient means of egress from the first floor, i.e., the second story (in which plaintiffs' late husbands were at the time of their death) to the ground.

Richard Pritchard, the city fire chief, testified that he inspected the building before the fire. He asked for no further exits, etc.—there was no necessity whatever for them, he said. The defendant complied with every suggestion he, Pritchard, made.

The actions must be dismissed with costs if exacted. There will be a stay of proceedings for thirty days.

As to the law, I have consulted the following, amongst other, authorities. The statute is 3 & 4 Geo. V. ch. 60, now R. S. O. (1914), ch. 229. *Hagle* v. *Laplante* (1910), 20 O. L. R. 339; *Rogers* v. *McLaren* (1909), 19 O. L. R. 622; *Griffiths* v. *Grand Trunk Rw. Co.* (1911), 45 S. C. R. 380; *The Schwan*, [1892] P. 419; *Carnahan* v. *Simpson* (1900), 32 O. R. 328; Ruegg, Can. ed. pp. 6, 12, 242 to 247, and 34, 39, 206, 239; *Thompson* v. *Ontario Sewer Pipe Co.* (1908), 40 S. C. R. 396; *Canada Coloured Cotton Co.* v. *Kerwin* (1899), 20 S. C. R. 478; *Pomfret* v. *Lancashire & Yorkshire Rw. Co.*, [1903] 2 K. B. 718; *Ross* v. *Cross* (1890), 17 A. R. 29; *Wadsworth* v. *Canadian Railway Accident Ins. Co.* (1912), 26 O. L. R. 55; S. C., reversed 28 O. L. R. 537; *Winspear* v. *Accident Ins. Co.* (1880), 6 Q. B. D. 42; *Law-*

rence v. *Accidental Ins. Co.* (1881), 7 Q. B. D. 216; *Housey* v. *White*, [1900] 1 Q. B. 481; *Pressick* v. *Cordova Mines* (1913), 25 O. W. R. 236; *Ramsay* v. *Toronto Rw. Co.* (1913), 24 O. W. R. 959; *Montreal Rolling Mills Co.* v. *Corcoran* (1896), 26 S. C. R. 596; *Young* v. *Owen Sound Dredge Co.*, 1900, 27 A. R. 649; *Gorris* v. *Scott* (1874), L. R. 9 Ex. 125; *Goodwin* v. *Michigan Central Rw. Co.* (1913), 25 O. W. R. 182; *Ronson* v. *Can. Pac. Rw. Co.*, 1909, 18 O. L. R. 337; *Johnston* v. *Great Western Rw. Co.*, [1904] 2 K. B. 250; *Stephens* v. *Toronto Rw. Co.* (1905), 11 O. L. R. 19; *Loffmark* v. *Adams* (1912), 7 D. L. R. 696; *Jones* v. *Morton Co.* (1907), 14 O. L. R. 402; *The Pennsylvania* (1873), 19 Wall. (S. C. U. S.) 125; *The Chilian* (1881), Asp. 4 Mar. L. C. N. S. 473; *Stone* v. *Can. Pac. Rw. Co.* (1912), 14 Can. Ry. Cas. 61.

HON. MR. JUSTICE LENNOX. MARCH 24TH, 1914.

LABATT LIMITED AND THE KUNTZ BREWERY CO. v. SARAH WHITE AND JOSEPH WHITE.

6 O. W. N. 127.

Execution—Husband and Wife — Property in Wife's Name—Action for Declaration of Trusteeship—Evidence—Dismissal of Action.

LENNOX, J., dismissed an action by execution creditors for a declaration that certain property standing in the name of a wife was in reality her husband's, holding that the allegation had not been proven.

Action by plaintiffs, execution creditors of Joseph White, against Sarah White and Joseph White, husband and wife, for a declaration that an hotel property in the town of Barrie standing in the name of Sarah White was in reality the property of Joseph White and liable to satisfy his debts.

W. R. Smyth, K.C., for plaintiffs.

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

HON. MR. JUSTICE LENNOX:—The hotel property at Callendar, and its furniture and equipment, vested in the assignee for creditors of defendant Joseph White, and was purchased for the defendant Sarah White, without the intervention of her husband, and in good faith, by a man

named Morrison. The purchase was made upon an understanding between Morrison and Mrs. White that she would be allowed time for payment and would repay Morrison out of the profits of carrying on an hotel business in the purchased premises. The assignee was aware of the arrangement between Morrison and Mrs. White and the purchase money paid by Morrison went in discharge of the claims of Joseph White's creditors.

The fact that Joseph White had failed and assigned was, of course, notorious, but beyond this, and the local publicity of the sale to Morrison, and the registration of the deeds to and from Morrison, there was nothing to indicate to anybody from the manner of carrying on the business, or otherwise, that the business was not being carried on by the defendant Joseph White as theretofore it had been carried on; but, on the other hand, there was no active misrepresentation or concealment as to the ownership of the business, and no fraudulent scheme or purpose is shewn or suggested. There is no evidence to shew whether the moneys realized by the assignee were sufficient to pay the creditors of Joseph White in full or not, but the fact that these creditors have made no claim upon the assets indicate either that they were paid in full, or that they, at all events, recognized the *bona fides* and validity of the purchase by Mrs. White. Whatever may be the fact as to the old creditors it is admitted on all hands that after the business passed into the hands and ownership of Mrs. White every obligation in connection with it was punctually met, the Morrison money was repaid, and when Mrs. White sold out in Callendar and purchased the Barrie Hotel property she was worth in the neighborhood of $10,000.

It is not improbable that as time went on many of the people furnishing supplies judged from the part taken by Joseph White—took it for granted in fact—that it was Joseph White's business; but there were no inquiries made, and no need to enquire, or duty to make disclosure, and for the best of all reasons—everybody was paid his claim as it became due. What is true of the Callendar business is true of the Barrie business. The money from Callendar and the earnings and profit went into the Barrie property and business. There was evidence and I think it is the fact that it is difficult if not impossible to get a license in the name of the wife when her husband lives with her in the house. I am satisfied that Mrs. White gave a candid, truthful state-

ment of the facts. That the sale of the Barrie business was because she did not feel equal to carrying it on, and that instead of money out of the Kincardine or the Kuntz loan—although there may have been temporary accommodations between the husband and wife in anticipation of this loan to the husband—going into the Barrie property, a very substantial sum was given by Mrs. White to her husband when he again embarked in business, as she swears.

It is not shewn that Joseph White owed anything whatever when he took the Kincardine Hotel. He was justified in believing it to be a prosperous business. The law as to "hazardous undertakings" has no application as he had no property to put out of the reach of hazard. The action should be dismissed with costs. Execution stayed for thirty days.

MASTER-IN-CHAMBERS. MARCH 24TH, 1914.

REX EX REL. SULLIVAN v. CHURCH.

6 O. W. N. 116.

Municipal Corporation — Officers—Quo Warranto—Deputy Reeve—Right of Town to Have—Municipal Act 1913, s. 51 (1) (2), 56, 57, 58—Number of Electors—Computation—Affidavits—Tenants not Entitled to Vote — Removal from List—Allowance of Motion.

MASTER-IN-CHAMBERS *held*, that upon the evidence submitted, the voter's lists of the town of Arnprior did not shew more than 1,000 qualified electors, and that therefore it was not entitled to a deputy reeve under sec. 51 s.-s. (1) and (2) of the Municipal Act 1913, and the election of the defendant as such should be set aside.

Application by the relator, Murtagh Sullivan, elector and ratepayer, to unseat Thomas S. Church, who was elected by acclamation to the office of Deputy Reeve of the municipality of the town of Arnprior at the last municipal elections held on the 5th January, 1914.

E. E. A. DuVernet, K.C., and R. J. Slattery, for relator.

J. E. Thompson, for Church.

MASTER-IN-CHAMBERS:—This application is made under the Municipal Act of 1913, sec. 51, sub-secs. (1) and (2), which are as follows:—

"(1) A town not being a separate town . . . shall be entitled where it has more than 1,000 and not more than 2,000 municipal electors, to a first Deputy Reeve, etc."

"(2) The number of municipal electors shall be determined by the last revised Voters' List, but in counting the names, the name of the same person shall not be counted more than once."

It is contended by the relator that the municipal electors in the town of Arnprior, which is not a separated town, fall short of the number of "more than 1,000" required by subsec. (2). He files a number of affidavits in support of the motion, and the Voters' List and Assessment Rolls were produced before me at the hearing by the town clerk. From the affidavits and this material it appears that the total number of persons on the Voters' List is 1,098; of these 12 were struck off by the County Judge on the revision of the list, and 87 voted in other subdivisions. These being deducted from the above total leave 999 names. Two names were claimed to be down on the same subdivision more than once, but one of these was shewn by the affidavit filed by the defendant to be properly on the list, and this was accepted by the relator. I have, therefore, allowed one of these. This leaves a total of 998 names of qualified electors. Mr. Thompson argued strenuously that as there were some slight differences in the spelling and in the occupation of the persons claimed to be twice on the Voters' List, the names should not be taken off. In view, however, of the uncontradicted affidavits filed by the relator as to the identity of these persons, and that the only case where contradicted the defendant filed an affidavit, I do not see my way clear to allow these voters to be counted more than once. Counsel for the relator also contended that the names of 35 tenants, whom he claims are not entitled to vote, should be deducted from the list, and affidavits are filed shewing that these persons were not tenants on the day of the election or for one month prior thereto. These affidavits are uncontradicted, nor were the defendants cross-examined upon them, nor was the town clerk, who was present at the hearing, called to contradict these affidavits. Although it may not be necessary for the decision of this application I think that the 35 tenants' names should be taken off on account of the sworn uncontradicted statement that these tenants were not at the time of the election or for one month prior thereto resident in the municipality.

The persons whose names are entitled to be placed on the Voters' List at municipal elections are set forth in sec.

56 of the Municipal Act of 1913. Under sec. 57 it is enacted that "subject to secs. 59, 60 and 61, every person whose name is entered on the proper Voters' List shall be entitled to vote at municipal elections, except in case of a tenant who shall not be entitled to vote unless he is resident in the municipality at the date of and has resided therein for one month next before the election," and by sec. 58 no question of disqualification shall be raised at the election, except in the case of a tenant "from his not residing in the municipality for one month next before the election, and at the time of the election."

I do not see how these names can be counted as qualified voters upon the facts as sworn before me at the hearing. If this be so, the municipality is not entitled to a Deputy Reeve under the Act, and the election of Mr. Church to such office was null and void, and is set aside.

I disposed at the hearing of a preliminary objection raised by Mr. Thompson that the municipality should be a party to the proceedings. Whether or not a substantive application can be made against the municipality for a declaration that it was not entitled to a Deputy Reeve under the Act, I think that the ordinary remedy of the elector to apply by way of *quo warranto* remains unaffected.

The application will be allowed with costs.

HON. MR. JUSTICE KELLY. MARCH 26TH, 1914.

ANDERSON v. GRAND TRUNK Rw. CO.

6 O. W. N. 123.

Costs—Motion for Costs of Action Rendered Unnecessary by Order of Dominion Railway Board — Rule as to Costs — Person in Wrong to Pay.

Application by plaintiff for an order for the payment by defendant, a railway company, of the costs of the action. The defendants had *ex parte* obtained an order of the Dominion Railway Board which enabled them to construct a spur which interfered with plaintiff's rights over a lane. This action was brought for an injunction, but before the case came to trial, the real facts were stated to the Railway Board which granted plaintiff the relief he desired.

KELLY, J., *held*, that as defendants were in the wrong they should pay costs.

Knickerbocker v. *Raty*, 16 P. R. 191 and *Eastwood* v. *Henderson*, 17 P. R. 578, followed.

Motion by plaintiff for an order for payment by defendant of the costs of the action.

Grayson Smith, for plaintiff.

D. O'Connell, for defendants.

HON. MR. JUSTICE KELLY:—On September 5th, 1911, defendants, the railway company, obtained *ex parte* an order of the Dominion Railway Board authorizing them to construct a siding into the lands of their co-defendants; this siding leading across a lane on which the plaintiff's lands abutted. The material on which the order was granted did not disclose the existence on the registered plan of this lane.

On September 19th plaintiff, being then ignorant of the issue of the Railway Board's order, commenced this action and obtained and served upon defendants an interim injunction order restraining them from constructing on the lane. In defiance of the injunction order the railway company proceeded, on September 20th, to lay down the siding on the lane, and that work was practically completed at the time of the return of the motion to continue the injunction.

Plaintiff afterwards became aware of the order of the Railway Board and such proceedings were then had before that board as resulted in their making an order on October 12th, 1911, amending the order of September 5th so as to declare the owners of certain lots (including plaintiff's lands) to be "adjacent land owners," within the meaning of sec. 6 of 1 Geo. V. ch. 22, amending sec. 235 of the Railway Act.

