THE

ONTARIO WEEKLY REPORTER

VOL. 26. TORONTO, NOVEMBER 26, 1914. NO. 14.

HON. MR. JUSTICE MIDDLETON. JUNE 26TH, 1914.

JOSS v. FAIRGRIEVE.

6 O. W. N. 640.

Appeal—Appellate Division—Ex-parte Order of Master Permitting Issue of Execution Set Aside — Order Pronounced in Court Issued as Chamber Order—Leave to Appeal from—Execution on Judgment Twenty Years Old.

An order was obtained *ex parte* permitting issue of execution on a judgment which had remained unissued nearly twenty years. An appeal from this order, which should have been taken by way of a chamber motion, was made and heard in Court. The said order and the execution based on it were set aside on the ground that the motion was improperly made *ex parte*. By this time the judgment had become more than twenty years old. The Court order was issued as though it was a chamber order.

MIDDLETON, J., granted leave to appeal to the Supreme Court of Ontario on the grounds that the questions involved were difficult, that a technical error of the plaintiff's solicitor should not defeat the payment of a claim which undoubtedly existed, and that the order appealed from, in effect, finally disposed of a right or claim.

Motion for leave to appeal to a Divisional Court of the Appellate Division from the order of Falconbridge, C.J.K.B., 6 O. W. N. 401.

M. Wilkins, for the plaintiff.

O. H. King, for the defendant.

HON. MR. JUSTICE MIDDLETON:—I think the case is one in which leave should be granted, and that inasmuch as notice has already been given upon the assumption that the order was a Court order, it should stand as an appeal from the order actually issued.

A judgment for the recovery of money was given by consent, now more than twenty years ago. The judgment was not actually issued until recently, probably because the de-

fendant was supposed to be worthless financially. There is no suggestion that the judgment has been paid. The judgment was settled upon notice to the defendant before the Senior Registrar, just before the expiry of the twenty years. An order was then obtained *ex parte,* permitting issue of execution. The execution was issued and placed in the Sheriff's hands.

A motion was made by way of appeal from the order of the Master in Chambers, upon the ground *inter alia* that the order was improperly issued *ex parte.* Although properly a chamber motion, this was made in Court and heard in Court. The motion was out of time, but the learned Chief Justice of the King's Bench relieved the defendant from her default, and set aside the order and the execution based upon it; upon the technical ground that the order was improperly made *ex parte.*

The twenty years had then expired. The plaintiff desired to appeal, and, assuming that the order was a Court order, appealed. The order has now been issued as though it were a chamber order, and this motion is made upon the theory that the order was rightly so issued.

I give leave to appeal, and extend the time so far as may be necessary to validate the notice already given, because the questions involved are difficult, and it appears to me questionable whether indulgence should have been granted to the defendant to avail himself of what was after all a technical error of the plaintiff's solicitor, and so defeat payment of a claim which undoubtedly exists; and also because in effect, though not in form, the order in question finally disposes of a right or claim.

A factor influencing my decision is the fact that it seems unfair to allow the motion to have been made and heard in Court, where the right of appeal would be untrammelled, and then, after an appeal is taken, to defeat it by issuing the order as a chamber order.

The costs will be costs in the cause upon the appeal.

SUPREME COURT OF ONTARIO.

FIRST APPELLATE DIVISION. JUNE 8TH, 1914.

WILLIAMSON v. PLAYFAIR.

6 O. W. N. 462.

Contract — Hypothecation of Stock — Sale or Pledge—Evidence—Liability of Pledgee to Account for Price of Shares Sold.

SUP. CT. ONT. (1st App. Div.) affirmed the judgment of HON. MR. JUSTICE LENNOX, 26 O. W. R. 182.

The appeal was heard by HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE, and HON. MR. JUSTICE HODGINS, JJ.A.

Leighton McCarthy, K.C., for the appellant.

Hamilton Cassels, K.C., for the plaintiff, the respondent.

HON. MR. JUSTICE MAGEE:—It would be difficult upon the evidence in this case to come to a different conclusion from that arrived at by the learned trial Judge. The defendant will not deny that he supposed the application to him through Grundy for an advance of the money was made really on behalf of the plaintiff, though he asserts, no doubt with truth, that he did not know how much the plaintiff was to get and points to the fact that $10 was in fact retained by Grundy. It is impossible to believe that he considered the plaintiff's note and the shares as two separate and unconnected items of property in the hands of either Grundy, the negotiator, or Stewart, whose name appeared as payee of the note and who endorsed it without recourse. He is in the position either of having notice that the shares were security for the note in the hands of an existing holder or that an application was being made to him on behalf of the plaintiff the maker of the note for a loan secured by the note and by the shares. If the former then he cannot resist redemption. If the latter it may be that he refused to advance the money in that way and that he required that the sums should be absolutely transferred to him to become his property if the note was not paid at maturity, but none the less he required and obtained the note and therewith the personal liability of the plaintiff for the amount of the advance and which he has

never disclaimed being entitled to and which in the pleadings he has still insisted upon. A purchase of the shares such as he claims took place would be unconnected with any consideration for the note and the acceptance of and insistence upon the latter is irreconcilable with the stand now taken by the defendant.

His idea probably was that expressed upon the face of every mortgage but which none the less the Courts of Equity did not and do not give effect to. It would not be a collateral stipulation consistent with the right of redemption such as is discussed in *Kreglinger* v. *New Patagonia, etc., Co.,* [1914] A. C. 25, but would be inconsistent with the doctrine of equity which is crystallized in the maxim "Once a mortgage always a mortgage," and which is so fully referred to in that case.

The appeal should, I think, be dismissed with costs.

HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MACLAREN and HON. MR. JUSTICE HODGINS, agreed.

HON. MR. JUSTICE MIDDLETON. JUNE 13TH, 1914.

HUDSON v. HUDSON.

6 O. W. N. 503.

Alimony—Amount of—Circumstances Governing.

MIDDLETON, J., on the evidence, in action for alimony, allowed claim at $35 a month.

Action for alimony, tried at Brockville, June 2nd, 1914.

H. A. Stewart, K.C., for the plaintiff.

J. A. Hutchinson, K.C., and Jackson, for the defendant.

HON. MR. JUSTICE MIDDLETON:—At the trial, the matter was discussed at length, and I hoped that a settlement would result. I am now told that a settlement is impossible.

The case is a painful one. There is no reason for supposing that the plaintiff is in any way to blame for the difficulties that have arisen, and I think she is entitled to alimony. In the interests of the parties, I think it better to refrain from saying much. The conduct of the defendant, I think, has been such as to indicate that it would not be altogether safe for the wife to continue to reside with him at present.

I desire to spare the parties the expense of a reference to ascertain the amount to be paid for alimony. In her affidavit, the plaintiff places her husband's earnings at $60 a month net, and he has about $40 from realty. The plaintiff intends taking the youngest child with her. During all her married life, she has been used to working to some extent. She appears to be in good condition physically, and I do not think she is entitled to be maintained in a condition of idleness.

I have come to the conclusion that she should have $35 a month for alimony, on the understanding that she has this child to maintain. I think there is foundation for the view expressed by the husband that his income in the absence of his wife's assistance will be seriously and prejudicially affected.

Of course, the husband will also have to pay the wife's costs.

I desire to express again the hope that this separation may be only temporary, and that such steps may be taken as will lead to the restoration of the husband to a better condition of mental health.

HON. MR. JUSTICE MIDDLETON. JUNE 2ND, 1914.

BONNELL v. SMITH.

6 O. W. N. 414.

Evidence — Action against Executors — Evidence Act, R. S. O. (1914) ch. 76, sec. 12—Corroboration — Point on which Corroboration Necessary—Action for Money Lent.

MIDDLETON, J. dismissed an action to recover from the personal representative of a deceased person certain alleged loans on the ground, *inter alia*, that there was no corroborative evidence, as required by the Evidence Act in such actions.

Thompson v. *Coulter*, 34 S. C. R. 261, followed.

Action tried at Toronto, 29th May, 1914, to recover from the personal representative of the late E. W. Smith, $1,768.82, being the amount of some sixty cheques, most of them for small amounts, drawn by plaintiff upon an account in his own name in Bank of Montreal "in trust."

N. S. Macdonnell, for the plaintiff.

R. W. Treleaven, for the defendants.

HON. MR. JUSTICE MIDDLETON:—These cheques, it was said, were all for loans. None of them indicate this upon the face. No one, other than the plaintiff, has any knowledge of the relations between the parties or the circumstances under which these advances were made, and the case depends upon the credit to be given to the plaintiff's story and the sufficiency of corroboration under the statute.

At the time of the transaction, the plaintiff was in some way connected with the firm of Jenkins and Hardy, brokers. He was employed for them under a guarantee, bringing them as much business as he might obtain, and having the right if they rejected any of the business to retain it for himself.

The plaintiff employed Smith as a sub-agent for the purpose of purchasing volunteer scrip issued by the Ontario Government. Smith was at liberty to purchase this at any price he chose to give and turn it over to the plaintiff at a fixed price of $75, retaining the difference for himself. This business was undertaken in 1907.

The plaintiff and Smith were also jointly interested in a much more important speculation. They thought they could obtain a grant of three hundred thousand acres of pulpwood land in Keewatin for a nominal consideration. It was proposed to turn this over to American financiers at a profit of at least $1.50 an acre. In that event, the expenses were to be deducted and the balance divided between Bonnell and Smith.

Bonnell apparently found the purchasers; Smith was to secure the grant. This handsome profit, $450,000, was not realised, because the result of the elections in September, 1911, was to remove Mr. Smith's friends from political power. In the meantime $5,000 had been put up by the purchasers; and I think the proper inference of fact is that a certain $2,000, which reached the Royal Trust Company in July, 1908, and which was transferred to Mr. Smith's account on the 16th July, constituted part of that $5,000, and that it was a fund available for expenses.

At this time, Mr. Bonnell had paid considerable money to Mr. Smith, and the letter of "Tuesday, the 14th," referred to in the evidence, is no doubt a letter of Tuesday, the 14th July, 1908. This letter is significant. The plaintiff writes: "Dear Edgar: Russell here and gone away. Cannot find you, hear from you or see you. Everything looks

good, only if you don't shew up when in necessity I will cheat you. The money is here at the Royal Trust Company. Everything all O.K., except I do not like your ways or curves."

The reference to cheating is no doubt innocent and jocular, but the importance of this is that it shews that this money was a fund which could be resorted to when Smith was in necessity, that is, when he needed funds for the prosecution of this important venture.

Upon cross-examination the plaintiff admitted that the money paid to Smith by the cheques might well have been, and probably was, used for expenses in connection with this venture. If so, it is not a loan, and the plaintiff's case fails.

An attempt was made to corroborate by the evidence of Mr. LeVesconte, a solicitor, who had lent Smith money or had had dealings with Smith in connection with the purchase of volunteer scrip. His evidence does not help, because all that he establishes is that Smith said that when he, LeVesconte, refused to make further advances the plaintiff had undertaken to finance him. That is well proved by the Trust Company's letter of September 11th, 1907, put in. This does not corroborate in any way the plaintiff's statement that these cheques represent loans.

I think the plaintiff fails in the action for two reasons. In the first place I think the proper inference from his own evidence is that the payments were advances in connection with this transaction in which they were both interested, to be charged against the $2,000 put up by the prospective purchasers. In the second place I do not think the corroboration is sufficient. There is no doubt ample corroboration of the fact of payment but that is not the real controversy. The corroborative evidence is as consistent with the case of either party as with the case of the other. This is not sufficient. I think the corroboration required is evidence that would appreciably help the judicial mind towards the acceptance of the one case in preference to the other.

No good purpose would be served by reviewing the authorities. *Thompson* v. *Coulter,* 34 S. C. R. 261, is one of the latest, and the point that I rely upon is there emphasized.

Nor do I think any good purpose would be served by reviewing various matters in the evidence which lead me to the belief that plaintiff's evidence should be accepted with caution.

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

DOMINION WASTE CO. v. RAILWAY EQUIPMENT CO.

6 O. W. N. 426.

Landlord and Tenant—Lease — Sub-lease—Covenant for Quiet Enjoyment—Privilege of Making Fireproof Room—Breach of Covenants—Failure to Prove.

The owners of land leased the building thereon to a company which covenanted that it would not carry on any business in the nature of a nuisance or by which the insurance on the premises would be increased. The lessee subleased part of the premises to plaintiff with a clause permitting the erection of a fire-proof room to contain a "waste machine." The company assigned its lease and the reversion of the sub-lease to the defendants. The insurance company objected to such erection as increasing danger, and cancelled the insurance. The lessors obtained an injunction restraining operation of the machine, thereby necessitating the renting of other land and the erection of a building thereon:—

MIDDLETON, J., *held*, on evidence, that an action to recover rent of this land, costs of building, and loss of business profits, failed, as no breach on part of defendants had been shewn.

Action tried at Toronto on 28th May, 1914.

Action for damages for breach of covenants in a lease.

J. C. Macbeth, for the plaintiff.

C. A. Moss, K.C., for the defendant.

HON. MR. JUSTICE MIDDLETON:—The Canada Malleable and Steel Range Manufacturing Company, Limited, the owners of the lands in question, on the 31st July, 1911, granted a lease to the Rhodes Railway Equipment Company, of New York, of a building known as number 1240 Dundas street, Toronto, for a term of five years, commencing 31st July, 1911, with a right of renewal for a further term of two and a half years upon certain terms. The lessee covenanted that it would not permit any business to be carried on upon the premises which would be deemed a nuisance or by which the insurance on the premises would be increased.

On the 15th January, 1912, the lessees made a sub-lease of part of the premises to the plaintiff company for one year and nine months, commencing 15th January, 1912. This sub-lease contains a clause "and the lessee shall have the privilege of making a fireproof room in which will be installed a waste machine." The sub-lease also contains the ordinary covenant for quiet enjoyment.

Some three weeks after this—on the 6th February, 1912—the Rhodes Company assigned its lease, and the reversion in the sub-lease, to the Railway Equipment Company of Toronto, Limited. Notice of this assignment was not given to the plaintiffs until the 2nd November, 1912.

In the operation of the business carried on by the plaintiff company—the manufacture of "waste" from the refuse from cotton mills—the crude material received from the mills is placed in a machine in which the fibres are torn apart and separated. There is a risk of some stone, nail, or other foreign matter getting into this machine, when by reason of its contact with the revolving steel parts a spark may result, and the separated cotton fibre, being of a highly inflammable nature, a fire may occur, which would be sudden and violent in its nature; consequently the operation of this machine is recognized as being highly dangerous from the fire standpoint. It was for this purpose that the plaintiffs obtained permission in the sub-lease to construct the fireproof room. The nature of the business to be carried on was probably understood by the lessors at the time of this sub-lease; but, if so, both parties contemplated that a fireproof room would be sufficient security.

At the time of the making of the sub-lease the head lease was not produced nor could it be found. No adequate search was made for it, no enquiry was even made from the lessors; so that the provision of the lease against the carrying on of any business which would increase the insurance rates was not known to the plaintiffs.

Shortly after the business was commenced, objection was taken by the insurance companies to the increased risk, and the insurance on the entire building and its contents was cancelled. The result was that the lessors, the Canada Malleable Range Company brought an action and finally obtained an injunction restraining the operation of the machines in question in the premises. This no doubt placed the plaintiffs in a very serious position. They had the lease; they had no other premises; premises of the kind necessary for business were not easily obtainable, and their business called for the immediate production and supply of material.

In the result they did what I think was prudent; they rented an adjacent lot and erected upon it a temporary fireproof building, removed the dangerous machinery to it, and

continued the manufacture. This action is brought to recover the amount of the rent of this land, the cost of the building, the loss of profit during the time the business operations were suspended, the excess wages paid for carrying the raw material to this new building and returning it to the other building, and the costs of the former action. The sums claimed I think may be fairly taken to represent the actual loss sustained by the plaintiffs by reason of the failure of their original plan.

While I sympathise much with the very unfortunate position in which the plaintiffs find themselves, I think there are insuperable difficulties in the way of maintaining this action. As brought, the action is based upon a breach of the covenant for quiet enjoyment and of the covenant permitting the erection of the fireproof room.

In the first place, and at the threshold of the plaintiffs' case, is the difficulty that the defendant here sued is not a party to the lease or the covenants. It can only be made liable by shewing that these covenants were covenants running with the land and that this defendant had been guilty of a breach. Assuming that the covenants do in one sense run with the land, I do not think that any breach on the part of the defendant has been shewn. The covenant for quiet enjoyment, when read in the light of the Short Forms Act, is a covenant against any "disturbance from the lessor or other person or persons lawfully claiming by or under him." The disturbance here was by the head landlord. The lease contains no covenant on the part of the lessor as to their right to make the lease. If it did, the original lessor and not the assignee would be liable for any damages under it.

Then, the other covenant sued on is a covenant permitting the erection of a fireproof room. There is no breach of this. The lessees erected just such a room as they saw might do.

The action fails, and must be dismissed, with costs if fit. The complaint was that the room erected was not an adequate protection against fire. In no way were they prevented from doing that which the lease stipulated they asked. I hope the defendant may be generous enough not to press the claim for costs.

HON. SIR G. FALCONBRIDGE, C.J.K.B. JUNE 4TH, 1914.

CASSAN v. HAIG.

6 O. W. N. 437.

Surgeon—Malpractice—Negligence—Finding of Fact—Damages.

Action against a surgeon to recover damages for permanent injury and disfigurement of the plaintiff through the injection of a fluid into his eye, and which was alleged to be malpractice or negligence.

Tried at Cobourg.

E. G. Porter, K.C., and G. A. Payne, for plaintiff.

R. McKay, K.C., and D. J. Lynch, for defendant.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—The application of the crystal (which the defendant claims was cocaine) to plaintiff's eye, was instantly followed by excruciating pain to the patient and by an alarming appearance of the eye itself.

Two high experts testified that these conditions were *post hoc,* but not necessarily or even probably *propter hoc,* but were more likely due to poisoning from a small piece of wood or sawdust which had got into plaintiff's eye the day before.

The coincidence in time and otherwise is too startling for me to accept this theory, and in view of the general history of the case and the other medical testimony I am driven to the conclusion that defendant made a mistake and introduced into the eye not cocaine, but a crystal of some corrosive or caustic substance, and accordingly I so find as a fact.

Defendant is therefore liable to plaintiff.

The jury assessed the damages at $1,200, a very reasonable amount, and I direct judgment to be entered for that sum with costs.

Thirty days' stay.

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

HAY v. COSTE.

6 O. W. N. 443.

Contract—Construction—Scope—Partnership — Contemplated Profits from Oil Leases and Agreements—"Extensions"—Profits from Natural Gas Leases and Agreements—"Oil and its Products."

In an action by plaintiff to compel defendant to account for all profits resulting from oil and gas discoveries made by him, directly or indirectly, on the alleged ground of a partnership, MIDDLETON, J., *held*, upon the evidence, that the alleged partnership agreement had reference exclusively to oil; that there was no subsequent agreement nullifying or modifying the original agreement; and that the word "products" as used therein referred to artificial products or products resulting from manufacture, and not to gas as a possible product of oil "in Nature's laboratories."

Action by Colonel Alexander M. Hay to compel Eugene Coste to account to him for all profits resulting from oil and gas discoveries made by him, directly or indirectly, upon the theory that there existed a partnership by which the plaintiff was entitled to one-half of all profits derived from leases, rights, agreements or franchises for or connected with oil or gas.

Action tried at Toronto on 26th, 27th, and 28th May, 1914.

J. W. Bain and M. L. Gordon, for plaintiff.

C. A. Masten, K.C., and G. C. Cooper, for defendants.

HON. MR. JUSTICE MIDDLETON:—Colonel Hay, an English gentleman residing in Kenora, claims to have such an extensive connection with moneyed people in England and Scotland as to enable him to secure capital necessary for the development of undertakings such as those in question in this action.

Mr. Coste has long been connected with oil and gas development in Ontario and elsewhere in Canada. He is a geologist of experience and undoubtedly has great knowledge in connection with oil, and gas exploration and development.

These gentlemen had been acquainted for some time, and met frequently, more particularly in connection with the Mining Institute, which meets in March of every year. In

1904 or early in 1905 there is no doubt that conversation took place between them looking towards their becoming jointly interested in development work of this kind. There is some difference in the accounts given of these preliminary negotiations; but I find as a fact that there was not any concluded partnership arrangement or any concluded agreement of any kind prior to the making of the agreement evidenced by the written document of the 20th July, 1905.

At that time, natural gas was known to exist in the north west. It was not then regarded as of any great commercial value, owing to the difficulty and expense of conveying it to market and the very small market there was in the towns then existing in the west, and the enormous expense of installing the necessary pipe lines.

It was supposed that where gas was found further exploration would reveal the existence of oil; and the discovery of oil in paying quantities was much desired by the Canadian Pacific Railway. It was suggested that the railway should be approached and that an arrangement might be made by which Coste should explore the C. P. R. lands with a view of finding oil, upon some basis which should secure profit to the parties. Originally the idea had been to interest outside capital. It was then suggested that the C. P. R. officials might be induced to take the matter up on their own part. When approached it was found that they would do nothing except for the railway. This was entirely acceptable. All the preliminary negotiations culminated in an interview between Colonel Hay and Mr. Coste on one side, Sir Thomas Shaughnessy and Mr. White on the other. At this interview the whole matter was pretty well canvassed; it was made abundantly plain that the C. P. R. cared nothing about natural gas discovery but was most anxious about oil; and as the result of the interview Sir Thomas Shaughnessy asked Messrs. Hay and Coste to reduce to writing what was proposed. This resulted in the letter from these genltemen jointly, addressed to Sir Thomas, dated July 20th, 1905, in which they purport "to set forth the proposed arrangement discussed as the basis of an agreement." Put shortly, this proposition was that the railway provide the outfit, pay Mr. Coste $20 per day and expenses while engaged in operation; if the result was unsatisfactory the railway was to have the option of desisting or of proceeding further, as it chose. In the event of oil being found

in paying quantities a company was to be formed, the railway was to furnish it with the necessary capital to commence and carry on business on a commercial scale, and Messrs. Hay and Coste were to have between them one-eighth of the capital stock free. Added to this letter is a statement of a matter not discussed at the interview, namely, that it was desirable to secure oil and gas leases from the Government and others which might come within the sphere of the operations; the operations contemplated being solely upon the C. P. R. lands.

In the preparation of this letter it is admitted that it was strictly confined to the discovery of oil. Gas is only mentioned in this last clause, and then only because it was known to all that the Government did not lease gas and oil privileges separately, but jointly.

After this letter had been written, and on the same day, Messrs. Hay and Coste drew up a memorandum for the purpose of defining their rights as between themselves. This recited the negotiations looking to the development of oil fields in western Canada along the line of the C. P. R. and that these negotiations had now reached a point where an agreement was likely to be entered into with the railway for the purpose of drilling for oil in the north west on or near the line of the railway; the basis of the agreement being set forth in the letter of which a copy was attached. Then follows the recital of importance: "Whereas the parties hereto have agreed that they shall mutually benefit in any and all profits which may result from the conclusion of these negotiations and from any agreement which may be entered into by them or either of them as a result of the same." It is then agreed that in consideration of the assistance and services each had rendered to the other in conducting the negotiations "that all profits which may accrue to the parties hereto or to either of them, whether in cash or in stock in any company or companies which may be formed as the outcome of the negotiations which have led up to the agreement contemplated to be made as above referred to and of any extensions of the same shall be equally divided between the parties hereto." This is followed by a provision excepting any salary or fees paid to either party for specific services rendered.

Sir Thomas Shaughnessy, when he received this written proposition, at once realized that the scheme outlined was

too vague to be practicable and carried in it the seeds of many future difficulties. He therefore wrote the letter of July 22nd, 1905, suggesting that in lieu of the proposed interest to be given in the company a cash payment should be made in the event of discovery.

No good purpose would be served at present by following the history of the negotiations which took place, as all agree that the negotiations with the railway culminated in a letter dated 8th February, 1906, from Mr. White to Mr. Coste, which was accepted by both Colonel Hay and Mr. Coste. Mr. Coste was to explore and to be paid $20 a day. The company might abandon the experiment after twelve months at any time, at its own option. If oil was discovered of sufficient value to warrant the company in proceeding further, of which the company was to be the sole judge, $25,000 was to be paid. If the company decided adversely, the company's interest might be purchased by Hay and Coste by reimbursing all expenditure in connection with the experiment.

I think that this agreement then became *the* agreement which was to be read into the agreement between Hay and Coste of the 20th July, 1905. Under it, all profits the outcome of this agreement and any extensions thereof are to be divided equally.

Coste went to work and worked for years, finding abundance of gas but no oil. Had he found oil the $25,000 to be paid as reward would have been the profit to be divided. Had he found oil and had the company "decided adversely," i.e., that the oil was not in paying quantity, then Coste and Hay might have purchased. Nothing so far has developed which can be regarded as the outcome of this agreement unless it can be held to reach the matters now to be mentioned.

Between 1905 and 1910 the situation had changed greatly in the north west. It had been realized that natural gas could be marketed at a profit; at least, Coste had formed that opinion. The railway company had become tired of paying out large sums resulting in the discovery of no oil but only gas. Coste had been doing various things at different times for the railway, and the railway officials had apparently formed a high opinion of him. They had, however, apparently made up their minds that the time had come when they should cease spending further money in

searching for oil. Mr. Coste was asked to report at Montreal to Sir Thomas Shaughnessy. He accordingly went there; and he has given an account, which I entirely accept, of this interview. Sir Thomas asked how much money would have to be expended to market the natural gas. On being informed that between two and three million dollars would be required, he stated that this was too large a sum for the C. P. R. to sink in a side venture, and suggested to Coste the desirability of his considering entering into some arrangement for marketing it on his own account. Coste promised to consider. He met Hay; there was further discussion; Hay was apparently staggered at the amount of money involved, and nothing was accomplished at that time or through Hay. Coste ultimately arranged for the flotation of a gas project, and has received gas leases and entered into agreements with relation to gas which have no doubt produced to him very considerable profit. Hay now claims to be entitled to one-half interest in all this.

Looking solely at the agreement, as I think I must, I am satisfied that this is not within its scope. The agreement itself speaks of oil. Both parties agree that this was deliberate. The only thing upon which it appears to me to be possible to hang any argument is the expression contained in the agreement which gives to Colonel Hay a half interest in the profits accruing from the agreement "and any extensions of the same." I feel quite satisfied that the agreements of 1910 are not in any sense extensions of the agreement evidenced by the letter of February 8th, 1906, but are totally independent and distinct agreements.

It is sought to expand this agreement by dwelling much on expressions found in the correspondence between the parties, both anterior to and subsequent to the agreement. I do not think that this is admissible. The agreement must stand or fall entirely by what is found within its four corners. No claim is made for reformation, nor could any such claim be put forward with hope of success. Yet I have read these letters very carefully, and heard with great interest Mr. Bain's forcible argument upon them. I cannot find anything in them which leads me to modify in any way the views I have expressed. There are expressions in the letters which relate to gas. Some of these are readily understood when it is borne in mind that, as shewn by the last clause of the letter of the 20th July, it was proposed to take

oil and gas leases of adjacent lands. Other references are readily understood in view of what is said by Mr. Coste, that in oil wells gas is found which can be used locally, i.e., in the immediate vicinity of the well itself, though it has no market at any distance owing to the absence of pressure. To treat natural gas as Mr. Bain contends, as a product of oil, when he refers to the use in one letter of the expression "oil and its products," indicates, I think, a misunderstanding. "Products" is there used in the sense of artificial products or products resulting from manufacture. It is quite beside the question to enter into a discussion whether natural gas is produced from oil in nature's laboratories. The word "products" is used in no such sense.

The action fails and must be dismissed with costs.

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

RE WATKINS.

6 O. W. N. 421.

Distribution of Estates — Intestate Succession—Shares of Next of Kin Presumed to be Dead—Nephews and Nieces—Exclusion of Children of Nephews and Nieces.

A portion of an estate was realized and paid into Court. Upon an application for an order for payment out, a reference was made to the Registrar to ascertain the next of kin. The Registrar, in his report, distributed the fund *per stirpes* when he should have distributed it *per capita*. The errors of the Registrar being apparently overlooked an application was made for payment out:—

MIDDLETON, J. (in Chambers) *held*, that, the money having been paid out under the order, it was too late to correct these errors with reference to anything except the shares retained in Court.

Motion by nephews and nieces of Margaret Watkins, deceased, for payment out of Court of shares of a deceased sister and a deceased niece of Margaret Watkins.

HON. MR. JUSTICE MIDDLETON:—The intestate, Margaret Watkins, died on the 1st February, 1909. She left her surviving six nephews and nieces, who would be entitled to share equally in her estate. A portion of her estate being realized, the administrator paid it into Court and freed himself from liability. A motion was made before the Chief

Justice of the Common Pleas for an order for payment out of Court, and he referred it to the Registrar to ascertain who were the next of kin. The learned Registrar by his report distributed the fund not only among the nephews and nieces but included the children of deceased nephews and nieces, and made the distribution per stirpes and not per capita.

The Registrar, acting upon this theory, set apart one-fourth of the fund for Mrs. Keenan, a sister of the deceased, and one-eighth of the fund for Mary Jane Litle, one of two children of Mary McNulty, another sister. These two sums were not paid out of Court, as Mrs. Keenan had not been heard of for many years, and was, no doubt correctly, supposed to have died in Ireland. Her only daughter was last heard of in 1907, when lying ill in a hospital in Belfast, Ireland.

Mary Jane Litle was last heard of in 1895. She is supposed to have had two children. These children would not be entitled to share, being too remote.

Upon an application being made for payment out, the errors in the report of the learned Registrar were apparently ovelooked. It is now too late to correct these errors with reference to anything other than the shares retained in Court, the money having been paid out to the representatives of the deceased nephews and nieces. I thought it proper that notice should be sent to those who took under the former erroneous distribution, so that they might, if so advised, be represented. No one appeared upon the return of the motion except counsel for the Kinler Estate, representing the representatives of one branch of the family, who admit that the grand-nephews and grand-nieces cannot claim. A written statement was, however, sent in by Robert A. Starratt, claiming that the former distribution was correct. He was, of course, unaware of the decision of our Courts excluding under our Statute the representatives of deceased nephews and nieces. The matter is not now open for argument, and the distribution should, I think, be made as sought by the applicants.

Under the former distribution McFadden received more than his proper share, but counsel representing the other nephews and nieces do not ask that he should be now compelled to equalize. The order will, therefore, go as indicated.

Costs out of the fund.

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

REX v. NERO.

6 O. W. N. 420.

Liquor License Act—Magistrate's Conviction—Keeping Intoxicating Liquor for Sale—Evidence—Onus—Secs. 109 and 111 of Act—Presumption from Finding of Liquor, not in a Bar.

MIDDLETON, J. *held*, that sec. 111 of the Liquor License Act only applied to a finding of liquor in a bar or upon premises where there was a sign, a display indicating that liquor was for sale, and that, therefore, a conviction under the said section must be quashed where the bottles were found in the barn of the accused and where the only evidence of the intoxicating nature of their contents was the existence of seals on them.

Held, that sec. 109 of the Liquor License Act did not justify the raising of a presumption that liquor was for sale where it was not found in a bar.

Motion by the defendant for an order quashing a conviction of the defendant by a magistrate for having intoxicating liquors on his premises for sale, without having a license to sell, contrary to the Liquor License Act.

F. W. Griffith, K.C., for defendant.

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

HON. MR. JUSTICE MIDDLETON:—The motion was made before me on the return of the notice 24th April, for an order quashing the conviction. On that day, owing to some misunderstanding the Crown was not represented, nor were any papers returned. The papers have now been handed to me by Mr. Cartwright, who tells me that he agrees that the conviction cannot be supported.

The charge was having liquors for sale without a license. The only evidence was the finding of certain bottles containing beer, and certain bottles that had contained beer, in the barn of the accused. It was objected that there was no evidence that the liquor found was intoxicating and that there was no evidence to shew that the liquor, such as it was, was kept for sale. The magistrate held that the seals on the bottles were sufficient evidence of the intoxicating nature of the liquor contained and also held that the onus was upon the accused under sec. 111 of the Statute. The magistrate was quite wrong in holding that this section applies here. The section relates only to the finding of liquor in a bar or upon premises where there is a sign or a display indicating that liquor is for sale.

Section 109, also relied upon, has no application. That dispenses with proof of payment of money if the magistrate is satisfied that there was a transaction in the nature of a sale. Nowhere in the Statute is there found anything to justify the presumption that liquor is kept for sale merely from the finding of the liquor, unless found in a bar.

I find nothing to indicate the magistrate did not act in good faith; and so, while I quash the conviction and direct repayment of the fine and costs, I make an order for the protection of the magistrate, and give no costs of this motion

---

SECOND APPELLATE DIVISION. JUNE 15TH, 1914.

TOWNSHIP OF SANDWICH SOUTH v. TOWNSHIP OF MAIDSTONE.

6 O. W. N. 538.

Municipal Corporations—Drainage—Insufficiency of Drain—Improvement and Extension—Report of Engineer—Cost of Improvement—Assessment against Adjoining Townships—Costs and Damages in Action against one Township — "Surface Water"—Cut-off—Municipal Drainage Act, R. S. O. 1914 ch. 198, sec. 3, sub-sec. 6 — Spreading Excavated Earth on Township Line Road.

SUP. CT. ONT. (2nd App. Div.) *held*, that "surface water" does not cease to be such within the meaning of Municipal Drainage Act, R. S. O. (1914), c. 198, s. 3 (6) which provides that "any lands or roads from which the flow of surface water is by any drainage work cut off may be assessed and charged," etc., at the moment it reaches a drain forming part of a system of drains made to take care of such surface water, but that "if any part of such system proves insufficient, the water not so taken care of continues to be surface water within the meaning of the said sub-sec."

Held, that, since the work was necessary to cut off surface water within the meaning of the sub-sec. the cost was properly assessable against lands thereby protected.

Held, that the spreading on the town line of earth excavated from the drain constituted a necessary and proper part of the cost of the work, such item not being within sec. 11 of the Act.

Held, that defendant township was no more responsible than plaintiff township for insufficiency of drain the overflow of which caused damages aforesaid.

Appeal by the plaintiffs and cross-appeal by the defendants from a judgment of the Drainage Referee.

The appeal was heard by HON SIR WM. MULOCK, C.J.Ex., HON. MR. JUSTICE CLUTE, HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE LEITCH.

J. G. Kerr, for the plaintiffs.

J. H. Rodd, for the defendants.

HON. SIR WM. MULOCK, C.J.Ex.:—Appeal from a decision of the Drainage Referee. We are asked to set aside the report and assessment of James S. Laird, engineer of the township of Maidstone, in respect of a proposed improvement of the west town line and Mooney Creek drain.

The townships of Maidstone and Sandwich South adjoin each other and originally portions thereof, which may be referred to as the drainage area, were a swampy swale. Southerly, easterly and westerly of this area were higher lands from which surface water flowed in a northerly direction towards this swampy swale, thereby contributing to its swampy character, the water partly escaping therefrom by certain natural water courses into Big Pike Creek. Nevertheless, the drainage area remained in a condition calling for artificial drainage and work of this character has for many years been carried on under the provisions of the drainage laws.

Amongst such works was the contruction of a drain on the town line which runs northerly and southerly between the two townships. The Michigan Central Railway crosses this town line, and it was necessary to have a sufficient passage for water along this drain including the point where it was crossed by the railway. Accordingly at this point a culvert was put in as forming part of the town line drain construction work. This culvert was not in accordance with the engineer's report and proved insufficient.

Complaints as to the insufficiency continued for some years without bearing fruit. The waters obstructed by the insufficient culvert and probably also by the fact that for some distance north of the railway crossing the town line drain had become somewhat filled up, injured the lands of one Deehan, who brought an action under the Drainage Act against the township of Maidstone, and recovered a verdict of $200 and costs.

In his judgment the Drainage Referee says: "The culvert crossing the Michigan Central Railway is admittedly insufficient for the purpose intended, not being the culvert which was intended by the engineer who made his report, under which the town line drain was constructed. As a result of the insufficiency of the culvert the water brought down by the west town line drain to that point has been in part blocked, and thus, as I find upon the evidence, caused

to overflow on to the lands of Graves and from these on to the lands of the plaintiff," etc.

The learned Referee also in his judgment says: "In the event of the municipality deeming it necessary in order to prevent a continuation of damage to improve, extend or alter the town line drain work, it may add the damage and costs incurred in this action to the engineer's estimates of the costs of such improvements, extension or alteration."

In consequence of this judgment the township of Maidstone under the Drainage Act, instructed their engineer to report the scheme for remedying the defective condition of the west town line drain and for assessment of the cost. Thereupon the engineer made his report whereby he recommended that the town line drain be cleaned out and improved for a distance of 300 rods northerly of the railway, at an estimated cost of $1,467.87, this sum to include the sum of $80, the cost of spreading on the road earth to be taken from the drain, and he also added to the cost of the work the sum of $958.78, being the damages and costs in the Deehan case, making the total cost $2,426.65. This sum he recommended to be assessed as follows:

Against Maidstone Township because of benefit to roads	$442 80
Against Maidstone Township because of outlet for water from roads	186 55
Against Maidstone Township lots for improvement	23 65
Against Maidstone Township lots for benefit from outlet	1024 40
Making a total assessment against Maidstone and lots of Maidstone of	$1,677 40
Against Sandwich South because of benefit to roads	$358 85
Against Sandwich South because of outlet for water from roads	67 50
Against Sandwich South lots for improvement..	229 65
Against Sandwich South lots benefited by outlet	93 25
Making the total assessment against Sandwich South and lots in Sandwich South	$749.25

From this report the township of Sandwich South appealed to the learned Drainage Referee and evidence in support of and against the report was adduced before him, and on the 23rd of January, 1914, he gave judgment refusing to disturb the engineer's recommendations except as to the disposition of the amount of the judgment and costs in the case of Deehan v. Maidstone. As to those items, he ordered that the amount awarded for costs should be "chargeable against the lands and roads in the township of Maidstone alone."

From the Referee's judgment the township of Sandwich South appeals on the general ground that the report and assessment are illegal, unjust and excessive. The township of Maidstone cross-appeals because of the costs in the Deehan case being assessed exclusively against the lands and roads in Maidstone.

As to that part of the plaintiffs' appeal respecting the assessment of the cost of the work, Mr. Kerr very ably argued that in fixing the assessment the engineer should have taken into account the assessment in connection with the Tooney outlet and other assessments for other works in respect of the same drainage area, and contended that the lands in Sandwich South having already been assessed for cut off purposes were no longer assessable in respect of new works of a like nature.

The evidence shews that in about the year 1881 drainage works were begun; the first attack on natural conditions being to improve Tooney Creek, which was the natural outlet for the swale district. Then followed the construction on the east side of the town line of a drain which intercepted some water from the higher level on its way down to the swale, thereby furnishing an artificial outlet northerly to Pike Creek. This work, so far as it was effective, operated as a cut off in respect of the lands on the west side of the town line drain and to that extent relieved the Tooney Creek drain. From time to time other drains were constructed whereby surface water was conducted to the town line drain. These various side drains diverted into the town line drain waters from higher levels which but for the town line drain would have flowed into the swale and upon the lands on the north-westerly side of the town line.

Further these various side drains accelerated the flow of water into the town line drain and silt having there accumulated it was deemed advisable to clean out and deepen the town line drain; otherwise it might prove insufficient to take care of all the water, in which event there might be an overflow across the town line and upon the lands of lower level.

Accordingly the work in question was undertaken. It consisted of cleaning out the west town line drain for a distance of 300 rods and deepening and otherwise improving it in order to benefit the drainage area in question.

Mr. Kerr strongly contended that the improvement in question took care of the artificial flow only and not as a cut-off of surface water within the meaning of sub-sec. 6 of sec. 3 of the Municipal Drainage Act, R. S. O. 1914, ch. 198; that sub-sec. is as follows: "Any lands or roads from which the flow of surface water is by any drainage work cut off may be assessed and charged," etc. I do not think that surface water has ceased to be "surface water" within the meaning of this section the moment it reaches a drain which is but one part of a system of drains constructed for the purpose of taking care of such surface water. If any part of such system proves insufficient the water not so taken care of continues to be surface water within the meaning of the sub-sec.

That is the position here. The evidence justifies the improvement of the town line drain as a necessary work in order to cut off the surface water and thereby prevent it overflowing upon the lands in South Sandwich.

Therefore, the work in my opinion serves as a cut off of surface water within the meaning of the sub-section and the cost is properly assessable against the lands thereby protected.

Mr. Kerr attacked the item of $80 for spreading on the town line the earth excavated from the drain in connection with its improvement. For all that appears the spreading of the earth upon the road is the cheapest way of getting rid of it. Further its utilization in that manner improved the road by raising the grade upon the water level in the drain and by widening it, whereby it is less dangerous. Thus it constitutes a necessary and proper part of the cost of the work and the item is properly included in such cost. The

facts respecting the item did not bring it within sec. 11 of the Drainage Act.

I have carefully studied the evidence and the report of the engineer and am unable to see wherein that officer has disregarded the requirements of the Statute in respect of his assessment of the sum of $1,467.87, being the estimated actual cost of the work.

The remaining question is in regard to the costs and damages in the Deehan case.

That action was against the township of Maidstone alone, and in his judgment the learned Referee said: "In the event of the municipality deeming it necessary in order to prevent a continuance of damage, to improve, extend or alter the town line drainage work it may add the damages and costs incurred in this action to the engineers' estimate of the costs of such improvements, extension or alteration. I assume that any engineer instructed will not overlook the fact that these damages and costs have been occasioned by reason of the insufficiency of the outlet of a drainage work provided for the benefit of lands higher upstream than those of the plaintiff."

It further appears from that judgment that two conflicting views then existed as to the proper remedy for the condition then complained of, the Municipal Council of Maidstone taking the view that the improvement of the culvert under the railway crossing would meet the requirements of the case, whilst the plaintiff's engineer and others thought that the improvement of the drain northerly from the railway was necessary. The council was at that time negotiating with the railway to improve the culvert and the learned referee approved of their efforts and for that reason did not see fit to penalize the township of Maidstone with the costs of that action, but disposed of them in the manner set forth in the foregoing extract from his judgment.

The Council appear to have reached the conclusion that in order to prevent a continuance of the damage, it was necessary to adopt the alternative plan of cleaning out and enlarging the town line drain, and in reaching that decision they had before them the judgment of the learned Referee that the costs and damages might be added to the cost of the work.

The township of Sandwich South was not a party to that action and may properly be held as not bound by the disposition there proposed to be made of the damages and costs, and the whole matter is now before us and must be dealt with as *res integra.*

Nevertheless I feel that the proper disposition to make of these damages and costs is in accordance with the view expressed by the Referee in his judgment in the Deehan case, by permitting the township of Maidstone to have them added to the engineer's estimated cost of the work.

It is obvious that the cleaning and enlargement of the town line drain was necessary in order to bring about a satisfactory solution of the question in issue, and that the township of Maidstone was no more responsible than was the township of Sandwich South for its proving insufficient to take care of all the water.

For these reasons the appeal should be dismissed with costs, and the cross-appeal allowed with costs.

HON. MR. JUSTICE CLUTE, HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE LEITCH, agreed.

HON. MR. JUSTICE BRITTON. JUNE 22ND, 1914.

KEANE v. McINTOSH.

6 O. W. N. 650.

Mortgage—Power of Sale—Action to Set Aside Sale—Alleged Conspiracy—Service of Notice on Tenant—Duty to Notify Mortgagor—Suspicious Circumstances — Sale at Undervalue—Rent—Surplus Proceeds—Costs.

BRITTON, J., *held*, that a tenant of a mortgaged property is not bound to notify the mortgagor of the service of a notice of exercising the power of sale upon him, even though he is fully cognizant of the mortgagor's whereabouts.

That the existence of suspicious circumstances surrounding the sale and the fact that the property was sold at an undervalue are not in themselves sufficient to invalidate the sale.

Action by a mortgagor to set aside a sale under the power in the mortgage and for damages on the ground that the sale was at a gross undervalue in pursuance of a fraudulent con-

spiracy between the mortgagee and the purchasers, tenants of the mortgagor.

Tried at Stratford without a jury.

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

F. R. Blewett, K.C., for defendant, Helen McIntosh.

L. Harstone, for defendant, Janet Hardy.

R. T. Harding, for defendants, James Keane and Bridget Keane.

HON. MR. JUSTICE BRITTON:—The plaintiff was the owner of the east half of lot 5 east of the Oxford Road in the township of Downie subject to a mortgage to the defendant Helen McIntosh which mortgage is dated the 4th day of March, 1908, and was for $1,000 payable in 5 years after date with interest at 6 per cent. per annum. The mortgage fell due on the 4th day of March, 1913; the plaintiff paid all interest up to said due date, and he alleges that he arranged with Helen McIntosh, through her brother, L. Sutherland, for an extension of the time for payment of principal, and that he then left Ontario and went to Port Huron in Michigan. He was at this place for a time and then went to other places in the State of Michigan, but alleges that at all times he was within easy reach by mail and could at any time upon notice have gone to Stratford, reaching there a few hours after.

On or about the same day the mortgage fell due the plain tiff rented the farm to his brother, the defendant James Keane. He, with his wife, went into possession of and worked the farm.

The plaintiff alleges that he left his address with the defendants James Keane and Bridget Keane and that his address was well known to the defendants and to others in the vicinity of plaintiff's farm.

The plaintiff further alleges that during the summer of 1913 his brother and the defendant Bridget Keane conspired together and with the said E. L. Sutherland, agent of Helen McIntosh, to have the farm sold so that the defendants James and Bridget Keane or one of them should purchase and hold plaintiff's land.

Proceedings were taken by defendant McIntosh under power of sale in her mortgage, and the property was, on the 31st day of August, 1913, put up for sale at auction at the

city of Stratford and sold to the defendant Bridget Keane for the sum of $1,400. The plaintiff says that the defendants Keane and his wife and E. L. Sutherland conspired together to dissuade and discourage others from bidding on this farm on the pretence that the Keanes desired to purchase for the plaintiff, and the plaintiff says that the three mentioned did in fact persuade others not to bid on the property.

On the 5th September the defendant McIntosh executed to Bridget Keane under the power of sale in the mortgage a conveyance of the land mentioned. Notice of exercising the power of sale in the mortgage is dated the 29th July, 1913.

The defendants James and Bridget Keane apparently had little money and they borrowed from the defendant Janet Hardy the sum of $1,600, and on the 2nd of September, they executed to Janet Hardy a mortgage for that sum. It is alleged, however, that out of the $1,600 the defendant Bridget Keane paid the mother of her husband and of the plaintiff the sum of $300 for a release of her dower. The whole circumstances are of an exceedingly suspicious character and not the least of them is the transaction about the release of dower. Mrs. Keane the elder, was of about the age of 74, and she died before plaintiff's return to Ontario.

She had made no claim for dower out of this property and was residing with and maintained by James Keane and Bridget Keane, so that the payment of this $300, if made at all, was practically the same as paying the money to themselves.

It appeared at the trial that there was a surplus of $274.04 in the hands of the defendant Helen McIntosh after paying the amount in full for principal and interest upon the mortgage and costs of sale proceedings.

At the trial, the plaintiff abandoned his action against Janet Hardy. She was a mortgagee in good faith, and the action against her must be dismissed with costs.

I find that the farm was actually worth $2,500 and would have sold, and would now sell for that sum if the usual notice of proceedings was given and if sold for say one-third cash and balance secured by mortgage carrying interest at 6 per cent. making the mortgage as good as cash.

As I have said the circumstances are of a suspicious character, but I am unable, upon the evidence, to find that there was any conspiracy to sell without notice to the plain-

tiff or that there was any representation to intending purchasers that this property was being bought in by the defendants James and Bridget Keane for the benefit of the plaintiff.

The defendant Helen McIntosh had her business managed by her brother, E. L. Sutherland. He did not think the property of so great value as was proved at the trial, and as there was an outstanding dower he thought strangers would be, on that account, deterred to a greater extent than necessary, from purchasing. The defendant Helen McIntosh is not liable in damages for sacrificing the property.

I am of opinion, and so find, that both James Keane and Bridget Keane knew the post office address of the plaintiff and that they wilfully and intentionally withheld from Sutherland and Helen McIntosh and others any information as to where plaintiff could be found. That, however, does not create a liability against them or either of them. They were not bound to disclose the place of residence of the plaintiff or where he could be found. They were not obliged to inform the plaintiff of the notice of exercising the power of sale under this mortgage.

This case does not fall within the provisions of the Act respecting landlord and tenant, which compels the tenant to give notice to his landlord of the service of any writ served upon the tenant for the recovery of the land demised. It is very close to the line as the same reason exists for giving notice of a notice of exercising a power of sale under a mortgage as in the case of the service of a writ. The sufficiency of the notice in this case was not attacked at the trial, although only served by posting up and delivering a copy to the defendant James Keane on the 7th August.

The lease from plaintiff to defendant James Keane is dated the 1st March, 1913, and is for one year from 10th March. The rent reserved was $100, and lessee to pay taxes, to repair, etc. The lessee retained possession, it was not given to him by the mortgage and he is liable to the plaintiff for the rent.

The defendant Helen McIntosh received a return from her solicitor on or about the 9th October. It was a cheque or cheques for $274.04. She deposited the money in the Royal Bank, but did not attempt to find the plaintiff or give any notice. The money was deposited in trust; and upon

[illegible]

the inside cover it is said to be in trust, not for the plaintiff, but for one Michael Keane. The costs charged and deducted from the purchase money are put at $90, with no bill in detail.

Counsel for the plaintiff did not ask for taxation. The whole dealing with this mortgage and sale of plaintiff's property to the defendant Bridget Keane were most summary, and the plaintiff has suffered damages to the extent of nearly, if not quite, $1,500.

I regret that I am not able upon the law and facts to give the plaintiff more adequate redress.

There will be judgment against James Keane for the rent $100, with interest at five per cent. from the 1st March, 1914. Judgment against Keane will be with costs on the County Court scale with no set-off of costs.

Judgment against Helen McIntosh for $274.04 with interest from 1st November, 1913, at 5 per cent. and without costs.

Judgment in favour of Janet Hardy as above stated.

The action will be dismissed as against Bridget Keane without costs.

Twenty days' stay.

HON. R. M. MEREDITH, C.J.C.P. JUNE 8TH, 1914.

BRETT v. GODFREY.

6 O. W. N. 484.

Vendor and Purchaser—Agreement for Sale of Land—Writing Evidencing Completed Bargain—Finding of Fact—Inability of Vendor to Make Title—Knowledge of Purchaser — Absence of Deceit—Damages for Breach of Contract—Limitation to Amount of Expense Incurred by Purchaser — Recovery of Small Sum—Costs—Discretion.

MEREDITH, C.J., *held*, where a person entered into a contract for the sale of land, knowing that he had no title, but honestly believing, though mistakenly, that he could obtain title, that the purchaser could in the absence of deceit on the part of vendor only recover damages for the expenses incurred, and not for the loss of the bargain.

Ontario Asphalt Block Co. v. *Montreuil*, 29 O. L. R. 534, followed.

Action for specific performance of an agreement for the sale by the defendant to the plaintiff of certain lands in the city of Toronto, and for damages for breach of contract.

J. M. Ferguson, for the plaintiff.

Armour A. Miller, for the defendant.

HON. R. M. MEREDITH, C.J.C.P.:—The much greater weight of the testimony, and of the evidence, is on the plaintiff's side of this action; the witnesses are two to one in his favour, and the admitted circumstances surrounding the transaction are quite strong against the defendant's contention; the one circumstance favouring him—the retention by him of the contract in question, is, not unreasonably, explained in the testimony of the plaintiff, and of the land agent, through whom the transaction took place, and who has now no pecuniary interest in the matter; whilst the facts of the execution of the contract and the payment of the deposit to be made under its terms, as well as other circumstances, making strongly against the defendant's contention, have not been satisfactorily explained by him, and no other person testified in his behalf; so it cannot but be found that the written agreement in question was intended to be and comprised a completed and binding bargain between the parties and that it was not merely an escrow; and I so find.

And so the single substantial question now involved in the action is: What is the proper measure of damages? The exception applicable to cases of sale of land, from the usual rule respecting damages for breach of a contract of sale, which is exemplified and fully discussed, in such cases as *Bain* v. *Fothergill,* L. R. 7 H. L. 158, is one which, having regard to the intricacies of title to lands in many cases, and to other exceptional circumstances attending the sale and conveyance of land seems to me to have been not only a permissible one, but also, for practical purposes, a necessary one; the only doubt raised in my mind upon this subject is whether the exceptions from the exception have gone far enough; whether, for instance, they ought not to include such a case as this. But they do not; it is within the exception to the rule, and is plainly covered by the decision by, and the opinions expressed in, the case of *Bain* v. *Fothergill, supra,* which firmly established this rule, that if a person enter into a contract for the sale of land, knowing that he has no title to it, or any means of acquiring title, the purchaser cannot recover damages for loss of his bargain, unless he can prove a right of action for deceit. To quite the same effect is the latest case, upon the subject, in this Court: *Ontario Asphalt Block Co.* v. *Montreuil,* 29 O. L. R. 534.

There is no allegation or proof of deceit; the purchaser knew that the title was in a land company, not in the vendor,

who was but a shareholder and a director of the company, entitled substantially to one-fifth only of the 300 feet of land out of which the 60 feet in question were to be sold; and who seems to have believed when the agreement to sell was made, that his fellow-directors would be willing to join with him in giving a valid conveyance; which, according to his testimony, they afterwards refused to do.

Though one may be somewhat suspicious of a statement that the vendor did all that he could do to procure for his purchaser title to the land sold, there is not sufficient evidence upon which to base a finding that it was in his power to do so, but that he abstained for the purpose of making more out of the land, or for any other deceitful purpose.

The plaintiff's damages are therefore limited to the amount of the expenses incurred by him in the transaction; which I assess at $10.

There will be judgment for the plaintiff and $10 damages, with costs of action upon the Supreme Court scale without any set off of costs. I exercise my discretion, in that respect, not because the plaintiff cannot have damages for loss of his bargain, though in some cases that circumstance does not seem to have been altogether without weight in dealing with the question of costs, but because I think the defendant might have found some means, not involved in a legal right, by which he might have kept his bargain unbroken, and that the additional price obtainable and afterwards obtained for the land by him, as well as by the other four persons interested in it, at least was not an inducement to him to apply as fully as he might such means. Out of the additional $300 received by him, and which was one of the consequences of his breach of contract, he can doubtless pay these costs and yet have some of the money to the good.

HON. MR. JUSTICE KELLY. JULY 8TH, 1914.

RE NEAL & TOWN OF PORT HOPE.

6 O. W. N. 701.

Municipal Corporation—Arbitration and Award—Closing of Highway —Injury to Neighbouring Lands — Construction of Railway— Benefit from—Refusal to Consider—"Contemplated Work"— Meaning of—Municipal Act, 1913, s. 325—Non-retroactivity— Evidence — Damage beyond that Suffered by Public — Award Sustained.

KELLY, J., *held*, that where a town closed a portion of a street to facilitate railway improvements, it was only the advantage that property-owners would receive from the act of the municipality that arbitrators could set-off against damages sustained by reason of such act.

Brown v. *Owen Sound*, 14 O. L. R. 627, followed.

That an owner suffers damage by the closing of a highway above that suffered by the rest of the public where his property is in such close proximity to the highway that its value is affected thereby.

Re Taylor v. *Belle River*, 15 O. W. R. 733; 17 O. W. R. 815, followed.

[Cf. *McArthur* v. *R.*, 34 S. C. R. 570.—*Ed.*]

Appeal by the corporation of the town of Port Hope from an award made by His Honour John E. Harding and His Honour Edward C. S. Huycke, two of three arbitrators, allowing the respondents $900 as compensation for damages occasioned to their property by the closing of Hope street in the town of Port Hope.

J. G. Smith and D. H. Chisholm, for the town.

W. F. Kerr for E. B. Neal and Eliza Jane Neal.

HON. MR. JUSTICE KELLY:—Part of respondents' property fronts on Hope street, part on Alfred street, which runs into Hope street, and part on Walnut street, which runs into Alfred street. These are the properties in respect of which the two arbitrators awarded damages. Lots 8, 9 and 10 fronting on the west side of Ontario street, also owned by the respondents, these arbitrators find were not damaged by the closing of Hope street. The other arbitrator disagreed with the conclusions of his co-arbiters and made a separate finding that no compensation should be made and no damages paid by the corporation to the owners.

By-law number 1,038 passed by the Municipal Council on June 26th, 1911, provided for the closing of that

portion of Hope street lying fifty feet on each side of the centre line of the Canadian Northern Ontario Railway, as located across that street. Hope street runs in a northerly and southerly direction, the part of it so provided to be closed being south of the respondents' property, and the main or central part of the town being still further to the south. Another means of access from plaintiff's property to the centre of the town was provided by the opening of Helm street from Hope street to Ontario street, a short distance to the north of the part of Hope street so closed. The corporation on 10th May, 1910, entered into an agreement with the Canadian Northern Ontario Railway Co., by which they agreed, amongst other things, to permanently close Hope street at the point and to the extent above indicated.

The present proceedings were instituted on 24th June, 1912, by the appointment by the owners of His Honour Judge Huycke as their arbitrator under the provision of the Municipal Act of 1903. I have no evidence of the date of the appointment of the town's arbitrator; but the third arbitrator, His Honour Judge Harding, was appointed by order of the Senior County Court Judge of the united counties of Northumberland and Durham on 8th October, 1913. The award of the two arbitrators was made on 24th January, 1914, and that of the other arbitrator on 12th February, 1914.

Substantially the gounds of appeal are that the two arbitrators did not take into consideration in making their award any advantage which the owners derived from the building and construction of the Canadian Northern Railway "and the other work for the purpose and in connection with which the land in question was alleged to be injuriously affected;" that these arbitrators refused to take into consideration the provisions of sec. 325 of the Municipal Act of 1913—(3 & 4 Geo. V., ch. 43); that upon the evidence it was manifest that the owners suffered no damage by the closing of Hope street, and that the evidence shewed that the owners were not injured to any greater extent or in any different manner than the general public in the vicinity of their property.

The Municipal Act of 1913 came into force on July 1st, 1913. The by-law which provided for the closing of Hope

street was passed and these arbitration proceedings were instituted not only before that Act came into force, but before it was passed. The appellants contend that they are entitled to invoke the Act of 1913, and to rely on sec. 325 thereof.

Without going into what would be the effect of the application of that section to these proceedings and to the award of these two arbitrators, I think the proceedings are properly under the former Act. To hold otherwise would be opposed to the fundamental rule of English law that no statute shall be construed so as to have a retrospective operation, unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication. A statute is not to be construed so as to have greater retrospective operation than its language renders necessary. The advantage which the appellants contend inured to the owners' property is not anything arising from the mere closing of the street, but from the advent of the railway and the changes incident thereto. But the "contemplated work," the advantage of which is to be considered by the arbitrators, is the work of the corporation alone (*Brown* v. *Owen Sound,* 14 O. L. R. 627), and not other advantages to accrue to the property by reason of whatever changes or improvements the railway company did or made, or which result from the advent of the railway to that locality.

I have read all of the lengthy evidence taken before the arbitrators and on it the two arbitrators whose award is now appealed against were, in my opinion, quite correct in coming to the conclusion they reached. From a perusal of the evidence, a fair conclusion is that the respondents' property was injuriously affected. The arbitrators had the added advantage of having the witnesses before them.

The gist of the objection to the award on the part of the other arbitrator is that the two arbitrators refused to take into consideration any advantage which the owners might have derived from the construction of the railway, which he stated his opinion to be "was the work for the purpose or in connection with which the land was injuriously affected." That, as I have said, does not, in my opinion, enter into the merits of the case.

In *Brown* v. *Owen Sound* (*supra*), the closing of the road which injuriously affected the property of the owner was part of a scheme for granting facilities to a lumber company, and the owner was held entitled to compensation without any diminution because the erection of the company's mill enhanced the value of his lands. It is seldom that any two cases, in their facts and circumstances, so nearly resemble each other, as *Brown* v. *Owen Sound* and the present case.

The question which the arbitrators had to consider was whether there was a diminution in the value of the respondents' lands consequent upon the closing of Hope Street. Evidence was particularly directed to that very fact—evidence which established that the owners suffered in their property, not as part of the public, but in a special way, because of their ownership of these lands. Mr. McGill, who for several years held the position of assessor for the appellants, and was engaged by them to prepare their case in these proceedings and gave evidence on their behalf, puts it this way:

Q. You do consider the closing of Hope Street was a distinct disadvantage to the people on it? A. No; if no benefit.

Q. The closing of Hope Street itself, distinct? A. Without any countervailing elements.

Q. I am eliminating countervailing elements. A. I can't separate them. I have to associate them together. If that street was closed, there was no railway and the canning factory down here, certainly it would be a damage.

As touching upon the loss to the particular owner, as distinguished from the injury to the public, the statement of Lord Penzance in *Metropolitan Board of Works* v. *McCarthy* (1874), L. R. 7 H. L. 243, is in point: "The question then is, whether when a highway is obstructed, the owners of those lands which are situated in a sufficient degree of proximity to it to be depreciated in value by the loss of that access along the highway which they previously enjoyed suffered especial damage 'more than' and 'beyond' the rest of the public. It surely cannot be doubted but that they do."

The same question was considered in *Re Taylor* v. *Belle River* (1910), 15 O. W. R. 733, where Sir William Mulock,

C.J., held that the owner suffered damage by the closing of a highway which, owing to the proximity of her property to it, enhanced the value of that property and the closing of the highway depreciated the value. This case was cited with approval in the judgment of the Appellate Division in *O'Neil* v. *Harper*, 28 O. L. R. 635.

My conclusion is that the two arbitrators were justified by the evidence in making their award, and in that view the appeal should be dismissed, with costs.

HON. MR. JUSTICE LENNOX. JULY 6TH, 1914

SOPER v. CITY OF WINDSOR.

6 O. W. N. 697.

Limitation of Actions—Possession of Lands—Evidence—Purchaser at Tax Sale—Insufficiency of mere Claim or Entry—Declaration of Title—Trespass—Injunction—Damages—Reference.

LENNOX, J., in an action for a declaration of title by a possessory owner, *held*, that on the evidence, plaintiff was entitled to the declaration sought.

That a mere entry on the land in assertion of title by the true owner is insufficient, for there must be something done that amounts to a resumption of possession.

Baker v. *Coombes*, 9 C. B. 714, referred to.

Action for a declaration of the plaintiff's title to land in the city of Windsor and for an injunction and damages in respect of the defendant's entries and trespasses thereon, the defendants setting up title under a tax sale.

D. L. McCarthy, K.C., and A. H. Foster, for plaintiffs.

J. H. Rodd, for defendants.

HON. MR. JUSTICE LENNOX:—The action was brought by Abram S. Soper. I added his wife as a party plaintiff. I do not know that this was necessary, as upon the terms upon which the plaintiffs were living, I think the possession might well be attributed to the husband.

The plaintiffs have established "open, obvious, exclusive and continuous" possession of the land in question, of the character required to defeat the defendants' claim under the Limitations Act, R. S. O. (1914), ch. 75, for a period of twenty-five years or more; and, subject to the trespasses of

the defendants in this action complained of, this has been continued down to the time of the issue of the writ. It is true that, as to the rear part of the land which they acquired by deed, and, as is true of the back portion of nearly every city lot, the plaintiffs were not able to make any actual use of the land in winter time, but it was fenced in, and was resting, mellowing and renewing its life for the plaintiffs from winter to winter, it was never abandoned by the plaintiffs, it was ploughed and cultivated and cropped or pastured from year to year, the fences were renewed, repaired and kept up from time to time in the ordinary way of ownership, "everything was done upon the land that an owner not residing upon it would do in reaping the full benefit of it," and but for the opinion expressed in *Coffin* v. *North American Land Co.* (1891), 21 O. R. 80, now overruled, I would not have thought that it was reasonably open to argument that a distinction could be drawn between the winter and the summer months. The point is set at rest at all events in favour of the plaintiffs by the Court of Appeal in *Piper* v. *Stevenson* (1913), 28 O. L. R. 379.

This point being settled, it is not disputed that the possession of the plaintiffs from the time they enclosed the land, about 1888, until Mrs. Brown intervened was visible, notorious, adverse, continuous, and unchallenged; and, with the land constantly fenced in and cropped or pastured, and used and enjoyed by the plaintiffs as ostensible owners, there was to the registered owner, as there was, upon the evidence, to everybody living in the neighbourhood, "the plainest evidence of wrongful possession . . . calling for action on the owner's part, if he desired to save his rights," as was pointed out by Meredith, C.J.C.P., in the Piper case.

The defendants set up ownership of the property by registered title, but, in considering what inference should be drawn or presumptions raised in their favour, it is worth while to keep in mind that they are not registered owners by a chain of title from the Crown, there is no link uniting them with "the true owner" whom the defendants dispossessed, and they have never been in possession, nor has any person under whom they claim been in possession at any time, except in so far as the defendants may be said to derive title through the plaintiffs.

And the defendants have the plaintiffs' title or they have nothing. It was the plaintiff's title, not the title traceable

back to the Crown, that the defendants' grantor bought at the tax sale on the 21st December, 1900, for whatever the contention may be as to the character of the occupation after 1906, it is not denied that from about 1888 down to the time of the tax sale in December, 1900, the true owner was absolutely shut out and the plaintiffs were in undisputed enjoyment and possession of the land in question. Whether they paid the taxes or not is immaterial. In *Iredale* v. *London,* 20 S. C. R. 313, the occupant of a room for the statutory period acquired title to it, although he not only failed to pay the taxes, but from time to time as they were delivered, sent on the tax bills to the true owners, thus, as might be said, recognizing the ownership of the parties claiming by deed. The legal result is that at the end of the first ten years of this possessory period, and probably two years before the date of the tax sale, the title of the true owner was extinguished by sec. 16 of the Limitations Act, and under sec. 5, sub-sec. 3 of sec. 6, and sec. 16 of this Act, the plaintiffs became, if not to all intents and purposes, at all events for all practical purposes, the owners; and, upon the authority of many cases, and, as I think, according to the correct interpretation of the statute, although there are cases to the contrary, they obtained a statutory conveyance of the land in question. This latter point is not perhaps very material, except in view of the plaintiffs' claim for a declaration of title; but some authorities will be found collected in Halsbury's Laws of England, vol. 19, p. 155—notes to par. 316.