Plaintiff's rights were then dealt with by the board, and the object of this action having been thus substantially attained, there existed no reason for proceeding further with it, though when it was commenced the circumstances justified it.

The present motion is not in respect of costs of an action in which there is an ordinary discontinuance, but of one wherein further proceedings became unnecessary owing to plaintiff having otherwise, and, as I believe by reason of this action, practically obtained the relief asked for.

Defendants were in the wrong, and there is nothing to take the case out of the rule that the persons in the wrong shall answer the costs. *Knickerbocker Co.* v. *Ratz*, 16 P. R. 191; *Eastwood* v. *Henderson*, 17 P. R. 578.

The application is therefore granted with costs.

HON. SIR JOHN BOYD, C. MARCH 25TH, 1914.

RE McLAUGHLIN.

6 O. W. N. 121.

Will—Construction — Life Estate—Gift in Remainder—Vested Interest in Remaindermen.

BOYD, C., *held*, that a gift of lands in a will to a wife for life and a direction to sell after her death and divide amongst the children, gave each child a vested interest.

Motion by the executors of the will of Robert McLaughlin, deceased, for an order declaring the true construction of the will and determining questions arising in the performance of the duties of the executors under the will.

The will (after a direction to pay debts and funeral expenses) was as follows:—

"I direct that all the residue of my property both personal and real shall be given to my wife . . . to hold in trust during her lifetime for my children and at her decease the whole of such property composed of my farm . . . together with stock and chattels of every kind shall be sold and the proceeds equally divided among my children, except that my son George shall receive $100 more than each of the other boys and girls.

"I desire that the old home shall still be a home for the family as much as possible and that any of the boys or girls who may be needed at home to help on the farm shall receive wages after they become of age."

The applicants raised for consideration the questions whether the children took a vested estate upon the death of the testator; and whether Hugh D. Copeland, the husband of Bella McLaughlin, a daughter of the testator, who survived him, leaving children her surviving, but these children having since died, leaving their father, Hugh D. Copeland, them surviving, took the share of his deceased wife.

B. F. Justin, K.C., for the executors and Hugh D. Copeland.

W. H. McFadden, K.C., for George McLaughlin.

T. J. Blain, for Robert McLaughlin.

HON. SIR JOHN BOYD, C.:—I favour the construction of this will advocated by Mr. Justin. The lands vested in the children at the death of the testator, though the enjoyment was postponed during the life of the wife who was to keep up the house for the benefit of the family. The death of any child during the life of the wife would not affect the vested ownership of that child's share in the corpus. In these circumstances the husband of the deceased daughter and father of his deceased issue by that daughter will take the share which the testator's daughter would have taken had she lived till the time of distribution.

Costs out of the estate.

HON. MR. JUSTICE BRITTON. MARCH 26TH, 1914.

PIERCE v. GRAND TRUNK RW. CO.

6 O. W. N. 128.

Appeal—Application for Leave to Appeal from Order of Judge-in-Chambers—Con. Rule 507—Refusal of Application—Particulars of Statement of Claim—Refusal of.

BRITTON, J., refused leave to appeal from judgment of MIDDLETON, J., 26 O. W. R. 6.

Motion by defendants for leave to appeal to the Appellate Division from the order of MIDDLETON, J., in Chambers, *ante* p. 5.

Frank McCarthy, for defendants.

T. N. Phelan, for plaintiff.

HON. MR. JUSTICE BRITTON:—Leave to appeal must be refused:—

(1) There are no conflicting decisions upon the points involved.

(2) I have no reason to doubt the correctness of the judgment from which leave to appeal is asked.

(3) This appeal would not as it seems to me, involve matters of such importance that leave to appeal should be granted.

Costs of this motion to be costs in the cause to the plaintiff.

HON. MR. JUSTICE LENNOX. MARCH 28TH, 1914.

SPETTIGUE v. WRIGHT.

6 O. W. N. 129.

Surrogate Court—Removal of Action into Supreme Court.

Motion to remove case from the Surrogate of the Court of Oxford, for trial, to the Supreme Court of Ontario.

John MacPherson, for plaintiff.

G. S. Gibbons, for defendants.

HON. MR. JUSTICE LENNOX:—There will be an order directing that this action be removed from the Surrogate and that it be tried in the Supreme Court, the time and method of trial, at request of both parties, being reserved for subsequent order. Costs in the cause unless otherwise ordered by trial Judge.

APPELLATE DIVISION. MARCH 28TH, 1914.

WHITE v. ANDERSON.

6 O. W. N. 144.

Deed—Grant by Implication — Right of Way over Lane—User—Action of Trespass—Dismissal of.

SUP. CT. ONT. (2nd App. Div.) *held*, that defendant in an action of trespass had proven the acquisition of a right of way over a certain lane to his premises, by implication from the wording of his deed, fortified by the user of the said lane by the parties.

Roberts v. *Karr*, 1 Taunt, 495, referred to.

Appeal from a judgment of the County Court of the County of Dufferin, dated 30th December, 1913, dismissing the plaintiff's action in so far as he claimed an injunction to restrain the defendant from further trespassing upon his property, with particular reference to an alleged lane, and declaring defendant entitled to the use thereof.

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

C. R. McKeown, K.C., for plaintiff, applicant.

J. L. Island, for defendant, respondent.

Their Lordships' judgment was delivered by

HON. MR. JUSTICE SUTHERLAND:—In the year 1860 one Mary Ketchum was the owner of lots numbers 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10, in block No. 8, in the town of Orangeville, in the county of Dufferin, plan 159. Lots one to seven inclusive had a frontage on the north side of Second avenue, which runs east and west, and lots 8, 9, and 10, on the west side of Third street, which runs north and south, and the rear of the last three-mentioned lots abutted on the easterly limit of lot No. 7. Each of the ten lots had a frontage of 66 feet.

In October, 1880, Mary Ketchum conveyed to James Wiggins, parts of said lots Nos. 4 and 5, described as follows: "Commencing at the southerly boundary of said lot No. 4, at the distance of 210 feet easterly from the southwesterly angle of said block No. 8, thence northerly parallel with the westerly boundary of said lot No. 4, 150 feet, thence easterly parallel with the southerly boundaries of lots numbers 4 and 5, 77 feet, thence southerly parallel with the said westerly boundary of said lot No. 4, and along the westerly limit of a lane 20 feet wide, 150 feet more or less, to the southerly boundary of said lot No. 5, thence westerly along the southerly boundary of said lots Nos. 4 and 5, 75 feet to the place of beginning."

James Wiggins, in 1884, conveyed said portions of lots Nos. 4 and 5, to his brother, William Wiggins, and the latter, in 1887, conveyed them to Thomas Carrol. On the 25th July, 1905, Carrol died, and on the 26th December in that year his executors conveyed the lands to the defendant, Anderson.

By her deed to Wiggins, Mary Ketchum had parted with the westerly 23 feet of lot No. 5, and she having died in or about the year 1887, her executors on the 25th January, 1892, sold and conveyed to one Donald McDonald the easterly 34 feet of lot No. 5, together with lots Nos. 6, 7, 8, 9 and 10, aforesaid. Her estate at this time owned the easterly 43 feet of lot No. 5, and it is suggested that it was the intention to have conveyed the whole thereof, and that the insertion of 34 feet instead of 43 feet was an error. There is no direct evidence upon this point and as a matter of paper title, therefore, McDonald never obtained a conveyance of the 9 feet thus remaining.

In 1909 McDonald conveyed the easterly 43 feet of lot No. 5 to Annie Frampton and in any event probably considered that by that time he had acquired a title by possession to the 9 feet. Annie Frampton in 1912 conveyed the 43 feet to the plaintiff.

When William Wiggins, a predecessor in title of the defendant, acquired part of lot No. 5 in 1884, the land to the east, including the remainder of lot No. 5, was "all commons," as he says in his evidence. He further states that he built the house and stable now upon the lands, about 30 years ago, which would probably make it in the year he bought, namely, 1884. The stable was so built that the doors thereof opened out to the east and the way he entered the stable and the one used from the time of its erection until the institution of this action, was by proceeding from Second avenue northerly along the alleged lane and thence through the said doors. It was important and indeed necessary to have a use of the lane in order to get into the stable through the doors as thus placed.

The stable, it is common ground, was built and now stands upon the ground in such a way as that its easterly side is on the line between those parts of lots No. 5, owned respectively by plaintiff and defendant. In the deed from Mary Ketchum to James Wiggins and from James Wiggins to his brother William, there is the reference in the description to "a lane 20 feet wide."

I quote from the evidence of William Wiggins, p. 35:

"Q. You built the stable right on the east of the boundary line there? A. Yes.

"Q. Why did you build there? A. I built it there on account of a lane; the deed called for a lane there and I went by the deed.

Q. There was a lane there then in your time? A. Yes, and I used it, too.

Q. What did you use this lane for? A. For drawing hay for my horses.

Q. You went down this lane? A. Yes; I watered my horse on this lane, used the lane for everything; I had it for about three years, then I sold it to Mr. Thomas Carrol."

Page 36:

"Q. And the only reason you call this a lane was because in your deed your property was described as running along the limit to a lane? A. Yes, that twenty feet is the lane.

Q. That is the only reason you had? A. My brother told me there was a lane there.

Q. You bought from him? A. Yes."

The evidence is also that from the time Wiggins sold to Carrol in 1887 the latter during his lifetime and down to his death in the year 1905, used the alleged lane for all the ordinary purposes of a driveway or roadway, or lane, in connection with his property. Hay, wood, coal, etc., were hauled on and over the roadway to the house and stable of Carrol. A gate appears to have been put in the fance on the east side of the Carrol property, between Second avenue and the stable. by which access could also be had to the lane or roadway from the Carrol property.

When McDonald purchased part of lot No. 5, and the other lots to the east, he immediately fenced the property in and put up a gate ten feet wide, the posts of which were planted 8 and 18 feet respectively from the southeast corner of the Carrol property on the northerly line of Second avenue, and this gateway would be in the line of the alleged lane of 20 feet in width. McDonald cropped the land for the first year after he bought and in doing so ploughed it to within ten feet or thereabouts of the easterly limit of the Carrol property. He states that during all the years he had the property he never knew of any lane on that part of lot No. 5 owned by him, and no one had set up a claim for any part of the property.

On the other hand, Hammond, called by the defendant, testified that he ploughed the land for McDonald in the year in which he had it under crop and that before he went to work McDonald had told him "not to plough close up to the fence; that there was a lane there," and in consequence he did not go closer than "ten feet, maybe more."

McDonald himself also says at p. 10. "Q. How did Mr. Carrol get his coal, fuel and wood in? A. I think he took it on his land; I told him to."

After the first year McDonald did not crop the lands, but used them to pile lumber on, that is to say, on portions of that part of lot No. 5 he owned, and the other lots to the east, in connection with a lumber yard he was then operating.

The evidence is to the effect that the gate referred to was shut at night for the most part, but was opened and shut by Carrol for all needed purposes, as he went in and out to his stable, and by those coming to see him or having business

with him. It was also used to get in and take out lumber from McDonald's yard. It appears that McDonald is the son-in-law of Carrol, and he says that any use made by Carrol was purely permissive and not of right. No fence was ever put up on the easterly side of the lane, so-called, and, of course, for any use McDonald required to make of it, no fence was necessary.

From the evidence as a whole, it is, I think, plain that there was a road or driveway being used along the 20 feet from the north side of Second avenue into Carrol's stable whenever required.

This being the history of the matter, the defendant Anderson bought in 1905, and he apparently continued to use the driveway in the same way as his predecessors in title had done down to the time McDonald sold to Annie Frampton in 1909, and from then until she sold to the plaintiff in 1912. Up to this time no one had attempted to restrain or restrict the defendant or his predecessors in title in such user of the roadway or lane as had been referred to for about 50 years or perhaps longer.

Upon the defendant's evidence it appears clear that before purchasing he asked about the existence of the lane and was assured by the executors of the Carrol estate that there was a lane and bought in that belief. The stable doors opening out upon the roadway or lane and the driveway leading to it would indicate to him, and indeed apparently to anyone about to buy, that some such lane or driveway existed.

It was only after the plaintiff bought that any dispute arose. The defendant had been pasturing his cow apparently on the alleged lane to the east of his property and on the other property of the plaintiff. The latter remonstrated and followed his complaint up by putting a notice on the gate forbidding trespassing. The defendant by this time was pasturing his cow elsewhere, but it was necessary for him to take it in and out through the gate and along the roadway to and from the stable. The plaintiff thereupon put a padlock on the gate secured by staples, and these were drawn out by the defendant. Later on he put chains on and these were cut by the defendant, whereupon this action was instituted.

In the judgment it is stated "that at the time Mary Ketchum conveyed to James Wiggins there was a stable on the north-eastern portion of the property built up to the

eastern limit of same with two doors opening into the supposed lane, and that said lane was used in gaining access to and from said stable." This statement is not quite accurate as the stable was built by William Wiggins three years later. Upon the evidence the learned trial Judge has found as follows: "The deeds to the defendant and those through whom he claims title were made under the Short Forms of Conveyancing Act, and in addition to the advantages he might derive from the implied covenants the lane is specifically referred to in each of the said conveyances, giving the width of same 20 feet. This inclines me to the conclusion that it was intended by the deed to give the defendant the right to the use of the lane, and the reference to the lane in the deed I think places the defendant in a much stronger position than if the deed had merely described the property conveyed according to a registered plan which had on it a lane laid out but not specifically mentioned in the deed. It shews more clearly the parties at the time had the lane in question in their minds."

He finds on the question: "Did the defendant by virtue of his paper title acquire a right to an easement on the land 20 feet wide immediately east of his property?" as follows: "I think, therefore, the defendant is entitled to a private right of way over the 20 feet," etc. He also found upon the evidence that the defendant had acquired an easement or right of way over the strip of land in question.

As to that part of the plaintiff's claim that the defendant had been pasturing his cow upon the lane, and the land to the east, the Judge came to the conclusion that he was not justified in so doing, and gave judgment against him for damages to the extent of $10.

The evidence does not expressly shew that when Mary Ketchum conveyed to Wiggins, defendant's predecessor in title, that the lane was then used in gaining access thereto. The stable was, of course, not built at that time. The only registered plan produced was one dated 21st July, 1856, and registered in 1877, and while all the lots in block No. 8 are shewn upon it, the lane in question does not appear thereon. The only reference to the lane is in the conveyances. These consistently, in the various descriptions, refer to it down to the time of the defendant.

It is perhaps difficult to say just how far the reference in the description in the deed from Mary Ketchum to Wig-

gins, the predecessor in title of the defendant, can be regarded as sufficient to convey a right of way by implication over the lane of 20 feet referred to therein. The following cases, namely, *Roberts* v. *Karr*, 1 Taunt. 495; *Harding* v. *Wilson*, 2 B. & C. 96, and *Randall* v. *Hall*, 4 DeG. & Sm. 343, as also *Espley* v. *Wilkes*, L. R. 7 Ex. 298, relied on by the trial Judge seem to be authorities for the view that it would be sufficient.

It is contended, however, on behalf of the plaintiff, that such reference is only descriptive and that something more is necessary to indicate the intention that the grantee should have a right of way over the lane than the mere mention of the lane in the description. This is not, it is argued, a case in which no access could otherwise be had by the defendant to the stable in question. He could move the doors to the other side of the stable and get to it over his own land from Second avenue. The reference in the deed would seem to indicate that the grantor had in mind a lane as existing at the time. As the land then was, the alleged lane would form part of the commons and being unfenced on either side would not be indicated in any way unless there were even then evidences of travel over it.

Mary Ketchum, however, continued to own the easterly part of lot No. 5, and the use by Wiggins and Carrol down to the time she conveyed it to McDonald seems to have been consistent with the reference in her deed to a lane and the existence thereof, and to indicate that it was her intention that her grantee and his successors in title should have the right to use the lane. She seems to have acquiesced in the right of Wiggins and Carrol to use the alleged lane as a right of way, as did also McDonald in so far as Carrol was concerned.

If the deed to McDonald is correct and in reality she only conveyed to him the easterly 34 feet, it would seem that while she did not reserve the lane of 20 feet, or expressly give Carrol, the successor to Wiggins, a right of way over it, she did keep 9 feet which might appear to be referable to it.

On the whole I am of opinion that the evidence fully warrants the conclusion that the defendant is entitled as the owner of part of lot 5 to a right of way over the lane in question which the plaintiff must not unnecessarily obstruct.

I would, therefore, dismiss the appeal with costs.

HON. MR. JUSTICE LATCHFORD. MARCH 30TH, 1914.

BALDWIN v. CANADA FOUNDRY CO.

6 O. W. N. 152.

Contract—Construction — Sale of Gas Engine—Warranty—Guarantees—Breach of—Loss Sustained through—Consequential Damage — Limitation of Liability as to — Apparently Conflicting Clauses of Contract—Printed Form—Special Provision Inserted by Parties—Reference—Costs.

A contract for the sale of a gas engine and producer plant contained *inter alia* the two following clauses, the first being a special provision typewritten into the contract and the second a formal printed provision.

"Should the gas engine and producer plant fail to satisfactorily perform the duties which the company guarantee it to perform, the company will remove the same free of charge reimbursing the party of the second part for the loss he may have been put to owing to its failure."

Every effort will be made to ensure sound material and good workmanship, and we will replace free of cost and under the same conditions of delivery as the original contract any material which proves faulty within six months of delivery or setting to work. Our responsibility, however, shall be limited to the above and shall not include consequential damages."

The engine and producer failed to live up to its guarantee, but not by reason of unsound material or defective workmanship and the purchaser suffered damage thereby.

LATCHFORD, J., *held* that the latter clause only protected the vendors from consequential damages due to want of sound material and good workmanship but that they were liable for consequential damage suffered by the purchaser by reason of the failure of their guarantees.

That to apply general printed words (which might in a particular case receive complete fulfilment) to a particular stipulation in writing expressed in the same contract, would manifestly defeat the very object both of the parties had in view.

Glynn v. *Margetson*, [1893] A. C. 351, referred to.

Action for damages for breach of warranties or guarantees of a gas engine and producer plant installed by defendants in plaintiff's mill.

MacGregor Young, K.C., and T. Herbert Lennox, K.C., for plaintiff.

J. A. Paterson, K.C., for defendant.

HON. MR. JUSTICE LATCHFORD:—The plaintiff, a manufacturer at Aurora, entered into a contract with the defendants in June, 1907, whereby in consideration of $4,400, to be paid by him, they were to instal for him a gas engine and producer plant within twelve weeks. The fuel consumption on full load, provided the plant was run not less than

12 hours a day, was guaranteed to be not more than 1 lb., per brake horsepower hour. There was a further express guarantee that the engine and producer would satisfactorily drive the machinery at the time installed in the plaintiff's mill, and that, in the event of their failure to perform the work as guaranteed, the defendants would remove them free of charge and reimburse the plaintiff for any loss he might have been put to owing to the failure.

Payments were to be made, 25 per cent. on delivery of the goods, 25 per cent. on the starting of the engine, and the balance when the plant was running to the plaintiff's satisfaction. This satisfaction was not to be unreasonably withheld and was to be subject to arbitration should the parties be unable to agree "as to the satisfactory performance of the plant."

There was delay in installing the plant which arrived only in December at Aurora and was not set up until July, 1908.

The first producer failed to work and was removed by defendants.

The second producer failed, and was replaced by a third which seems to have ultimately afforded satisfaction.

The plaintiff had in the meantime paid the defendants $2.220. He brings this action not for the recovery of the moneys paid—in fact he concedes that the defendants are entitled to credit for the balance of $2,200—but for damages under the guarantee as to fuel consumption, and the further guarantee promising reimbursement for all loss he might be put to owing to the failure of the plant.

The defendants say they are not responsible for any delay in installing the plant as by the terms of the contract they were entitled to an extension of the time for completion "equivalent to any delay caused by strikes, . . . accidents, stoppages for want of material, either at their own works or at the works of any person supplying them with machinery or material . . . or by any other cause beyond their control." They were not to be held accountable for any delay caused by the purchaser in approving drawings, paying instalments, ordering alterations or extra work "or otherwise howsoever" . . . and their responsibility was "not to include consequential damages."

The defendants further allege that the plaintiff by his own acts delayed the installation and that consequently they are not responsible for the delay. They say that whether the plant was or was not satisfactory should have been determined by arbitration and add, as constituting their principal defence, "that any damages which the plaintiff suffered were occasioned by causes beyond the control of the defendants, and moreover were consequential damages."

There is a counterclaim by the defendants for the balance of $2,200 alleged to be owing them under the contract.

The plaintiff does not assert any claim for the delay in the original installation. By agreement between counsel for the respective parties, the question for my determination was restricted to the principle on which damages under the contract should be computed.

I find as a fact that the first producer plant and gas engine did not conform to the defendant's guarantees. After protests on the part of the plaintiff, repeated again and again, and notification of the losses he was sustaining as a result of the inefficiency of the new plant, the second producer was substituted for the first in September, 1908. This also I find failed to drive the machinery of the mill satisfactorily. The plaintiff again protested, and again informed the defendants that he would hold them responsible for his losses. After much and unreasonable delay the third producer was installed in November, 1909. The result was at first the same as in the former cases, and at all times the fuel consumption was greater than it was warranted to be.

The correspondence in evidence shews that while great patience and forebearance were manifested by the plaintiff throughout the whole period between the failure of the first plant in July, 1908, and July, 1910, he at no time waived his rights under the contract. There was no release express or implied to the defendants of their guarantees. The evidence on the point is uncontradicted and convincing. The defendants recognized that the performance of the first two plants was not satisfactory. There was no question raised by them on this point, and accordingly there was no occasion for an arbitration to determine the matter under the clause of the contract providing for a submission to arbitrators.

The clause of the contract upon which the defence mainly rests is upon a printed page headed, "Conditions of Contract" and was of a general character, evidently intended to be used in relation to contracts of every kind made by the defendants. After providing for an extension of the time for completion "equivalent to any delay caused by strikes . . . stoppages for want of material . . . or by any other cause beyond our control and also to any delay on the part of or caused by the purchaser"—all of which have no application—the following appears:

"Every effort will be made to ensure sound material and good workmanship, and we will replace free of cost and under the same conditions of delivery as the original contract any material which proves faulty within six months of delivery or setting to work. Our responsibility, however, shall be limited to the above and shall not include consequential damages."

It is therefore argued that the liability of the defendants was thus limited to replacing or remedying defective materials or workmanship, and should not attach for the damages consequential to the installation of the plant which the plaintiff sustained.

On behalf of the plaintiff it is urged that this clause does not apply to the facts established in evidence, as the complaint is not that any materials or workmanship was defective. The materials may have been, and doubtless were, like the workmanship, the best that could be used; but the plant, notwithstanding, undoubtedly failed to do the work the defendants guaranteed it would do. As I read the restriction as to consequential damages it has relation merely to such damages as might be sustained as a result of defective materials or faulty workmanship.

To give it any greater effect would be to render nugatory the typewritten provisions of the contract upon which, coupled with the guarantees mentioned, the plaintiff rests his case:

"Should the gas engine and producer plant fail to satisfactorily perform the duties which the company (the defendants) guarantee it to perform, the company will remove the same free of charge reimbursing the party of the second part (the plaintiff) for the loss he may have been put to owing to its failure."

If there was any real conflict between the two clauses cited, it might become necessary to determine which should prevail, and to that end invoke the principle stated in *Glynn* v. *Margetson*, [1893] A. C. 351, 358, and based upon the judgment of Lord Ellenborough in *Robertson* v. *French* (1803), 4 East 130, 136, that to apply general printed words (which might in a particular case receive complete fulfilment) to a particular stipulation in writing expressed in the same contract, would manifestly defeat the very object both of the parties had in view.

But I do not regard the general printed words, limiting the responsibility of the defendants, as conflicting in any respect with the stipulation on the part of the defendants to remove the plant free of charge, should it fail to do what it was guaranteed to do; and to reimburse the plaintiff for any loss suffered by him owing to such failure. The limitation in my opinion has reference only to loses consequent upon defects in materials and workmanship—as to which no question arises—while the written provision to remove the plant and indemnify the plaintiff has no application to defective materials or poor workmanship, but manifestly and necessarily relates to the express guarantee that the plant and engine would, with a certain fuel consumption, satisfactorily drive the machinery installed at the date of the contract in the plaintiff's mill.

The plaintiff is therefore entitled to be reimbursed by the defendants for such damages as he may be able to establish that he has sustained by breach of the guarantees as to fuel consumption and satisfactory performance of the plant.

On these points there will be a reference to the Master in Ordinary. The damages sustained will be subject to a reduction or set-off (as the case may be) of the $2,200, with interest from the date upon which the third plant can be shewn to have worked satisfactorily.

As the main issue has been determined against the defendants, the plaintiff is entitled to the costs of the action. Costs of reference and further directions reserved.

Stay of thirty days.

HON. MR. JUSTICE BRITTON. MARCH 30TH, 1914.

WOOD v. BRODIE.

6 O. W. N. 169.

Costs—Motion for Judgment on Further Directions—Executor—Costs of Reference and Motion.