The plaintiffs would be entitled to redeem. R. S. O. ch. 195, sec. 170. They could maintain an action for trespass. *Bentley* v. *Pippard,* 33 S. C. R. 144. They could, even while the time was running, dispose of the land by will, or deed, and it was inheritable by their heirs—that is, their right, I presume—Halsbury's Laws of England, p. 158, par. 320. Their title when the tax sale was made was good at law and in equity, and could be enforced upon a reluctant purchaser. *Scott* v. *Nixon* (1843), 3 Dr. & War. 388; *Lethbridge* v. *Kirkman* (1855), 25 L. J. Q. B. 89. Of course, like any other owners, their land was liable to be wrested from them by non-payment of taxes, followed by dispossession, before they became reinstated by purchaser's delay.

The plaintiffs did not cease to be the owners by reason merely of the tax sale. The municipality did not profess

to transfer the possession to the tax purchaser and the deed while conferring a fee simple estate, left it for the grantee to complete his title by obtaining possession. Has anything happened since to complete the defendant's title?

The plaintiffs remained in possession after the sale as before. The evidence of the plaintiffs and their witnesses is, to my mind, clear and satisfactory as to this, and is, I think, much more definite and reliable than the statements made by Mrs. Brown and members of her family. I am satisfied that the cattle were not pastured on the property until after Mrs. Brown had ceased to make payments, after she had, as Palling swears, relinquished the property, and after, Palling, acting on this, had sold and conveyed to the defendants. The defendants cannot claim under Mrs. Brown, nor can she be regarded as in possession for them. What she did was adverse to the defendants. If she was not using the land, as Mrs. Soper swears, with the consent of the plaintiffs, she was a mere casual trespasser, and the plaintiffs are entitled to count Mrs. Brown's occupation, of whatever character it was, with their own to complete the statutory period. *Goodey* v. *Carter* (1847), 9 U. C. L. 863; *Myres* v. *Ruport*, 8 O. L. R. 668; *Kipp* v. *Synod of Toronto*, 33 U. C. R. 220. But before the sale of the property to the defendants, and, as I presume, while the agreement between her and Palling was current, Mrs. Brown did something, and at this time her acts, if sufficient in themselves, would enure to the benefit of Palling and so to the defendants. A mere entry upon the land, however, in assertion of title, or even repeated entries, is not enough. There must be something done that "amounts to a resumption of possession by the true owner." *Baker* v. *Coombes* (1850), 9 C. B. 714; *Randall* v. *Stevens* (1853), 2 E. & B. 641; *Allen* v. *England* (1862), 3 F. & F. 49; *Thorp* v. *Facey* (1866), 35 L. J. C. P. 349; *Warrasam* v. *Vandenbrande* (1868), 17 W. R. 53; *Solling* v. *Broughton*, [1893] A. C. 556, P. C.

Mrs. Brown put up two or three notices of some kind somewhere upon or near the land in question; they were promptly removed by the plaintiffs, and she then relapsed into quiescence. This is clearly not enough to arrest the operation of the statute. The statute is specific in stating that no mere "entry or continual claim" will preserve the right of action. And there is nothing else. Palling, the

tax purchaser, says he did nothing whatever, and he could not controvert the statements of the plaintiffs and their witnesses.

Breaks in the possession are not fatal, so long as the true owner does not in consequence resume possession. *McLaren* v. *Murphy,* 19 U. C. R. 609.

Mr. Rodd refers to *McMann* v. *Grand Trunk Rw. Co.,* 12 O. W. R. 324, and contends that, as the plaintiffs' rights must still depend upon the fiction of a lost grant, they could not acquire title, as the defendants have only power to convey for specific purposes which can have no application here.

Leaving out of the question the obvious circumstance that our statute aims at the "extinguishment," rather than the creation of a title, the answer is plain enough, namely: that there is no question of a grant here from the defendants, they would not in any event be the grantors, for they did not acquire title until 1910—it is not a question of what they are presumed to have conveyed away, but what title they obtained and what they have done to preserve and perfect it.

I have no doubt at all that the plaintiffs have acquired a title to possession and enjoyment as against the original owners and the defendants, but they ask for a declaration of title, an injunction and damages. The state of the title at the time the adverse possession began has been shewn. The parties ousted were owners in fee. The conveyance at the tax sale was of a fee. There are, therefore, no outstanding estates in remainder to vest at a later date. In Halsbury's Laws of England, vol. 19, at p. 155, par. 316, it is said: "The operation of the statute is merely negative, it extinguishes the right of the dispossessed owner and leaves the occupant with a title gained by the fact of possession resting on the infirmity of the right of others to eject him." But he is clearly entitled to be protected against the aggression of others who seek to disturb him, including a former owner who has lost his title by laches. I have come to the conclusion, though not without some hesitation, that the plaintiffs are entitled to all the relief claimed.

There will be judgment declaring that the plaintiffs are owners in fee of the land in question, for an injunction restraining the defendants from entering upon or interfering with this land, a reference to the Local Master at Sandwich

to ascertain and assess the damages sustained by the plaintiffs and judgment thereon.

The plaintiffs will have the costs of the action and reference.

Stay of execution for thirty days.

References: *Lloyd* v. *Henderson,* 25 C. P. 253; *Brooke* v. *Gibson,* 27 O. R. 218; *McConaghy* v. *Denmark,* 4 S. C. R. 609; *Sherren* v. *Pearson,* 14 S. C. R. 585; *Nixon* v. *Walsh,* 19 O. W. R. 422; *Griffiths v. Brown,* 5 A. R. 303; *Rooney* v. *Petry,* 3 O. W. N. 113; and *Donovan* v. *Herbert,* 4 O. R. 635.

HON. MR. JUSTICE LENNOX. JULY 6TH, 1914.

STEERS v. HOWARD.

6 O. W. N. 708.

Fraud and Misrepresentation—Option Agreement on Land—Fraudulent Acceptance—Deceit Practised on Purchaser—Liability to Account—Purchaser for Value without Notice.

LENNOX, J., *held,* that where holders of an option on plaintiff's farm, learning that plaintiff had procured a purchaser at an advance in price, fraudulently assumed to take up the option and dealt with the purchaser direct, that they were liable to account to the plaintiff for all profits so made.

Action for $7,250, being part of the sale price of plaintiff's farm alleged to have been obtained from the plaintiff by fraud.

J. H. Rodd, for plaintiff.

D. L. McCarthy, K.C., for Howard and Bates.

Geo. Urquhart, for the company.

M. Sheppard, for Reid.

HON. MR. JUSTICE LENNOX:—Throughout the transaction giving rise to this action the defendants Howard and Bates were guilty of flagrant dishonesty and bad faith. The same is true of Reid after he became connected with it.

The plaintiff was the owner of a farm, coveted by the subdividers, in the township of Sandwich West, and Howard and Bates obtained an option on it, to be good for 2 months from about the beginning of May, 1913, at $20,000. They man-

aged to hoodwink the plaintiff in some way, and got him to sign an option for 90 days upon an agreement for 2 months, but although they finally acknowledged this, and repeatedly promised to make it right, they never did. They hung on to the option as it was and prevented the plaintiff from dealing with the property until he was induced to give them another option good until the 8th of September, 1913, but containing the following proviso, namely: "The party of the first part (the plaintiff) reserves the right during the life of this option to sell the property before the option is accepted, but the price at which he can sell is to be not less than $22,000, and if he should sell at that price the parties of the second part are to be refunded the sum of $750, which amount they have paid to the party of the first part."

The effect of this second option was that if these defendants were not able to take up their option, but the plaintiff effected a sale within the 2 months, the defendants, while failing to secure the profits they hoped to make, secured control of the plaintiff's property, in all for 4 months, and would have all they deposited returned to them. Howard and Bates of course had no way of handling the property except by finding a purchaser at upwards of $20,000 and financing this money to take up the option. They were in effect the plaintiff's agents for a time limited and at a fixed price—the margin beyond $22,750 being their field of profit. To exercise the option $2,750 had to be paid in cash. It was more to their advantage to have the plaintiff sell at $22,000 than to effect a sale themselves below $20,750. After a time and during the currency of the option, parties who ultimately became the defendant company got into communication with the plaintiff and were ready to purchase at $28,000 as soon as they could make financial arrangements for the first payment. The plaintiff desired a down payment of $6,000, but it was well understood that $5,000 would not be refused. There were details to be arranged, but these were not regarded as possible impediments, and practically an agreement, though not binding the parties or in writing, was come to, to be consummated as soon as the company's financial arrangements were completed. Meanwhile Howard and Bates had tried to carry out their plans and had lost hope of succeeding. They were getting anxious about their money, and, communicating with the plaintiff, were informed of his prospects, but not of the names of the prospective purchasers. Despairing of making

profits they became anxious to at least secure the return of the money they had paid out and frequently urged the plaintiff to complete the sale quickly, and, of course, it was important to them that this would be accomplished before the expiry of the option. This is how the matter stood on the 7th of August.

The plaintiff and his wife were from home on the 7th of August and when they returned that evening they found that the representatives of the defendant company, Jones and Jenks, had been at the house to see the plaintiff and had left a memorandum to the following effect: "We have come across to buy your farm—with the money. Too bad you were not at home. Call us up by phone so that we can do business to-morrow." It was signed Jones & Jenks and was endorsed with the phone number in Detroit where they were to be rung up.

Bates had told the plaintiff several times to be careful not to lose the sale.

Upon receipt of the memorandum the plaintiff and his wife immediately went to a neighbour's to use the nearest phone. I think the phone did not work satisfactorily, but, at all events, almost immediately Howard, Bates and Reid came up. Howard or Bates said: "I have come to you with a proposition." The plaintiff said: "It's too late," and told them of the arrangement to sell at $28,000 and that he was just trying to phone the parties in Detroit. Nobody made any objection. On the contrary, they told the plaintiff to go with them at once to town where a good telephone would be got and to lose no time. No further reference to "the proposition" was made. What it was has not been disclosed. It is clear of course that it was not the taking up of the option or they would have said so. They no doubt were thinking of submitting some new scheme—perhaps to make sure of getting back the $750 or a part of it.

These defendants then took the plaintiff to their own office and urged him to be quick lest the purchasers should have left their office for the day. In the presence and hearing of these men the plaintiff spoke over the telephone to the purchasers in Detroit and arranged with them to close the sale next morning, and a place of meeting. These 3 men then knew it all; including the names and address of the parties the plaintiff was dealing with. Bates and Howard expressed satisfaction that the plaintiff was effecting a sale

and offered to help him out next day should assistance be needed. I am satisfied that up to this time there was no thought of exercising the option, and there never was a bona fide exercise of it. The plaintiff left for home, and these three honest gentlemen put their heads together and proceeded at once to "help him out" in other words, because it meant nothing else, to filch the plaintiff's money.

Reid, from this time on was a very active factor, but they all "got busy," very busy. Before the plaintiff reached his home Bates overtook him and told him that Reid wanted him back. In answer to the inquiry—"Is it anything about the farm," Bates said "no." The plaintiff returned with Bates to the office. He found Reid and Howard there. Reid said nothing about wanting the plaintiff. Howard was writing out exhibit 4, called the acceptance of the option. When he finished writing he called on Reid to witness it. When it was handed to the plaintiff he said—"This option is good if my deal falls through." No answer was made to this, no objection was made to the position the plaintiff took. It was correct in law. The option remained valid if the plaintiff failed to sell. There was no money paid and the option could only be taken up by payment of the stipulated sum. The writing altered the situation in no way. The only valid "acceptance" if the term could be used at all, was by payment of $2,750, and in the circumstances I very much doubt if even that would be effective. Certainly these defendants could not arrest the plaintiff's action by an additional writing which might never be made good.

What followed may be said in a few words. Howard and Reid immediately got into communication with the parties the plaintiff was dealing with, got an appointment, met them in Detroit that night, assured them that they had closed the option, had bought the property, and were the only persons through whom they could get the farm, and relying upon this, and believing that they could get the land in no other way, the representatives of the company entered into and signed an agreement that night for the purchase of the plaintiff's farm from these men for the sum agreed on with plaintiff, namely, $28,000. This was followed up by a more formal agreement next morning. The Detroit people, of course, did not meet the plaintiff, and Bates assured the plaintiff that he and his associates had not interfered, saying: "We would not dare to interfere."

In ignorance of the fraud practised upon him and believing that the Detroit people had determined not to purchase, the plaintiff conveyed the property on the terms of the option, and it has become vested in the defendants the Detroit Ojibway Land Company.

I think the defendant company is to be regarded as a purchaser for value without notice—they should not be prejudiced—But I am not called upon to uphold the defendants Howard, Bates and Reid in their unmitigated rascality. They did not deny the evidence given at the trial in support of the action. Reid does not stand in any better position than Howard and Bates.

There will be judgment against the defendants Howard, Bates and Reid for $7,250 with interest from the 1st of September, 1913, and the costs of the action.

The mortgage given by the defendant company as balance of purchase, or a sufficient portion of the principal and interest thereof to satisfy the plaintiff's claim and costs and interest on both for so long as they remain unpaid, and any costs incurred in collecting the same, will be declared to be the property and moneys of the plaintiff and will be a first charge upon the mortgage, mortgage money and interest.

There will be an order directing the defendant company to pay these moneys to the plaintiff and the plaintiff will have power to give all proper acknowledgments and acquittance therefor upon payment or from time to time as the case may be.

There will be judgment also for the defendant company against Howard, Bates and Reid for the company's costs of defence; and subject to the prior claims of the plaintiff as above mentioned the defendant company will have a lien upon any balance of mortgage moneys in their hands and have the right to retain and apply these moneys in payment of their costs and interest.

If any difficulty arises upon settling the judgment I may be spoken to. There will be a stay of execution for 30 days.

HON. MR. JUSTICE BRITTON. JULY 6TH, 1914.

HELFAND v. SLATKIN.

6 O. W. N. 707.

Contract — Building Contract — Breach — Damages — Removal of Material on Ground—Mandatory Order—Counterclaim—Costs.

BRITTON, J., where a builder had contracted to build certain structures according to certain plans and specifications for $6,500, and, after doing certain work, had refused to complete, gave plaintiffs $200 damages for breach of contract and a mandatory order compelling defendant to remove his material from the plaintiff's lands.

Action to compel the defendant to remove certain building materials from the plaintiff's land on St. Clair Ave., Toronto, and for damages for breach of the defendant's contract for the erection of buildings.

Tried without a jury at Toronto.

A. Cohen, for plaintiffs.

MacGregor Young and C. M. Herzlich, for defendant.

HON. MR. JUSTICE BRITTON:—The plaintiffs were the owners of a lot upon St. Clair avenue in Toronto, upon which there were 2 mortgages. The defendant is a contractor.

On the 2nd day of October, 1912, the defendant made an agreement in writing with the plaintiffs by which he was to erect for plaintiffs upon their land 2 semi-detached houses of solid brick, each house to have 2 rooms on the ground floor and 12 rooms above; all to be completed according to plans and specifications which were made part of the contract, and delivered over before the 1st of May, 1913. The defendant was to furnish all material and was to be paid for the work when all complete the sum of $6,500. The parties apparently had little money and the defendant proposed a scheme for raising money which was that the defendant should get it by mortgage. The plaintiffs were to execute a mortgage upon their property for as large an amount as could be borrowed upon a first mortgage at 6 per cent. payable in 5 years. As I have said the property was already subject to 2 mortgages. Out of the money so to be raised the defendant was to pay off these existing mortgages and was to apply the balance towards the payment of the $6,500 contract price for the houses. Then the plaintiffs were to execute a second mortgage for the

balance of the contract price plus 20 per cent. on the amount of the balance, which mortgage would represent the balance. This was so arranged because the second mortgage would not be worth its face and would probably only sell upon a discount of 20 per cent. from its face value. The defendant entered upon his contract, brought a quantity of material upon the premises, did considerable work, but failed to complete the buildings, and he quit, leaving them in an unfinished state, with the result that up to the time of the trial the defendant had suffered great loss for labour and material and the plaintiffs suffered some loss in not being able to rent the premises as they intended.

This case is one that should have been settled amicably between the parties, and at my suggestion there was some delay with a view to their arriving at a settlement if possible, but none has been arrived at. Each party stands upon his strict rights. I find that the defendant has not fulfilled his contract.

Upon his failure to get on with his work, he left it and negotiations were entered upon for a new contract. Pending these negotiations, defendant again entered upon the work and did a little additional work, but he left it again, and it has remained in its unfinished state. The defendant not only failed to complete, but portions of the work done by him and his workmen were not done in a workmanlike manner or in accordance with the contract. The work on the ground is of no practical use or value to the plaintiffs, as the cost of taking down and removing will be as much as can be realised for it.

On or about the 2nd of August, 1913, the plaintiffs assumed to rescind and cancel the contract and gave a notice in writing to that effect to the defendant. There was no action taken upon that, but the matter was somewhat complicated by people, the defendant among the number, registering liens upon the property. The lien holders were not before me and my decision, therefore, has nothing to do with any right or pretended right of lien holders to any of the property on plaintiffs' lands.

Defendant has not proved the allegation in his statement of defence and counterclaim.

The plaintiffs are entitled to recover damages for breach of contract. These will not be as large as claimed at the trial. Had the houses been completed, the plaintiffs could

have rented them, but, if completed, the plaintiffs would have been obliged to lose or pay the interest on the $6,500. The plaintiffs would also have paid premiums for insurance and some amount for increased taxes. As it is, the plaintiffs have not paid anything and have not changed their position as to mortgages upon the property. There would also have been the care and management of the property.

The net amount that would have been realised from the property, had the defendant completed his contract, would not, in my opinion, have been more than $200.

There will be judgment for the plaintiffs for $200, with costs, and for a mandatory order upon the defendant compelling him to remove all the material owned by him from the plaintiff's premises within twenty days from the date of service of said order.

There will be a declaration that the contract is at an end and that the plaintiffs are now under no liability to the defendant thereupon.

The counterclaim of the defendant will be dismissed.

The judgment for the plaintiffs will be with costs, and dismissal of the counterclaim will be with costs. There will be no set-off of costs by defendant against the plaintiffs.

Thirty days' stay.

HON. MR. JUSTICE SUTHERLAND. JULY 4TH, 1914.

BRITISH WHIG PUB. CO. v. HARPELL.

6 O. W. N. 694.

Limitation of Actions—Promissory Note—Acknowledgment in Writing—Unconditional Promise to Pay—Notes made in Representative Capacity and for Accommodation—Evidence.

SUTHERLAND, J., *held*, that the following letter was a sufficient acknowledgment of liability on certain promissory notes to take the case out of the Statute of Limitations:—"I am exceedingly sorry that this account has not been paid before . . . I therefore hope that you will be good enough to bear with me a few days longer until the Judge gives the Quarterly matter a hearing."

Tanner v. *Smart*, 6 B. & C. 603, considered.

Action to recover $1,000 and interest on four promissory notes made by defendant, the last of which was dated March 22nd, 1904, and was payable at one year from date. None of the other notes matured later than the 16th January, 1905. The action was begun on March 23rd, 1911.

A. B. Cunningham, for plaintiff.

Alexander McGregor, for defendant.

HON. MR. JUSTICE SUTHERLAND:—For some time prior to 1902, the Queen's Quarterly Magazine at Kingston, Ontario, was published by a committee, the actual printing being done by an incorporated company called the Whig Publishing Company, of which the late E. J. B. Pense was proprietor. The company was subsequently incorporated by Letters Patent, dated 26th February, 1903.

The defendant had apparently been acting for the Committee as its business manager. As the result of a proposal in writing by him to the late Principal Grant, dated 5th April, 1902, an agreement was subsequently entered into between the committee and him, the exact date of which was not, I think, disclosed in the evidence, but it was probably the 1st May, 1902. By its terms, the defendant was to pay off "the present debt" during three years following and to substantially increase the circulation.

G. Y. Chown, one of the committee, testified that a term of the agreement was that the defendant should assume liabilities and pay debts. The account in respect of which the notes in question were given was apparently a small one at the time the agreement was entered into. By November, 1903, it had increased in plaintiffs' books to a sum in excess of $1,700. On the 19th of that month, four notes—each for $250 were given by the defendant to the order of the "British Whig Publishing Co.," payable at varying dates and each with interest at 5 (or 6) per cent. per annum. Credit is given in the account under the same date as follows: "By 4 notes, $1,000." Some of the notes were renewed and the renewals were also signed by the defendant personally.

On January 14th, 1904, there is a credit in the account for notes of $600, being apparently renewals of two of the notes and a new note for $100. At the end of December, 1904, all the notes then outstanding appear to be carried into the account as follows:

"December 31/04, to notes unpaid to date, $1,100."

Contemporaneously with giving the original notes, the defendant received a receipt in the following terms:—

"Received from J. J. Harpell four notes for one thousand dollars to apply on Queen's Quarterly Account.

"British Whig Publishing Co. Ltd.,

"T. Offord,

Nov. 19/03. "Secy.-Treasurer."

The defendant says that Mr. Pense asked him to give him the notes for his accommodation, and that they were given for that purpose and without consideration. He also says that he gave the notes merely in a representative capacity for the committee and that he insisted on getting a receipt for his protection. He admits there were adjustments of the account between the plaintiff company and himself from time to time during the period over which it extends, and that he made payments on account from time to time, but out of the funds obtained from the business.

In 1904, he wrote to the plaintiff company as follows: "Enclosed you will find cheque for $66.70, exchange, 15c., being the balance of account against Queen's Quarterly. Kindly send receipt in full. I am very grateful for your indulgence in this matter, as it would have been rather difficult for me to have sent this before now." He admits he took all receipts and paid all bills during the period from the time of entering into the agreement until it was put an end to in 1905, the original period of three years having in the year 1904, before its termination, been extended for two years from May 1st, 1905.

On March 2nd, 1905, the defendant wrote the plaintiff company a letter as follows: "Enclosed you will find a marked cheque for two hundred dollars and eighty-one cents ($200.81), being in full of the following accounts:

Interest on two notes of $250 each from Nov. 19th, 1903, to March 1st, 1905 @ 5%	$31 92
Interest on one note of $250 from Nov. 19th, 1903, to Aug. 13th, 1904, @ 5%	9 15
Interest on two notes of $250 each from Jan. 13th, 1904, to March 1st, 1905, @ 6%	33 80
Principal and interest on one note of $100 from Jan. 13th, 1904, to March 1st, 1905, @ 6%..	106 74
Printing 10,000 inserts for special number of Journal	19 20
Total	$200 81

Kindly receipt this and return with old note.

Yours very truly.

(Sgd.) J. J. Harpell."

In reply thereto, on the 6th March, the plaintiff company wrote as follows:—

"We are in receipt to-day of your cheque for $200.81 on account, and we thank you for the same.

"We are enclosing a detailed statement of the 'Quarterly' account to date, shewing receipt of your favour of to-day.

"We notice that the interest charges paid vary somewhat from what we billed you. We figured the interest at 6%, while, on the first two notes you used 5%, and on the latter two 6%. We do not understand this variation, but, as the interest is now paid to date, we will accept your figures and call it square.

"We beg to remind you that a note of $250 falls due on the 25th inst., and that there is still an outstanding account of $1,000, including the above-mentioned note. In view of the fact that this has been a long outstanding account and that we have endeavoured to meet you in every possible way, we expect that you will use your very best endeavours to close up the account as speedily as possible."

Difficulties arose between the committee and the defendant in the year 1905. A letter from Pense to Chown was put in at the trial, dated 17th July, 1905. While not written to a party to the action, it undoubtedly relates to the account in question and the controversy then existing between the defendant and the committee as to the taking over again by the latter of the publication of the monthly: "In reply to your request of the 14th inst., we beg to enclose a detailed statement of our account with Queen's Quarterly and its late business manager, Mr. J. J. Harpell. We found that we were running up a large account against the Quarterly, with very little prospect of receiving remuneration for the same, so, in the latter part of 1903, we prevailed upon Mr. Harpell to give us notes aggregating $1,000. These notes were for $250 each and were to run two, four, six and eight months respectively. Again on January 13th, 1904, we received from him three notes as follows: $250 at eight months, $250 at ten months and $100 at one year. On March 22nd, 1904, we received from him another note (renewal) for $250 at one year. These notes were to be paid with interest at 6%. We hold at this date four of these notes aggregating $1,000, which have not been taken up. On March 1st, 1905, at the request of Mr. Harpell, we adjusted the interest to that date, making it $79.35. This amount was agreed to by him

as being correct and was so nominated in the account we sent him."

On December 13th, 1905, the defendant wrote to Pense as follows: "I am exceedingly sorry that this account has not been paid before, and personally feel very grateful to you for your indulgence in the matter. It has given me a great deal of worry. But the delay has been caused by the postponement of the arbitration hearing, which began on the 5th of last July, but was postponed until the 5th September on account of the other side not having their witnesses ready." This is a reference to an arbitration between the plaintiff and the committee about their agreement and its dissolution. I quote further from said letter: "I, therefore, hope that you will be good enough to bear with me for a few days longer until the Judge gives the Quarterly matter a hearing."

Mr. Pense died some time after. It is said that the account in question herein was sent to defendant from time to time. His contention is that the committee was all along responsible for this account and the notes were really given for it. Mr. Chown, on the other hand, testifies that the defendant was to be responsible for all accounts during the period in question.

Notwithstanding that the defendant was not paying anything on the notes or account, the last credit on which was in 1905, the plaintiff company took no action to collect until the year 1911.

A demand having been made on the defendant, apparently by the plaintiff company's solicitors, on the 3rd March, 1911, for payment of the notes in question, he answered by letter on the 6th of the same month, and I quote therefrom: "Replying to yours of the 3rd inst., I beg to advise that the notes and amounts to which your letter refers were given on account of work done on Queen's Quarterly, which you will remember was taken out of my hands some six or eight years ago, etc." . . . "Several years ago, I advised Mr. Pense that I did not consider myself liable for the Quarterly's indebtedness to him. At that time, he intimated that he would put the account and notes in the hands of your firm for collection, and I signified my willingness to have them tested in the Courts. In equity, there are no grounds for any other decision than that Mr. G. Y. Chown, B.A., should pay the

balance of the account which the Queen's Quarterly owes the estate of the late Mr. Pense, who, in life, was such a good friend of Queen's, etc."

The writ was issued herein on the 23rd March, 1911, and the pleadings were delivered in December, 1911, and January, 1912. The action was not brought on for trial until 1914. In the statement of claim the notes sued on are set out as follows:—

1. Note dated November 19th, 1903, for $250 at 6 months, with interest at 5% per annum.

2. Note dated January 13th, 1904, for $250 at 8 months, with interest at 6% per annum.

3. Note dated January 13th, 1904, for $250 at 10 months, with interest at 6% per annum.

4. Note dated March 22nd, 1904, for $250 at 1 year, with interest at 6% per annum.

There was also an account for $23.29 sued for, but it was abandoned at the trial.

The defendant pleaded that he was the manager of the Queen's Quarterly to the knowledge of the plaintiff, that the notes were not in fact, as the plaintiffs well knew, the notes of the defendant but the notes of the committee, that the notes were signed by him as representing the committee and accepted by the plaintiffs in that way, that he received no consideration for the notes, that the proceeds of the notes were applied on behalf of and for the purpose of the committee and that the committee and not he was liable therefore. He also pleaded the Statutes of Limitations and Frauds.

I am of opinion that the notes when given were the notes of the defendant and not given in any representative capacity for the committee. Neither were the notes given I think for the accommodation of the plaintiff company, or Mr. Pense, but because the plaintiff company, through Pense, was pressing for payment of an account which at that time was the defendant's account and incurred in substantial part by him. Neither in the letter of the 13th December, 1905, written to Mr. Pense, the admitted agent of the plaintiffs, nor in the letter to the plaintiffs' solicitor on the 3rd March, 1911, did the defendant put forward the claim specifically that the notes had been given for the accommodation of the plaintiffs or Mr. Pense, even if under our Bills of Exchange Act, R. S. C. ch. 119, that would have availed him under the circumstances disclosed in evidence.

In the earlier letter he expressed his thanks for leniency extended and asked Mr. Pense to be good enough to bear with him for a few days longer. In the letter to the solicitors while he says he told Pense he did not consider himself liable for the balance of the quarterly indebtedness he also states that Pense threatened to sue him for the accounts and notes at that time apparently considering him liable. He also says in this letter that in equity Chown should pay the balance of the account. It may be that as between the defendant and the committee, the contract between them having been put an end to and the committee having taken over the assets in whole or great part and assumed the debts, or at all events some of them, the defendant is entitled to look to them, for payment of the notes if held liable therefor in this action. I am not trying that question and have not the facts before me on which to determine it.

I am of opinion that he is liable upon the notes sued on unless the plaintiffs' remedy is barred by the Statute of Limitations.

The plaintiffs rely on the letter of the 13th December, 1905, as an acknowledgment made within 6 years of the date of the issuing of the writ on which a presumption to pay can be implied so as to rebut the statutory presumption of payment at the end of that period.

A leading case is *Tanner* v. *Smart*, 6 B. & C. 603: "In *assumpsit* brought to recover a sum of money the defendant pleaded the Statute of Limitations and upon that issue was joined. At the trial the plaintiff proved the following acknowledgment by the defendant within 6 years 'I cannot pay the debt at present but I will pay it as soon as I can.' Held, that this was not sufficient to entitle the plaintiff to a verdict, no proof being given of the defendant's ability to pay."

This case is commented upon in Darby & Bosanquet's work on the Statute of Limitations (1899), p. 67, where referring to it it is said: "It was held after fully going into all the cases that proof of ability was required to turn the conditional promise into an absolute one and there was therefore no sufficient acknowledgment to take the case out of the statute for upon a general acknowledgment where nothing is said to prevent it a general promise to pay may and ought to be implied; but where a party guards his acknowledgment and accompanies it with an express declaration to prevent any such implication, the rule *expressum facit cessare tacitum*

must apply. Ever since the decision in *Tanner* v. *Smart* it has been settled law that nothing can take a debt out of the statute unless it amounts to an express promise to pay or an unconditional acknowledgment of the debt from which such an express promise may be implied."

And at p. 69: '"Though the rule laid down in *Tanner* v. *Smart* is perfectly clear, it is often difficult, owing to the variety of expressions employed by different persons, to apply the rule to each particular case."

The letter of December 13th, 1905, contains in its first sentence I think a clear admission of liability, and the last clause already quoted, namely, " I therefore hope you will be good enough to bear with me for a few days longer until the Judge gives the quarterly matter a hearing" is clearly a request for a few days longer time for payment and an intimation that he was hoping and expecting that the decision of the Judge in the hearing of the quarterly matter might assist him in that direction.

There are no words "accompanying the acknowledgment" contained in the letter such as in any manner qualify the presumption of an express promise which can properly be implied from such acknowledgment. *Dickinson* v. *Hatfield* (1831), 5 C. & P. 46; *Bird* v. *Gammon,* (1837), 3 Bingh. N. C. 883; *Comfirth* v. *Smithard,* 5 H. & N. 13.

There will therefore be judgment for the plaintiff for the amount of the 4 notes, namely, $1,000, together with appropriate interest and costs.

PRIVY COUNCIL.

JULY 6TH, 1914.

ROBERT DAVIES v. JAMES BAY RW. CO.

Railway—Expropriation—Mining Lands—Destruction of Surface by Working—Dominion Railway Act, ss. 26, 151, 169, 170, 171, 177, 191, 192, 193—Compensation—Ascertainment once for all—Interest taken by Railway under Act.

PRIVY COUNCIL *held*, that, in distinction to the law of Englnad, in Canada, under the various sections of the Dominion Railway Act, where a railway expropriates a right of way over mining lands, they acquire at once a right of support for the surface of the land taken, and must compensate the owner at once for loss of value arising from the liability to support which rests on him after severance of the title to the minerals and to the surface.

Judgment of Court of Appeal for Ontario, 15 O. W. R. 625; 20 O. L. R. 534, reversed.

On appeal from the Court of Appeal for Ontario.

Consolidated appeals from a judgment of the Court of Appeal for the province of Ontario, 15 O. W. R. 625; 20 O. L. R. 534; reducing to $122,171 the award of arbitrators who had allowed the plaintiff $238,583 damages as compensation for lands taken and injuries to plaintiff's brick yards.

The appeal to the Judicial Committee of the Privy Council was heard by VISCOUNT HALDANE, L.C., EARL LOREBURN, LORD MOULTON, LORD SUMNER and SIR GEORGE FARWELL.

THEIR LORDSHIPS' judgment was delivered by

VISCOUNT HALDANE, L.C.:—This appeal raises a question of importance as to the interpretation of the Railway Act of Canada. The case has been twice argued before the Judicial Committee. At the conclusion of the first argument it became clear that, of several points at first raised, the real one on which the parties had been so divided as to be unable to come to a settlement, was the point which became by agreement the exclusive subject of argument on the second hearing.

The relevant facts may be stated very briefly. The appellant claimed compensation from the respondents for the

compulsory taking of part of the land owned by him in the Don valley near Toronto. His claim related to several pieces of this land, and included compensation for damage sustained by the exercise of the powers of the railway company. The claim was referred to the arbitration of three arbitrators, who awarded in satisfaction a total sum of $238,583. On appeal to the Court of Appeal of Ontario this sum was reduced to $122,171. Both parties have appealed to His Majesty in Council from this decision. The cross-appeal of the respondents related to a claim in respect of a small piece of land which, as the result of arrangements come to after the first hearing, is not now in controversy. The case of the appellant on the second hearing was exclusively concerned with his rights as regards the minerals lying under the railway track over the land taken, and with certain minor matters which, including a question as to adjacent minerals, have been disposed of by the agreement of counsel. The remaining issue was, at the close of the first hearing, reduced to one of principle determining the compensation to be made. If the appellant is not to be paid for shale under the right of way (meaning the track of the railway), the award is to be for $119,831, while if he is to be so paid, the award is to be for $230,820.

The question which thus arises for decision relates to the basis of compensation, and depends on the construction of the Railway Act of Canada. Under this Act the respondents took such land of the appellant as was required for the purposes of the track. Under it is shale of considerable value. It is agreed that this shale can only be got by surface working, and in addition must be left practically entirely unworked in order that the surface occupied by the railway may be supported. Because the appellant was practically deprived of his right to mine for this shale the arbitrators agreed that he was entitled to be compensated for the injury thus inflicted on him. The Court of Appeal, on the other hand, took the view that as the respondents had not bought the minerals their value could not be taken into account in the present proceedings, but ought to be taken into account if the appellant applied hereafter to the Board of Commissioners established under the Railway Act for permission to work the shale. The reasons for this divergence of view will appear when their Lordships refer to the provisions of the Railway Act.

Before doing so it will be convenient, as the analogy of the law of England, and particularly of the Railways Clauses Act, has been much referred to in the arguments, both in the Court below and before the Judicial Committee, to state what that law is, not only apart from, but as affected by, the English Railways Clauses Act. It is the more desirable to do so because the Railway Act of Canada is framed on a scheme which is in many respects different from the scheme adopted in England. In Canada the conditions to which railway construction is subject are different from those which prevail here, and the differences appear to have been carefully kept in view by the Dominion Parliament when deciding on the scheme of the Railway Act.

Apart from the English Railways Clauses Act, when land is sold with a reservation of the minerals to the vendor, he cannot, in the absence of special bargain, work them so as to let down the surface which he has sold. The reason is that there is a natural right of support for the surface which passes to the purchaser when he buys it. Although the vendor retains the minerals and the right to work them, he can exercise this right only at his own risk. It is inaccurate to say that the purchaser buys, in addition to the surface, an easement of support for that surface. He acquires the right of support, not as a separate easement, but as a natural feature of the title to his land. The value of this necessary right, which is incident to his ownership, is thus *prima facie* included in the price which he has paid.

Such is the common law both in England and Ontario, but in England it has been completely altered in the cases to which they apply by secs. 77 to 85 of the Railways Clauses Act, 1845. Under these sections, so far as concerns mines and minerals under the railway, or within the prescribed distance, which is normally forty yards on each side, the company is deprived of the natural right to support which it would have under an ordinary conveyance. Unless it has expressly purchased the minerals, the owner may work them in the fashion which is usual in the district, and even by open working in a way which may destroy the railway. He may let down the surface, for the natural right of support has been taken from its owner. But he must before working give the company 30 days' notice of his intention, and the company may, then or thereafter, if it is willing to pay compensation, give him a counter notice, and so, on paying

compensation, stop the working. These provisions are valuable to the company, for they enable it to defer finding capital for the purchase of the minerals under the land until, for the sake of safety, it becomes necessary to do so. On the other hand, the mine owner is, for a time at least, free to work, though the amount he receives as the price of the surface is diminished by the taking away from it of the incidental and natural right to support. If the owner claims on a compulsory sale of the surface for injurious affection of his title to the minerals, the answer to him is that his title is not at present injuriously affected inasmuch as he can work freely until he receives a counter-notice, after which he may be able to claim full compensation for the minerals themselves.

In the Dominion of Canada the law has been differently moulded. Their Lordships have given much consideration to the group of clauses in the Railway Act which deal with the policy adopted, and they think that their effect is as follows:—The company which acquired the surface was not, as by the English Act, deprived of the natural right to support from subjacent and adjacent minerals. It was, on the other hand, put on terms to compensate the mineral owner at once for loss of value arising from the liability to support which rested on him after severance of the title to the minerals and to the surface. This compensation having been paid, the mineral owner was, by sections which have a separate and distinct purpose, restrained from working his minerals excepting under such conditions as might be imposed by the Railway Board in the interest of the safety of the public. These conditions, in the case of adjacent minerals, might be very easy. In such a case, just because the Board was likely to leave him comparatively free to work his mines, the initial compensation would be small. And where the minerals lay under the railway, and especially where they could only be won by surface working destroying the railway track, the compensation awarded initially would be heavy, inasmuch as the title to the minerals and their present value for working or for sale, would be materially impaired. Their Lordships recognise that considerations may have presented themselves to the Parliament of Canada quite different from those which presented themselves to the Parliament of Great Britain. In the latter country comparatively little land was available, and a different scheme from that adopted might have placed a heavy burden of finding immediate capital on the rail-

way companies, and might also have unnecessarily interfered with the liberties of many mineral owners in the comparatively small areas dealt with. In Canada, on the other hand, where the railways were likely to extend over great stretches of undeveloped country, it may well have been wisest to proceed on the footing that mineral rights were likely to be less frequently of immediate practical importance and would be less often asserted. It would, in this view, be natural to let the railway companies assume at once under such circumstances liability to compensate for injurious affection of title to minerals, while, on the other hand, the mineral owner, whose title had been so affected, was placed under restrictions to be imposed when he, if he ever should, desired to proceed to work. The discretion was intrusted to the Railway Board, a judicial body intended to be presided over by a Judge and to have the assistance of experts.

If this be the result of the Canadian legislation it was proper to take the course which the arbitrators took in the present case, and to award compensation for injurious affection.

Their Lordships now turn to the sections on which their view of the question of principle is founded. Section 26 defines the jurisdiction of the commission. It is to decide on complaints that any company or person has failed to do any act, matter, or thing required to be done by the Act or the special Act, or by regulations, orders, or directions made under the Act, or that any act, matter, or thing has been done in violation thereof. By sec. 151, the company may purchase any land or other property necessary for the construction, operation, or maintenance of the railway. Section 177 enacts restrictions on the quantity of land so to be taken. Sections 169 to 171 relate to mines and minerals. The company is not (sec. 169), without the authority of the Board, to locate the line of its proposed railway or construct the same so as to obstruct or interfere with or injuriously affect the working of or access to any mine then open, or for the opening of which preparations are being lawfully made. The company is not (sec. 170), unless the same have been expressly purchased, to be entitled to any mines or minerals under lands purchased or taken by it under the Act, except such parts as are necessary to be dug, carried away or used

in construction. No owner, lessee, or occupier (sec. 171) of any such mines or minerals lying under the railway or its works, or within forty yards from them, is to work the same unless leave has been obtained from the Board. On any application to the Board for leave to work, the applicant is to submit full plans. The Board may grant such application upon such terms and conditions for the protection and safety of the public as to the Board seems expedient, and may order that such other works be executed or measures be taken as under the circumstances appear to the Board best adapted to remove or diminish the danger arising or likely to arise from such mining operations. The provisions as to compensation are to be found in sec. 191 and the following sections. Plans, profiles, and books of reference are to be deposited, and then application may be made to the persons who are owners of, or interested in lands (which by the definition section are defined in terms wide enough to include mines) to be taken, or which may suffer damage from the taking of materials, or the exercise of any of the powers granted for the railway, and thereupon agreements may be made touching the lands or the compensation to be paid for the same, or the damages, or as to the mode in which such compensation is to be ascertained, and there may be a reference to arbitration. The amount of compensation or damage is, by sec. 192, to be ascertained as at the date of the deposit. By sec. 193, the notice served is to contain a description of the lands to be taken or of the powers intended to be exercised in regard to them, and a declaration of readiness to pay a certain sum or rent as compensation for the lands or the damages.

The sections referred to are those which appear to be most important for the purposes of the present question. Their Lordships interpret them as meaning that there is to be an immediate claim for compensation for the value of the lands taken and for injurious affection of any other hereditaments the title to which is affected, such as subjacent or adjacent mines and minerals. In default of agreement, they think that the entire amount of compensation is to be ascertained by the arbitrators as at the date of the deposit of the plans and once for all. For the rest, the mine owner remains entitled to his minerals, but subject to any obligation of natural support which attaches on severance. The Board

is to regulate the exercise by him of his remaining rights in the future, and the primary purpose of the intervention of the Board is to be the protection, not of the mineral owner or of the railway, but of the public. If the Board refuse him leave to work, his grievance is against the Board, to whom, and not to the railway company, his application is to be made. The principle on which the legislature has proceeded is apparently to dispose of the claim against the company once for all on the occasion of taking the land. Their Lordships do not think it necessary to decide whether, either in sec. 26, or in sec. 59, which relate to the powers of the Board to direct the construction of buildings and works on proper terms as to compensation, or in sec. 171, or elsewhere in the Act, any power can be found which enables the Board to award to the owner of mines and minerals who has applied to it for leave to work, compensation by reason of the Board having restricted his liberty in the interest of the public. It may be that the legislature has thought it right to give no such power. The only point which it is either necessary or proper to decide now is that power to award compensation as between the railway company and the owner of subjacent or adjacent mines for injurious affection of the title to the minerals has been intrusted to the arbitrators. The principle adopted is, as has been already observed, one which in the case of a country of great extent, with its minerals widely scattered, might not improbably commend itself as more adapted to the circumstances than the principle of the English Statute. At all events, this is the principle which the language of the statute appears to lay down.

Their Lordships have examined the reasoning of the careful judgment of Hodgins, J., as delivered on behalf of the Court of Appeal, in which the decision of the arbitrators was reversed. There are two main grounds on which, after consideration, they find themselves unable to concur in his reasoning. They think that the arbitrators were right in holding that the mineral owner suffered immediate damage as the consequence of the duty of support which on severance the law imposed on him, and that so far as the shale under the railway track was concerned, he substantially lost the value of his shale, the more plainly so because it could only be worked from the surface. It is no answer that the owner probably did not desire to get at his minerals at once.

His title to them was practically, so far as it was possible to foresee, destroyed, and he suffered immediate loss accordingly. They are further, for the reasons already given, of opinion that even if they were satisfied of the correctness of the view of the learned Judge on the other point, they ought not to treat it as arising at present. That view was that the Board has the power, upon the application of the mineral owner, to order the railway company to "acquire such part of the minerals as in England would be covered by the counter-notice of the railway company; or to put it in another form, to so support and maintain their line, and to acquire the necessary land and minerals for that purpose." They are not, as at present advised, prepared to express the opinion that the Canadian Act has substituted for the English system of notice, counter-notice and compensation, the interposition of the Board, and that the latter has jurisdiction to protect the mine owner and the railway company by its order. It appears to their Lordships that it may well be that the powers of the Board to impose conditions on the action of the mineral owner are conferred for a wholly different purpose, and do not extend to the making of any such order. But they hold that the question does not arise for immediate decision if it is once established that injurious affection has occurred to the extent of depriving the mineral owner of the present value of his subjacent minerals by the imposition of the duty of support and the taking away of the right of surface working. They think that the arbitrators in substance dealt with the question of compensation on a proper principle. As to adjacent minerals no controversy arises.

In the result their Lordships think that the appellant was entitled to be awarded compensation for loss of title, a loss substantially equivalent under the circumstances to the value of the shale. They hold that the arbitrators were bound to take this loss into account in assessing the compensation to be paid, and that the respondents must therefore pay to the appellant the agreed sum of $230,820, and they will humbly advise His Majesty accordingly.

As the appeal has resulted in a settlement of other questions in dispute, and as the victory in the litigation is a divided one, they think that the proper mode of dealing with the costs will be analogous to that adopted in the Court

of Appeal, and that there should be no costs either of the first hearing of this appeal or of the cross appeal, or of the hearing in the Court below. The respondents ought, however, to pay to the appellant the further costs limited to those occasioned by the attendance of counsel and solicitors at the second hearing before this Board.

LENNOX, J. JUNE 11TH, 1914.

WRIGHT v. TORONTO Rw. CO.

6 O. W. N. 486.

Judgment—Motion to Vary—Leave to Appeal—Arbitration—Costs of.

LENNOX, J., refused to vary judgment herein (26 O. W. R. 113), on the question of costs, or to give leave to appeal from the same.

Motion by defendants to vary judgment of Hon. Mr. Justice Lennox, 26 O. W. R. 113; 6 O. W. N. 119, by relieving defendants from paying the costs of the reference or alternately for leave to appeal.

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

W. H. Wallbridge, for plaintiff.

HON. MR. JUSTICE LENNOX:—Mr. McCarthy asks me to vary my judgment, as reported in 6 O. W. N. p. 119, to the extent of relieving the defendants from payment of the costs of the reference or alternatively to give the defendants leave to appeal.

The parties having since proceeded to trial upon the basis of my judgment, without either of them questioning it in any way, I think it would be unfair to open the matter now. Aside from this I think a proper disposal of the costs was made. The award failed solely through failure of two of the arbitrators to appreciate the duties they were called upon to discharge.

The action of Mr. McCarthy and Mr. Johnston in endeavouring to keep the costs as low as possible was eminently proper and there was nothing at all in what they tentatively arranged to preclude either of them from subsequently giving evidence; and nothing to give even a colour

of justification to these arbitrators ultimately refusing to hear evidence, yet as a matter of fact, they seem to have seized upon this as an excuse. This, however, was only another reason for setting aside the award—if this had stood alone I would have remitted the matter to them to take evidence. The award was set aside owing to actual misconduct of two of the arbitrators. Somebody had to bear the costs. The costs of the reference, had it been regularly conducted, were, by the terms of the submission, to be borne by the company, and for experts and a protracted investigation, would have amounted to a very large sum, and Mr. McCarthy, with the concurrence of Mr. Johnston in the first place, having relieved his clients from this pretty heavy burden—although it did not eventuate as the counsel had a right to expect—I thought it only fair, someone having to pay for the blunder of the two arbitrators, that the comparatively trifling costs of the brief investigation had should be borne by the defendants; and I still think so. The application is dismissed without costs.

LENNOX, J. JUNE 11TH, 1914.

MICHENER v. SINCLAIR.

6 O. W. N. 502.

Settlement of Action—Agreement for—Judgment in Terms—Costs.

LENNOX, J., gave judgment pursuant to the terms of a settlement arrived at between the parties.

G. T. Denison, Jr., for plaintiff.

John King, K.C., for defendant.

HON. MR. JUSTICE LENNOX:—After partial trial an agreement for settlement was come to by counsel for the parties. This was stated by counsel and with suggestions by the presiding Judge, recorded by the stenographer. There was a subsequent agreement for an extension of time, but this does not now vary the rights of the parties as arranged at the trial. The defendant applies for judgment dismissing the action and for possession and for judgment for $250 against the plaintiff. The only ques-

tion in dispute is as to whether there should be judgment for the $250.

I think the true construction of the agreement is that in the events which have happened the defendant was to have judgment for possession and for dismissal of the action with costs; and that this was to put an end to all matters in difference between the parties, was to be a complete settlement in fact. There will be judgment dismissing the defendant's counterclaim, except so much thereof as relates to recovery of possession, without costs, and dismissing the plaintiff's action and the claim set up in answer to the counterclaim and for recovery of possession of the lands in the pleadings mentioned by the defendant from the plaintiff, with costs, and for costs of this application.

MIDDLETON, J. JUNE 30TH, 1914.

REX v. FAUX.

6 O. W. N. 663.

Municipal Corporations — By-law—Sealing — Municipal Act, 1913, s. 258 (3)—Conviction under—Seal Affixed after Conviction—Conviction Affirmed.

MIDDLETON, J., *held*, that under the Municipal Act, 1913, s. 258 (3), where a seal is affixed to a by-law after its passage, the sealing related back to the date of such passage.

Motion by the defendant for an order quashing his conviction by a magistrate for being drunk in a public place in the township of Otonabee contrary to a by-law of the township.

The objection was that a valid by-law was not proved, the original not having been sealed when passed, and the corporate seal having been affixed only after the objection was taken before the magistrate.

By the Municipal Act 1913, sec. 258 (3) it is provided: "Where by oversight, the seal of the corporation has not been affixed to a by-law, it may be affixed at any time afterwards, and when so affixed, the by-law shall be as valid and effectual as if it had been originally sealed.

G. W. Gordon, for defendant.

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

HON. MR. JUSTICE MIDDLETON:—This motion I think fails. The true effect of the sealing of the by-law is to validate it from the beginning. The legislative will was then exercised and the intention of the legislature was to permit the sealing to relate back, and after the sealing has taken place I am to treat the by-law as a good and valid by-law from the date of the passing.

Motion dismissed with costs.

APPELLATE DIVISION. JUNE 15TH, 1914.

RAINY RIVER NAVIGATION CO. v. ONTARIO AND MINNESOTA POWER CO. AND MINNESOTA AND ONTARIO POWER CO.

6 O. W. N. 533.

Water and Watercourses—Obstruction of Flow—Injury to Navigation—Damages to Navigation Company—Special Damage—Lack of Riparian Ownership—Damages—Quantum—Appeal—Increase—Reference.

SUP. CT. ONT. (2nd App. Div.), *held*, that apart from the question of ownership of riparian lands, any one sustaining special damage beyond that suffered by the general public by reason of unlawful interference with the flow of a river, can recover such damage from the wrongdoer.

Drake v. *Sault Ste. Marie Pulp & Paper Co.*, 25 O. R. 251; *Ireson* v. *Holt*, 30 O. L. R. 209, and other cases followed.

Rickett v. *Metropolitan Rw. Co.*, L. R. 2 H. L. 175, distinguished.

Judgment of BRITTON, J. (24 O. W. R. 897), in favour of plaintiffs, a steamship company, increased from $540 to $1,960, subject to a reference.

I. F. Hellmuth, K.C., and A. R. Bartlett, for the plaintiffs, appellants.

A. W. Anglin, K.C., and Glyn Osler, contra.

HON. SIR WM. MULOCK, C.J.EX.:—This is an action for damages because of the defendant company penning back water from the Rainy River to such an extent as to materially interfere with the operation of the plaintiffs' steamboat called the "Aguinda" plying between the town of Fort Frances, situated at the easterly end of the river, and the village of Rainy River, which is at its mouth, for the period extending from about the 28th day of June, 1911, until the 5th of August, 1911.

Mr. Justice Britton, without a jury, tried the case and directed judgment for the plaintiff for $540 and costs. The plaintiffs complain that this sum is inadequate and appeal in order to have it increased. The defendants in resisting the appeal contend that the plaintiffs are not entitled to maintain the action.

The following are the circumstances giving rise to the plaintiff's claim:

The plaintiffs are an incorporated company owning and operating steamboats for the carriage of passengers, goods and mails between Kenora on the Lake of the Woods and Fort Frances at the head of the Rainy River, and had been carrying on such business for some years prior to the month of June, 1911, when their operations were interfered with by the low state of the water in the river. During the argument of the appeal, the question arose whether the plaintiffs in connection with their business possessed any lands along the river and it was agreed between counsel that the Court should be informed on that point. Subsequently correspondence between the solicitors of both parties was filed which contains admissions to the following effect; that at Fort Frances the plaintiffs have a controlling interest in the Fort Frances Dock Company, which company had there built a dock and warehouse, the plaintiffs owning over fifty per cent. of the stock in the dock company; that the dock was built upon land of the Ontario Government under license of occupation; that along the Rainy River at Boucherville, Barwick, Emo and Big Fork, the Ontario Government, under an arrangement with the plaintiff company, built docks; that the plaintiff company at these points established warehouses on said docks, and in connection with such arrangement fixed a tariff to the satisfaction of the Government for dockage and freight rates; that at Kenora the plaintiff company lease the dock and office from year to year and built on the dock at Kenora a warehouse owned by it.

The evidence shews that above the International Falls the two defendant companies constructed a dam completely across Rainy Lake at the place where it discharges into Rainy River, for the one purpose of thereby penning back water, and obtaining water power wherewith to generate electrical energy, and that in the year 1911, by means of this dam, they held back so much water as to seriously interfere

with the navigability of the river for a time, making it impossible for the plaintiffs to navigate the "Aguinda" between Fort Frances and the mouth of the river.

The Rainy River is an international boundary between Canada and the United States: *Rainy River Boom Co.* v. *Rainy River Lumber Co.,* 22 O. W. R. 952.

The north part of the dam is within Canadian territory, the southerly within that of the United States. Thus no one corporation could be empowered, to build such an international work; hence the two companies, for the common purpose, erected it as one work.

For the defence it was contended that the injury complained of by the plaintiffs was not different from that suffered by all persons navigating the river, that consequently the conduct of the defendants at most constituted a public nuisance only and that the plaintiffs were not entitled to maintain this action. Defendants' counsel also urged that as there was no physical injury to the plaintiff's property, but at most merely an injurious interference with their business, they were not entitled to damages for loss of trade, and *Rickett* v. *Metropolitan Ry. Co.,* L. R. (1867) 2 H. L. 175, was relied upon in support of this latter contention. That was a case of a claim for compensation under the Land Clauses Act and the Railway Clauses Act, and it turned upon the meaning of those Acts. The judgment decides that actionable damage under those statutes is limited to damage occasioned because of land injuriously affected by the railway company in the exercise of its statutory powers.

Referring to this case in the *Metropolitan Board of Works* v. *McCarthy* (1874), L. R. 7 E. & I. Appeals, at p. 256, Lord Chelmsford says:

"It may be taken to have been finally decided that in order to found a claim for compensation under the Acts there must be an injury and damage to the house or land itself in which the person claiming compensation has an interest. A mere personal destruction or inconvenience or damage occasioned to a man's trade or the goodwill of his business, although of such a nature that but for the Act of Parliament it might have been the subject of action of damages will not entitle the injured party to compensation."

Thus these cases do not decide that the measure of damages recoverable at common law is limited to what would be recoverable by way of compensation for lands injuriously

affected when a claim is made under these Acts, nor do they decide whether at common law an action would or would not in any particular case lie for injury to trade. Any such expressions of opinion as to the rights of parties at common law which may be found in either of those cases were *obiter,* the sole question involved in each of them being, what compensation was intended by the Land Clauses Act and the Railway Clauses Act.

In *Greasley* v. *Codling* (1824), 2 Bing. 263, the plaintiff was in the habit of conveying coal along a public highway, and the defendant shut a gate whereby the plaintiff was obliged to take a more circuitous route. It was held that without shewing special damage the plaintiff could maintain the action for interfering with his right to use the highway. Burroughs, J., says: "The question in all these cases is whether the inconvenience complained of is general or a particular inconvenience of the plaintiff complaining. A man travelling with asses is stopped and obliged to go by a circuitous route with an obvious loss of time and profit, what distinction is there in principle between such a case and that of a man who is carrying 10,000 pounds worth of goods to arrive by given date and is deprived of his market by an individual obstructing the road."

The facts of the present case shew that for some years the plaintiffs had been engaged in the carrying trade throughout the whole length of the river and for the purposes of such trade owned or were interested in wharves or other properties along the river and were actually engaged in prosecuting the business for the season of 1911, when on the 20th day of June the "Aguinda," which had with difficulty reached Fort Frances owing to shallow water was compelled to lie up there from that day until the 5th of August, because the river had ceased to be navigable in consequence of the penning back of the water by the defendants. The general principle is that a private action may be maintained in respect of a common nuisance where the complaining party has sustained some special damage not common to the general public, and thus in each case it becomes a question of fact whether the injury complained of specially affects the plaintiff or a limited few, the plaintiff being of the number: *Bell* v. *Quebec* (1875), 5 A. C. 510.

In *Rose* v. *Miles* (1815), 4 M. & S. 101, the plaintiff was navigating laden barges along a public navigable creek, and

the defendant wrongfully moored a barge across the stream thereby preventing the plaintiff from navigating his barges and putting him to the expense of carrying his goods by land. Lord Ellenborough, C.J., says: "In *Hubert* v. *Groves* (Willes, 71), the damage might be said to be common to all but themselves something different for the plaintiff was in the occupation, if I may so say, of the navigation. He had commenced his course upon it and was in the act of using it when he is obstructed. It did not rest merely in contemplation. Surely this goes one step further; this is something substantially more injurious to this person than to the public at large. He might only have it in contemplation to use it and he has been impeded in his progress by the defendants wrongfully mooring their barge across and has been compelled to unload and to carry his goods over land by which he has incurred expense and that expense caused by the act of the defendants. If a man's time or his money are of any value, it seems to me that this plaintiff has shewn a particular damage." The general principle thus laid down in *Rose* v. *Miles* has been generally adopted as a correct exposition of the law and is, I think, applicable to the present case.

It was followed by Osler, J., in *Drake* v. *Sault Ste. Marie Pulp and Paper Co.,* 25 A. R. 251. In that case briefly the facts were that the plaintiff, a fisherman, occupying a farm fronting on a navigable river, owned a sailboat which he used in going from his house via the river to Lake Superior and thence to the town of Sault Ste. Marie, carrying goods for himself and his neighbours for hire. The defendants obstructed the mouth of the river with saw logs and a boom, whereby the plaintiff was required to portage the goods around such obstructions and it was held that the plaintiff suffered damage beyond that of the rest of the public.

Ireson v. *Holt* (1913), 30 O. L. R. 209, where the facts were not unlike those in *Drake* v. *The Sault Ste. Marie Pulp and Paper Co., ante,* follows the decision of the latter case.

Although in each of the last two cited cases which adopt the principle annunciated in *Rose* v. *Miles,* there was present the circumstance that access to the plaintiff's property was interfered with, still neither decision turned upon that circumstance which was but one element as it here in the question whether special damage was in fact sustained.

In *Rose* v. *Miles* no question of access to property or riparian rights arose.

In *Winterbottom* v. *Lord Derby,* L. R. 3 Ex. 222, Kelly, C.B., says: "I am of opinion that the true principle is that he only can maintain an action for an obstruction who has sustained some damage peculiar to himself, his trade or calling."

In *Page* v. *Mille Lacs Lumber Co.,* 53 Minn. 492, the plaintiffs who carried on a lumber business at the mouth of a navigable river were in the habit of floating logs down the river to their place of business. The defendants were carrying on a similar business higher up the stream and for their purposes erected in it obstructions which interfered with its free use by the plaintiffs and it was held that although the obstructions were a public nuisance they so interfered with the plaintiffs' business and their right to drive logs down the river as to occasion them special and peculiar damage for which they were entitled to maintain an action.

Dealing then with the facts of this case the question is whether the defendants by their works so interfered with the navigability of the river as to occasion special damage to the plaintiffs. The evidence shews that the dam above the falls so prevented water escaping as to render the river non-navigable for the plaintiffs' vessel the "Aguinda" from the 29th day of June, 1911, until the 5th of August, a period of five weeks. During this time she was tied up at Fort Frances, daily expenses being incurred. In addition, this serious interruption of about five weeks, a very substantial portion of the vessel's whole summer season which ended on the 15th of September, must have injured the good-will of the route and prejudicially affected the company's earnings throughout the remainder of the season.

If running during those five weeks, the vessel would have earned money for carrying the mails, passengers and freight. This the defendants by their unlawful and high-handed conduct prevented, and in my opinion they are liable for the loss thus occasioned. The plaintiffs had a subsidy from the Dominion Government for carrying the mails between Kenora and Fort Frances which, estimated on a mileage basis, amounted to about $66.75 per round trip between Fort Frances and Rainy River. But for the defendants' interference with the water the vessel would have been able during

the five weeks to make 15 round trips, thereby earning at least $1,000 of this subsidy.

From the examination of the trip reports I think it reasonable to assume that the vessel's receipts from other sources for the five weeks would have amounted to $600. Against these earnings would have to be charged the difference between the expenses incurred when the vessel was tied up and the probable expense if operated. I find no satisfactory evidence enabling me to fix this amount. The plaintiffs should furnish the Court with a statement and if it is satisfactory to the defendants then there would be a reference to ascertain the amount of such difference and the parties may speak to the question of costs of the reference.

If no inquiry as to such expenses is desired the plaintiffs will be entitled to the two sums of $1,000 and $600, without any deduction.

The plaintiffs also claim damages for the interruption of their business. They had been at expense in advertising and otherwise making it known and there is evidence to warrant the inference that the plaintiffs' business was materially prejudiced by the five weeks' interruption, and for this interference I would give them $360 being at the rate of $20 per trip for 18 trips, between the 5th of August and the close of navigation.

The judgment appealed from will be amended by increasing the damages to $1,960 subject to the reference, if any. If it be found that the cost of operating the vessel during the five weeks would have exceeded the actual cost incurred in keeping her in commission when she was tied up then such excess should be deducted from the sum of $1,960.

The plaintiffs are entitled to the costs of the appeal.

RIDDELL, SUTHERLAND and LEITCH, JJ., agree.

FALCONBRIDGE, C.J.K.B. JULY 22ND, 1914.

COWPER-SMITH v. EVANS.

6 O. W. N. 722.

Master and Servant — Wages — Wrongful Dismissal — Assault — Damages—Counterclaim—Costs.

FALCONBRIDGE, C.J.K.B., in an action for wages due, damages for wrongful dismissal and for assault, gave judgment for plaintiff for $335.81, and to defendant, on his counterclaim, for $114.75.

Action for wages, damages for wrongful dismissal and for assault.

Belleville, non-jury sittings.

W. C Mikel, K.C., for plaintiff.

E. G. Porter, K.C., and W. Carnew, for defendant.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—Plaintiff and defendant both impressed me favourably—both of good appearance and manner, and both very high-strung and tenacious of their rights.

I find the balance due to plaintiff for wages to be..		$200 81
Damages for dismissal—one month's wages in lieu of notice		125 00
Damages for assault		10 00
Found due plaintiff		$335 81
Set-off or counterclaim. The only items I allow are:—		
Grinding attachment taken by plaintiff..	$73 25	
Saw-table taken by plaintiff	39 50	
Countersink	2 00	
		$114 75
Judgment for plaintiff for		$221 06

with County Court costs. Defendant to set off difference between County Court and Supreme Court costs as between solicitor and client.

Thirty days' stay.

MEREDITH, C.J.O. JULY 24TH, 1914.

RE EAST LAMBTON ELECTION.

7 O. W. N. 29.

Elections — Recount — Disputed Ballots — Numbered Counterfoils Attached—Election Act, s. 108—Single mark on ballot—Words "My Vote" Written on Ballot—Appeal.

MEREDITH, C.J.O., *held*, that ballots issued with numbered counterfoils attached, should be counted in an election, but not ballots where a single line was used, or where the words "my vote" were written on the ballot.

Stormont Case, 17 O. L. R. 174, referred to.

An appeal by John B. Martyn, one of the candidates at the election, from the decision of the Judge of the County Court of the county of Lambton, upon a recount of the ballots cast at the election, the effect of which was, that Robert John McCormick, the other candidate, had the majority of votes.

The learned County Court Judge rejected three ballots marked for the appellant with a single line, one ballot marked with a cross low down, one with two words upon it, and certain ballots cast at the Thedford polling sub-division where the deputy returning officer had given out the ballots with the counterfoils attached and numbers on the counterfoils and had deposited them in the ballot-box in that condition.

E. Bristol, K.C., W. H. Price and F. W. Wilson, for appellant, Martin.

R. I. Towers, for respondent, McCormick.

MEREDITH, C.J.O.:—I do not think anything would be gained by further consideration of this case. Mr. Towers has very ably argued it, and it is to be borne in mind that a decision here against the respondent will not prevent the question of the validity of these ballots being raised on an election trial.

The policy of the Provincial Legislature for forty years has been to prevent the vote of a voter who has done all that the law requires him to do to entitle him to exercise his franchise from being lost by the mistake or misconduct of a deputy returning officer. The qualification of sec. 108 was intended to prevent any act of a returning officer from in-

validating the vote by an omission to do something that he ought to have done, or doing something that he ought not to have done, and this legislation is to be construed liberally, and, in my view, it was not so construed by the learned Judge of the County Court.

As I said during the argument, the respondent is upon the horns of a dilemma. If, as Mr. Justice Osler says, in the *Stormont Case,* the counterfoil is not a part of the ballot paper, then there is no mark of identification upon it, and, therefore, no right to reject it. If the counterfoil is a part of the ballot paper, then the numbers are upon the ballot papers, and the case is brought plainly within the section.

It is either of two things. If these numbers were put there by the returning officer, the consecutive numbers would afford no means of identifying the voter. If they were not put there by the deputy returning officer, they are marks upon the ballot papers, by which it is probable that the voter can be identified, and the saving clause says that any mark which the deputy returning officer puts on the ballot paper, which but for the saving clause would vitiate the vote, is not to do so.

It seems to me, that, looking at it in either way, the decision must be in favour of the appellant. I thoroughly agree with what Mr. Justice Osler says in the *Stormont Case,* 17 O. L. R. p. 174.

"No doubt the whole question may be reconsidered upon a petition, and it is possible that a different view may prevail, but if there be a doubt, though I do not wish to be considered as intimating that I have a doubt, it should be resolved in favour of the view which gives effect to the intention of the electors rather than in support of one which would disfranchise so large a body of them by reason of the carelessness of an official."

As I have said, I entirely agree with that, and if I were in doubt about the result, I would act on that view and hold for the purpose of this inquiry that the ballots are not to be rejected.

I have already said, with regard to the ballot in No. 3, Bosanquet, that I think the Judge properly rejected it. The ballots marked with a single line were properly rejected, and also the one on which was written the words "my vote."