BRITTON, J., made an order of further directions after the reference herein, disposing of the costs and directing the executor to pay the amount found due by him.

Motion by the plaintiff, and by the defendants other than R. J. Brodie, Mary Chalmers Wood and Beatrice Ferguson, and on behalf of the official guardian, for further directions for disposition of subsequent costs pursuant to the judgment dated the 25th day of November, 1912, for an order that defendant R. J. Brodie pay the money in his hands due and owing to the estate of the late Alexander Wood, and for an order that the defendants, R. J. Brodie, Mary Chalmers Wood and Beatrice Ferguson, do pay the costs of the reference herein and of this motion.

It was also asked "that the amounts used by the defendant Brodie, which stood to the credit of the infant children, in order to make up deficits in the payment of annuities, be credited to the infant children."

C. A. Moss and W. McCue, for plaintiffs, and for defendants other than Brodie, Mary C. Wood and Beatrice Ferguson.

H. M. Mowat, K.C., for defendants Brodie, Mary Chalmers Wood and Beatrice Ferguson.

E. C. Cattanach, for Official Guardian.

HON. MR. JUSTICE BRITTON:—Alex. Wood died on the 27th day of January, 1895, and there was no interference with the defendant Brodie in reference to his conduct as executor, until this action, which was commenced by writ on the 15th day of August, 1912. What the plaintiff asked in the action was an account, payment over, and injunction restraining the defendant Brodie from further acting, the appointment of a Receiver, and costs of the action.

At the Assizes held at Perth on the 25th November, 1912, there was a consent judgment before Mr. Justice

Sutherland. This judgment was: (1) that the executor should be allowed to make or set up a claim for further compensation as executor; (2) that defendant Brodie be removed from the position of trustee and executor, and the Toronto General Trusts Corporation appointed trustee, etc.; (3) there was to be a reference to the Master at Perth to take the accounts; (4) the question of further compensation to the executor was referred to the Master; (5) J. B. Watson, chartered accountant, was to examine the accounts, and his certificate was to be taken by the Master as conclusive; (6) costs of the plaintiff as between party and party, to be paid out of the estate; (7) costs of defendant Brodie, executor, to be paid out of the estate, as between solicitor and client; and (8) costs of the official guardian, as representing the infants, to be paid out of the estate as between party and party. Further directions and subsequent costs were reserved. The senior Registrar settled the minutes and formal judgment was entered on the 25th March, 1913.

Proceedings were carried on in the Master's office at Perth. The Master made an interim certificate, from which an appeal was taken and heard by Mr. Justice Middleton—24 O. W. R. 505, April 30th, 1913. The learned Judge held that the charges of mismanagement on the part of the defendant Brodie, made against him in the statement of claim, had been abandoned and could not be gone into before the Master. The appeal was dismissed with costs to be paid by the plaintiff and those of the defendants who made common cause with the plaintiff.

The report was made on the 10th October, 1913.

From this report there was an appeal by the plaintiff, and those of the defendants other than Brodie, Mary Chalmers Wood and Beatrice Ferguson. This appeal came on before Meredith, C.J.C.P., and he disposed of practically all the matters in dispute, allowing the appeal as to a claim for money paid to a firm of solicitors to be invested by loan upon mortgage to one Judge; and allowing the appeal also as to the amount of compensation to be allowed to the executor.

As to much of the work in the Master's office, in the result it was such work as would naturally come up on a reference, and as to which no fair argument could be urged to make the defendant Brodie personally liable for costs.

Upon that appeal, the order was that the appellant should get their costs out of the estate, and the direction that there would be no other order as to any other costs of that appeal.

From the decision of the Chief Justice Common Pleas there was an appeal by the defendants, Brodie, Wood and Ferguson, and a cross-appeal by the plaintiff and the defendants other than Brodie, Wood and Ferguson, to an Appellate Division, with the result that the compensation to the executors was somewhat increased from the amount fixed by the Chief Justice of the Common Pleas.

The judgment of the Appellate Division was that paragraph 4 be further amended and do read as stated in the judgment. Otherwise the appeal and cross-appeal were dismissed, and no order was made as to costs.

The only "subsequent" costs for my consideration, are the costs of the reference and of this motion.

I have read the report and the papers filed, and I have consulted many of the cases cited, and in my opinion this is not a case for an order compelling the defendants, Brodie, Mary Chalmers Wood and Beatrice Ferguson to pay costs of other parties or even to pay their own costs.

The order will be that all the costs of all parties, of the reference and of this motion, be paid out of the estate; except the costs of defendant Brodie in reference to the claim against him in regard to the Judge mortgage, for which Brodie was made liable. Brodie is not to get costs which are specially as to that item, but he is not to be liable to pay any costs in respect to it.

There will be an order for payment by defendant Brodie of the amounts found due by him to the estate.

I thought from the argument that the amount found due by Brodie to the estate had already been paid. If anything found due is not paid, the order would be for judgment for that amount, with interest from date of fyling report at 5 per cent. Counsel said there would be no difficulty in agreeing upon the amount, and no doubt—if not already paid—will be paid at once.

It is asked upon this motion "that the amount used by defendant Brodie, which stood to the credit of the infant children in order to make up the deficit, be credited to the infant children. The amount is said to be $338.25.

I find that amount already virtually credited to the infant children of S. Wood on Ex. 3.

I find a difficulty in making any order as to payment of the money into Court or of making any other order about it, first, because upon the same material as before me, the matter was before the Chief Justice of the Common Pleas upon appeal to him. The learned Chief Justice of the Common Pleas declined to deal with it, as the Master had not dealt with it—the Master has not yet dealt with it. Then this sum if paid into Court must be paid by the present trustee, the Toronto General Trusts Corporation, and that party was not notified, nor did that party appear on the argument of the present motion. It is not necessary that I should make any order. If this sum is rightfully to the credit of these infants it will eventually be paid to them or into Court for them. All the money and other assets are now in the hands of the present trustee. The defendant Brodie has no money of the estate with which to pay; and as a mere matter of bookkeeping any entry or order would be in no way different from what already appears, of which the present trustee must take notice.

HON. MR. JUSTICE MIDDLETON. APRIL 1ST, 1914.

BECKERTON v. CANADIAN PACIFIC RW. CO.

6 O. W. N. 158.

Negligence — Fatal Accidents Act — Master and Servant — Dock Labourer Casually Employed by Defendants—Deceased Subject to Epileptic Fits—Release of Liability—Neglect to Barricade Gangways—Findings of Jury—Non-Suit.

MIDDLETON, J., dismissed an action brought by the personal representatives of a dock labourer employed from time to time by defendants, for damages for his death from drowning, caused by falling off defendants' dock while in an epileptic fit, holding that there was no evidence of employment or of negligence.

Action by the representative of a dock labourer employed from time to time by defendants and who fell from defendants' dock at Windsor and was drowned, to recover damages for his death caused by the alleged negligence of defendants.

J. H. Rodd, for plaintiff.

A. McMurchy, K.C., for defendants.

Action (tried at Sandwich, March 25th, 1914) under Lord Campbell's Act.

HON. MR. JUSTICE MIDDLETON:—The deceased was a dock labourer employed from time to time by the Canadian Pacific Rw. Co. to assist in unloading freight from vessels calling at the docks at Windsor and loading freight upon cars. When work was required to be done, any labourers applying were employed. They were paid by the hour; but the regular relationships of master and servant, of employer and employee, only existed during the time for which employment was given upon the particular matter in hand.

The deceased worked at the docks for some years in the manner described and was recognized as an efficient and faithful labourer. Employment was given to him whenever there was work to be done and he made application, and probably in some instances when assistance was needed word was sent by the railway officials to the deceased, who lived across the road from the docks.

For some time the deceased had suffered from epileptic fits. He would fall down in a condition of unconsciousness, and remain in that condition for a few minutes, when he would recover consciousness without being aware of what had befallen him; in fact, he was ready to deny that he had had any fit and to quarrel with those who stated the contrary.

This unfortunate malady in no way impaired his general usefulness, and notwithstanding it he was employed at the docks, those responsible seeing that he was given work in the sheds and away from the danger of falling into the water.

The railway officials finally became alarmed at the recurrence of the fits, which would sometimes happen as often as four or five times a day, and determined to cease employing him. The unfortunate man then found himself without any means of maintenance; and finally the railway officials agreed to allow him to work upon his executing a release of all liability in respect of injury which might befall him. This document has been lost, but there is no doubt upon the evidence that it was a release of the nature described, and probably in the very words of the document set forth in the pleadings.

On the day before the fatal day the deceased had been engaged at the docks in unloading flour. All the flour save a comparatively small quantity had been placed upon the cars. On the morning of the day in question he went down

again with the view of assisting in the loading of this remaining flour upon the cars. He was met by the foreman, who told him that all the men necessary had already been employed. Nevertheless, he went towards the office along the front of the dock outside of the sheds. This dock consisted of a narrow walk, eight feet in width, with gangways opposite the different doors. These gangways sloped from the door to the edge, the slope being one foot in eight.

An eye-witness describes what took place, and the jury have expressly accepted his statement. This man had been bathing in the river, and was rubbing himself down on the dock when the deceased passed him. Some few words were exchanged, and just before the deceased reached the gangway in question he staggered, fell forward upon the sloping gangway, and rolled into the water. No doubt he was then in a fit. Two or three men at once dived to rescue him, but he never rose. His hat and a pipe which he was smoking floated almost immediately. A boat was secured but the body was not raised by grappling until long after life was extinct.

A motion was made for a non-suit, and reserved. The jury have found that the deceased was in the employ of the company and that the company was negligent in not having gates or guards across the gangway at the water's edge, and have assessed the damages at $1,600, a sum which is exactly equal to the three years' wages.

Three questions were argued: First, it is said there was no evidence upon which it can be found that the deceased was an employee; secondly, there was no evidence to justify the finding of negligence; and thirdly, that the release bars the action.

I think the action fails, as there was no evidence to justify the finding that at the time of the accident the man was an employee. He was not a man going to work. He was a man going to seek work, even assuming the evidence of the foreman, to which I have alluded, should not be accepted. There is no reason to suppose that this evidence was not absolutely reliable; and I think what the jury really meant by their finding was that in their view a man accustomed to seek work and going to the dock for the purpose of obtaining it ought to be regarded as an employee. The real test is rather, was there any contract between the parties? Plainly, there was not. The deceased came and went

at his own will, and he could not have sued if employment had been refused to him, nor could the company have maintained any action against him if he had chosen to stay away. This is sufficient to dispose of the action; but I think the action would also fail upon the ground that there was no evidence to justify the finding that a guard across the opening to these gangways would be either necessary or proper. This relieves me from considering the difficult question as to the validity of the release in view of the provision of the Statute against "contracting out."

Under the circumstances, the company will no doubt not claim costs.

SUPREME COURT OF ONTARIO.

FIRST APPELLATE DIVISION. APRIL 6TH, 1914.

PHILLIPS v. CANADA CEMENT CO.

6 O. W. N. 185.

Negligence—Injury to Workman—Air-drill Falling on Him—Alleged Negligence of Fellow-Workmen—Findings of Jury—Contributory Negligence—Negligence of Foreman — Supplemental Finding by Appellate Court.

FALCONBRIDGE, C.J.K.B. (25 O. W. R. 426) dismissed an action brought by a workman for injuries sustained in the defendant's employ caused by an air-drill falling on him, holding that the accident was caused by the contributory negligence of the plaintiff.

SUP. CT. ONT. (1st App. Div.), *held*, that the findings of the jury negativing contributory negligence on the part of the plaintiff and finding the foreman in charge guilty of negligence were warranted by the evidence and should not have been disturbed.

Appeal allowed and judgment entered for plaintiff with costs.

Appeal by the plaintiff from a judgment of HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., dated 8th December, 1913 (25 O. W. R. 426), dismissing the action which was directed to be entered after the trial of the action before him sitting with a jury at Belleville on the previous 29th October.

The action was brought to recover damages for personal injuries sustained by the plaintiff, who was a workman in the employment of the defendants, owing as the plaintiff alleged to the negligence of the defendants.

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.

Eric Armour, for appellant.

W. B. Northrup, K.C., for respondent.

THEIR LORDSHIPS' judgment was delivered by

HON. SIR WM. MEREDITH, C.J.O.:—The negligence complained of is thus stated in paragraphs 2 and 3 of the statement of claim:—

"(2) The plaintiff was a workman in the employ of the defendants at the time hereinafter mentioned and for some time prior thereto, and on the 24th day of January, A.D. 1913, was injured by the carelessness and negligence of the said defendants.

(3) On the date aforesaid the plaintiff was engaged in his usual work of helping operate an air drill at the said works, when, owing to the grossly careless and negligent way in which the defendants were moving an adjoining air drill, the said air drill, which was being moved, toppled over and struck the plaintiff in the back, causing painful, severe and permanent injuries to his spine and back."

The appellant's injuries were caused by an air drilling machine toppling over and striking him. This happened on the night of the 24th January. He was a helper to a man named Schrieber, who was in charge of another drilling machine. The drilling machine, the toppling over of which caused the appellant's injury, was in charge of a man named Buck Brant, and Edward Titterson was his helper. This machine, which weighed between 300 and 350 pounds, was being moved from where it had been standing, in order to be set up in another place about 12 feet away, and had reached the place where it was to be set up, which was sloping ground, falling towards where the appellant was sitting with his back towards the machine. The machine was in the form of a tripod, each leg of which had a species of foot upon which, when the drilling was going on, was placed iron weights to hold it in position. As I have said, the machine was placed in the position in which it was intended to stand, but the weights were not attached to the feet of it. Titterson was engaged in putting in the steel which I understand to mean the drill, and Brant had gone for the weights. After putting in the steel, Titterson started to tighten the bolts

to keep the steel in place. He was using a wrench for this purpose, and while engaged in this work, owing to the slant of the ground, the pressure in lifting the machine to tighten the bolts, and the absence of the weights on the feet of the machine, it toppled over and struck the appellant, who was sitting about six feet away from it in a direct line and about the same distance to one side of it. The appellant had finished the work at which he had been engaged and had sat down in front of the fire to dry himself and his mittens. Russell Fox was the night foreman in charge, and was present and saw these operations going on, and saw the appellant sitting in front of the fire, but made no objection to his being there. Fox says he did not apprehend any danger of the machine toppling over or that the appellant was in a place of danger. It was known to Fox that machines had toppled over before, and he knew or ought to have known the condition of the ground where the machine was being placed.

The jury found that the appellant's injuries were caused by the negligence of the respondent; that the negligence consisted of "carelessness of the foreman," and that the appellant could not by the exercise of reasonable care have avoided the accident.

Notwithstanding these findings, the learned Chief Justice directed that judgment should be entered dismissing the action, being of opinion that the appellant was clearly guilty of contributory negligence and that the case might properly have been withdrawn from the jury, and in his reasons for judgment he says that there is no indication by the jury as to wherein the negligence of the foreman consisted and it would be difficult to point it out.

I am, with great respect, of opinion that judgment should have been entered for the appellant on the findings of the jury. The question as to contributory negligence was, on the evidence, for the jury, and their finding as to it was warranted by the evidence. Under ordinary circumstances and conditions the apellant had no reason to apprehend that he incurred any danger by taking his seat before the fire. Having regard to the condition of his clothing and his mittens, and the season of the year, it was a most natural thing for him to do. Why he should be charged with contributory negligence it is difficult to understand, when Fox, the foreman, did not, as he testified, apprehend that there was any

danger of the machine toppling over? The appellant had a right to assume that the work of moving the machine would be properly done. It does not appear that he knew that it was being placed on sloping ground or that the steel would be bolted in without the weights being attached to the feet of it, and in these circumstances the jury were well warranted in acquitting him of contributory negligence.

It is argued, however, that the only negligence proved was that of a fellow servant (Titterson). This argument overlooks the fact that Fox, the foreman in charge, was present and saw what was going on. As I have said, he knew or ought to have known that the machine was standing on ground which sloped towards where the appellant was sitting and that if the weights were not on the feet of the machine it would be more likely to topple over than if it were standing on level ground. He knew that machines had toppled over on other occasions. He must have seen that the bolting in of the drill was being done while the machine was yet unweighted, and the jury were warranted in finding that he was guilty of negligence in permitting the operations to go on under his superintendence without seeing that every available precaution was taken to prevent injury to any one if the machine should topple over, or at the least seeing before proceeding with the work as it was carried on that the appellant moved away from the place in which he was sitting.

There was, I think, evidence from which the jury might properly find that the appellant's injuries were caused by the negligence of the foreman Fox, and if the answer of the jury is open to the objection pointed out by the learned Chief Justice that it does not indicate wherein the negligence of the foreman consisted, the case is one in which we should exercise the powers conferred upon the Court by the Judicature Act and instead of sending the case back for a new trial find the facts which the jury have omitted to find. If this course is taken, the finding I would make is that the foreman's negligence consisted in what I have stated to have been his acts and omissions.

I would allow the appeal with costs, reverse the judgment of the trial Judge, and direct that judgment be entered for the appellant for the sum at which his damages were assessed, with costs on the scale of the Supreme Court.

MACLAREN, MAGEE and HODGINS, JJ.A.:—We agree.

SUPREME COURT OF ONTARIO.

FIRST APPELLATE DIVISION. APRIL 6TH, 1914.

BROWN v. TORONTO RW. CO.

6 O. W. N. 182.

Negligence — Street Railway — Injury to Passenger—Contributory Negligence—Alighting while Car in Motion—Findings of Jury—Interpretation of—Evidence.

SUP. CT. ONT. (1st App. Div.) *held*, that a passenger on a street car, who had alighted while the car was in motion was guilty of such contributory negligence as to disentitle her to recover for injuries sustained thereby.

Appeal by the plaintiff from judgment of York County Court, dated 22nd December, 1913, dismissing the action on the findings of the jury after the trial of the action before a junior Judge of that Court on the 19th day of that month.

The action was brought to recover damages for personal injuries sustained by the female appellant owing, as is alleged, to the negligence of the respondent, the negligence charged being that after notice of her intention of alighting from a Queen street car on which she was a passenger when it reached the intersection of Queen street by Jones avenue, and after the car had come to a stop and while she was in the act of alighting, the car was suddenly and without warning started forward, with the result that she was thrown violently to the pavement and sustained the injuries of which she complained.

The jury, in answer to questions put to them, found that the respondent was guilty of negligence "in speeding up the car after almost stopping," that the car was in motion at the time the female appellant alighted, and that she was guilty of contributory negligence "by alighting before the car had actually stopped," and they added as a rider "your jury are of the opinion that the conductor should have tried to stop car by ringing the bell."

In order to understand these answers it is necessary to mention that an accident had happened near the place where the female appellant was injured and a crowd had gathered at the scene of it. The car in which the female appellant was travelling was an open one and when it came to where the crowd was gathered some of the passengers, at-

tracted by the commotion, left the car while it was still moving. The jury appear to have thought that she was misled by this into thinking that the car had reached its stopping place on Jones avenue, and their idea appears to have been that, seeing what was going on, the conductor should have tried to stop the car by ringing the bell.

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.

T. N. Phelan, for appellant.

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

THEIR LORDSHIPS' judgment was delivered by

HON. SIR WM. MEREDITH, C.J.O.:—The contest at the trial was as to whether, as the female appellant testified, the car had come to a stop before she attempted to alight, or, as the jury found, it was still in motion when she alighted. That was clearly pointed out by the learned Judge, and there could, we think, have been no misconception on the part of the jury as to its being the crucial question.

It was argued by Mr. Phelan that the jury may have been and probably were misled by what took place just before the jury retired to consider their verdict, as thus reported in the shorthand notes:

"The Court: Was the car in motion at the time the plaintiff alighted?

Mr. Godfrey (counsel for the plaintiffs): I object to that question altogether as misleading, your Honor.

The Court: I think that is right. I suppose the time might be from the time she arose from the seat and began to move forward. It is a straight issue between the parties, and the jury can find upon it."

In order to understand the meaning of this observation it is necessary to refer to the form which it had been proposed the question should take. The question as at first proposed was, "Was the car in motion at the time the plaintiff attempted to get off?" And it was changed to the form in which it was eventually put, by eliminating the words "attempted to get off" and substituting for them the word "alighted." In suggesting this change counsel for the re-

spondent pointed out that "attempting to alight means from the time a passenger rises from the seat until she gets on the ground," and asked if the question should not be made to read, "Was the car in motion at the time she alighted?" To this Mr. Godfrey objected, saying that he thought the question should be struck out altogether, that the appellant's whole case was that "while she was alighting the car was in motion, because they had started the car after it stopped." In answer to this the learned Judge is reported to have said: "Oh, no, that is not the point. The woman says the car had stopped, and she started to go down, and then it started. Now all the other witnesses say the car had never stopped."

The concluding observation of the learned Judge, which I have quoted, in the light of all this, was plainly meant to apply to the question in the form in which it was first proposed to put it.

All this took place in the presence of the jury, and it is impossible to believe that they did not understand that the questions were intended to obtain their opinion as to whether, as the appellants contended, the car had stopped and had been started again when the female appellant was in the act of alighting, or, as the respondent contended, that the car had not stopped and that she was injured while alighting while the car was still in motion.

It is impossible to give any effect to the rider which the jury attached to their findings. No complaint was made by the appellants that the conductor should have stopped the car when he saw that some of the passengers were getting off, while it was still moving, nor was any suggestion made that if he had done so the accident would not have happened, and the rider must be rejected for that reason and for the further reason that there was no evidence to warrant the conclusion that any such duty rested on the conductor or that he was negligent in omitting to ring the bell.

The appeal fails and must be dismissed.

SUPREME COURT OF ONTARIO.

FIRST APPELLATE DIVISION. APRIL 6TH, 1914.

RAMSAY v. CROOKS.

6 O. W. N. 180.

Contract—Motor Car Entrusted to Plaintiff for Sale—Allegation in Counterclaim that Highest Possible Price Not Obtained—Evidence—Construction of Agreement — Finding of Trial Judge—Reversal on Appeal.

SUP. CT. ONT. (1st App. Div.) dismissed a counterclaim for damages for failure to sell a car placed in appellant's hands for sale for as high a price as could have been obtained, holding that the evidence did not warrant such a finding.

Appeal by the plaintiff from a judgment of Wentworth County Court in favour of the defendant on his counterclaim. The judgment is dated the 10th January, 1914, and was pronounced by the senior Judge after the trial before him sitting without a jury on the 19th December, 1913.

The counterclaim was based upon an agreement between the parties dated the 27th March, 1912, for the sale by the plaintiff to the defendant of a motor car. The price of the car was $2,705, and the defendant was given credit on the purchase price for $1,050 for a secondhand car which the plaintiff had taken as part payment.

By the terms of the agreement it was stipulated as follows: "We (i.e., the plaintiff) also agree to pay to Mr. Crooks all we can get for his old car over $1,050, less $50."

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.

F. Morison, for appellant.

S. F. Washington, K.C., for respondent.

Their Lordships' judgment was delivered by

HON. SIR WM. MEREDITH:—The allegation of the respondent on which he bases his counterclaim, is that he had procured a buyer for the old car and could have "realized" for it $1,200, "if it had been fixed and overhauled," as he alleges the appellant had agreed that it should be.

The respondent appears to have shifted the ground of his counterclaim as pleaded, at the trial as well as before us; his contention now being that the appellant had he so chosen might have sold the old car for $1,200, and that his failure to do so entitles the respondent to be paid the difference between that sum and $1,050, after deducting from that difference the $50 mentioned in the agreement.

The case attempted to be made at the trial and before us was that Alderman Newlands was desirous of purchasing the old car and was willing to pay $1,200 for it; that he sent a man named O'Connor to the appellant to negotiate for its purchase; that O'Connor offered $1,100 and would have increased his offer to $1,200 but that the appellant turned on his heel and seemed indisposed to discuss the offer and made no effort to get a better one from O'Connor, and it was argued that under these circumstances the proper conclusion is that the appellant might have got $1,200 for the car, and is therefore liable to pay to the respondent $100.

There was in our opinion no evidence that would warrant such a conclusion. Nothing was said by O'Connor to indicate that he was prepared to give more than $1,100 for the car, There was no reason why the appellant should refuse an offer in excess of $1,100 as the whole of the excess would belong, not to him, but to the respondent, and there is no evidence from which it can properly be found that the appellant could have got more than $1,100 for the old car. The price asked by the appellant was $1,300, which was enough to pay him all he was entitled to receive and to leave a surplus of $200 to go to the respondent. There is nothing to indicate that the appellant was not acting in good faith, and I do not see what possible motive he could have had in asking $1,300 except to benefit the respondent.

From what was said by the learned Judge at the close of the argument at the trial and from the judgment which he subsequently directed to be entered, it would appear that he must have come to the conclusion that according to the terms of the agreement the respondent was entitled to all that the appellant could get for the old car in excess of $1,000, and that as he could have got for it from O'Connor $1,100 he was liable to pay the difference between the two sums to the respondent.

The following is what the learned Judge is reported to have said:

"I have no hesitation in finding that he got an offer for $1,100, which, according to Alderman Newlands, would have been carried out. I feel satisfied of that. That would make $100 on the counterclaim, but whether he is entitled to another $100 or not, I am not just prepared to say whether the evidence is strong enough to warrant me in saying that he should have another $100. In other words, whether he allowed Crooks to suffer damage to the extent of another $100 because he would not negotiate or did not refer the matter to Crooks and did not take any trouble whatever to endeavour to see what was in that offer or to get any other offer.