I think, as I have already intimated, that the ballot in No. 7, Euphemia, which was rejected because the cross was

held not to be within the space opposite the appellant's name was improperly rejected, as there was a clear indication that the voter intended to cast his vote for the appellant.

The result is that there is a majority of four for the appellant. There will be a majority for him at all events.

I do not think it is a case in which there should be costs to either party, because the fault is that of the deputy returning officer, and there will, therefore, be no costs of appeal to either party.

MEREDITH, C.J.C.P. JULY 24TH, 1914.

RE CAWTHROPE.

6 O. W. N. 716.

Will—Construction — "Needy Relations"—Meaning of—Right of Executors to Participate—Discretion of Executors—Bona Fide Exercise of—Costs.

A testatrix disposed of her residuary estate in the following words: "All the residue of my estate not hereinbefore disposed of I give and bequeath unto those of my relations who are needy, in such amounts and to such of the same as my executors see fit in their discretion."

MEREDITH, C.J.C.P., *held*, that "relations" mean those only of the same blood in some degree; connections by marriage are not included.

Hibbert v. *Hibbert*, L. R. 15 Eq. 372, referred to.

That if the executors are needy relations of the testatrix, they are eligible for benefit out of the fund, provided they exercise their discretion in a *bona fide* manner.

Tempest v. *Lord Camoys*, 21 Ch. D. 571, referred to.

Motion by executors for the construction of a will.

D. C. Ross, for the executors.

C. G. Jarvis, for interested parties.

W. C. Fitzgerald, for others.

Many also appeared in person and were heard.

MEREDITH, C.J.C.P.:—The legal advisers of the executors of Sarah Cawthrope's will think it desirable that their clients should not exercise the power conferred upon them, by that will, until the executors have been advised and the will interpreted by this Court in these respects:

(1) As to the meaning of the word "relations," and (2) as to the meaning of the words "who are needy," both con-

tained in the residuary clause of that will, conferring that power upon them; (3) also as to their rights regarding persons and amounts in exercising such power; and also (4) whether they can include themselves among those benefited.

The residuary clause of the will only is involved; and it contains but few, and only such as would ordinarily be thought plain words; so that I have no doubt the executors themselves would have thought the intention of the testatrix plain enough, and that only the fear of what the law might think of it has brought them here, and, in coming here, it may be that they are right.

The clause is in these words:

"All the residue of my estate not hereinbefore disposed of I give and bequeath unto those of my relations who are needy in such amounts and to such of the same as my executors see fit in their discretion."

The intention of the testatrix, though somewhat awkwardly expressed, is that the residue of her estate shall go to such of her relations who are needy, and in such amounts as her executors shall in their discretion determine.

The words "relations who are needy" seem simple and plain words at first sight; words which ordinary persons might think afforded little excuse for stumbling over; yet such, and like, words have been the subject of not a little judicial consideration, and results have been reached which, to an ordinary person, might at first sight seem extraordinary.

A long line of decisions running back hundreds of years has settled that a gift to relations is not a gift to all relations, but only to those who would take under the Statute of Distributions in case of an intestacy; and some of such cases indicate that where such, or the like, word is qualified by such words as "poor" or "needy," the qualifying word is to be excluded altogether.

In one of the several cases in *Ambler-Widmore* v. *Woodroffe*, Amb. 636, the Lord Chancellor is reported to have said, in regard to a will directing that one-third of the residue of the estate there in question should be distributed among the most necessitous of the testator's relations, that several cases "all proceeding upon the same ground, make the Statute of Distributions the rule, to prevent an equity which would be infinite, and would extend to relations *ad infinitum*. The Court cannot stop at any other line. Thus, it would clearly stand

on the word 'relations' only; the word 'poor' being added makes no difference. There is no distinguishing between the degrees of poverty; and, therefore, the Court has, as unanswerably argued, construed the will as if the word 'poor' were not in it."

But, also, it has been long settled, in like manner, that where power is conferred, as in this case, upon someone to distribute a fund among such relations as he shall in his discretion name, the word "relations" is not restricted to those who would take under the Statute of Distributions in case of an intestacy, but includes all who are actually relations—which, of course, is limited to those of legally provable relationship.

This, too, is plainly laid down in an early case, also reported by Mr. Ambler—*Supple and Wife* v. *Lowson,* Amb. 729—in which Sir Thomas Sewell, Master of the Rolls, is reported to have said, regarding a case such as this: "Am clear that the relations at large are the objects of the bounty, and not the next of kin only."

And, in the case of *Grant* v. *Lynam,* 4 Russ. 292, Sir John Leach, Master of the Rolls, dealt with the subject in these words: "The principle, therefore, of that case"—referring to *Harding* v. *Glyn*—"is that, where the author of the power uses the term "relations," and the donee does not exercise the power, there the Court will adopt the Statute of Distributions as a convenient rule of construction, and will give the property to the next of kin; but that the donee who exercises the power, has a right of selection among the relations of the donor, although not within the degree of next of kin."

"I cannot find that the doctrine of that case has ever been impeached; on the contrary, it has been repeatedly acted upon, and the same rule has been applied with respect to personal estate, where the word 'family' has been used in the place of relations."

So, too, there are not wanting cases in which it has been held that in a gift to poor or needy relations, the qualifying words are not to be rejected—as in the case of *Widmore* v. *Woodroffe,* it was said that they are to be—but are to be given effect. The subject is discussed, and the cases referred to, in Jarman on Wills, 5th ed., pp. 978-9, and in Lewin on Trusts, 8th ed., pp. 836-8.

But, however that may be, there is authority for this, that in a case such as this, in which there is a discretion as to the objects of the bounty, the qualifying words are to have effect. I refer to the case of *Gower* v. *Mainwaring*, 2 Ves. 87, in which, in a trust deed, it was provided that the trustees should give a fund among the donor's friends and relations, where they should see most necessity, and as they should think most equitable and just. The Lord Chancellor, after consideration, directed that the fund should be divided between certain members of the family according to their necessities and circumstances, which the master should enquire into, and consider how it might be most equitably and justly divided; 2 Ves. 110: adopting the rule that was applied in the case of *Grant* v. *Lynam*, that as to the persons, the Statute of Distribution is the guide when the Court has to act, instead of the trustee; and that where there is a discretion as to persons, such qualifying words as "according to their necessities and circumstances" are to be given effect, not treated as dead letters.

So that, as it seems to me, where there is, as in this case, a discretion to be exercised by executor or trustee, as to the individuals to be benefited, the case is taken out of the rules laid down in *Widmore* v. *Woodroffe*, in both respects—the word "relations" is not restricted, so far as the executor or trustee is concerned, to the next of kin, and such qualifying words as "poor" or "needy" are to be given effect. A result which I cannot but think satisfactory, because it avoids making a new will or deed for the donor, it gives effect to that which the donor intended.

Then does the word "relations," in such a case as this, include relationship by affinity, as well as in blood?

My own idea was that, accurately speaking, the word "relations" could be used only in reference to those of the same blood; that the proper word for relationship by marriage is "connexions;" but, upon referring to the dictionaries—which formerly it was said the Judges might turn to to refresh their memories, but which, in these days, are treated as witnesses competent to give admissible evidence as to the meaning of such words, expressions and terms as are commonly dealt with in such books. I find that, on all hands, the word "relations" is treated as including connection or alliance by affinity as well as by blood; and the word "connections"

as also applicable to relationship by blood or marriage. And in the case of *Davies* v. *Baily*, 1 Ves. 84, the Lord Chancellor, speaking of the word "relation," said: "'Relation' is a very general word, and takes any kind of connection; but the most common use of it is to express some sort of kindred, either by blood or affinity; though properly by blood."

But it has long been settled that, in the eyes of the law, the word "relations," used as it is in the will in question, implies consanguinity, and does not include connections by marriage.

The firmness and fullness with which this technical interpretation of the word is still applied by the Courts is shewn in the case of *Hibbert* v. *Hibbert*, L. R. 15 Eq. 372; in which case the learned Vice-Chancellor, who decided it, also said: "It is not the province of the Court to speculate or consider what the testator would, by strangers, be supposed to have meant;" though that case was one in which, I have no doubt that ninety-nine out of every hundred persons unfamiliar with the law upon the subject, would have interpreted the will, unhesitatingly in a way directly opposed to the interpretation of the Court.

Nothing in this will itself, or in any of its numerous codicils, gives any encouragement to connexions by marriage, beyond the use of the word "relations;" with the exception of one gift to a stranger, all of the many gifts, made in them, are to blood relations only; which may seem rather hard upon the deceased husband's relations, the whole of the property in question having come to the testatrix, in the first instance, it is said, under the will of her husband, who died some years ago. But it is always unsafe to express, or form, an opinion of that character; those who make wills may know many things rightly affecting their bounty, of which none else may have any knowledge.

There is, then, nothing in this case to take it out of the general rule that only those who are in some degree blood relations of the testatrix are eligible for a share of her bounty.

These observations cover the whole ground, upon which advice is sought, except that upon which the question whether the executors may share in the gift, is based. They may, if they really come within the class designated by the testatrix; that is, among her needy blood relations; but they must, of course, execute their power in good faith, and their action,

in this, as well as in all other respects, must not be influenced by improper motives.

So, too, it may be added, that a gift of that character will naturally be more the subject of suspicion of bad faith, or improper motive, than a like gift to a stranger would be.

That they must be "needy," as well as "relations," seems to me, as I have indicated, to be necessary to qualify them as objects of the bounty of the testatrix; if they come within that class, and if in good faith and uninfluenced by improper motives, they benefit themselves, the Court cannot interfere.

"Needy" is not such an indefinite word, perhaps, as at first sight it might appear to be. When the circumstances of all the relations are known, as doubtless they have long been to the executors, it may not prove at all a difficult task to separate, as far as may be necessary, the needy from those who are not needy. The testatrix obviously considered some of her relations needy and others not needy; and, with the wide discretion conferred by the will, upon the executors, there is not likely to be any failure to give full effect to all that the testatrix desired, and expressed in her will, in this respect; the executors exercising their best judgment conscientiously in the matter.

The law upon the subject of discretionary powers, generally, was thus expressed by Jessel, M.R., in the case of *Tempest* v. *Lord Camoys*, L. R. 21 Ch. D. 571:

"It is very important that the law of the Court on this subject should be understood. It is settled law that when a testator has given a pure discretion to trustees, as to the exercise of a power, the Court does not enforce the exercise of the power against the wish of the trustees, but it does prevent them from exercising it improperly. The Court says that the power, if exercised at all, is to be properly exercised. . . .

"But in all cases where there is a trust or duty coupled with a power, the Courts will then compel the trustees to carry it out in a proper manner within a reasonable time."

In this case, there is, I think, a gift of the residue of the estate, to be distributed among such of the needy relations of the testatrix, and in such amounts, as the executor may see fit; a gift which the Court would carry into effect if the executors failed to exercise their power over it; but with which the Court will not interfere if the executors, in good

faith and uninfluenced by improper motive, exercise, within a reasonable time, their power over it: see *Burrough* v. *Philcox,* 5 My. & Cr. 73; and *Brown* v. *Higgs,* 4 Ves. 708; 5 Ves. 495; 8 Ves. 561, and 18 Ves. 192.

Accordingly, the answers to the questions propounded upon the argument of this motion, shortly stated, are:

The executors' power of distribution of the fund is limited only to this extent: Only those who are relations of the testatrix and are needy can share in it, and the executors' discretion in the distribution of the fund must be exercised in good faith, without improper motive. Subject to these limitations persons and amounts are in the discretion of the executors.

The "relations" of the testatrix are those only of the same blood in some degree; connections by marriage are not included.

If the executors are needy relations of the testatrix, they are eligible for benefit out of the fund, but subject to the limitations before-mentioned; and the power should be exercised within a reasonable time.

The executors will be advised, and the will construed, accordingly.

The costs of this motion are to be paid out of the fund, those of the executors as between solicitor and client.

FALCONBRIDGE, C.J.K.B. JULY 24TH, 1914.

DUGGAN v. ALLAN.

6 O. W. N. 713.

Will—Invalidity—Incompetence of Testatrix—Onus of Proof—Evidence of Physician who Witnessed Will—Declaration of Intestacy—Injunction—Costs.

FALCONBRIDGE, C.J.K.B., *held*, that where a testamentary disposition is propounded under circumstances of suspicion, as where the party propounding it was the drawer, and was benefited by it, and it was executed at a time when the testator was of doubtful capacity, without any evidence of instructions previously given or knowledge of its contents, the party propounding it must prove that the testator knew and approved of the contents of the instrument.

Mitchell v. *Thomas*, 6 Moo. P. C. 137; *Baker* v. *Batt*, 2 Moo. P. C. 317, referred to.

Action for a declaration that a testatrix was incompetent to make a will and for a declaration of intestacy.

Trial at St. Catharines.

H. H. Collier, K.C., for plaintiff.

G. H. Kilmer, K.C., for defendant.

FALCONBRIDGE, C.J.K.B.:—The plaintiff is a brother and one of the heirs-at-law of Isabella D. Allan, who died December 20th, 1910, she having on the 7th of same month signed a will. The plaintiff asserts that at the time she is said to have signed and executed the same she was not of a competent and disposing mind and was not aware of what she signed. The plaintiff further asks for a declaration that the said Isabella D. Allan died intestate. By the said will all her real and personal estate was devised and bequeathed to her husband, who died on 27th June, 1911; the defendant is his executor.

In *Baker* v. *Batt* (1838), 2 Moo. P. C. 317, the headnote is as follows: " The burthen of proof of the genuineness and authenticity of a will lies on the party propounding it; and if the conscience of the Judge is not judicially satisfied that the paper in question does contain the last will and testament of the deceased he is bound to refuse its admission to probate.

A will written or procured to be written by a party who is benefited by it is not void; but the circumstance form a just ground of suspicion against the instrument, and calls upon the Court to be vigilant and jealous; and unless clear and

satisfactory proof be given that it contains the real intentions of the deceased, will be pronounced against."

See also the "notable case" as the Chancellor appropriately calls it, of *Barry* v. *Butlin,* reported in the same volume of Moore, P. C. at p. 480, and also in 1 Curt. Eccl. R. 637, a judgment of Parke, B., (Lord Wensleydale) by a slip of the pen ascribed to Lord Hatherley in *Lamoureaux* v. *Craig,* 1914, 49 S. C. R. at p. 340, and discussed by the Chancellor in *Loftus* v. *Harris,* 1914, 30 O. L. R. 479.

In *Mitchell* v. *Thomas* (1847), 6 Moo. P. C. 137, it was held: "Where a testamentary disposition is propounded under circumstances of suspicion, as where the party propounding it was the drawer, and was benefited by it, and it was executed at a time when the testator was of doubtful capacity; without any evidence of instructions previously given, or knowledge of its contents; the party propounding it must prove that the testator knew and approved of the contents of the instrument."

On the application of the rules laid down in these cases I hold that the defendant has failed to satisfy the onus cast upon him.

The evidence is somewhat conflicting but it does not preponderate in defendant's favour but rather the other way.

The attending physician was in Court, having been subpœnaed, I presume, by one or both of the parties. There seemed to be a curious reluctance about calling him. Plaintiff's counsel evidently expected defendant to call him, but when defendant's counsel closed his case without doing so, plaintiff asked leave to put the doctor in the box. I allowed him to do so, expecting that he would give material aid in the disposition of the case, as he was one of the subscribing witnesses and had made the affidavit of execution.

But his evidence was extremely disappointing and unsatisfactory. It is in effect as follows: "She suffered from heart disease, Bright's disease and dropsy in consequence of these. Morphia and strychnine administered as heart stimulants. She said she was going to leave money for missions in north-west and one or two beds in the hospital." (I shall revert to this statement hereafter) "I don't remember saying to Miss Stephens that the will was not worth the paper it was written on. I would not likely make such a statement." (Miss Stephens was not called.) "Her memory was not very good. I can't recollect whether the will was read over

to her or not. I had no idea what was in it. Her mental condition was about the same as ever since she had a stroke about a year before." (According to Mrs. Wilson the stroke was 3 years before she died). "If her husband would bring her a paper to sign, I think she would sign it. I did not hear the will read. It may have been read to her before I went in." Cross-examined: "She had lucid intervals when she was quite bright. I made affidavit of execution on 15th January, 1911. She knew me when I came in. Her mental condition was impaired from the stroke—it varied—sometimes she was bright. I would not say myself about her mental condition. I would not contradict the nurse." (Matilda Glass, examined on commission.) Re-examined: "Nor Miss Grant" (witness called by plaintiff.).

A medical man who avouches a will by signing as a witness ought to be prepared to state that the person purporting to make the will had sufficient mental capacity for the purpose. See remarks on this subject in *Trusts & Guarantee Co.* v. *Fryfogel,* 1914, 26 O. W. R. 330. They do not appear in the report in O. W. N.

The doctor speaks of her avowed intention to leave money for missions and beds in hospital. She told her cousin, Mary A. Grant, on the day the will was made, and after the doctor and the nurse came out, that she had left quite a sum of her money to missions.

And Miss Glass says (p. 5, questions 29 and 30), that prior to the actual signing of the document a remark was made between husband and wife about leaving some money to a public institution in St. Catharines and about some money for furnishing a window in the church. She also says, (p. 15 question 128): 128. "Q. Did it appear to be of more or less passive obedience to any expression of his (the husband's) will to her as to what she ought to do and what not to do? A. Yes."

I find therefore against the will and declare that the said Isabella D. Allan died intestate.

Plaintiff will have an injunction as prayed and his costs against defendant, of course as executor only, i.e., out of estate of Wm. B. Allan.

Thirty days' stay.

FALCONBRIDGE, C.J.K.B. JULY 25TH, 1914.

CANADIAN MALLEABLE IRON CO. v. LONDON MACHINERY CO.

6 O. W. N. 722.

Contract—Alleged Breach of—Damages—Evidence—Costs.

FALCONBRIDGE, C.J.K.B., in an action for breach of contract gave judgment for plaintiffs for $44.21 with Division Court costs.

Action for damages for breach of contract.

Trial at Owen Sound.

W. H. Wright (Owen Sound), for plaintiffs.

H. H. Dewart, K.C., and N. Jeffrey (Guelph), for defendants.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—The correspondence does not form a contract, nor is there any other note or memo. signed by the defendants.

The burthen of proving consensus as to quantity lies on plaintiffs. It is asserted by plaintiffs' manager that the bargain was for 100 tons. This the defendants' Canadian manager denies, saying there was no agreement as to quantity or price. I do not see that the correspondence materially assists the plaintiffs, who therefore fail to prove the contract which they set up.

On the same principle defendants fail to prove their counterclaim for damages for delay in making and shipping the castings which were delivered.

Judgment for plaintiffs for $44.21 with Division Court costs—defendants to have usual set-off of costs, not to include any costs of their counterclaim which is dismissed without costs.

Thirty days' stay.

FALCONBRIDGE, C.J.K.B. AUGUST 6TH, 1914.

McKINNEY v. McLAUGHLIN.

7 O. W. N. 21.

Pleading—Action for Possession of Motor Car—Statement of Defence —Lien for Debt—Insufficiency—Particulars—Leave to Amend.

FALCONBRIDGE, C.J.K.B., gave judgment for plaintiff on the pleadings in an action to recover possession of a motor car and for damages for detention.

Motion by plaintiff for judgment on the pleadings in an action to recover possession of a motor car and damages for detention. The defendants asserted a lien on the car.

W. Laidlaw, K.C., for plaintiff.

L. F. Heyd, K.C., for defendants.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:— Not having received from Mr. Heyd's office the expected consent for the final disposition of this case, I proceed to give judgment on the motion as originally launched.

It is quite clear that the statement of defence does not disclose a defence to the cause of action alleged in the statement of claim.

The lien should be specially pleaded and particulars of the debt in respect of which the lien is claimed should be given.

Bullen & Leake, Pleading, 6th ed., 1905, p. 866, *et seq.*; Halsbury, XXVII., p. 911; *Halliday* v. *White*, 1864, 23 U. C. R. 593; *Somers* v. *B. E. Shipping Co.*, 1860, 8 H. L. C. 338; *Monarch Life Assurance Co.* v. *Mackenzie*, 25 O. W. R. 743.

The plaintiff is therefore entitled to judgment with costs and reference as to damages. Of course the defendant may amend on payment of costs.

KELLY, J. AUGUST 7TH, 1914.

MACMAHON v. TAUGHER.

7 O. W. N. 9.

Solicitor—Agreement with Client in Foreign Country—Contingent Fee — Share of Estate — Client, Widow without Independent Advice—Duty of Solicitor—Agreement made after Relationship of Solicitor and Client Established—Proof of Foreign Law — Lex Loci Contractors—Action to Set Aside Agreement—Solicitors Act, R. S. O., c. 159, s. 56, et seq.—Impossibility of Performance of Agreement by Solicitor—Lack of Consideration—Agreement Set Aside.

Plaintiff, a widow of slender means and delicate health consulted a San Francisco attorney, formerly of the Ontario Bar, with regard to her interest in an Ontario estate, and after he had acted as her attorney for some time entered into an agreement with him to give him twenty-five per cent. of any moneys coming to her from the estate in return for his services. In entering into the agreement in question, plaintiff had no independent advice.

KELLY, J., *held*, that, according to the law of both California and Ontario, an attorney who bargains in a matter of advantage to himself with his client is bound to shew that the transaction was fair and equitable and that the client was fully informed of his rights and interests in the subject-matter of the transaction and the nature and effect of the transaction itself, and was so placed as to be able to deal with the attorney at arm's length; and that the defendant had not satisfied the onus on him in this regard.

That the provisions of the Solicitors Act, 2 Geo. V., c. 28, s. 56, *et seq.*, were not intended to apply to a case of the present character.

C. A. Moss and S. King, for plaintiff.

I. F. Hellmuth, K.C., for defendant, Taugher.

C. S. MacInnes, K.C., for defendants, National Trust Co. Limited.

Action by the widow of James A. MacMahon, son of the late Honourable Hugh MacMahon, against one Taugher, an attorney-at-law, who at the time of the making of the agreement, over which the action arose, was a resident of the city of San Francisco, and National Trust Co. Limited, the executors of the will of the late Honourable Hugh MacMahon, dated September 2nd, 1910, to have a certain agreement between the plaintiff and the defendant Taugher set aside: for a declaration that the defendant Taugher was not entitled (as he claimed to be) to twenty-five per cent. of the value of the estate of Hugh MacMahon coming to the plaintiff; and for a declaration that the plaintiff was entitled to the whole of the estate, subject only to the payment of the proper charges and disbursements of the defendants, the executors.

HON. MR. JUSTICE KELLY:—The testator died on January 18th, 1911, and probate of the will issued from the Surrogate Court on March 14th, 1911.

Plaintiff's husband, James A. MacMahon, died in California on March 16th, 1910.

By the said will, the testator, after making provision for his wife, holding during her lifetime certain articles of furniture, silverware, etc., and for payment to her of a sum of $600, directed his executor to invest the balance of the monies of his estate, and to pay his wife in quarterly payments the income arising therefrom, as well as a sum of $300 annually out of the corpus.

The will then proceeds as follows:—

"On the death of my wife, I direct that the interest arising out of the monies then existing to be paid in quarterly payments to my son, D'Arcy Hugh MacMahon, during his life, but he shall have no power to anticipate, mortgage, encumber or alienate the same or any part thereof, and on his decease, I direct that the fund then remaining be paid Stella MacMahon, widow of my son, James Alexander. But should the said Stella predecease my said son, D'Arcy Hugh, he is hereby empowered to appoint by deed or will the balance of the fund remaining at his decease and in default of such appointment, to my niece, Ella MacMahon, of Dundas."

Testator's widow died on June 18th, 1911, and his son, D'Arcy Hugh, died on July 8th, 1913. At the time of all these occurrences and for some time prior thereto, plaintiff was a resident of the State of California.

Defendant, Taugher, formerly a resident of Ontario, was called to the Bar of this Province in 1900, and having practiced here as a solicitor for a short time, he left the province and engaged in the practice of law successively in Seattle, in the State of Washington; in the State of Montana; in the City of Portland, in the State of Oregon; and in the City of San Francisco, in the State of California. He states he is a naturalised subject of the United States.

According to the evidence of the plaintiff, she first became aware of the death of Mrs. MacMahon, widow of the testator, and of the benefits intended for her by the will, in November, 1911, when a communication reached her asking her to consent to payment out of the assets of the testator's estate of expenses connected with the death of Mrs. MacMahon, the testator's widow. Her own testimony is that with the object

of ascertaining if it were possible for her to borrow money upon her position under the will, she consulted a lawyer in San Francisco. Not having been successful, and having, as she says, become aware that defendant, Taugher, had been admitted to practice at the Bar of Ontario, and, therefore, familiar with the laws of that province, and understanding, as she also says, that members of the Ontario Bar had the reputation of being of high standing and trustworthy, she sought and obtained an interview with him in December, 1911. Her financial condition at that time was bad; she says it could not well have been worse; she was without means, except such as she derived from her personal earnings at office work; and she was in a poor state of health, and in fear of having, in nursing her husband through a long illness preceding his death, contracted tuberculosis. Her interview with defendant, Taugher, was for the purpose of raising or procuring money on her prospects under her father-in-law's will, as well as to consult him on the advisability of consenting to the estate contributing to the funeral expenses of Mrs. MacMahon. Taugher says that any reference to the payment of the funeral expenses was only incidental and that it was not a subject of advice. Whatever may have been the object of her seeking out and consulting with Taugher, he told her he would first have to see a copy of the will under which she claimed, as well as that of Mrs. MacMahon, the testator's widow. Her statement is, and I accept it, that Taugher asked her if she would not care to get some money presently from the estate, and not wait for "dead men's shoes," as he put it. She fell in with the suggestion. and told him the value of her father-in-law's estate, and that she had absolutely no money.

About the beginning of February, Taugher received the documents from Toronto, and negotiations were entered into between them with the object of his seeking, on her behalf, to effect a settlement, compromise or agreement by which she would receive some immediate benefit from the estate, and providing for his remuneration for his services. The matter was discussed by them at his office, and a draft agreement was prepared, by the terms of which he was to have received one-half of any sum or amount agreed to be paid to her for her interest in the estate.

A copy of this draft agreement was given to plaintiff with the request by him, as she says, that she shew it to her

friends; Taugher says he added "preferably to an attorney;" this the plaintiff does not deny. The draft was partly, at least, prepared in plaintiff's presence.

Having kept it in her possession for about ten days, during which time she did speak of it to her friends, but did not consult an attorney; she returned it to Taugher and took exception to his receiving fifty per cent., if D'Arcy Hugh MacMahon should die before the contemplated settlement was completed. He admitted that that amount of remuneration was excessive, if D'Arcy Hugh MacMahon should die within a short time, and the draft agreement was then amended by providing that "in the event that said D'Arcy Hugh MacMahon die before any compromise or settlement of the aforesaid matters be consummated, then, and in that event, the said Stella MacMahon agrees to assign, transfer, set over unto the said J. L. Taugher one-fourth (twenty-five per cent. (25%)) of the whole amount of her interest in and of all the money that she shall become entitled to by or under the will of Honourable Hugh MacMahon, deceased." Thus amended, the agreement dated 16th March, 1912, was executed. At the same time Taugher obtained from her a power of attorney, by which he was given the very widest powers of entering into an agreement or compromise with D'Arcy Hugh MacMahon, in relation to her interest in the estate, and of selling, assigning, disposing of, etc., her interest, present and contingent, therein.

Taugher entered into correspondence with Mr. Smellie, his representative in Toronto, with the object of opening up negotiations with D'Arcy Hugh MacMahon, and Mr. Smellie got into communication with Mr. Rose, who had acted as solicitor in other matters for MacMahon—the latter being then absent from the country. From the very first, Mr. Rose disapproved of any proposal tending to a compromise of, or interference with the provisions of the will, in so far as they related to his client, and he so expressed himself to Mr. Smellie. This was communicated to Taugher and by him to plaintiff.

Taugher's next suggestion was that he or his representative get into communication directly with Mr. D'Arcy Hugh MacMahon; with that end in view, they obtained his foreign address. Little, if anything was done in the matter from October, 1912, until May, 1913, when plaintiff called at Taugher's office for some papers of hers. The proposed

settlement or compromise was then again discussed. Taugher intimated his intention of going to Europe within a short time thereafter, when he would, if possible, go to D'Arcy Hugh MacMahon, who was then in Europe, and enter into negotiations with him personally. Plaintiff did not disapprove of this. Taugher did go to Europe, but he made no effort to see D'Arcy Hugh MacMahon or get into communication with him; in fact, he did nothing further until MacMahon's death in July. On learning of the death from a friend in Canada, plaintiff consulted a solicitor, who soon afterwards gave notice to Taugher that she revoked the power of attorney and disclaimed any rights of his under the agreement.

In August, 1913, notice on behalf of Taugher was given the National Trust Company Limited of his claim under the agreement, with an intimation that legal action would at once be taken to secure and realize what he claimed to be entitled to and to protect his rights. This was followed on August 22nd by a further notice to the company that he claimed the right to have the estate of the Honourable Hugh MacMahon paid over to him to be distributed by him, that any payment to or dealing with plaintiff or on her account inconsistent with this claim would be objected to and that in carrying out the trusts of the will, the company should pay over what plaintiff is entitled to to Taugher, and deal with him, leaving him to account to her.

The present action is brought to have the agreement set aside and declared null and void; for a declaration that Taugher is not entitled to the 25 per cent. claimed; and a declaration that plaintiff is entitled to the whole of the estate subject only to the payment of the proper charges and disbursements of the executors, basing her claim upon the ground that the agreement was procured by Taugher, who, she alleges, was her attorney, without independent advice, and by deceit and over-reaching. She also alleges that long prior to the death of D'Arcy Hugh MacMahon negotiations looking to any division of the estate had ceased and further efforts in that direction were not contemplated, and, to the knowledge of Taugher, would have been of no avail—that in effect the whole matter had been considered at an end.

On August 5th, 1913, plaintiff wired from Toronto to Taugher, who was then in New York, a notice that she had revoked the power of attorney to him, and on the same date

her present solicitor wrote him, repeating the telegram, and intimated a willingness to pay any reasonable expenses Taugher might have incurred on her behalf.

Apart from the questions of fact to be determined, several questions of law are involved and were raised at the trial; the validity of agreements providing for contingent fees, the liability and duties of an attorney arising from the relationship of attorney and client, the right to maintain this action in its present form in view of the provisions of The Solicitors' Act, 2 Geo. V. ch. 28, sec. 56, *et seq.* (now R. S. O. 1914, ch. 159, sec. 56, *et seq.*)

The evidence of a number of attorneys-at-law in San Francisco, men of long professional experience, was taken on commission and submitted at the trial.

On the question of the validity of agreements entered into by attorneys-at-law in that State, providing for the payment of contingent fees, this evidence suffices to shew that such agreements have been upheld by the Courts of that State and that such contracts may there be made. Other evidence of these witnesses was directed to the question of the relationship between an attorney and his client, and the obligation of the attorney towards the client, with respect to the good faith required of him from the time the relationship is established; the opinions expressed by these witnesses being supported by decisions of the California Courts cited in their evidence. I refer particularly to *Cox* v. *Delmas* (1893), 99 Cal. Rep. 104, in which it was laid down that "the relation between attorney and client is a fiduciary relation of the very highest character and binds the attorney to the most conscientious fidelity," a statement much as it would be enunciated in our own Courts. The judgment (at page 124), taking a view the most favourable to the attorney, adds:—"The attorney must shew affirmatively that he gave full and proper advice in the premises; acted with entire fairness throughout the transaction and took no advantage of his client;" so that the fair deduction to be drawn from the evidence of these witnesses on the law of the State of California is that the attorney who bargains in a matter of advantage to himself with his client is bound to shew that the transaction is fair and equitable, that the client was fully informed of his rights and interests in the subject matter of the transaction and the nature and effect of the transaction itself, and was so placed as to be able to deal with the

attorney at arm's length, the general principle there governing this class of cases and forming the basis of the rule being, that if a confidence is reposed and that confidence is abused and the other party suffers an injury thereby, the Court will grant relief. But while these witnesses in general terms agree upon this view of the law as it exists in their State, they in effect also agree that the strict duty required of the . . . attorney when the relationship of attorney and client has been established does not arise in the making of a contract by which the relationship is originally created and the attorney's compensation is fixed. This is supported by the decisions of the California Courts, to which reference is made in the depositions of these witnesses. In *Cooley* v. *Miller & Lux,* 156 Cal. Rep. 510, which may fairly be taken to embody the opinions of these professional witnesses on this subject, the headnote contains this:—

"The relation of attorney and client is confidential in character, and any contract entered into between them while that relation continues, whereby the attorney obtains an advantage from the client, is presumed to have been made by the client under the undue influence of the attorney. The presumption does not apply to a transaction in which the attorney openly assumes a hostile attitude to his client nor to a contract by which the relation is originally created and the compensation of the attorney fixed."

Unless in the excepted instances thus given the burden is thrown upon the attorney of satisfying the Court that the dealings between him and his client have been conducted with that degree of straightforwardness, candor, and good faith which the relationship of attorney and client involves. As put by Mr. Henley, one of these witnesses, after that relationship has been established, the burden of proof shifts, and before a lawyer can recover he must prove that everything was fair and above board.

Had the relationship of attorney and client been established between these parties before the making of the contract now in issue? And if so, did the attorney fulfil the obligations involved in that relationship?

To properly answer these questions, the sequence of events leading up to the agreement must be considered. The suggestion to adopt the scheme afterwards embodied in the written agreement, and which was made when the plaintiff went to Taugher to be advised about payment of the

funeral expenses and to raise money if possible, was his, not hers. Copies of the will of the Honourable Hugh MacMahon and of Mrs. MacMahon, his widow, were procured from Toronto so as to enable Taugher the better to advise plaintiff. He contends that this advice was in respect of the feasibility of dissolving the trust under the will and so obtaining an immediate benefit out of the estate for plaintiff, and he takes the position that he was not asked to advise and did not advise on the question of funeral expenses, but only in respect of the proposed compromises with D'Arcy Hugh MacMahon; and that anything that happened in regard to the question of funeral expenses was only, as he puts it, incidental and did not establish the relationship of attorney and client between him and plaintiff; and further, that such relationship was not established until the agreement now in controversy had been made.

Plaintiff on the other hand insists that the proposal made to her as to contributing to the funeral expenses was the very matter on which she had sought Taugher's professional advice and in which he did advise her, and that he was from the time of the first interview, *de facto,* her attorney—that the object of his writing to Toronto for copies of the wills was that he could advise her on this very point.

Taugher's contention, moreover, is met by his own written admissions which establish fully to my satisfaction, if I had had any doubt of the truth of plaintiff's evidence—which I have not—that he acted from the beginning as her attorney. On February 3rd, 1912, after he had received from Toronto copies of the documents (the wills, etc.) he wrote plaintiff expressing surprise, in view of what the documents contained, that she should be asked to consent to payment of the funeral expenses and asking her to call upon him as he would like to take up with her a communication, he had received, in respect to this very matter. Not a word of any other business but that—the very transaction on which plaintiff says he was advising her, and not merely something incidental to the scheme embodied in the agreement.

It is not without significance, too, that in a letter of March 2nd, 1912 (two weeks before the agreement was executed), to his representative in Toronto, whom he retained to negotiate the settlement or compromise, he more than once refers to plaintiff as his client; and in the following sen-

tence, referring to a letter he proposed writing to the Toronto solicitors who asked plaintiff's consent to payment of the funeral expenses, he refers to himself as her attorney: "I will tell . . . that I am from Osgoode and that I was in your office. Probably someone from that firm will call you up to discover how hard a bargain they can drive with Mrs. MacMahon's attorney. In the event they do telephone you, you might assure them that I am not 'easy!'"

Notwithstanding his denial that the relationship of attorney and client existed between them until the agreement had been made, facts well established are against him, and are opposed to his contention. When I consider the evidence of plaintiff, given throughout with the greatest of candor and straightforwardness, and without any appearance of a desire to overstate her own position, and the deductions to be drawn from Taugher's correspondence as well as from other circumstances, I find it impossible to reach any other conclusion than that from the end of December, 1911, or the beginning of January at least, his relation to the plaintiff was that of an attorney to his client, and that he so considered himself and held himself out. One cannot overlook, too, that this defendant, with his trained mind and an evident keenness in pursuit of his claim, shewed unmistakable appreciation of the legal obligation which his position as plaintiff's attorney and legal adviser cast upon him, if it should be proved that such relationship existed between them when the agreement was entered into.

The relationship having been, as I find, so established, the next consideration is, did Taugher discharge the obligations to plaintiff which his fiduciary relationship towards her demanded? As expressed in *Cox* v. *Delmas* (*supra*), at p. 123, citing from *Gibson* v. *Jeyes*, 6 Ves. 278, one of these obligations is that if the attorney on his own account has any transaction with his client about the subject of the litigation, he must with reference to such transaction be able to give and must give to his client that reasonable advice against himself that he would have given against a third person.

Not only was plaintiff entitled to the protection that this expression of the law indicates, but the confidence she reposed in Taugher was based on unusual circumstances. The very reason for her selecting and retaining and consulting him, and which reason was made known to him, rested on the confidence which she under-

stood could be reposed in him as an Ontario lawyer. She had the utmost confidence in him and implicitly relied upon him. She had no male friend or adviser, in fact, no friends, except one woman friend, as was made known to Taugher. She had had no experience in legal matters; she was without knowledge of business affairs, except such as she acquired from having been employed for a time as a clerk in a book publishing house; her financial condition could not have been worse than it was; her health was not good, and she had fears of having contracted an illness which might prove fatal. She had no money for present payment of her attorney for his services. He, an attorney of some years' standing, keen and shrewd, proposed the scheme of attacking the trust created by the will of her father-in-law or a compromise which would result in getting some immediate or early benefit from the estate, one-half of which he would receive as his remuneration for his services, his statement to her being that that amount was customary in such cases. He advised her against returning for her papers to the attorney whom she had interviewed before she called upon him. She relied upon him throughout, and in March the agreement was prepared under the circumstances detailed above, and having had it in her possession the only objection that occurred to her to make was as to the amount that Taugher should receive in the event of D'Arcy Hugh MacMahon's death before the contemplated settlement or compromise was effected. The agreement is signed and Taugher then advises her not to shew it to her friends, as they are prone to give advice.

The power of attorney given at the time the agreement was executed is of the broadest and most comprehensive character, giving the attorney the most absolute powers of dealing with plaintiff's interest in the estate.

Were these documents such as a prudent and careful attorney—one fully appreciating his duty to his client—would or should advise or permit that client to execute? I am forced to answer in the negative; and I would be slow to believe that if defendant Taugher had been consulted by plaintiff as to executing such documents in a transaction between her and another attorney, he would have advised their execution. My conclusion is that the relationship of attorney and client having been established before the making

of the agreement, that relationship cast upon the defendant Taugher an obligation and duty towards plaintiff which he failed to perform, and, as a consequence, the agreement cannot be enforced against plaintiff. This is in accordance with the law of California, as I understand it from the evidence submitted and the authorities cited; and it is not out of harmony with the state of the law in this Province. A contract such as this, entered into here under similar circumstances, would not be upheld.

This renders it unnecessary to further discuss the question raised on the argument as to whether the matter should be determined under the law of California, where the contract was made, or subject to the law of this Province.

No end is to be served by going into the happenings subsequent to the making of the agreement, except in so far as they help to throw light on the antecedent occurrences and the intention and object of defendant Taugher in making the agreement. Between the latter part of December, 1911, and March 16th, 1912, the date of the agreement, some correspondence passed between him and his Toronto representative about the proposed attack on the trust, or settlement with D'Arcy; and from the latter date until June 14th, 1912, this correspondence was continued with varying intervals, the Toronto representative having also had interviews with D'Arcy Hugh MacMahon's solicitor on the subject. On June 14th, this representative wrote Taugher that D'Arcy's solicitor had that day "finally turned down" any further consideration of the proposal that had been made to him. Taugher's interest did not take the form of even a reply to that letter until August 24th, and thereafter nothing further happened until October 11th. From August until D'Arcy's death, Taugher had no direct dealings with any of the parties, except the interview with plaintiff in May, 1913, and the only evidence of any action on the part of his Toronto representative was a letter to D'Arcy's solicitor and another to Taugher on October 11th, 1912, and the obtaining of D'Arcy's address from his solicitor in December and the communicating of it to Taugher. From August 12th, the negotiations were practically at an end; efforts in that direction appear to have been considered futile, so much so, indeed, that defendant though he went to Europe soon after the interview between plaintiff and him

in May, 1913, made no effort to get into touch with D'Arcy Hugh MacMahon.

A deduction easily made is either that on the refusal in June, 1912, of D'Arcy's solicitor to further consider a compromise Taugher treated the matter as at an end, or that he was content to take no further active step in plaintiff's interest, but quietly sit by and await results. If D'Arcy survived plaintiff without a compromise or settlement having been effected, his loss would be the value of the services he rendered down to June, 1912, and which, so far as can be gathered by the evidence, was not serious. If, on the other hand, plaintiff survived D'Arcy, he would then assert his claim to twenty-five per cent. of the estate—an amount out of all proportion to the services rendered. Had he displayed the same activity and earnestness in the performance of the services called for by the agreement as he has exercised in his effort to sustain the agreement and in the prosecution of his claim against the plaintiff, his services would have entailed upon him much more labour and outlay than he devoted to planitiff's interests, and he would with a greater semblance of sincerity now urge the *bona fides* of his intentions in making the agreement.

The question of whether the agreement is void by reason of impossibility of performance is one which, in view of my findings on other grounds, need not be dealt with. Not a little evidence as directed to shew that the trust in favour of D'Arcy Hugh MacMahon could not have been legally set aside or varied (and this to the knowledge of defendant Taugher), and in consequence that the agreement was one which could not have been performed. Interesting as is the discussion of this question in the evidence of the professional witnesses, I am inclined to the opinion, if a decision were necessary (though these witnesses do not altogether agree as to the character of the impossibility that renders a contract void), that this agreement could not be successfully attacked on that ground alone.

A further contention raised by this defendant is on the right of the plaintiff to have the question of his remuneration disposed of by action and not under the provision of The Solicitors' Act. This, in my view, could not have been determined by the machinery provided by that Act, the provisions of which were not intended to apply, and do not apply, to a set of circumstances such as have arisen in the

present case. Moreover, defendant Taugher having by notice denied the right of the plaintiff to receive any part of the estate of which the defendant company are the trustees except by payment to be made through him, and having expressly forbidden her co-defendants making any payment to the plaintiff, and having thus tied up the assets of the estate, plaintiff did not exceed her rights in proceeding by this action to have the question in dispute determined, and thus obtain a judicial declaration as to the distribution of these assets by the trustees whose hand had been stayed by the claim made by their co-defendant and by his prohibition against their making payment to her.

In view of the intimation given by plaintiff's solicitor to Taugher before action, of plaintiff's willingness to give consideration to any reasonable account for any services he had rendered for her, I suggested to counsel at the close of the hearing the advisabilty of the parties coming to an amicable arrangement, and judgment has therefore been withheld to enable them to confer. Ample time has been given for that purpose, but without result, though I have learned from the solicitors for both parties that an offer had been made by plaintiff of a sum which, in my view, would have been much more than a generous remuneration for any and all services performed, so far as these services and their value are revealed in the evidence. But Taugher, as if to say, "I'll have my bond," prefers to rely upon the merits of his case and his strict legal rights.

Judgment will be in favour of plaintiff, declaring that defendant Taugher is not entitled to twenty-five per cent. of the estate of the late Honourable Hugh MacMahon nor to any part thereof, and that as between them the whole estate belongs to the plaintiff; and that the agreement entered into between plaintiff and him is null and void and should be set aside. Defendant Taugher will pay the costs of the action both of the plaintiff and of his co-defendants.

HON. SIR G. FALCONBRIDGE, C.J.K.B. AUGUST 8TH, 1914.

GLAESER v. KLEMMER.

7 O. W. N. 14.

Fraud and Misrepresentation—Partnership Agreement—Promissory Notes given as Share in Partnership—Uberrima Fides—Repudiation—Delay—Counterclaim.

FALCONBRIDGE, C.J.K.B., dismissed an action upon a promissory note given as defendant's share in a prospective partnership, where defendant was induced to enter such partnership by fraudulent misrepresentations.

Beckman v. *Wallace*, 29 O. L. R. 96, referred to.

Action upon a promissory note for $1,000. Counterclaim for wages and for delivery up of two other notes made by defendant.

Trial at Owen Sound.

W. H. Wright, for plaintiffs.

D. Robertson, K.C., for defendant.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—Defendant is 27 years of age and son-in-law of plaintiff Leinberger. He is quite inexperienced in business. He had saved some money driving 'bus for nearly 9 years for his father and for the man who bought the father out. In January last he was induced to go into partnership with plaintiffs, giving three notes of $1,000 each as his capital. One of these is the note sued on. His defence is that he was induced to enter into the partnership by certain false and fraudulent representations of plaintiffs.

My Lord Justice Lindley says (Partnership, 6th ed., 314): "The utmost good faith is due from every member of a partnership towards every other member. . . . This obligation to perfect fairness and good faith is, moreover, not confined to persons who actually are partners. It extends to persons negotiating for a partnership but between whom no partnership as yet exists."

And in *Beckman* v. *Wallace*, 1913, 29 O. L. R. 96, it is held that if there be a fraudulent misrepresentation as to any part of that which induces a party to enter into a contract, the party may repudiate the contract.

I allow the defendant to amend his statement of defence by adding thereto the paragraphs 3a, 3b, and 3c, in the

notice to amend served 23rd May, and I find that defendant has proved all these.

I accept also his statement that plaintiffs falsely and fraudulently represented that they had reduced their indebtedness to $200, that they had in the last 6 months of 1911 and all 1912 made a profit of $5,600 and that their profit on the goods they manufactured was 50 per cent.

I consider defendant's inexperience and want of business capacity to be sufficient explanation and excuse for his not having sooner repudiated the contract.

The action will be dismissed with costs. Judgment for defendant on his counterclaim with costs, for $22.52 wages and for delivery up of the other two notes to defendant, or if they have endorsed over or otherwise transferred same, that plaintiffs be orderd to indemnify defendant therefrom.

Thirty days' stay.

FALCONBRIDGE, C.J.K.B. AUGUST 10TH, 1914.

PRIER v. PRIER.

7 O. W. N. 22.

Contract—Bond for Maintenance of Parents — Conveyance of Farm to Son—Action to Enforce Bond—Evidence.

FALCONBRIDGE, C.J.K.B., dismissed an action to enforce bonds given to ensure the maintenance and support of defendant's father and mother, holding that default on the part of defendant had not been proven.

Action originally brought by the father and mother of John Prier to enforce bonds given by him for their support and maintenance, the defendant being the executor and devisee of John Prier, to whom the original plaintiffs had conveyed their farm, in consideration of the bonds, etc. The action was continued by the executor of the father and an alternative claim to set aside the conveyance of the farm was made.

Trial at Sarnia.

J. S. Fraser, K.C. (Wallaceburg), for plaintiff.

F. F. Pardee, K.C. (Sarnia), for defendants.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:— The old people are both dead, and on the great preponderance of testimony, they had nothing to complain of in

their lifetime, e.g., many witnesses depose to offers made to them to build a house as contemplated by the bonds.

This is no case of failure of consideration. The contract was executed on both sides.

The action will be dismissed, under all the circumstances without costs.

Thirty days' stay.

FALCONBRIDGE, C.J.K.B. AUGUST 14TH, 1914.

HUNT v. EMERSON.

7 O. W. N. 15.

Principal and Agent—Real Estate Broker—Action for Commission—Promise to Pay Commission not Proven—Evidence—Costs.

FALCONBRIDGE, C.J.K.B., *held*, that a broker claiming a commission upon the sale of lands must prove not only the procurement of a purchaser, but a definite promise to pay commission.

Sibbitt v. *Carson*, 26 O. L. R. 585, referred to.

Action by broker for commission on the sale of land.

Trial at London.

G. Lynch-Staunton, K.C., and E. W. Scatcherd, for plaintiff.

Sir George Gibbons, K.C., and G. S. Gibbons, for defendant.

FALCONBRIDGE, C.J.K.B.:—There is very little dispute about the facts. In any conflict which cannot be settled by reference to a writing, the plaintiff would fail to satisfy the burthen of proof.

In his telegram, defendant declared positively that he would not take less than $100,000 net to him and that he would not pay any commission on that figure, and to order the payment of a commission to plaintiff would be to place it in the power of an agent to dictate to his employer at what price the latter should sell.

Here, as in *Hubbard* v. *Gage* (1913), 24 O. W. R. 184, the transaction was in the form of an option.

In *Toulmin* v. *Millar*, 1887, 58 L. T. N. S., a case strongly relied on by plaintiff, Lord Weston says, p. 97: "The

agent then says 'I think I can find you a purchaser. Will you not sell?' To which he replies: 'I will sell for £10,000, not a sixpence less; if you can get that sum, sell; if not, let the property.' I am not prepared to hold that an arrangement expressed in these or in equivalent terms would confer a general employment to sell upon the agent."

This case falls rather within the lines of *Sibbitt* v. *Carson,* 1912, 26 O. L. R. 585: "The mere finding of a purchaser is not enough; there must be a contract to pay; and the terms of the contract, including all limitations as to time, must govern," per Middleton, J., at p. 587, S. C. affirmed in appeal 1912, 27 O. L. R. 237; and *Sutherland* v. *Rhinhart,* 1912, 5 Sask. L. R. 343.

I have, of course, referred also to *Burchell* v. *Gowrie, etc.,* 1910, A. C. 614, and *McBrayne* v. *Imperial Loan Co.,* 1913, 28 O. L. R. 653.

The plaintiff fails. Defendant might have afforded to be a little generous. He denies even that he offered plaintiff $250 for his expenses. For this and other reasons, in dismissing the action, I make no order as to costs.

Thirty days' stay.

FALCONBRIDGE, C.J.K.B. AUGUST 19TH, 1914.

THOMPSON v. THOMPSON.

7 O. W. N. 23.

Will—Action to Set Aside—Interim Injunction—Motion to Continue — Incapacity of Testator — Evidence — Injunction Dissolved —Costs.

FALCONBRIDGE, C.J.K.B., dissolved an interim injunction restraining defendant from dealing with an estate, holding the material in support of the motion to continue insufficient.

W. J. McLarty, for plaintiff.

John King, K.C., for defendant.

Motion to continue an injunction order granted by Britton, J., restraining defendants from dealing with the estate of Thomas Thompson or taking proceedings under the letters probate.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—The material filed on behalf of the plaintiff discloses a very weak case indeed. With the exception of a statement on hearsay alleged to have been made by a minister of the Gospel, who does not himself make an affidavit, the only real material is what is contained in the affidavit of a medical practitioner, who says he visited the testator on the 22nd day of May last—the will having been made on the 20th of May. The doctor says: "I verily believe that the said Thomas Thompson was not capable of making a will on the said 22nd day of May." He does not swear that, in his opinion, the testator could not have been capable of making a will on the 20th. In other words, the Court is asked to draw an inference which the deponent evidently does not venture to draw.

It is sworn in the affidavits filed by the defendants that the doctor visited the testator on the 19th, and it is strange that this fact is not mentioned in the doctor's affidavit. It looks as though these omissions were designedly made, but the affidavits are drawn in a very slovenly fashion. For example, the plaintiff, Alice Thompson, is made to swear in her affidavit that "I am one of the above-named defendants."

This motion will stand over until the trial, the injunction being dissolved in the meantime.

Costs of this motion to be costs in the cause to the defendants in any event, unless the Judge at the trial shall otherwise order.

FALCONBRIDGE, C.J.K.B. AUGUST 19TH, 1914.

RE NATIONAL AUTOMOBILE WOODWORKING CO. LIMITED.

7 O. W. N. 22.

Company—Winding-up—Order under Dominion Statute—Consent of Creditor or Shareholder—Section 12 of Statute.

Motion by the assignee of the company for an order for the winding-up of the company under the Dominion Statute.

J. F. Boland, for liquidator.

Grayson Smith, for A. J. H. Eckhardt.

Upon filing the written consent of a creditor or shareholder to the amount required by sec. 12 of the Winding-up Act, let the usual order go; Frederick Curzon Clarkson to be provisional liquidator. Reference to Master in Chambers to appoint permanent liquidator and exercise other usual powers.

FALCONBRIDGE, C.J.K.B. AUGUST 24TH, 1914.

BARKER v. NESBITT.

7 O. W. N. 17.

Fraud and Misrepresentation—Sale of Plant and Business—Evidence —Action for Balance of Price.

FALCONBRIDGE, C.J.K.B., gave judgment for the plaintiff for $14,000, balance due upon the sale of certain machinery, etc., holding that the defence of misrepresentation had not been proven.

Action to recover $14,000 in the circumstances mentioned below.

Trial at Belleville.

I. F. Hellmuth, K.C., and T. Walmsley, for plaintiff.

E. G. Porter, K.C., and W. Carnew, for defendants.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—The plaintiff is a manufacturer, carrying on a foundry and stove business in the town of Picton. The defendants are business men residing in the village of Brighton, in the county of Northumberland. By memorandum of agreement, bearing date 5th May, 1913, plaintiff sold to defendants, and defendants purchased, all the machinery or appliances used or owned by the plaintiff for the sum of $15,000, payable $1,000 cash on or before 15th May, 1913, and the balance on the removal or taking over of the said machinery. The plaintiff also sold to the defendants, and the defendants purchased, for a company to be formed, the goodwill, trade marks, patents, etc., for $10,000, to be paid for in or with $10,000 stock in the company, to be formed under the Ontario Companies Act, with a provision for defendants redeeming such $10,000 stock at par if desired within three years by plaintiff. The said plaintiff was to give assistance towards the planning of the building to be

erected, etc., and assist the general manager in the operation of the company for a period of at least six months. There were other stipulations in the agreement, one of which was that the plaintiff covenanted that he would not, directly or indirectly, either by himself or in partnership, etc., engage in any business similar to the one now carried on by him for a period of ten years. The defendants were to form the new company at once and have suitable buildings erected in Brighton, and proceed to remove the machinery, plant, etc., not later than the first day of December. Defendants paid the sum of $1,000 to the plaintiff, but refused to pay the balance of $14,000; hence this action.

By their statement of defence and counterclaim, the defendants plead that the plaintiff having a special knowledge of the business of foundryman and stove manufacturer, entered into negotiations with the defendants, who had no personal knowledge of the business, and he, knowing that the defendants would have to rely entirely on his representations, undertook and represented to the defendants that the business he was offering to sell had for a number of years before been actually earning a profit of 50 per cent. gross, and 33⅓ per cent. net on the output annually; and the defendants desiring to establish a paying industry to boom (sic) the village of Brighton, as well as for their own profit, and relying on the plaintiff's representations, paid the $1,000 mentioned; that they afterwards learned that the said representations were not true, but were grossly exaggerated, and they wrote a letter to plaintiff requesting him to verify his said representations, to which they received no reply (this is the letter of 29th November, 1913, hereinafter referred to); but the plaintiff, on the contrary, commenced this action; and the defendants claimed by way of relief that the agreement, by reason of the false representations made by plaintiff as aforesaid, was a fraud upon the defendants, and should be declared to be null and void, etc., and, by way of counterclaim, they asked repayment of the said $1,000 and damages, etc. The reply to this pleading was delivered on the 21st day of February, 1914.

On the 9th day of April, 1914, the defendants' solicitor served a notice on plaintiff's solicitor that application would be made at the hearing for leave to amend the statement of defence as follows:—

"By adding, after the word 'annually' in the twenty-third line of the third paragraph thereof, the following words: 'and that the annual output was fifteen hundred or more stoves of various patterns, selling at various prices ranging from $5 to $38, and that the total sales and gross proceeds for the year 1912 was upwards of $32,000; that the net profits thereon was thirty-three and one-third per cent., and that the plaintiff had been drawing from such profits the sum of about $4,000 a year for living expenses, leaving the balance of profits as shewn in the said business, that the business was one well established and had a large and growing trade and at a point such as the town of Brighton would make a good return for money invested, as the plaintiff alleged he could shew by his cost of production, and that the plaintiff had in the said business been giving employment to about twenty-five hands all the year round,' and by adding, after the word 'profits,' in the thirtieth line of said paragraph three, the following words, 'extent and volume of business, withdrawal of profits and employment of labor.'"

In accordance with my usual practice, I directed the notice of motion to be filed, intimating that, no doubt, I would allow an amendment, if the evidence and the merits of the case seemed to justify it.

The only written representation made by plaintiff is contained in the following letter:—

"Picton, Ont., April 11th, 1913.

"S. D. Ross, Esq.,
"Brighton.

"Dear Sir:

. . . "This business is one well established and has a large and growing trade and, with more capital, could easily be very much increased, and at a point such as your town, with more than one railway, would make a good return for money invested, as I can shew by my cost of production.

"We have been giving employment to about 25 hands the year around. Any further information you may desire will be pleased to give it.

"Yours truly,
"D. J. Barker & Co."

It is but faintly contended that this letter contains any substantial misrepresentation. The business did increase

slightly from 1910 to 1911 and from 1911 to 1912, and "about 25 hands" is not a gross misrepresentation.

Then, as to the alleged verbal misrepresentations, it is a matter of comment that up to the middle of February apparently the only instruction given to defendants' solicitor was as to the statement set out in the defence, i.e., as to the profits, net and gross. When this is read in connection with the alleged statement of a business shewing sales or gross proceeds of $32,000, the result is that this presumably sane plaintiff sells a business worth net $10,000 or $11,000 a year for $15,000, or, if we add the $10,000 stock, for $25,000—*a reductio ad absurdum*.

As counsel said in argument, there was a lamentable conflict of testimony. The phrase is well chosen in view of the fact that parties and their witnesses all seemed to be highly respectable people, and I have no remarks to make as to their respective demeanour in the witness-box.

Only four out of the six defendants were called.

Bullock and Russell did not give evidence, and, therefore, I am told nothing about any representations which may have been made to them to induce them to enter into the contract. And I think it is a subject of comment as to the whole case that they were not called for the defence.

It is a very remarkable thing that while Drewry says he heard before or about 1st July that things were not as represented and told plaintiff so, and Ross says he heard of misrepresentation "in early fall," yet they went on with their preparations for building in Brighton for the company which had been incorporated on 20th May. Mr. Austin, an architect, was in Brighton on the last Saturday in August in connection with plans and specifications for the building. He saw some of the directors of the company and Brandenburg (plaintiff's agent) was there. He advertised for tenders which were opened about the middle of September. They decided then not to build at that time. Defendant Nesbitt said the price of brick was too high and made the announcement: "Gentlemen, building will not go on under present conditions." There is not a syllable of direct protest or complaint to the plaintiff until the writing of the letter of the 29th November, 1913, two days before the payment of the balance was due.

The defendants differ in their evidence as between and among themselves. There are two discrepancies in Ross's

evidence, as compared with his examination for discovery. He said he thought of it as a mistake in his evidence immediately after the examination, but did not take steps to correct it. He was a very important witness for the defence. He admits he told Fred Cory, in the autumn, that he thought his co-defendant, Nesbitt, was trying to "queer" the business and to tell Barker to go on and sue, and he would give evidence for him when the time came. True, he says this was before he acquired knowledge of the falsity of the alleged representations.

The agreement itself does not favour defendants' contention. It is not for the bare purchase of a continuing business. It is (1) a purchase of specific machinery, appliances, etc., for $15,000; (2) a purchase of good-will, trade-marks, patents, etc., for $10,000, to be paid for in or with $10,000 stock in the company to be formed, with the other provisions as set out above. There is no undertaking or covenant as to volume of business or profit or any matter now complained of.

The defendants knew that plaintiff kept no books.

The defendants fail to satisfy the onus of proof. Crediting all parties with a reasonable desire to tell the truth, the plaintiff has a better reason for remembering exactly what took place than have the defendants in this: that he was vitally interested in the bargain which he was making, involving the sale of his whole business enterprise, he apparently had faith in it to the extent of taking $10,000 stock. The primary object of the defendants was not to make money for themselves (although they probably would not have scorned that element), but to secure an industry for the town of Brighton, in the language of the statement of defence, to "boom" it, and their personal interest was, therefore, comparatively indirect and remote. They were acting for and with the board of trade of the town, and they wanted married men in the employment of the concern, so as to increase the number of householders in Brighton.

The plaintiff will have judgment for $14,000, with interest from the 1st day of December, and allotment and delivery of $10,000 fully paid-up shares of the company and costs.

The counterclaim will be dismissed, with costs. Leave to amend the statement of defence is refused.

Thirty days' stay.

HON. MR. JUSTICE BRITTON. AUGUST 31ST, 1914.

ANGELSCHICK v. ROM ET AL.

7 O. W. N. 42.

Landlord and Tenant—Claim for Forfeiture of Lease—Surrender—Possession—Return of Deposit—Deduction of Rent—Evidence—Costs.

BRITTON, J., dismissed an action for cancellation of a certain lease for non-payment of rent, holding that the plaintiff had accepted a surrender of the lease and re-entered into possession.

Action for a declaration that a certain lease of premises for occupation and use as a moving picture theatre and the term thereby created, were forfeited and for possession and *mesne* profits. Tried at Toronto without a jury.

McGregor Young, K.C., and L. Davis, for plaintiff.

M. Wilkins, for defendants.

HON. MR. JUSTICE BRITTON:—The plaintiff is the owner of the premises in question, and on the 14th May, 1913, leased them to Wm. Weintrope, Morris Speigal and Joseph Green for 5 years from that date at a rental of $3,300 a year, $275 a month, payable monthly, on the 14th day of each month. The premises were occupied and used as a moving picture theatre. There is a proviso in the lease that the business of a moving picture show shall be carried on their continuously, except when discontinued for repairs. The lease contains the usual proviso for re-entry on non-payment of rent or non-performance of covenants. On the 10th day of June, Weintrope, Speigal and Green, with the consent of the plaintiff, assigned this lease to the defendants, Rom and Burnstein.

On the 24th July the defendants Samuel Gang and Samuel Cohen agreed with Rom and Burnstein to purchase the lease and all the interest of the latter two in the moving picture theatre. This was to the knowledge and with the consent of the plaintiff. The lease contained further provisions in regard to changes and repairs not necessary to refer to more particularly, because of what happened. It is shewn by the lease that the lessor, in addition to the rent reserve

of $275 a month, got $700 "as a consideration for the granting of this lease."

By the terms of the lease the plaintiff required as a deposit, and there was deposited with him, the sum of $1,000, as a guarantee for the payment of the rent, and it was provided that if the rent be not paid, and if, for that reason, the lesser exercised his right to re-enter, he shall be entitled to retain the $1,000 as liquidated damages for the failure of the lessees to carry out the terms of the lease. It was also provided that if the terms of the lease should not be violated the lessor would return to the lessees the said $1,000 at the end of the term, and if the lessees so desired they could retain the last 3 months' rent payable under the lease, by way of re-payment of the $1,000 deposited, if the same shall not be previously forfeited. Gang and Cohen went into possession with the plaintiff's knowledge and plaintiff's recognition of them as the intending purchasers from Rom and Burnstein.

The rent was payable monthly in advance. The month's rent which fell due on 14th September was not paid in full on that date but, on the 25th September, Gang, by his cheque for $250, paid balance in full, paying rent then to 14th October. If the rent which fell due on 14th October had been paid, it would have paid the rent to 14th November. On 15th September the month's rent due on 14th had not been paid. The plaintiff was looking to Gang and Cohen to pay, but he also looked, as he had a right to do, to Rom and Burnstein. On the 15th September plaintiff borrowed from Rom $275. There was no agreement that this sum should be paid by applying it upon the rent, but, I think, a fair inference is warranted that the plaintiff in borrowing, at that time, the precise amount of one month's rent had in mind the securing in that way the rent due on the 14th September. There was a good deal of contradictory evidence as to the payment of interest upon this loan, and as to extension of time by Rom to the plaintiff for payment but in view of the fact that Gang afterwards paid to plaintiff the rent due on 14th September, and that plaintiff has not yet paid the loan, the contradiction is not of consequence except as to the credibility of those witnesses who testified upon the important questions of the giving up of possession by Gang and Cohen to the plaintiff on the 27th October.

During September, perhaps before, business was going bad with Gang and Cohen, they went into negotiation with one Steinhudt to sell to him. It was important to Rom and Burnstein and to Gang and Cohen that the place should be kept open, and it was even more important to the plaintiff. Gang and Cohen told plaintiff, that they could not go on; that they had lost all their money; that going on was out of the question. That being the case and no purchaser available, Gang and Cohen came to a settlement with the plaintiff. The negotiation as to terms was at plaintiff's house on the 26th October, and it was completed on Monday, the 27th October. On the 27th October Gang and Cohen handed over possession to the plaintiff, and the plaintiff accepted possession, continued the business and got all the cash receipts paid at the door. I find that Gang and Cohen were there in and out from the 27th October for a time, but at plaintiff's request and with the object of making the business appear to any probable purchaser, a more prosperous business than it really was.

After the settlement was arrived at, it was the intention of the parties to have it evidenced by receipt or other writing. For that purpose Gang and Cohen and the plaintiff went at first to a Mr. Johnston, a solicitor named by Cohen. Mr. Johnston declined to act so Cohen says. They then went to the office of plaintiff's solicitor. Mr. Davis was not in but a student or clerk of Mr. Davis started to write a receipt or other document. Before it was finished Mr. Davis came in and he advised the plaintiff not to sign any papers in the matter. No paper was signed, but the important thing was that possession was given to the plaintiff and accepted by him, and possession was not restored to Gang and Cohen or either of them.

The plaintiff then proceeded by this action, which was commenced by writ issued on the 30th October and is brought against the four, viz.: Rom, Burnstein, Cohen and Gang.

The statement of claim alleges that the defendants are in wrongful possession of the premises, and that they have refused to give up possession to the plaintiff although repeatedly requested by the plaintiff so to do. The plaintiff asks for a declaration that the lease and term thereby created are forfeited and that the plaintiff is entitled to possession and for possession and for *mesne* profits from the 14th October, 1913.

Cohen and Gang put in no defence.

Rom and Burnstein set up the proviso in the lease respecting the deposit of $1,000 and the actual deposit of that sum, and further, that the note representing the $275 was tendered in payment of rent due on the 14th October, and state that the plaintiff was not willing to accept the same, and so these defendants claim that there was no default in payment of rent. Although the facts in regard to the deposit of the $1,000 are pleaded, no return thereof—and indeed, nothing was asked in that respect beyond a dismissal of the action. Since the trial, counsel for defendants Rom and Burnstein ask for an amendment of their statement of defence and counterclaim, by claiming from the plaintiff the sum of $1,000 deposited under the circumstances mentioned.