If I thought that the $1,200 was a binding offer or perhaps that he might have got it and did not, I would allow another $100, but otherwise it will be $100. I will reserve as to that. The amount will be either $100 or $200."

It is clear, we think, that the learned Judge erred in his interpretation of the agreement. What was to be paid to the respondent was all that the appellant could get for the old car over $1,050 less $50; that does not mean over $1,000 but the deduction of $50 is to be made from the excess over $1,050, and indeed that was not disputed upon the argument before us.

The result is that the appeal must be allowed with costs, and the judgment on the counterclaim reversed, and in lieu of it judgment must be entered dismissing the counterclaim with costs.

The dismissal should, however, be without prejudice to the right, if any, of the respondent to sue as he may be advised in respect of any dealing by the appellant with the old car subsequent to the offer of purchase made by O'Connor.

HON. MR. JUSTICE MIDDLETON. APRIL 4TH, 1914.

CHADWICK v. TORONTO..

6 O. W. N. 167.

Nuisance—Municipal Corporation—Operation of Electrical Pumps—Noise and Vibration—Permissive Statutes—Did Not Authorize Nuisance—Damages in Lieu of Injunction—Necessity of Operation for Municipal Purposes—Quantum of Damages—Diminution in Value of Property.

MIDDLETON, J., *held*, in an action to restrain an alleged nuisance, caused by the operation of certain electrically driven pumps in a pumping station adjacent to the plaintiff's residence, that an actionable nuisance had been proven.

Appleby v. *Erie Tobacco Co.*, 22 O. L. R. 533, referred to.

That the Toronto Waterworks Acts, 39 Vict. c. 39, 41 Vict. c. 41, authorised the construction of waterworks, but not the maintenance of a nuisance.

Guelph Worsted Co. v. *Guelph*, 25 O. W. R. , referred to.

That as the pumping of water was necessary for municipal purposes, under the Judicature Act there was power to substitute damages for an injunction, and the measure of damages should be the injurious effect of the nuisance on the plaintiff's land.

Action for an injunction restraining the operation of certain electric pumps at the high level pumping station on Poplar Plains road, Toronto, tried at Toronto 20th and 21st March, 1914.

H. E. Rose, K.C., for the plaintiff.

G. R. Geary, K.C., and Irving S. Fairty, for the defendants.

HON. MR. JUSTICE MIDDLETON:—The defendants have for many years owned and operated a high level pumping station at the place in question. Originally there were only two comparatively small pumps, capable of delivering three and one-half million gallons each per diem. These were reciprocating pumps, driven by reciprocating engines, and the noise produced was not sufficient to seriously interfere with the comfort of persons living in the neighborhood.

Two much larger reciprocating steam pumps were added to the plant in 1906. These were capable of pumping six million gallons each. Although these made a good deal more noise, their operation is not sufficient to constitute a nuisance calling for legal interference.

Early in 1912 eight electrically driven pumps were installed, capable of delivering a very much larger quantity

of water. These are not all operated at once, but from the moment of their installation they have been found to interfere seriously with the plaintiff's comfort. Instead of the comparatively slow motion of the old pumps, these operate at a speed of between 721 and 750 revolutions per minute; the result being a vibration which is felt, as well as a humming or buzzing noise which is heard.

The different pumps are not run at precisely the same speed, so that the noise produced is a discord, resulting in pulsations or waves of greater or less intensity, which is stated to be peculiarly trying. Numerous witnesses were called for the plaintiff, who describe this noise and its effect in different ways. The plaintiff's own experience is detailed in a diary which was kept for the purpose of recording her impressions, with a view to this litigation.

Although there is some conflict upon the evidence, I have no doubt that the noise and vibration occasioned in the operation of these electric pumps do constitute a nuisance, and seriously interfere with the comfort of the plaintiff and her family in the enjoyment of the house. It is true that in one sense the plaintiff may be said to have come to the nuisance; but the state of affairs which now exists could not reasonably have been anticipated from the condition of things when the land was bought and the house erected.

I need not repeat what was said in *Appleby* v. *Erie Tobacco Co.*, 22 O. L. R. 533, as to what is necessary to constitute an actionable nuisance. What is complained of here is not, I think, fanciful and does not arise from mere delicacy or fastidiousness, but is an inconvenience materially interfering with the ordinary physical comfort of human existence, and therefore materially depreciating the value of the plaintiff's house as a place of residence.

The defendants seek to justify the erection of the plant and its operation, under the Acts Authorizing the Establishment of Waterworks in the City of Toronto. These statutes, 39 Vict. ch. 39, 41 Vict. ch. 41, while authorizing the construction of the waterways, do not justify the commission of a nuisance. The case in this respect does not differ widely from the action of *Guelph Worsted Co.* v. *Guelph*, in which I had recently occasion to review most of the authorities, and I need not here repeat what I there said. I may add to the cases therein referred to references to

Price's Patent Candle Co. v. *London County Council*, [1908] 2 Ch. 526, and *Knight* v. *Isle of Wight Electric Light Co.*, 73 L. J. Ch. 299.

The Quebec decision, *Adami* v. *Montreal*, 25 Que. S. C. 1, is in entire accord with this view.

There is no doubt that the city has acted in the best of good faith, endeavouring to minimise the amount of noise and vibration resulting from the operation of these pumps, and there is also no doubt that the condition of affairs as it exists to-day is nothing like as serious as before the change made in the pumps by which a new and different diffusion ring was substituted. Even after all that is possible has been done, a nuisance still exists, and I think it may be taken for granted that it is impossible to do anything further and that the nuisance will be more likely to increase than to abate when a greater number of pumps come to be operated at the same time.

Inasmuch as the pumping of this water is necessary for municipal purposes, the case, I think, falls under the provision of the Judicature Act empowering me to refrain from granting an injunction and to substitute damages.

For the reasons indicated in the case of *Ramsay* v. *Barnes*, 5 O. W. N. 322, these damages should be upon the basis of compensation for the injurious effect resulting in the depreciation of the plaintiff's land, and as a term of granting defendants relief from an injunction I think they should assent to damages being assessed upon this basis. The evidence indicates that the works established are a permanency, and in the assessment of damages it would be unfair to allow the damage to be dealt with on any other basis.

From the attitude of the plaintiff at the trial I take it that she does not insist on damages for inconvenience suffered in the past, and that she is content with the damages now awarded. It was agreed that if damages were given there should be a reference to assess. This way be to the Master in Ordinary, unless the parties can agree upon some other referee or desire to give evidence before me at some date which may be arranged, so that I may myself assess them.

HON. MR. JUSTICE LENNOX. MARCH 19TH, 1914.

HARRISBURG TRUST CO. & POWELL v. TRUSTS & GUARANTEE CO.

6 O. W. N. 110.

Trusts and Trustees—Bond Mortgage — Resignation of Trust Company as Trustee—Appointment of Well Qualified Private Person —Security—Costs.

LENNOX, J., appointed an eminently qualified private person as a trustee for bond-holders under a bond mortgage in place of a trust company which had resigned.

Application by the plaintiff for an order appointing a trustee under a mortgage made by the Woodstock, Thames Valley and Ingersoll Electric Railway Company to the plaintiff company, in lieu of the plaintiff company.

M. H. Ludwig, K.C., for plaintiff.

W. T. McMullen, for bondholders, other than the defendants.

Grayson Smith, for defendants.

HON. MR. JUSTICE LENNOX:—The total issue of bonds under the mortgage amount to $140,000; $27,000 of these bonds are held by the defendants, and $96,800 are held by bondholders, represented by Mr. Ludwig and Mr. McMullen, and who have signed consents to the appointment of Mr. Wallace as trustee. The other bondholders did not appear, and I appointed Mr. McMullen to represent them.

The mortgage contains provisions for the resignation of the trustees and the appointment of a trustee in their place. The Harrisburg Trust Company have tendered their resignation, and refuse to act further as trustees of the mortgage; and there is no suggestion from any quarter, that an effort should be made to retain them in the execution of the trusts. To appoint a new trustee under the provisions of the mortgage would be exceedingly inconvenient, if not impracticable or impossible, and in the end would result in the appointment I propose to make. I have power to make the appointment, I think, as a matter of inherent jurisdiction as well as under the Trustees and Executors Act. Counsel for defendant company insists that a trust company should

be appointed, and as a rule, I think, that such an appointment is to be preferred to the appointment of private persons. I have come to the conclusion, however, that in this instance it may be more in the interest of all parties that Mr. Wallace, who is exceedingly familiar with the affairs of the railway undertaking, resides in Woodstock, is a bondholder to a large amount, and is acceptable to the majority of bondholders, should be appointed.

There will be an order approving and accepting the resignation of the Harrisburg Trust Company as trustees, and appointing James Gamble Wallace of the city of Woodstock, King's Counsel, trustee in their stead, upon his giving security, to the satisfaction of the Junior Registrar of this Court, for the faithful performance of the trusts; and there will be reserved in the order the right of any bondholder hereafter to apply to have the security increased in case the condition of the railway company should any time change, or appear to make it necessary to do so.

The costs of all parties to this application will be paid out of the funds of the railway company.

HON. MR. JUSTICE LENNOX. MARCH 19TH, 1914.

TRUST & GUARANTEE CO. v. GRAND VALLEY Rw. CO.

6 O. W. N. 113.

Trusts and Trustees—Receiver of Railway Company—Payments to Bondholders—Costs.

LENNOX, J., granted application by certain bondholders for an order requiring the receiver of a railway company to distribute certain moneys in his hands amongst the bondholders entitled.

J. G. Wallace, K.C., for applicant.

J. Grayson Smith, for receiver.

HON. MR. JUSTICE LENNOX:—Let an order issue requiring E. B. Stockdale, receiver of the Grand Valley Railway Co., to pay forthwith out of $4,800.62, now in his hands as receiver, to certain bondholders of the company in the proportions shewn in the schedules filed, a total sum of $2,627.50; and to the parties to this application their costs.

SUPREME COURT OF ONTARIO.

FIRST APPELLATE DIVISION. MARCH 18TH, 1914.

SASKATCHEWAN LAND AND HOMESTEAD CO v. MOORE, ET AL.

6 O. W. N. 100.

Company—Managing Director of—Claims Against—Counterclaim—Indebtedness to Company—Alleged Assumption of Mortgage—Account—Commission—Salary — By-laws of Company—Retention by Defendant of Surplus Assets of Company to Satisfy Alleged Debt—Directors—Right to Delegate Powers to Committee—Interest—Statute of Limitations — Trustee — Commission—Salary—Endorsement of Commercial Paper—Compensation for—Reference—Further Directions Reserved.

KELLY, J., 25 O. W. R. 125; 5 O. W. N. 183, gave judgment for the plaintiffs with a reference in an action by an incorporated company against its managing director for the return of certain of its moneys retained by him in various pretexts, and refused to permit the defence of the Statute of Limitations to be raised on account of the fiduciary relationship existing between the parties.

SUP. CT. ONT. (1st App. Div.) varied above judgment by directing that defendant should have credit for $2,000 upon a claim allowed against him at $8,166.66 otherwise above judgment was affirmed. No costs of appeal to either party. Plaintiff's cross-appeal dismissed with costs.

Livingstone's Case, 14 O. R. 211; 16 A. R. 397;
Re Ontario Express Co. (*Directors' Case*) 25 O. R. 587;
Birney v. *Toronto Milk Co.*, 5 O. L. R. 1; and
Benor v. *Can. Mail Order Co.*, 10 O. W. R. 899, discussed.

Appeal by the defendant from the judgment of HON. MR. JUSTICE KELLY, dated 25th October, 1913, after the trial on the 20th February, 1913, of the action before him sitting without a jury.

The reasons for judgment are reported in 25 O. W. R. 125.

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.

A. J. Russell Snow, K.C., and Dyke, for the defendant (appellant).

J. L. Whiting, K.C., and A. B. Cunningham, for the respondent.

Their Lordships judgment was delivered by

HON. SIR WM. MEREDITH, C.J.O. (v.v.) :—The action is brought by a colonization company against its managing director, Moore, who occupied that position during the whole of the active existence of the company, for the recovery of certain moneys of the company which, it is alleged, were appropriated by the appellant to his own use in breach of his duty as managing director.

Several of the items that have been allowed are involved in the appeal.

The first is a promissory note for $4,600, made by the appellant, dated 30th October, 1893, at six months from date; the other a sum of $3,279.22, and the question of the liability of the appellant as to both rests upon the same ground.