For the purpose of having the whole matter as between Rom and Burnstein and the plaintiff disposed of in this action, the amendment should be allowed.

My findings are:—

1. That what took place between the plaintiff, and Gang and Cohen, amounts to a surrender by operation of law of the lease in question.

2. That at the time of the issue of the writ herein, the plaintiff was already in possession of the premises.

3. The plaintiff did not give any notice to the defendants Rom and Burnstein, or either, of his intention to exercise his right of re-entry, nor did he re-enter in any hostile way as against Gang and Cohen, but the re-entry was by agreement with Gang and Cohen—the said Gang and Cohen being in possession under Rom and Burnstein with the consent of the plaintiff.

4. There was no arrangement in terms made between Gang and Cohen and the plaintiff, for the payment or return of the $1,000 to any one.

If I am right in holding that there was a surrender by operation of law, then the deposit which was held by way of security should be given up by the plaintiff as no rent would become payable after that which became due on the 14th day of October. The payment back should be to the defendants Rom and Burnstein.

The original lessees assigned all their interest to Rom and Burnstein, and Gang and Cohen made no claim.

There will be judgment in favour of Rom and Burnstein dismissing the plaintiff's action as against them, with costs,

and for those defendants on their counterclaim for $725, being the sum of $1,000 less rent due 14th October, $275, and also for money lent, $275 with interest at 5 per cent. from October 14th, 1913.

The plaintiff did not offer any reason why the $275 should not be repaid.

Judgment will be with the costs of Rom and Burnstein payable by plaintiff.

Thirty days' stay.

MR. HOLMESTED. AUGUST 31ST, 1914.

ROBINSON v. PERRIN.

7 O. W. N. 43.

Appearance—Affidavit with — Specially Endorsed Writ—Officer of Company—Personal Knowledge Non-essential—Information and Belief Sufficient—Cross-examination — Amendment of Writ of Summons.

HOLMESTED, K.C., *held*, that where a defendant is a corporation and the affidavit disclosing a defence is made by an officer thereof it is not probable or necessary that the deponent should be able to speak from personal knowledge of all the matters contained in the affidavit, and in such a case facts based on information and belief can be deposed to.

Motion for a judgment on a specially indorsed writ. The defendant was a limited company, the affidavit filed with the appearance was made by the secretary-treasurer of the company. The action was for goods sold and delivered. The defence set up was that some of the goods were not according to the contract and that the defendants had as to part of the claim a set-off.

J. I. Grover, for plaintiff.

H. H. Davis, for defendant.

GEO. S. HOLMESTED, K.C.:—The deponent has been cross-examined, and it appears from his examination that he has not much personal knowledge of the facts on which the alleged defence is based. He speaks from information received from other employees of the defendant company. Where a limited company is defendant it seems to be obvious that in very few cases can any officer of the company speak

from his own knowledge as to the details of the company's business; and it can hardly be the intention of the Rules that unless he can do so, the affidavit is to be rejected as not being sufficient compliance with Rule 56. Rules of practice it appears to me ought to be construed reasonably and with due regard to the circumstances to which they may have to be applied, and one of those circumstances is the case where a limited company is a defendant. In such cases it is not I think intended that all the officers of the company who have an actual knowledge of the facts must joint in the affidavit. It appears to be a sufficient compliance with the Rule if one of the principal officers of the company even though he speaks only from information and belief. I am inclined to think that something will be found due from defendant to the plaintiff but on the depositions of the secretary-treasurer I am unable to say what that amount will be. I am not called on to try the action on this application; all that I have to be satisfied of, is that some definite sum is admitted to be due, or that there is a *bona fide* defence or some reasonable ground for believing that there is. The cross-examination does not, it appears to me, shew that the defendants have no defence. It rather goes to shew that they have. The city authorities although they appear to have taken over the work for which the goods were supplied have intimated that they will claim an abatement by reason of the goods in question not being up to the required standard. What that deduction (if any) will be has not as yet been determined, but I cannot say on the evidence before me that it will not be made. But even if the city authorities are willing to accept and pay contract price for goods of superior quality to that stipulated for it does not follow that the defendants must do so. On the whole, I think I can make no order except to refuse the motion without prejudice to the further prosecution of the action. The cost to be in the cause. The amendment asked being allowed and service of the amended writ may be dispensed with; the costs of the amendment should be paid by plaintiffs.

HON. MR. JUSTICE BRITTON. AUGUST 31ST, 1914.

LADUC v. TINKESS.

7 O. W. N. 31.

Fraud and Misrepresentation—Sale of Farm—Material Misrepresentation as to Drainage Taxes—Evidence—Damages, Measure of—Compensation for Present Loss — Possible Future Grant by Crown or Municipality — To be Applied in Reduction of Damages.

BRITTON, J., *held*, that where a vendor of a farm had misrepresented the amount of the drainage taxes to be due thereon, and the purchaser had relied on such representation, the latter was entitled to damages based upon the difference between the value of the farm charged with the drainage taxes which it was actually charged and its value charged with the amount represented by the vendor.

Action for damages for false and fraudulent misrepresentations alleged to have been made by the defendant whereby the plaintiff was induced to purchase the defendant's farm and certain chattels. Tried at Cornwall and Toronto without a jury.

G. I. Gogo, for plaintiff.

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

HON. MR. JUSTICE BRITTON:—The defendant was the owner of the east half of lot 14 in the 1st concession of the township of Roxborough, and he sold it with the crop, and certain named chattels, to the plaintiff, the price for all being $4,700. The price asked by defendant was $4,800, but during the negotiation reduced to $4.700, and the bargain was closed at that sum. The price or selling value of the farm alone as between the parties was fixed at $3,500, that sum being mentioned in the deed.

The plaintiff charges that the defendant falsely and fraudulently represented to the plaintiff that all the drainage taxes the plaintiff would be obliged to pay on this farm were $100 a year, and were only for 3 years from the date cf plaintiff's purchase. It appears that this land was specially assessed for drainage work and there was and is now a liability of this land for $145.52 a year for 14 years for that amount and for a lesser amount for 4 additional years.

The defendant pleads a general denial of making any such representation, and he denies that he at any time made any statement false to his knowledge, or fraudulent. It is a little

more difficult in this case than in the ordinary case to dispose of the issues of fact, for here the negotiations were carried on through interpreters.

The plaintiff speaks only the French language and does not understand the English language, whilst the defendant speaks only the English language and does not understand the French.

In my opinion a true interpretation was given to the plaintiff of what the defendant said, and what the plaintiff understood and relied upon, and what the defendant represented, depends upon the evidence of Napoleon Pronix and Frank Delorme on the one side, and the defendant himself on the other.

The bargain for this land was not closed or completed until after the 12th of July, 1913. John Kennedy was defendant's agent to sell and he brought the plaintiff and defendant together, but was not present when the last word was spoken. On the 12th July the plaintiff was taken by Kennedy to see the property, and negotiations for its purchase were on, but not closed that day, Napoleon Pronix was present when plaintiff and defendant were together and Pronix fixes the time as 12th July. Some of the witnesses say that Pronix was not present at the interview on 12th July. I am satisfied that Pronix' evidence is correct as to the conversation, even if by any possibility he is in error as to the date, and I am satisfied that the conversation took place before negotiations were completed. The plaintiff asked witness to ask defendant what drainage taxes he (the defendant) was paying upon the land in question. The witness did ask the question, and the defendant replied $100 a year for 3 years. The witness Pronix as interpreter told this to plaintiff. I am of opinion that this occurred on the 12th July.

The witness Frank Delorme strongly corroborates Pronix in determining what defendant intended to give the plaintiff to understand. The interview spoken of by Delorme took place on the 26th September. That date was subsequent to the date of the deed to the plaintiff, but it was prior to the delivery of the deed, and prior to the delivery of the mortgage to the defendant. Delorme is a son-in-law of the plaintiff, but he appeared to be a fair and truthful witness, and it is clear to me that defendant then represented that the drainage taxes were only $100 a year, and were for only 3 years. This representation was not true in fact. I am clearly of

opinion that the defendant knew when he made the representation as alleged that this representation was not true. He must have known that the drainage taxes were more than $100 a year, and for a longer term than 3 years. The defendant had the means of knowing all about these drainage taxes. His land was being assessed under by-laws regularly passed, and the statement of the defendant being made as a statement on which the plaintiff had a right to rely, and did rely, it must be held, at least, that the defendant made the statement recklessly, not caring whether it was true or false, —and so fraudulently made.

As to damages. The proper measure of damages is the difference between the value of the farm at the time of the purchase, taking the farm charged with the drainage taxes, and its value if charged only to the extent of $100 a year for 3 years. The plaintiff bought supposing it to be charged for only $100 a year for 3 years. The price paid was $3,500,— that amount was fixed between the parties.

Counsel for the defendant contended that as the land was improved and would year by year increase in productiveness by reason of the drainage work, that should be taken into consideration in reduction of damages. I am not of that opinion. The plaintiff had a right to the land as it was and as it would be in the natural course, and charged only to the extent represented by defendant. It appears that the province of Ontario came to the relief of landowners, including the owner of the land in question, and made a grant to compensate in part. The Government may again make a grant, —that need not be considered by me. The plaintiff consents that if such is made by either the province of Ontario or the municipality, the defendant must get the benefit of it.

I am assisted in ascertaining the amount of the damages by finding the present value of the excess payments over the $300 for the 3 years, and by finding the present value of all the drainage taxes existing at the time of the purchase and payable year by year after 3 years. The present value depends upon rate of interest allowed in the computation. The larger the rate the smaller the present value. The plaintiff's computation is based upon the rate of 4, 4½ and 5 per cent., arriving at the conclusion that the present value of future payments is $1,585.73, from which he is willing to deduct $300, being $100 each year for 3 years, leaving $1,283.73. The defendant did not object to the correctness of this com-

putation, but he contended that if defendant is liable at all he is liable only for difference in value, and the farm is worth all the plaintiff paid for it.

I am of opinion that the farm, charged as it was at the time of purchase, was not worth what plaintiff agreed to pay.

I do not wholly agree with plaintiff's computation as to the present value of the future payments of drainage taxes but the plaintiff, upon the whole case, is entitled to recover as damages the sum of $950.

The defendant's further contention was that the plaintiff, not having yet paid any of these drainage taxes is not now entitled to recover. This contention is not entitled to prevail; see Mayne on Damages, 8th ed., p. 261. The damages are not given in reference to a future contingent loss, but they are the proper compensation for an actual and existing loss. "The question is how much is the value of the estate diminished at the moment by the existence of the incumbrance," and I regard this tax as an encumbrance. Further as to liability see Sugden on Vendors, 14th ed., vol. 2, p. 202, par. 27.

There will be judgment for the plaintiff for $950 with costs, and the plaintiff consenting thereto, this sum may be set off against amount of plaintiff's debt to defendant, secured by chattel mortgages. The plaintiff consenting, it will also be a term of the judgment that if at any time after the expiry of 3 years from the date of purchase, and before the expiration of 18 years from the date of the said purchase, the province of Ontario shall pay any sum of money in relief of the existing drainage tax upon the land in question, or if the township of Roxborough shall, after the 3 years and before the 18 years make any reduction in the now existing drainage taxes upon said land, the defendant, if he has paid the amount of this judgment and costs, shall be entitled to the benefit of such payment or reduction.

Thirty days' stay.

HON. SIR G. FALCONBRIDGE, C.J.K.B. SEPT. 1ST, 1914.

TUCKER v. TITUS.
TITUS v. TUCKER.

7 O. W. N. 44.

Fraud and Misrepresentation—Exchange of Properties—Evidence—Damages—Quantum of.

FALCONBRIDGE, C.J.K.B., gave judgment in favour of plaintiff for $7,000, in an action for deceit in the exchange of certain properties.

These two actions arose out of the same transactions as the former action of *Tucker* v. *Titus,* 24 O. W. R. 687, which was an action for rescission of certain contracts on the ground that they were induced by the fraud and misrepresentation of the defendant. That action was dismissed without prejudice to an action for damages for deceit. The new action of Tucker v. Titus was brought for an injunction restraining a sale of the land in question under a mortgage. The action of Titus v. Tucker was to recover possession of the land; and in that action Tucker counterclaimed for $8,000 damages for deceit. Tried at Belleville.

I. F. Hellmuth, K.C., and A. Abbott, for Titus.

E. G. Porter, K.C., and F. H. White, for Tucker.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—Tucker is a farmer. Titus is a veterinary surgeon. Tucker is honest and stupid. The latter quality predominates to such an extent that he was probably as bad a witness as one is likely to see in the box. Titus is a very alert and clever man. But I have no hesitation in accepting Tucker's version of the transaction as being in the main true and in declaring that he has been made the victim of a gross and cruel fraud whereby he traded his good farm for a property in Trenton of less value and in addition gave a mortgage on the latter for $6,900.

The false and fraudulent representations made by Titus are set out in par. 2 of Tucker's statement of defence and counterclaim in the suit of Titus v. Tucker, and these I find to have been substantially proved to my entire satisfaction.

The action was tried on the 25th June, on the eve of the long vacation. I had no more doubt then than I have now of what my judgment ought to be, but I was puzzled to account for the testimony of the wife and daughter of Titus, whom I

should not like to characterize as persons deliberately saying on oath what they knew to be not true. Titus had sworn that what he told Tucker was that he was making from $3 to $23 a day *out of all his businesses,* and in this the wife and daughter corroborate him. The words which I italicise are the crucial ones. It is a shallow and weak device. Tucker cared not, nor did he bring his wife there to hear, what Titus was *making in all his businesses.* It was, that Titus should repeat in her presence what Titus had already told him as to what profit he was making out of the business he was desirous of transferring to Tucker, and which Tucker was thinking of acquiring.

I think the mother-in-law, Mrs. Burlingham, omits the magic words. If she does not she also may be included in the following charitable suggestions.

(1) Either Titus has so schooled the female members of his family by constant repetition and suggestion that they now think that they distinctly remember that those words were uttered or

(2) If such words were used by Titus they were designedly spoken in such a tone of voice that only his own people could hear them.

Certainly Tucker and his wife never heard them, because the swift answer would have come, "We are not asking about *all your businesses.* Tell us what your profits are in these concerns which we are thinking of buying."

Tucker believed these false statements, acted on them and so was led to his destruction.

The contract cannot now be rescinded: *Tucker* v. *Titus* (1913), 24 O. W. R. 687.

It is a mere question of damages for deceit. I find the value of the properties to be as follows:—

Tucker's farm was well worth	$5,500	
Less mortgage	900	
	$4,600	
Titus' Trenton property worth at most..	$4,000	
Horses and livery stable outfit	500	
	$4,500	
Balance in favour of Tucker	$ 100	
Mortgage	6,900	
Total damages		$7,000

Judgment in both actions for Tucker with costs.

Of course interest would not run on the mortgage, so in the final result, if Titus discharges the mortgage, pays Tucker $100 and the costs of both actions, the parties will be in their proper positions.

Thirty days' stay.

LENNOX, J. SEPTEMBER 11TH, 1914.

MACKELL v. BOARD OF TRUSTEES OF THE ROMAN CATHOLIC SEPARATE SCHOOLS FOR THE CITY OF OTTAWA.

7 O. W. N. 35.

Schools—Separate Schools — Attempted Delegation of Powers of Board to Chairman—Interim Injunction—Attempted Evasion of —Rules of Practice—Purpose of—Interim Order for Opening of Schools Closed—Preservation of Status Quo — Adjournment of Trial.

LENNOX, J., *held*, that where a school board had assumed to delegate their powers and duties to the chairman in order to escape the effect of a threatened injunction, and the latter had discharged all the teachers and closed the schools, the action of the chairman was illegal and an order was made that the schools should be reopened and the *status quo* maintained in every respect until judgment in the main action.

Motion by the plaintiffs for an injunction and other relief as set forth below.

W. N. Tilley, J. F. Orde, K.C., and J. J. O'Meara, for the plaintiffs.

McGregor Young, for the Department of Education.

A. C. McMaster, K.C., and N. A. Belcourt, K.C., for the defendants.

LENNOX, J.:—The plaintiffs are a minority of the School Board. It will be sufficiently accurate to say that this action is brought to compel the Board, represented for the most part by chairman Genest, to conduct the schools according to the Departmental regulations, to engage and employ a teaching staff composed exclusively of legally qualified persons, to prevent the payment of school moneys to unqualified teachers, and the sale or disposal of certain debentures.

The Court has so far recognised the plaintiffs' status, the importance of the issues raised, and the plaintiffs' *prima facie* right to relief by enjoining the defendants until the trial. The bulk of the evidence on both sides was put in on the 25th of June last when an adjournment was asked for

and obtained by the defendants to enable them to make further searches in the records of the Department, and, though strenuously opposed, the injunction was continued. The adjournment was decidedly an indulgence to the defendants, as, so far as I am aware, no intimation of the application was given until the evidence for the defence was well advanced. The object of the action, the terms and aim of the injunction, and the conditions necessarily implied upon an adjournment, should without more have been a sufficient guarantee that the efficiency of the schools would be preserved, and the *status quo* honorably maintained pending the delay; but, had I known then that Mr. Genest contemplated what he has since consummated, namely, the turning out of the whole teaching staff, there would have been no adjournment without such additional guarantees as would have rendered the present disgraceful and disastrous conditions impossible.

Every separate school in Ottawa is closed, 7,000 or 8,000 boys and girls are without the means of obtaining an education, and the vicious and perhaps criminal habits which some of them will inevitably acquire in a life of idleness will probably never be shaken off. The teachers were discharged, if they were discharged at all, by Mr. Genest. This was done pursuant to a resolution of the Board, opposed by the plaintiffs, purporting to delegate to him the entire question of the discharge and engagement of teachers. Mr. Genest is a keen, intelligent gentleman, of excellent address, and in giving evidence argued the case from his standpoint with singular ability, but I failed to glean from his statements that he has actually a single teacher immediately available of the qualified class, and he frankly disclosed that one chief object of his action was to create a condition of things which would compel the Department to consent to the employment of some twenty-three Christian Brothers, who are without professional qualification.

I am asked to continue the injunction, and the injunction will be continued until I have given judgment in the action, and it will be continued with the addition that, if the plaintiffs desire it, it will be so amended as in words to apply to the servants, agents, employees and representatives of the defendants, as well as to the defendants; and, on the other hand, I reserve the right to the defendants to apply for leave meantime to dispose of some of the debentures, should an actual emergency arise.

I am asked, too, to make an interim order directing that the schools shall be opened forthwith and that the former teachers shall be restored to the positions they occupied in the schools prior to and at the end of the last half year. It is argued for the defendants that for me to do this would be to usurp the functions and duties of the trustees. That, of course, I cannot do, however deplorable the conditions are now or however intolerable they are likely to become during the many months—probably years—that must elapse before the issues in this action are finally determined. There is no use in saying that it is easy, it is a difficult question to deal with. It was argued at great length that the remedy does not arise in the action and that the rules of procedure bar the way. Rules of procedure are for the convenience of litigants and the Court, and the advancement of justice, and should not be invoked to perpetuate a wrong. If the relief asked is incidental to the action, I can grant it, if it would be granted upon substantive motion. But the more important point is to draw the line correctly between the jurisdiction of the Court and the exclusive functions of the trustees. If amendments of the pleadings are necessary to meet the evidence and define the issues as they have developed, and there is no answer of surprise, the pleadings can be, and in this instance they may be amended. As to the dividing line then? In matters relating to the schools under their control, the defendants are clothed with wide discretionary and quasi judicial powers. Assembled at a properly constituted meeting of the Board, regularly conducted, dealing with matters within their jurisdiction, and acting in the *bona fide* discharge of their duties and in harmony with the laws of the province, the regulations of the Department, and any existing judgment or order of the Court affecting them, the conclusions they reach, whether thought to be wise or unwise, cannot be interfered with by a Court. They are the judges in such a case. The salaries they will pay—the engagement and discharge of teachers, and the selection or rejection of duly qualified teachers—from time to time as these questions arise, but not in advance—are all matters within their jurisdiction.

But to shut out judicial action where error or misdoing exists and a remedy is invoked, there must be the act of the Board, as a board, and not merely the act of its individual members. In all matters involving discretion or judgment, the whole question must be presented to the Board, should be

weighed and considered by the Board, and must be determined upon by the Board.

What was done here was the act of chairman Genest alone. The Board had not the power to delegate their duties or functions to him. They have not discharged the old teachers, and they have not entertained, or deliberated, or determined upon the selection or engagement of any teacher or teachers to take their place; and, speaking of the majority, for the plaintiffs are powerless, the Board by their flagrant neglect to discharge the duties imposed upon them by law have not only opened the way, but have unintentionally invoked the action of the Court. More than this, not only was there no power to delegate, but the resolution purporting to appoint Mr. Genest was vicious and unlawful *per se,* for its exercise was intended, upon the face of it, to contravene and override the injunction order of the Court, should it be issued. This omission of this provision from a subsequent resolution does not change the character of the act.

There is a palpable absence of good faith in the whole transaction, it is contrary to the spirit and intent of the injunction order, it is contrary to what was necessarily implied upon the adjournment, and it has created an intolerable state of things which I feel I have power to, and ought to, remedy. There will be an order directing the trustees to open the schools not later than Wednesday next and to maintain and keep them open and properly equipped with properly qualified teachers and in all other ways until argument and judgment in this action, to suffer, permit and facilitate the return of the ousted teachers referred to their former positions as teachers—and restraining the Board from interfering with or molesting these teachers in the discharge of their duties as such during the time aforesaid. The order will include the servants, agents and employees of the defendants and may contain provisions for notices being sent out by the secretary to the teachers concerned. If the parties cannot agree as to the terms of the order to be issued, I will settle them in the jury room of the Court House (City Hall), in the City of Toronto, on Monday next, the 14th instant, at 10 a.m., and I will then consider any argument addressed to me as to teachers said to have been engaged before the 5th day of this month. I will also be prepared to hear argument as to whether the Board should be restrained from giving notice, terminating the engagements, pending the judgment, except upon leave of the Court.

HODGINS, J.A. SEPTEMBER 11TH, 1914.

BASSI v. SULLIVAN.

7 O. W. N. 38.

Private International Law—State of War—Alien Enemy—Right to Maintain Action—Resident "in Protection"—Royal Proclamation—Terms of—Inquiry as to Status and Conduct of Alien—Stay Pending—Injunction Restraining Sale under Chattel Mortgage—Dissolution of.

HODGINS, J.A., *held*, that where an alien enemy was a plaintiff in an action that it should be stayed with leave to apply to permit the action to proceed after it is duly proven that the plaintiff was "quietly pursuing his ordinary avocatioln" according to the terms of the Royal Proclamation of August 15th, 1914, in regard to aliens in Canada.

Review of cases dealing with the legal right of alien enemies to maintain an action in the King's Courts.

Motion by plaintiff to continue an interim injunction restraining the sale of certain chattels under a chattel mortgage.

W. R. Smyth, for plaintiff.

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

HODGINS, J.A.:—The plaintiff, who holds an unregistered chattel mortgage, dated 18th May, 1914, on the stock in trade of Wiwcaruk and Bassi, in the town of Cobalt, brings this action to set aside the defendant's registered chattel mortgages upon the same goods, dated 29th May, 1914. He has obtained from the local Judge at Haileybury an injunction restraining their sale. The present motion is to continue that injunction. The plaintiff claims to sue on behalf of himself and all other creditors of the firm already named, and grounds his action upon the fact that the seizure and sale will, in his belief, "create an unjust preference."

The plaintiff, by so suing, must be taken to have abandoned his rights as a secured creditor. Insolvency is not suggested, except inferentially, and apparently will only arise after the defendants have realised upon their security.

I do not understand upon what principle a simple contract creditor, even suing in a class action, can restrain a chattel mortgagee from realizing upon his security, unless he, in the first place, alleges more than plaintiff does, and,

in the second place, satisfies the Court that the circumstances under which the mortgage was given indicate some infraction of the Statutes relating to preferences. This the plaintiff does not attempt to do.

So far as the amount due upon the mortgage is concerned, the Court will not upon this application take the account, nor, as I understand the practice, will it restrain realization by a solvent creditor under his mortgage, except upon at all events *prima facie* proof of invalidity.

I am therefore unable to continue the injunction.

The defendants, however, contended that the action is not maintainable and that I should dismiss it because the plaintiff is an alien enemy, being an Austrian and not naturalized. The plaintiff does not deny that he is a native of Austria and by his counsel admits that he is not naturalized. The writ was issued on the 27th day of August, 1914, which was after the date at which a state of war existed between His Britannic Majesty and the Emperor of Austro-Hungary, viz., 12th August, 1914.

This raises a most important point, of which the Court is bound to take notice—per Lord Davey in *Janson* v. *Dreifontein Consolidated Mines, Limited,* 1902, A. C. 484 at page 499. The position of an alien enemy has not, except in a few isolated cases, been dealt with in the Courts since the Napoleonic and Crimean wars. The doctrines then established have not in consequence undergone much, if any, modification. But if not altered in substance, the extreme rights arising thereout are rarely—according to Lord Loreburn in *De Jager* v. *Attorney-General of Natal* (1907), A. C. 326—put into actual practice.

An alien enemy is one whose Sovereign is at enmity with the Crown of England, and one of his disabilities which has always been strongly insisted upon is that he cannot sue in a British Court during war. But this rule is always stated with an exception. In *Wells* v. *Williams,* 1 Lord Raymond's Reports 282, 1 Salkeld 46, Sir George Treby, Chief Justice of the Common Pleas (temp. William III.) said: "An alien enemy who is here in protection may sue his bond or contract." And in the oft-quoted case of *The Hoop* (1799), 1 Ch. Robinson 196, Sir William Scott laid it down that even in British Courts by the law of nations, "no man can sue therein who is a subject of the enemy unless under particular circumstances, that, *pro hac vice,* discharge him

from the character of an enemy, such as his coming under a flag of truce, a cartel, a pass or some other act of public authority that puts him in the King's peace *pro hac vice.* But otherwise he is totally *ex lex.*"

This exception is recognized in more modern time by Sir Alexander Cockburn, L.C.J., in his work on Nationality (1869), page 150.

"An alien enemy has no civil rights in this country, unless he is here under a safe conduct or license from the Crown. In modern times, however, on declaring war, the Sovereign usually, in the proclamation of war, qualifies it by permitting the subjects of the enemy resident here to continue, so long as they peaceably demean themselves; and without doubt such persons are to be deemed alien friends."

But to the enjoyment of this privilege important qualifications are annexed. One is that the alien enemy must shew himself possessed of what amounts to such a license. *Esposito* v. *Bowden* (1857), 7 E. & B. 762, 793. And further, if the license be a general one, the alien enemy may be prevented from asserting it. In *Sparenburg* v. *Bannatyne* (1797), 1 B. & P. 163, at page 170, Eyre, C.J., says: "I take the true ground upon which a plea of alien enemy has been allowed is that a man professing himself hostile to this country and in a state of war with it cannot be heard if he sue for the benefit and protection of our laws in the Courts of this country."

The Crown has by Royal proclamation dated on the 15th August, 1914, directed:

"That all persons in Canada of German or Austro-Hungarian nationality, so long as they quietly pursue their ordinary avocations, be allowed to continue to enjoy the protection of the law and be accorded the respect and consideration due to peaceful and law-abiding citizens; and that they be not arrested, detained or interfered with, unless there is reasonable ground to believe that they are engaged in espionage, or engaging or attempting to engage in acts of a hostile nature, or are giving or attempting to give information to the enemy, or unless they otherwise contravene any law, order in council or proclamation."

In the present case the Court has no means of knowing whether this proclamation, the terms of which are relied on as giving a right to maintain this action, covers this particular plaintiff. He may or may not be quietly pursuing

his ordinary avocation, or he may be for all that is before me, one of the class excluded by its subsequent provisions or otherwise disentitled to take advantage of provisions intended for those who have resided here and engaged in business for some length of time. Nor am I at all sure that the proclamation has the effect contended for. It appears to have been issued under sec. 6, sub-sec. (b) rather than under sub-secs. (e) and (f) of the War Measures Act, 1914, and may well refer only to police protection. It is not incumbent on the Court to make, still less to act upon, any presumption in favour of natives of either of the two nations now at war with the British Crown, and I think every facility should be afforded for local inquiry, so that the Court should be fully informed as to whether or not the plaintiff is in fact entitled to set up the protection extended by the Crown under the wording of the proclamation. Such an inquiry may properly be made at or before the trial and may be called for at any time on motion, but if pleadings had been delivered in this case I should prefer to leave the questions both of fact and law to be determined when the case came up for trial, especially as recent English statutes and proclamations have not yet reached this country. But as attention is pointedly called to it on this motion, and as the Crown has drawn a distinction betwen peaceable alien enemies and those who may be otherwise engaged, I think at this early stage of the war it will be proper to stay the action until the plaintiff satisfies the Court that it ought to allow him to proceed to trial and there urge the contention that he is here under what amounts to a license sufficient to enable him to sue on such a cause of action as he is setting up.

Reference to recent discussions in the English law periodicals and to the report of an expert committee of the London Chamber of Commerce in August may be of use in finally determining the extent of the proclamation and the scope of its provisions.

The injunction will be dissolved and the action stayed meantime, with leave to apply on notice to a Judge of the High Court to permit the action to proceed after time has been given to make the enquiries I have indicated. Two weeks will be sufficient. If the action proceeds the costs of this motion will be to the defendants in the cause, unless the trial Judge otherwise orders. If no further proceedings are taken, the costs will be paid by the plaintiffs to the defendants after taxation.

HON. MR. JUSTICE LENNOX. SEPTEMBER 18TH, 1914.

CHRISTINA BERLET v. ALBERT NICOLAUS BERLET

7 O. W. N. 67.

Husband and Wife—Alimony—Lump Sum—Moneys Lent by Wife—Separate Estate—Offer of Defendant—Costs.

LENNOX, J., in an action of alimony, granted a lump sum of $2,500 to the plaintiff in lieu of periodical payments.

Action for alimony and money lent.

A. L. Bitzer, for plaintiff.

E. P. Clement, K.C., for defendant.

HON. MR. JUSTICE LENNOX:—The parties to this action have lived together as man and wife for about 40 years. Until recently they have been fairly contented and happy.

There may not have been any actual ground for the plaintiff's accusations but the defendant was far too eager in seizing upon them as an excuse for deserting a woman who in the main was a good wife to him. The plaintiff is 8 years older than her husband and no doubt all the more prone to jealousy on that account.

I am satisfied that as matters turned out it is better that they should continue to live apart.

The evidence convinces me that the plaintiff was assaulted and injured by the defendant upon both the occasions referred to. This was not, of course, the cause of separation, as this was, in the end, the voluntary act of the defendant, but it is an element in considering the rights of the plaintiff. The difficulty I have is that the defendant's means is not sufficient to enable me to award the plaintiff as large a sum as I would like to give—a reasonable sum for her maintenance according to her station in life. Having regard to the fact that the defendant's property is considerably encumbered a lump sum will be better for the plaintiff than periodical payments. In the statement of defence the defendant offers to pay $2,500 without costs—the plaintiff executing a deed of separation. Leaving out the question of costs I do not think the offer an unreasonable one. Aside from alimony the plaintiff set up that she loaned the defendant $201.14. The defendant denies that it was a loan but admits the receipt

of the money and adds that it was his own. I find that it was a loan to the defendant and that he promised to repay it, and I think that as a matter of law it was the plaintiff's money, and it was at the time in her exclusive control. Aside from this altogether, the plaintiff put $200, as well as personal earnings to a very considerable sum, into the property standing in the defendant's name. The defendant did not include this indebtedness in his offer of $2,500 as he does not admit the indebtedness. The defendant's argument that he should be relieved from costs would have been stronger if he had brought the money into Court.

There will be judgment for the plaintiff for $2,701.14 with interest on $201.14 from the 24th day of December, 1913, (the time the defendant deserted her) with costs upon the County Court scale, and there will be no set-off of costs.

HON. MR. JUSTICE MIDDLETON. SEPTEMBER 18TH, 1914.

LONGFORD QUARRY CO. LTD. v. SIMCOE CONSTRUCTION CO. LTD.

7 O. W. N. 67.

Contract—Supply of Building Material—Terms of Contract—Extras—Evidence—Deductions—Costs.

MIDDLETON, J., in an action by a quarry company for extra stone supplied under a contract, *held*, that, upon the evidence, the plaintiffs had agreed to supply all stone required for the price stated, and, therefore, they could not recover upon their main claim.

Action to recover $1,188.11, being the balance alleged to be due to the plaintiff for stone supplied to the defendants for use in the construction of a post-office building at Midland.

Action tried at Barrie 15th September, 1914.

A. E. H. Creswicke, K.C. and W. A. S. Bell, K.C., for the plaintiff.

F. W. Grant, for the defendant.

HON. MR. JUSTICE MIDDLETON:—The defendant undertook the construction of a post office at Midland. After making the contract with the Government, it sought to obtain tenders for the stone required for the erection of the

building. Although the correspondence between the parties speaks generally of "stone," both agree that this expression does not include foundation stone or stone used for backing, but is confined to the cut stone required and the rubble stone required for facing the upper walls. It was desired that this stone should be supplied in the rough, the construction company itself doing all necessary cutting.