It was admitted by the appellant in his examination *de bene esse* that he was indebted in the amount of the promissory note, but his contention is that Leadlay, one of the mortgagees of the respondent's property, had agreed personally to assume the payment of the note and that the amount of it should be credited on the mortgage; and he further contends that he subsequently paid the amount to Leadlay, and therefore, there is no liability to the respondent in respect of it.

It is doubtful, on the evidence, whether the note was handed to Leadlay or was given to the Imperial Bank along with the $6,850 note of the company which the appellant discounted at that bank. However, that is immaterial for the purpose of the decision of this appeal. That promissory note was made up into four promissory notes for the following amounts, $1,000, $750, $350 and $2,500, which the appellant had apparently made use of the company's banking account for the purpose of getting the money upon. He received the $4,600, and his contention is, as I have said, that he ultimately paid the amount. The note for $6,850 was renewed from time to time, the amount being increased until, on the 29th of May, 1899, it amounted to $13,750; and it was then in the hands of the Imperial Bank and remained there until it was subsequently paid by the mortgagees.

The other sum represents an amount which the appellant owed the company as part of the consideration for the conveyance to him of some of the lands which the company

owned, and the contention with regard to it is somewhat similar to that as to the note for $4,600. A promissory note for $3,279.22 he says, and there is evidence to substantiate his statement, was made by him on the mortgage; that being the case, he says he should not be charged as the company has received the benefit of it. This note for $3,279.28 was dated 5th December, and was drawn at six months. Leadlay and Hook were the mortgagees of the property for a large amount, and by agreement made in 1895, it was arranged that the mortgage debt should be postponed to the floating indebtedness of the appellant, which included the indebtedness in respect of the two notes upon which, as I should have mentioned, the company was the endorser.

On the 2nd of March, 1900, an arrangement was made by which the company released its equity of redemption in the mortgaged property, the mortgagees assuming and agreeing to pay off the floating indebtedness of the company, and the company retaining some of its assets, and everything was supposed then to be closed up. Subesquently an action was brought by the company to set aside the release, and the litigation resulted in its being set aside, and the company being let in to redeem on payment of liabilities which had been assumed by the mortgagees, as well as the amount of the mortgage debt.

It is somewhat singular that in the previous litigation the company, relying on the statement of the appellant as to the arrangement he had made with Leadlay, sought to get credit for these two sums on their mortgage debt. That was resisted by the mortgagees, but the Master-in-Ordinary charged them with these two sums. See *Saskatchewan Land & Homestead Co.* v. *Leadlay*. Upon appeal to Mr. Justice Teetzel, the ruling of the Master was reversed, 14 O. W. R. 1096; 1 O. W. N. 228, and upon further appeal to the Court of Appeal, the judgment of Mr. Justice Teetzel was affirmed; 16 O. W. R. 890; 2 O. W. N. 1.

It is somewhat singular, in view of his present contentions, that in the reasons for appeal of that case, the present appellant took the position he did. On page 11 of the appeal case, in the reasons against the appeal it is said: "(1) There is no reliable evidence whatever to support the appellant's contention that the late Edward Leadlay assumed or guaranteed the defendant John T. Moore's liability of $4,600 to the appellants, and that the said defendant Moore

gave to the said Edward Leadlay securities for assuming such indebtedness, and the appellants' statement that the said Moore gave the said Edward Leadlay a note for $4,600 is incorrect and misleading.

(2) There was absolutely no reason, and no consideration for the said Edward Leadlay assuming or guaranteeing such indebtedness of the said Moore to the appellants, and there is no evidence of any binding arrangement or agreement between the appellants and the said Edward Leadlay."

And in paragraph 3 the facts as to the note are set out substantially as in the present case they have been found to be.

With regard to the $3,279.22, at p. 14 of the reasons against the appeal they state: "(1) The above amount has never been paid to or received by the respondents, the Leadlays.

(2) The facts regarding this item are as follows: The appellants under an agreement with the said Edward Leadlay and Thomas Hook were entitled to obtain partial releases of lands from the mortgage in question upon payment of $3 per acre. In or about December, 1895, the respondent, John T. Moore, then manager of the appellants, applied to the said Leadlay and Hook for a release of certain lands from the said mortgage and to obtain said release gave to the said Edward Leadlay and Thomas Hook, his, Moore's, note for the amount required to obtain such release, and the said Leadlay and Hook then gave the release as asked for, and gave the receipt in question. The said Edward Leadlay and Thomas Hook, however, never agreed to accept said note in payment of the amount, and never agreed to replace the appellants from payment of the said amount, and never made any other agreement, and there was no other understanding excepting that credit should be given for the amount of said note when and in case the same should be paid.

(3) Not only is there no satisfactory evidence whatever to support the appellants' contention, but there is also no corroborative evidence to support their contention as required by the Evidence Act, R. S O. (1914), ch. 76, sec. 12."

Now, turning to the reasons for appeal of the present appellant and his wife (p. 16 of the appeal case), they say: "These respondents adopt and support the reasons of their co-respondents, the Leadlays, against this appeal as to this

item, and in addition say that the evidence of the respondent, John T. Moore, is not corroborated in a material point, nor does the evidence establish a novation.

"The receipt given by Edward Leadlay was for a note for this amount ($3,279.22), and if the note was not paid at maturity, no credit can be allowed therefor on the mortgage debt, unless the note is taken in lieu of money, or its equivalent. In other words, there must be an express contract shewing that the acceptance of the note, and the giving of the receipt therefor, was to be in satisfaction of the mortgage *pro tanto*, whether the note was paid, or not. There is no evidence to support any such contract."

Now, it seems to require some boldness, in view of the position thus taken by the Moores and the mortgagees, which resulted in the Court determining in favour of their contention, for the appellant to now come forward and attack the finding of my brother Kelly, upon the ground that the position he then took was not in accordance with the truth, and now to take te position that the then appellants' version of the transaction was the true one.

That these two notes were paid by the mortgagees and that the mortgagees were repaid what they had paid in respect of them by the now respondents when the property was redeemed, is not open to question, and there is therefore no ground for the appellants' contention that the release which he subsequently obtained from the Leadlays operated to discharge him from his indebtedness on the notes.

There is not a shadow of ground for any such contention. Nothing was owing by the appellant to the Leadlays when the release was executed. The mortgagees had succeeded in establishing that they were entitled to be paid their mortgage debt, including what they had paid on account of the floating indebtedness of the company, and upon redemption at all events the notes became the property of the respondents.

The result of what has taken place is that the appellant, by his improper conduct and breach of trust, has made the company of which he was the manager director, liable for these two debts of his, and he is bound, as the learned trial Judge has found, to repay what the company has paid, with interest.

The next item is one of $8,166.66, which, it is said, was improperly charged by my learned brother Kelly to the ap-

pellant. The contention of the appellant is that this sum represented the proportion of his salary for three years, which was allowed to the company for his benefit in a settlement with the Dominion Government, and that in receiving this money from the company he received only that which they had received upon his account.

There is no foundation for that contention, and the contradiction of it is to be found under the hand of the appellant himself. By the first by-law his compensation as managing director was $2,000 per annum, with five per cent. upon the purchase money of the lands sold. A change was subsequently made by which the fixed remuneration was increased to $3,000, and by a still later by-law his salary was fixed at $5,000, to date back to the beginning of his employment. Upon his examination *de bene esse* he admitted that he was paid that salary for all the years down to 1900, and yet in the face of that admission and the undoubted facts, his contention is that he only received $2,000 per year from the company, and that the other $3,000 was allowed by the Government to him, and that the company received lands for it. The Order in Council by which the grant was made is conclusive evidence against that contention, for every dollar that the company had paid for salaries was taken into account in the settlement with the Government.

As to there being under the hand of the appellant disproof of his present contention, I refer to the letter which he wrote on the 17th March, 1887, to the Rev. Mr. Short, referring to the by-law which had been passed carrying back his increased remuneration to the time of his appointment as managing director. In this letter he is justifying that, and pointing out his services to the company; the letter reads. "Yours of the 15th to hand, and most heartily do I concur in every word. My compensation was to consist of $2,000 per annum, and certain commissions from the very first, the latter being expected to be much the larger sum. When a settlement was being made with the Government, and expenses being recognized, the above placed us at an unfair disadvantage by preventing that part of my compensation which I was willing to take in commissions from appearing in our accounts, as it was not yet ascertained. To let it remain in that shape would be a dead loss of every dollar of

commission afterward paid me. Then, so that a proper sum might be included in our accounts, and one that represented an equivalent for my services, the proviso spoken of giving me a credit of $3,000 per year in respect of commissions was made. For the $2,000 salary, and $3,000 credit for commissions per year, the company have received land at $2 per acre—not costing the company one cent for my services—for I will be glad to take just what the company received on my account. Instead of taking anything *out* of the capital, I thus was able personally to add that much to the purchasing power of the company, and got that much more land; while only getting a fair compensation for the difficulties undertaken and work accomplished.

You will see from accounts and reports sent you that only since 1st May last have expenses of any sort—including my compensation—taken one cent from property of the company.

The statements in the circular referred to, attacking the by-law, are wickedly false. It is a cowardly attack in the very moment of our success; and it will recoil upon its authors.

You have mine of yesterday with enclosures, but you cannot be with us, so I thought I would make these further explanations.

Very sincerely yours,

Jno. T. Moore."

Then at a meeting of the company called to meet charges that were being made—those referred to in the letter—this statement appears over the signature of several gentlemen connected with the company, including the appellant. After referring to By-law No. 22, which made the salary $5,000—and pointing out that that meeting at which it was ratified was largely attended by the shareholders, and that the by-law was ratified by a large majority of those present they go on to say: "The arrangement made with the Government was of such a nature that for certain expenditures incurred the company became entitled to receive land at $2 per acre, and had the manager's by-law not been passed when it was, the company would have lost over 6,000 acres of land, and would have still been called upon to remunerate the manager in accordance with his invaluable services to the company."

"The Board do not think it necessary to enter into a detailed discussion of the various statements made in the circular, but they can assure the shareholders, one and all, that their interests have been carefully guarded on all occasions, and on none more than in passing the manager's by-law, which was passed and submitted to the shareholders in strict accordance with all legal forms and requirements, and after full notice as above mentioned." . . .

It is a somewhat singular circumstance that no entry was made except a marginal note in one of the books of this credit to the appellant, until the year 1895. In that year there was a meeting of the directors, at which it was arranged that this sum should be paid to the appellant. The proper conclusion upon the evidence is either that the directors were imposed upon by the representation that the appellant was entitled to the amount that was allowed to him, or that it was a bonus for his services, and in either view it is impossible to treat it as a proper payment.

It is said that there were meetings of the shareholders at which accounts were submitted which included this item, and that, therefore, there was ratification of these payments. As to this I will quote what was said by Mr. Justice Street in *Gardner* v. *Canadian Man. Pub. Co.*, 31 O. R. 488: "It is contended further by the plaintiff that the assent of the other shareholders to the resolution is shewn, and that it must be treated as having been ratified by them. The fact that annual statements of the affairs of the company were submitted to meetings of shareholders on two occasions after the passing of it, in which balances are shewn as being due to the plaintiff and Cassidey without explanation, and in which a lump sum is put down in the expense account for "salaries," including these sums, is the principal evidence relied on as proving assent. There is also some evidence that Mr. Cassidey, who had purchased the greater part of Nicoll's stock, had heard of some bonus having been voted by the directors. But in my opinion none of these circumstances are sufficient to shew that the shareholders in the company, other than the two directors who passed the resolution in question, with a knowledge of the circumstances, gave their assent to the action of the two directors, and before the resolution can be treated as having been ratified, the proof must go to that full extent." . . .

There is a further difficulty, that if the payment is treated as a bonus, a by-law is essential to authorize the payment.

It appears that out of this sum of $8,166.66 the appellant paid $2,000 to a Mr. Owens, who was the bookkeeper of the company. His evidence is that Owens was employed at a salary of $1,200 per annum, and that he received that sum for the first year; that after that time, the company not being in a flourishing condition, the directors, or the managing director, requested Mr. Owens not to draw more than a thousand dollars a year, and to leave the other two hundred dollars in abeyance; and that that went on up to the time of the payment of the $2,000 to Owens.

It seems to us that Owens had a good claim on the company for that sum, and that the appellant is entitled to credit for the $2,000 which he paid to Owens in discharge of that obligation of the company, and the appellant should be credited with that amount, as of the same date as the charge against him of the $8,166.66.

The other items were several sums amounting to something over $3,000, which were by the direction of the Finance Committee handed over to the appellant, as the resolution says, for his services and for his trouble in connection with the closing up of the company's business. His services as managing director were then supposed to be at an end. These balances were sums owed by members of the company who had turned in their shares as part payment for land. The deeds were executed but not delivered, and the balances affected some 1,400 acres of land.

We think that the learned trial Judge was right in charging that sum to the appellant. The cases shew that no remuneration can be given to a director without the sanction of the shareholders. There was no such sanction given, not even a resolution of the directors, but only the authority of the Finance Committee.

In *Livingstone's Case, Re Bolt & Iron Co.* (1887), 14 O. R. 211; 16 A. R. 397, the authorities establish the correctness of the trial Judge's judgment on the facts as found by him. There the facts were that a by-law of the company was passed providing that the managing director should be paid for his services such sums as the company "may from time to time determine at a general meeting." The com-

pany had not determined anything, but the managing director had withdrawn from the money of the company certain sums to cover the salary he was entitled to, or thought he was entitled to. It was held that he was liable to pay back the amount withdrawn, that nothing but a by-law of the company would entitle him to salary or remuneration for his services; and it was also held that it was a breach of trust on the part of the managing director to withdraw the money. The judgment of the Chancellor was affirmed by the Court of Appeal (1889), 16 A. R. 397, where the note of the case is, "The Court dismissed the appeal with costs, unanimously agreeing with, and fully adopting, the judgment of the learned Chancellor."

During the course of the argument it was suggested that there was a distinction to be drawn between remuneration to a director *qua director*, and remuneration to a person who occupies the position of managing director, and some support for that view is to be found in *Ontario Express Co. (Directors' Case)*, 25 O. R. 587, in which Rose, J., expressed the opinion that the provisions of the Statute requiring a by-law have no application to any remuneration except that for services of a director *qua* director.

The *Livingstone Case* is opposed to that view, and it was dissented from by a Divisional Court in *Birney* v. *Toronto Milk Co.*, 5 O. L. R. 1, and in which case it was held that a managing director stood in all respects in the same position as if he were an ordinary director, as to the right to remuneration for his services.

In *Benor* v. *Canadian Mail Order Co.*, 10 O. W. R. 899, Riddell, J., upon the authority of the decision of Rose, J., held that a by-law was not necessary in the case of a managing director in respect of his remuneration *qua* managing director. A motion was subesequently made to my learned brother to vary his judgment; and in disposing of the motion he said that his attention had been called, since he gave the former judgment, to *Birney* v. *Toronto Milk Co.*, and that while he thought that that case did not absolutely overrule the decision of Mr. Justice Rose, yet its authority was so shaken as to permit of his acting upon his own opinion which was opposed to that of Rose, J.

The result is that so far as the appeal is concerned, with the variation that the appellant is to have credit for the

$2,000 paid to Owens, the judgment is affirmed and the appeal dismissed, without costs.

By a cross-appeal, the respondents seek to charge the appellant, not merely with the balances owing by the persons to whom I have referred, which were handed over to the appellant, but also with further sums which he received for the land when it was resold for default in paying these balances.

We do not think that, upon the evidence, we should interfere with the decision of the trial Judge on this branch of the case, and the cross-appeal is, therefore, dismissed with costs.

SUPREME COURT OF ONTARIO.

FIRST APPELLATE DIVISION. MARCH 18TH, 1914.

LABINE v. LABINE.

6 O. W. N. 100.

Partnership—Mining Claim—Action to Establish — Evidence—Findings of Fact—Counterclaim—Promissory Notes—Costs.

LATCHFORD, J., 25 O. W. R. 527; 5 O. W. N. 609, dismissed plaintiffs' action for a declaration of partnership as to a mining claim, holding that the evidence did not support their claim, and gave judgment for the defendant upon his counterclaim for certain promissory notes given by plaintiffs to defendant.

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

Appeal by the plaintiffs from a judgment of HON. MR. JUSTICE LATCHFORD, dated 24th December, 1913, after the trial of the action before him sitting without a jury, on the 4th November, reported in 25 O. W. R. 527.

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.

G. H. Watson, K.C., T. W. McGarry, K.C., with him, for the appellants.

R. McKay, K.C., A. G. Slaght, with him, for the respondent.

THEIR LORDSHIPS' judgment was delivered by

HON. SIR WM. MEREDITH, C.J.O. (v.v.) :—We have read the evidence carefully, and the judgment of the learned trial Judge, and have come to the conclusion that there is no reason for interfering with his findings of fact, or with the judgment which he has pronounced.

The appellants sought to establish a general partnership between themselves and the respondent; but in that they wholly failed—admittedly failed. The evidence shews that they were interested together in several mining transactions, but that they had transactions of their own in which the respondent was not interested, and that the respondent had transactions in which they were not interested.

The case, therefore, depends upon the appellants having established a partnership with regard to the transaction in question—a purchase by the respondent of a quarter interest in the Hollinger discovery.

According to the statements of the two Labines, the appellants, they had some talk about the Night Hawk country, as it is called, and had discussed with the respondent going up there if they could; but apparently nothing came of that. They were working with the respondent in the Township of South Lorrain, or a claim in which they were jointly interested and, according to the statements of the appellants, while they were in South Lorrain an agreement was come to that they, the two appellants, should go to Gowganda, and work for the Colonial Lumber Company, which was carrying on business there; and that the respondent should stay in South Lorrain and finish up the work on the claim there,; and afterwards go into the Night Hawk country for the purpose of acquiring interests or getting claims there for the three of them; and that they would finance him for these operations.

It is strange enough, as it appears to me—I do not know that it strikes my brothers in exactly the same way—that although this agreement is said to have been made before they came to Haileybury—on the day before—the account that both of them give is that they came to Haileybury, and at the station met a man named McLean, and that he told them about some rich find in the Porcupine, i.e., in the Night Hawk Lake district, and that when going away from the station they entered into the agreement.

There was in addition to that evidence, the testimony of two men named Bellec, of conversations which they say took place between them and the respondent, which the appellants rely upon as shewing that the account which they gave of the agreement is the true one, and that they were interested in the Night Hawk Lake transactions.

Conversations are always to be looked at with great circumspection, especially after a number of years have elapsed from the time when they are said to have taken place. A word exchanged here or there may alter the whole effect of what was said—even assuming a desire to tell the truth.

It is said that the respondent had denied having met and had a conversation with the two appellants outside of the camp at Porcupine on the Hollinger claim, on an occasion when the appellants say there was a discussion about the Night Hawk country. A witness was called who testified that he had seen the parties in conversation outside the camp. It may be that the respondent is mistaken as to a meeting having taken place on this occasion, but evidence that it did take place affords no corroboration of the testimony of the appellants as to the conversation which they said was had on that occasion.

The conversations deposed to by the two Bellecs, even if their truthfulness and the accuracy of their recollection is conceded, are not inconsistent with the position which the respondent takes, and the statements said to have been made by him are too indenite to afford any substantial corroboration of the story of the appellants.

Then there is the other conversation, with Montgomery, which is denied by the respondent. According to Montgomery's testimony, the respondent wanted him to go with him and do some work in which he was interested, and the respondent then said that it did not matter whether he or the appellant Charles Labine went with Montgomery as they were working together to make some money.

I do not think this, having regard to the relations between the parties, proves anything, even if the conversation actually took place.

The occurrence upon which special reliance is placed by the appellants is a cheque transaction which took place after the meeting in Haileybury on the occasion to which I

have referred. The story, as I have said, of the appellants is that they were to finance the respondent to go into the Porcupine country to prospect, and take up claims; and that the way in which he was financed was by leaving two or three Bank cheques with the respondent. That cheques were left with him is not denied. There is, however, a difference between the parties as to what took place. According to the respondent he got one cheque for $65, and the other cheques were in blank. Only two cheques were produced. Both of these are payable, not to the respondent, but to John A. Labine, his brother, to whom I shall afterwards refer.

It is admitted by one of the Labines, Gilbert, I think, that upon the occasion of the passing of these cheques, there was a settlement with the respondent of money which Gilbert or Charles owed him, and that that money was paid; and it seems to me that it may well be that the respondent is mistaken about the cheque, and that it may have been money that he received. There is nothing to shew how that money was paid, and if what I have suggested were the fact a great deal of the difficulty suggested by Mr. Watson is removed.

Then, it is said that the letter of the 20th of October, from the respondent to Gilbert Labine, is inconsistent with the story the respondent tells, that his brother, John A. Labine, was willing to do work on the "Big Charlie," but had no money of his own, and was not willing to do it unless the appellants put up the money, and that these cheques were put up for that purpose.

The appellants say that the cheques had no connection with the "Big Charlie," that they had decided not to do any work on "Big Charlie." That they left the cheques with the respondent to acquire interests and take up claims in the Night Hawk Lake country while they went to Gowganda to make some money at work there.

The letter speaks of a man named Dan Smith having told the respondent that things were looking well in the "Big Charlie" district, and says that the respondent decided to go on with the work there. It is argued from this that there could have been no such arrangement as the respondent alleges, and that the letter supports the testimony of the appellants that it was decided to do no more work on the

"Big Charlie," and indicates there was a change in the arrangement in consequence of what Dan Smith had said, and that the respondent had determined to abandon the intention which they had of letting "Big Charlie" go, and had decided to go on with the work on it. It seems to me that that is all susceptible of explanation, and is consistent with the arrangement having been that the respondent was left to determine when, if at all, the work on "Big Charlie" was to go on, and that the cheques were left with the respondent in order to provide funds for doing this work if it should be decided to go on with it.

I do not see why, if the appellants' story is true, these cheques were made payable to John A. Labine. This had not been the arrangement, and one would have to imagine, and that was a suggestion of the learned counsel for the appellants, if it were not so, that at that moment it entered into the mind of the respondent to cheat the appellants out of their interest in any Night Hawk Lake property he might acquire, and to adopt the plan of making out the cheques payable to the brother, John A., and of going on with the work on "Big Charlie," in order to give colour to the contention which the respondent makes as to the purpose for which the cheques were given.

I think that is altogether too far-fetched an assumption, and that at the most all that can be said as to the cheque transaction is that, the respondent's position in the matter is not very satisfactorily explained.

But there are circumstances on the other side, and evidence which make it impossible for the learned trial Judge to believe, and make it impossible for me to believe, the story which the appellants told.

The interest in the Night Hawk Lake claim was sold for $300,000. Of that purchase money, the respondent was entitled to receive $75,000, and that sum ought to have been divided between him and the appellants, if their story is true.

After a large part of the purchase money had been paid, these appellants who say that they were entitled to a third interest in this claim, borrowed from the respondent, at one time $1,000, at another time $100, and at another time $100; these sums being loaned to Gilbert Labine: and Charles Labine, the other appellant, borrowed from the respondent

two sums of $100 each, and for all these sums promissory notes were given.

It is impossible to believe that if the appellants had an interest such as they assert in the claim entitling them to this large sum of money, they would have entered into transactions of this kind. It is attempted to be explained that Charles Labine was a young man, that he had great faith in his cousin, the respondent, and that that explains these transactions. I should not so julge Charles Labine from the evidence, and the learned trial Judge did not so judge him. He thought him an astute, shrewd man, and the explanation given did not convince the learned Judge, as it does not convince me, that these transactions were of the nature which the appellants allege. They took place at a time when the appellants admittedly knew that the respondent denied their right to any share in the property, and besides this they also afterwards went into another transaction with the respondent.

Then there is the evidence of Mr. Beatty, with whom the appellants were working when in the employment of the Colonial Lumber Company. He says that Charles Labine applied to him for more wages, and gave as a reason that by being in that employment he had lost the chance of going into the Porcupine country and making "big money" there.

Charles Labine denies that this conversation, or the material part of it, took place. The learned trial Judge, however, accepted, and rightly so, the evidence of Beatty, and if the conversation took place it is quite inconsistent with the story told by the appellants.

Then a witness named Montgomery was called. He said he was introduced to Gilbert Labine in a camp in Turnbull township, that referring to the Hollinger property he asked Gilbert if he was the lucky Labine, and that Gilbert answered "No, I am not the lucky Labine," that James Labine was the lucky man.

Gilbert denied that he said that James Labine was the lucky man, but he admitted the rest of the conversation. The learned trial Judge accepted the testimony of Montgomery in preference to that of Gilbert Labine, and rightly so I think.

In our opinion the case failed, and the learned Judge came to the proper conclusion. He gave preference to the respondent's testimony over that of the appellants', where

their stories differ, and we see no reason for differing from him in that respect.

Much was sought to be made of the fact that in putting in some affidavit in connection with another mining claim, the respondent admitted that he swore to having done work that was not done until afterwards, but all that it is necessary to say as to this is that the learned Judge no doubt gave that circumstance due consideration in coming to his conclusion, and that if the testimony of the parties were left out of consideration, the undoubted facts and circumstances to which I have referred lead irresistibly to the conclusion to which the learned trial Judge came.

The result is that the appeal fails, and is dismissed with costs.