To the first letter, asking the quarry company if they could supply the stone, that company answered in the affirmative, and asked to see the plans and specifications, stating that they would then have pleasure in giving a tender. The plans were in due course supplied, and at an interview, to which no importance is attached, the stone for which a tender was sought was limited as above indicated.

After the plans were inspected a letter was written on the 4th April, in which the quarry company said: "We will supply you with the stone required for the Midland post office, being 372 tons of rubble, 5,083 feet lineal of dimension stone, according to the plans and specifications sent us, for the sum of $1,785." It is said tnat the plans had been submitted to another company and that it had made a tender of a little over eighteen hundred dollars. That quarry was situated further from Midland than the Longford quarry, and the purchaser in each case was to pay the freight, so that the plaintiffs' tender was the better one. Mr. Cochrane was sent by the construction company to interview the officers of the quarry company, with a view of seeking a reduction from the price named. Both parties knew at this time how the price named was arrived at. It was 30 cents per foot for the dimension stone and 70 cents per ton for the rubble. The claim for reduction was based on a statement said to have been made by Mr. McPherson, manager of the quarry company, that the dimension stone could be supplied at 25 cents per foot. Mr. McPherson was seriously ill and could not be consulted. In his absence it was arranged to compromise at 27½ cents. This would make the price upon the quantities given $1,658. Mr. Cochrane verbally closed the bargain at that figure, and h's company on April 18th wrote: "We have pleasure in accepting your figure of $1,658 for the stone for the new public building at Midland."

The quarry company made its own estimate of quantities. Cochrane told them that he thought their estimate of

quantity was a little high; but this was not true, as his own estimate indicated that more dimension stone would be required; but he made no misrepresentation which would warrant the setting aside of the contract, and it is not argued that the contract made was not a binding one.

When the work came to be constructed it was found that a good deal more stone was required, both of rubble and dimension stone, than the amount stipulated for. Save as to the stone required for the steps, all the stone has been supplied by the quarry company, and it now sues to recover $1,188.11, being the balance due to it upon the theory that it is entitled to charge over and beyond the contract price for all stone supplied in excess of the amounts named in the letter of the 4th April.

The defendant contends that the contract was a contract to supply all the stone required for the post office and that it was entitled to receive the necessary stone for the stipulated price, even if the quantity exceeded the amounts stated by the plaintiff as the basis of the price given. Its theory is that it sought a lump price; the plans were given to the plaintiff to make its own estimate of the quantity; the offer was to supply the stone required for the post office for the sum named; the acceptance was couched in the same language; if less was required then the quarry company would receive the price named, if more was required it would receive no more.

I think I am relieved from any anxiety as to what was meant by the quarry company by the interpretation which it has itself deliberately placed upon the contract in two letters. I have no reason to doubt the honesty of the statement made by the defendants' officers that their understanding throughout was as they contend; and the most that can be said is that the original letter is ambiguous and capable of two meanings. The letter of acceptance shews that the defendant attached to it in the inception the meaning which it has steadfastly contended for; and the letters I refer to I think establish that the plaintiff company itself, through its officers, attributed to the contract the meaning suggested.

As the stone was supplied and used in the erection of the building, the defendant sought to obtain payment from the Government. The invoices forwarded with the stone sent on did not shew any price. Opposite the items indicated as shipped was placed, in lieu of price, the word "contract."

The Government authorities, for the purpose of enabling them to estimate the value of the material put in the building, so as to justify progress certificates, required the invoice of the material to shew the cost. The defendant explained this to the plaintiff, and on the 30th July, 1913, the plaintiff wrote the following letter in reply to the request:

"Your letters of the 28th inst. to hand. We enclose you herewith a statement of the approximate value of all the stone shipped to you to date, amounting to $938.80. In this connection, we might say that in supplying these statements, we do it in order to facilitate you getting payment from the Government and the value is only approximated, as the whole material is supplied under contract. When the shipments have been completed these statements might shew more or less than the contract price, but we would not expect that in either case they would interfere with the original price given, except in the case of stone not specified in the contract.

On the 16th of August, in reply to a further similar complaint, it wrote as follows:

"We note your remarks on your recent order in regard to extending the amount on our invoices for stone shipped. We explained in a previous letter why we do not do this. We are not selling you this stone by the carload and will not bill it in that way. Neither are we selling it to you at so much per foot or ton, although the contract price is made up in that way. When the contract is completed we will send you a bill of the total. In the meantime we are sending the invoices marked 'contract' and putting in a price per foot or ton that will readily enable you to arrive at the approximate value of the shipment."

The letter of the 29th August is also not without significance. All of the rubble stone and the greater part of the dimension stone had been supplied. Inquiry was made as to what charge the quarry company would make to dress the remaining dimension stone. This covered more than a thousand feet in excess of the amount named in the April letter. A price was given, and this remark added: "We have made no charge for the stone in this, as that will be covered by the original contract."

As against this, much is sought to be made of the fact that on the 21st of August the quarry company wrote calling attention to the fact that they had already shipped 375 tons

of rubble under the contract, while the amount to be supplied as per the letter of April 4th was 372 tons, and asked if a car of rubble then required "is extra to the contract." This letter was never answered. The defendants' officers looked at the contract and concluded that it was intended to cover all the stone, and they simply sent forward orders. There was an interview after this, and it is said that Mr. Murphy, the president of the construction company, discussed this question and said: "Send on this stone, it will make no difference, as we have to pay for what we get." This is denied by Murphy, and I think, even if accepted, would fall short of an admission binding upon the company or the making of a new contract. In one sense the supplying of the stone made no difference, as if the contract was as the defendant contends, then the stone would have to be supplied by the plaintiff or it would be liable in damages.

In another aspect of the case I think the plaintiff must fail. The letter of April 18th indicated an interpretation by the defendant of the ambiguous letter of April 4th. If it was not an acceptance of the earlier letter, and amounted to a new offer, then the plaintiffs have accepted that offer by undertaking to supply the stone. It is not a case in which the Statute of Frauds has application, nor is it pleaded.

This disposes of the main contention. There is a minor matter to be cleared up. At the time of the bringing of the action the defendants had not paid for all the stone received, even on their own contention. They sought to balance the account by claiming an abatement with respect to stone that was not supplied or the erection of the steps, $157.28, and by bringing into Court $400.72. The stone for the steps amounted to 125 feet. For this the company paid $125 and freight $32.25 in excess of the freight from Longford; but the stone purchased was sawn stone and not stone in the rough. This it is admitted saved the stone-cutting which was to be done by the construction company. Taking the same price for the rough stone this would make the amount which should be deducted $34.50, plus $32.25, a total of $66.75. The plaintiff was, therefore, at the time of bringing the action, entitled to recover $558, the balance upon the contract, less $66.75, that is, $491.25; and for this sum, with interest from the date of the writ, it is en-

titled to judgment, with costs upon the County Court scale, subject to a set-off.

The money paid into Court may be paid out on account of the ultimate balance due the plaintiff. If there is any excess, that may be returned to the defendant.

HON. SIR G. FALCONBRIDGE, C.J.K.B. SEPT. 3RD, 1914.

SHOREY v. POWELL.

7 O. W. N. 44.

Principal and Agent—Real Estate Broker—Action for Commission—Evidence.

FALCONBRIDGE, C.J.K.B., gave judgment for plaintiff in an action for commission upon the sale of land.

Action upon a commission on the sale of lands for the defendant.

Tried at Belleville.

E. G. Porter, K.C. and F. H. White, for plaintiff.

R. U. McPherson, for defendant.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—Gilbert French and Jno. Johnson give evidence corroborating plaintiff, i.e., tending to shew that his statement is rather to be preferred to that of Thos. M. Barry, who, besides, was not a very good witness.

It is not easy to assign or apportion commissions in a case like this. I allow the plaintiff $250. Deducting the $151 collected by him, there will remain due him $99, for which sum he will have judgment with County Court costs and no set-off.

Thirty days' stay.

MIDDLETON, J. SEPTEMBER 18TH, 1914.

McKEY v. CONWAY.

7 O. W. N. 62.

Mortgage—Priority—Covenant by First Mortgagee in Second Mortgage — Construction — Non-postponement — Reformation — Foreclosure—Sale.

MIDDLETON, J., *held*, that a covenant by a first mortgagee in a second mortgage that he "will not collect or receive payment of or seek to collect any of the principal money secured by his mortgage, but will allow said principal to remain unpaid and will collect the interest thereon only until and while and so long as the moneys hereby secured shall remain unpaid" did not have the effect of postponing the first mortgage to the second.

Burrowes v. *Malloy*, 2 Jo. & Lat. 521, and *St. John* v. *Rykert*, 10 S. C. R. 278, distinguished.

Action by a second mortgagee for a declaration that his mortgage has, by virtue of a certain covenant, priority over the first mortgage and for foreclosure.

Action tried at Barrie, 16th September, 1914.

A. E. H. Creswicke, K.C., and W. A. J. Bell, K.C., for the plaintiff.

B. H. Ardagh, for the defendant, John Gibbs.

HON. MR. JUSTICE MIDDLETON:—Cassidy, the owner of the land in question, mortgaged the same to the defendant John Gibbs to secure an advance of fifteen hundred dollars; the principal falling due on the 21st December, 1911. The mortgage contained a proviso for the acceleration of the payment of the principal upon default of payment of interest, also a proviso enabling the mortgagor to pay off the whole or any part of the principal sum on any interest day without notice or bonus.

Cassidy conveyed this property to the defendant Conway, but on the 22nd June, 1910, executed a mortgage in favour of the plaintiff to secure the sum of $500 in ten equal monthly instalments of $50, the first instalment to become due on the 22nd of September, 1910; so that the last instalment payable under this mortgage would mature before the principal would fall due under the earlier mortgage, by effluxion of time.

The occasion of making the second advance was the partial destruction of the building on the property by fire. The

building had been used as an hotel, and the License Commissioners required its restoration and improvement before the license would be renewed. The money advanced was spent towards this restoration, but the building never was completed, and the license never was renewed. Conway has made default in payment of the mortgage, and it may be taken that both he and Cassidy are financially worthless.

At the time of the making of McKey's advance some arrangement was made between him and Gibbs looking to the protection of McKey with respect to the loan to be made. This arrangement was embodied in a covenant found in McKey's mortgage; and I find nothing upon the evidence which would justify the reformation of that covenant. I think it must be taken to express the real bargain between the parties, and their rights must be worked out upon the documents as they stand.

This covenant, omitting immaterial words, is a covenant on the part of Gibbs that he "will not collect or receive payment of or seek to collect any of the principal money secured by 'his mortgage' but will allow said principal to remain unpaid and will collect the interest thereon only until and while and so long as the moneys hereby secured shall remain unpaid."

So far as the mortgagors are concerned, it may be taken that these moneys will remain forever unpaid; and it is plain from the evidence given that the property in its present condition will not realize enough to satisfy the first mortgage.

The second mortgagee now seeks in this action a declaration that the effect of this covenant is to give to his mortgage priority over the first mortgage, and in default of redemption he asks foreclosure as against his mortgagee. To this Gibbs answers, alleging that the true intention of his covenant was merely to postpone the demand of the principal upon his mortgage during the period of the currency of the plaintiff's mortgage according to its terms, and in the alternative he takes the position that even if the covenant has any wider effect he is nevertheless entitled to priority and to enforce payment in respect of his interest for all time, and that all he is prohibited from doing by the covenant is calling for or enforcing payment of his principal, which nevertheless remains and is a first charge upon the property.

There is much in force in the contention made by Mr. Ardagh that this covenant, read in the light of *St. John* v. *Rykert,* 10 S. C. R. 278, contemplates payment by the mortgagor in accordance with his covenant, and that the words "so long as the money hereby secured shall remain unpaid" really mean "until the time herein stipulated for payment;" but I think that this will be carrying the *St. John Case* beyond its true effect, and that bearing in mind the fact that no default would in ordinary course take place under the Gibbs mortgage so that the principal would become payable, until all payments under the plaintiff's mortgage were past due, it seems to me that the parties contemplated the postponement of the calling in of Gibbs' principal so long as the monies secured by the plaintiff's mortgage were in fact unpaid.

I am unable to yield to Mr. Creswicke's contention that the effect of this covenant is to postpone the Gibbs' mortgage. A postponement was not asked, nor was it contemplated by the parties; and the right of Gibbs to receive his interest is expressly stipulated for. This I think distinguishes the case from *Burrowes* v. *Molloy,* 2 Jo. & Lat. 521. There the mortgagee had covenanted that he would not call in the principal money during the lifetime of the mortgagor. Default was made in payment of interest. It was held that the interest was so accessory to the principal that he could not maintain foreclosure for the non-payment of interest while the principal was not yet due. This case might make it very difficult for Gibbs to maintain foreclosure; but he is not seeking to foreclose; he is content to allow the principal to remain a charge upon the property; but he does desire to receive his interest in the meantime, because that is expressly stipulated for by his covenant. As under the covenant he will be entitled to interest upon his principal so long as it remains unpaid, this charge for which priority is reserved is really equivalent to the principal itself.

In no aspect of the case can I find anything to justify the declaration sought.

Judgment has been signed against the defendant mortgagor for foreclosure. Both parties agree that it is in the interest of all that the property be sold. I think the judgment should be changed from foreclosure to sale, and that a sale should be had at as early a date as possible. This prob-

ably cannot be done without some notice being given to the Conways. I permit notice asking for this relief to be given to them by registered letter, and in the meantime do not formally pronounce judgment. I think each party should be at liberty to add his costs of the action to his mortgage security.

If I am correct in thinking that the plaintiff has no priority, he might well release his claim upon the property, leaving Gibbs to work out his own salvation; for it is plain that the property will not bring the amount due upon the mortgage.

LATCHFORD, J. SEPTEMBER 19TH, 1914.

PARKER'S DYE WORKS v. SMITH.

7 O. W. N. 65.

Contract—Covenant in Restraint of Trade—Construction and Scope of—"Agent or Otherwise"—Manager Included—Reasonableness —Extent of Territory—Injunction.

LATCHFORD, J., *held*, that where a business extended throughout Canada, a covenant restraining a former manager from carrying on business in Ontario for three years was not unreasonable.

Allen Mfg. v. *Murphy*, 23 O. L. R. 467, followed.

That a covenant not, "as agent or otherwise, for any person, directly or indirectly enter into competition with or opposition to the business" of a company was broken by acting as the manager of a person carrying on a competing business.

Gophir Diamond Co. v. *Wood*, [1902] 1 Ch. 950, distinguished.

Motion by plaintiffs for an interim injunction.

W. R. Cavell, for plaintiffs.

E. B. Ryckman, K.C., for defendant.

LATCHFORD, J.:—The plaintiffs, Parker's Dye Works, Ltd., have for many years carried on business as dyers and cleaners in Toronto and the other principal cities of Ontario and have in all about four hundred agencies in the Dominion of Canada. In 1912 they purchased a similar business theretofore for many years conducted by the defendant under the name of "Smith's Toronto Dye Works." They incorporated the latter business as "Smith's Toronto Dye Works, Limited," and retained defendant in the position of manager.

In June, 1914, an agreement dated April 23rd, 1914, was made between the plaintiff companies and the defendant whereby Mrs. Smith, in consideration of $1,000 assigned to the Parker Company her claims against the Smith Company, acknowledged that she had no further claim against either company, and covenanted that she would not "as agent or otherwise, for any person . . . directly or indirectly enter into competition with or opposition to the business " of either company within Ontario for a period of three years from the date of the agreement.

In a Toronto newspaper of July 23rd, the following advertisement appeared:

" Smith,
French Cleaning and Dyeing,
85 Bloor St. West,
Under the management of
Mrs. E. T. Smith."

A circular issued about the same time sets forth that "O. E. Smith" has opened a dyeing and cleaning business at the address mentioned "under the management of Mrs. E. T. Smith, formerly of Smith's Toronto Dye Works with many years of experience in high-class trade."

The plaintiffs now seek an injunction restraining Mrs. Smith from managing the rival business of O. E. Smith, on the ground that her management of the business at 85 Bloor Street West, constitutes a breach of her covenant.

The defendant was examined under oath for the purposes of the motion. Her evidence—to say the least—is not remarkable for its candor. With much reluctance, Mrs. Smith admitted that "O. E. Smith" is her daughter Olive. There was even greater difficulty in obtaining from the defendant an admission that she was acting as manager of the O. E. Smith business. She was asked: Q. 147, "Are you managing the business " and answered, "I am working for her." While denying that she knew anything of the advertisement she acknowledged that the daughter had shewn her the circular. The examination referring to this circular proceeded:

"Q. 148. You told me just now the circular was correct, you know, and that circular says 'under the management of Mrs. E. T. Smith'? A. I said I was doing any-

thing I was told to. She may call me a manager; I don't know what she calls me."

There is little difficulty about the reasonableness of the restriction by which the defendant agreed to be bound. As the business of the Parker Company extends throughout the whole of Ontario, the restriction does not in my judgment afford the company more than fair protection, and the interests of the public are not interfered with. See *Allen Mfg. Co.* v. *Murphy,* 22 O. L. R. 539 and 23 O. L. R. 467.

The business carried on at 85 Bloor St. West is undoubtedly in competition with or opposition to the business of the plaintiffs. I assume for the purposes of this motion that that business is not a mere cover for a business which is in fact the defendant's.

Yet the management of that business by the defendant is in my opinion in breach of her covenant that she would not for the term mentioned as agent or otherwise for any other person, directly or indirectly enter into competition with or oppositon to the business of the plaintiffs.

The covenant in *Gophir Diamond Co.* v. *Wood* (1902), 1 Ch. 950, so much relied on by the defendant, turns on the use of the word "interested" in any connection which meant that the defendant was to have a proprietory or pecuniary interest in the success or failure of the business. No such connection exists in the present case. "Manager" seems to me to fall within the general words "or otherwise" following the word "agent," if, indeed, it is not within the word "agent" itself. The defendant will, therefore, be enjoined as asked until the trial. Costs in cause to plaintiffs unless trial Judge shall otherwise order.

APPELLATE DIVISION. SEPTEMBER 21ST, 1914.

BECKERTON v. CAN. PAC. RW. CO.

7 O. W. N. 51.

Negligence—Master and Servant—Fatal Accident—Fall from Gangway—Employment not Established—Lack of Contract—Negligence—Evidence—Findings of Jury Overruled—Invitee—Duty of Defendants—Absence of Latent Danger — Knowledge of Invitee—Epileptic Fits—Cause of Death.

Action for damages for the death of plaintiff's husband drowned by falling from a gangway of a dock belonging to defendants. Deceased used to work casually for defendants and had applied for and had been refused work the morning of his death. He was walking slowly along the wharf and fell into the water, apparently, as the result of an epileptic fit, to which fits he was subject. The jury found the defendants negligent in not guarding their gangways, and that deceased was at the time of his death in their employ.

MIDDLETON, J., (26 O. W. R.) granted defendants a non-suit on the ground that deceased was not in defendants' employ at the time of his death and that the guarding of the gangways was neither necessary nor proper.

SUP. CT. ONT. (1st App. Div.) dismissed plaintiff's appeal, holding that deceased was an invitee and that there were no latent defects in the wharf or gangway to which his attention should have been directed.

Lax v. *Corporation of Darlington*, 5 Ex D. 28, referred to.

Appeal by the plaintiff from the judgment dated April 1, 1914, which was directed to be entered by Middleton, J., after the trial of the action before him sitting with a jury at Sandwich on March 25, 1914, 26 O. W. R.

The action was brought on behalf of the widow and the infant children of Wm. Beckerton, deceased, to recover damages under the Fatal Accidents Act, for the loss sustained by them by the death of the deceased, which it is alleged was caused by the negligence of the respondent.

Rodd, for appellant.

McMurchy, K.C., for respondent.

HON. SIR WM. MEREDITH, C.J.O.:—The deceased was a labourer who was employed by the respondent when there was work for him to do in unloading vessels at the respondent's dock in Windsor and reloading the cargoes into railway carriages; and he was employed and paid by the hour. He met with his death by drowning on the morning of the 16th August, 1913, at about half-past seven. He had been employed with a number of other men on the dock on the previous day, and had taken part in un-

loading a cargo of flour and reloading it into the cars. When work was stopped for the day the whole of the cargo had been unloaded, but there remained enough to fill three or four cars yet to be loaded on the cars—a work of about two or three hours.

The hour for commencing work in the morning was 7 o'clock. Between 7.15 and 7.30 in the morning the deceased left his house, which was very near the dock and proceeded to the dock. On his way to it he was overtaken by Robert Hunter, the timekeeper, who was employed in the work, and in reply to the deceased's inquiry if there was "anything doing" that morning Hunter said that there was not and that all the men that were needed to complete the loading of the flour had been employed. After receiving this information the deceased continued on his way to the dock, and, according to the testimony of the only eye-witness of what happened—Louis Hill—walked along the dock, keeping about four feet away from the edge on the water side and had almost reached the third of the gangways to which I shall afterwards refer when he staggered backward and then went forward and "slipped right down" on to the gangway and rolled down its incline into the water, and was not seen again until his body was found some time after by dragging for it in the river.

The deceased was subject to fainting or epileptic fits, and when under their influence would become unconscious and fall down, and the only reasonable inference is that what caused him to stagger and fall on the occasion referred to was the occurrence of one of these fits.

The ground of negligence charged is that the gangways, which were constructed at intervals along the dock and sloped towards the water, were a source of danger to persons having occasion to cross or to walk upon them, especially when, as was said to have been the case on the morning on which the deceased met his death, they were rendered slippery by flour having fallen upon them, and it was contended that when not in use, as they were not that morning, a guard should have been placed across the mouth of them to prevent a person who might fall on them from rolling or slipping into the river as apparently the deceased did.

After falling or rolling into the river the deceased did not rise again to the surface but his hat and pipe did, which would seem to indicate that he was smoking.

There was no evidence that the deceased after meeting the timekeeper went towards the office on the dock, where, if he desired to be put to work, it was his duty to report, and the fair inference from all the testimony is that if the deceased, when he left his house, intended to go to work on the dock he abandoned that intention when informed by the timekeeper that there was no work for him to do, and that he was strolling along the dock enjoying his morning smoke.

At the close of the case for the appellant at the trial a motion was made by counsel for the respondent to dismiss the action, but the learned trial Judge decided to submit the case to the jury, reserving the motion to be afterwards dealt with by him.

The jury in answer to questions put to them found:

(1) That the witness Hill fairly described the accident as it actually happened.

(2) That the respondent was at fault by not having proper protection at the mouth of the slips.

(3) That the deceased was in the employ of the repondent at the time of the accident;

And they assessed the damages at $1,600.

The learned Judge eventually gave effect to the respondent's motion and dismissed the action, being of opinion that there was no evidence that the deceased was at the time of the accident in the employment of the respondent.

With that opinion we agree. It is unnecessary to say what would have been the result if it had appeared that the deceased when he met his death was on his way to his work, though I think that even in that case, bearing in mind that he was employed and paid by the hour while actually at work, it could not be said that when he met his death he was in the employment of the respondent. However that may be, as I have said, the proper conclusion upon the evidence is that the deceased was not on his way to work but that after having been told by the timekeeper that there was not work for him to do he abandoned his intention, if he had any, of going to work.

The case is not presented on the pleadings and was not presented at the trial as one in which the deceased was on the respondent's premises by their implied invitation, as he would have been if he had gone there to inquire if there was work for him to do, but, if the respondent was sought to be

made liable on the assumption that the deceased was on the dock for that purpose the action must have failed, because if the condition of the gangway was dangerous the danger was obvious to the deceased and there was no duty to protect him against it.

The duty in the case of an invitee is thus stated in Halsbury's Laws of England, vol. 21, p. 388-9, sec. 656: "The duty of the occupier of premises on which the invitee comes is to take reasonable care to prevent injury to the latter from unusual dangers which are more or less hidden of whose existence the occupier is aware or ought to be aware," and is thus put by Bramwell, L.J., in *Lax* v. *Corporation of Darlington* (1879), 5 Ex. D. 28-34:

"If the place was not safe, if there was a danger that was not obvious to any person coming there, that person ought to have been warned against it, and it should have been said, 'If you come, you must come and take the place as you find it, for the situation of things is such that there is danger there.' The defendants did not warn the plaintiffs, and the jury have found the place was dangerous, and therefore there is, in my opinion, a *prima facie* case against them, not upon any ground of negligence or misfeasance, but simply upon this ground, that they have not done their duty to their customer in apprising him that there was danger in his accepting their invitation and allowing him to come to their ground or a profit to themselves."

In the case at bar, upon the hypothesis that the condition of the gangways was a source of danger to persons walking along the dock, that danger was obvious and was well-known to the deceased, and therefore no warning such as mentioned by the Lord Justice was necessary for him. There was nothing in the nature of a trap and nothing concealed, and if danger there was it was patent to the deceased.

The action was, we think, properly dismissed, so far as the liability of the respondent was based upon the duty owed by it to the deceased as a person in the respondent's employment, and no good purpose would be served by sending the case back for a new trial on the other ground I have mentioned. We have before us all the materials necessary for finally determining the matters in controversy, and there is no case made for holding the respondent liable opon the

ground on which the defendant in *Lax* v. *Corporation of Darlington, supra,* were held to be liable.

The answers of the jury to the third question should be set aside and judgment pronounced dismissing the action.

I cannot part with the case without expressing the opinion that the effective cause of the unfortunate death of the deceased was the fit which he evidently had at the moment when he staggered and fell, and that the respondent is not answerable for the consequences which followed. The respondent was not bound to foresee that such an event might happen or to guard against the consequences of it, if it did happen, and the case might be disposed of adversely to the appellant, I think, on that ground also.

The appeal is dismissed with costs.

MACLAREN, MAGEE, and HODGINS, JJ.A., concur.

APPELLATE DIVISION. SEPTEMBER 21ST, 1914.

SHAFER v. ROSS.

7 O. W. N. 81.

Vendor and Purchaser—Specific Performance—Agreement for Sale of Land—Option—Notice of Acceptance—Mode of Acceptance—Tender—Evidence—Findings of Trial Judge—Appeal.

SUP. CT. ONT. (1st App. Div.) dismissed an action for specific performance of an alleged agreement for the sale of certain lands, holding that the agreement had not been proven.

Judgment of MIDDLETON, J., confirmed.

Appeal by plaintiff from the judgment of Middleton, J., dismissing his action for specific performance of an agreement by the defendant Ross to sell to him a parcel of land containing about eight acres in the outskirts of Windsor.

HON. MR. JUSTICE MAGEE:—The agreement bears date 13th January, 1913, and by it Ross in consideration of $10 paid did give an option to and agreed to sell to " the plaintiff the therein described property. The price to be $1,475. The option to hold good for two months from date, and to be extended for a further term of two months on payment of $10,

both of such payments to be applied on the purchase money if the sale is carried out on or before the expiration of the option and to be forfeited if sale is not carried out. Ross was to retain possession until the purchase was completed. The agreement proceeds: "When sale is made I agree to accept $500 at time of sale and for the balance of $975 a first mortgage to run for a period of five years with interest at 6%."

The plaintiff did pay another $10, thus extending the option till 13th May, 1913.

On 5th May the plaintiff went to Ross' house near the land and wrote out and signed on Ross' duplicate of the agreement a memorandum as follows: "I hereby accept and exercise this option, terms and conditions as mentioned." He did not pay or offer any money but according to the defendant Ross he said: "Now, this is a sale I consider it a sale according to this agreement," to which it does not appear that Ross made any reply. The plaintiff went away and did not make any effort to see Ross again until 17th May. On that date and again on 21st he drove to Ross' house but found it closed—Ross living alone and being frequently in Windsor. On 19th May Ross went to the plaintiff's office in Windsor "to close the matter with him," and he says that if he had found him then he would have taken the money, though he denies having in any way agreed to postpone the date for its payment. However, the plaintiff was not there and Ross told a clerk there to tell the plaintiff that the option was off and he did not want anything more to do with it. On 19th May, the plaintiff on his way to Ross' house passed the latter driving with the husband of the defendant Gauthier, but did not stop him or mention the subject of the sale.

On 23rd of June the plaintiff registered the agreement of 13th January, and on 5th of June began this action. On the latter date Ross conveyed the land to the defendant Gauthier, who subsequently conveyed to the defendants, Gundy and Gundy.

Not until after this action was first set down for trial was any tender of documents or offer to pay the $480 made by the plaintiff, but he says he was at all times on and after the fifth of May ready to pay, and he had on 7th May instructed Mr. Kirby, his solicitor, to prepare both deed and mortgage, and they had been prepared on 11th May and the mortgage executed by him on that date.

He excuses this inaction between 5th and 17th May because he alleges that on 5th of May Ross had directed him to have Mr. Kirby prepare the papers for Ross and had agreed to come in and close the sale, but Ross denies this and whatever may have been the actual fact as to this it is impossible to disturb the finding of the learned trial Judge against the existence of such an arrangement.

The case then stands that instead of making a payment up to $500 at the time of sale the plaintiff seeks to make out that there was a sale without such a payment which was of the very essence of the transaction. The two payments of ten dollars were not made or accepted as deposits on account of purchase money but only as consideration for postponing the term for the plaintiff to determine whether there would be a sale at all or not. If it had been a case of an immediate sale, that is immediate acceptance of the offer, the plaintiff could not have pretended that it was closed without payment of the sum which must accompany the acceptance and form part of the actual making of the agreement itself. The time for acceptance being postponed does not alter the character of the payment which was to accompany it or turn it into a postponed instalment of the purchase money.

I do not see any reason to disturb the decision of the trial Judge, more especially in view of the speculative nature of the transaction and the circumstances which gave rise to the increased value of the property over ordinary farming land.

APPELLATE DIVISION. SEPTEMBER 21ST, 1914.

DOMINION TRANSPORT CO. v. GENERAL SUPPLY CO.

7 O. W. N. 55.

Contract—Cartage Charges—Liability of Consignor — Evidence—Estoppel—Course of Conduct—Appeal—Dismissal of Action.

SUP. CT. ONT. (1st App. Div.) *held*, in an action against consignors for city cartage charges that there was no evidence of any employment of plaintiffs by defendants and that the action must be dismissed.

Judgment of SENIOR, J., CARLETON Co., reversed.

G. G. S. Lindsey, K.C., for appellant.

S. Denison, K.C., for respondent.

Appeal by the defendant from the judgment of the County Court of the county of Carleton dated 21st April, 1914, which was directed to be entered by the Senior Judge at the trial before him sitting with a jury on that day.

The action was brought to recover the respondent's charges for transporting machinery from the Ottawa station of the Canadian Pacific Railway to the West End Construction Co., afterward referred to as the construction company, in that city.

HON. SIR WM. MEREDITH, C.J.O.:—The machinery had been purchased by the construction company from the appelland and was shipped from Prescott to Ottawa by the Canadian Pacific Railway consigned to the appellant. By the terms of the contract of purchase the property in the machinery remained in the appellant until the price of it was paid and the purchaser was entitled to possession of it until default in payment.

On the arrival of the machinery at Ottawa the advice note was handed to the respondent, a cartage company which delivers goods which arrive at Ottawa by the Canadian Pacific Railway to the persons to whom they are consigned and a duplicate or copy of the advice note was sent to the respondent.

Upon the advice note the words "no cartage" were stamped, which means, as the evidence establishes, that the shippers do not undertake responsibility for the cartage charges.

The construction company was desirous of obtaining quick delivery of the machinery and its representatives,

Claffy and Grey, saw the agent of the respondent, Mr. Manners, and told him of this. Mr. Manners at once communicated with the appellant asking for its consent to the respondent's letting the construction company have or delivering to that company the machinery, and the appellant's consent was given to that being done. Arrangements were then made between the representatives of the construction company and Manners for the cartage of the machinery to the works of that company at or near Fairmount Avenue. A discussion took place as to the charges and it was finally arranged that the work should be charged for by the day. According to the testimony of Manners, Grey said that the charges would be paid by the appellant, but this was denied by Grey. Assuming that Manner's evidence on this point is accepted there is nothing to indicate that Grey acted or assumed to act, in the transaction or in making that statement, for the appellant, but it is clear that he was acting as all parties knew, for his own company.

The machinery was delivered in pursuance of this arrangement and its delivery occupied several days.

On the 3rd July, 1911, the respondent sent to the appellant a bill of its charges, and on the 19th of the same month the following letter was written by the sales manager of the appellant.

"Ottawa, Can., July 19-11.

"The Dominion Transportation Co.,
Ottawa, Ont.

Attention of Mr. D. H. Manners.

Gentlemen:—We are in receipt of your statement dated July 3rd, for cartage on car of machinery to Fairmount Avenue. We note that you charge us at the rate of $7.50 per day for five teams, which we think is a trifle stiff, in view of the fact that these teams were practically on the same wagon.

"We would thank you to look into this matter, and we think that you will agree with us that this charge is a little steep.

Yours truly,
The General Supply Co. of Canada, Ltd.,
G. B. Harlock,
Sales Mgr. Mchy. Dept."

On the following day Manners replied to this letter, explaining the reason for the charges, and concluded his letter by saying that he "would be pleased to see you personally and talk the matter over."

According to the testimony of Greene, an officer of the appellant company, Manners, in accordance with the suggestion in his letter of the 20th July, had an interview with Greene at which he repudiated all liability of the appellant for the respondent's charges. Manners does not in terms deny this, but says that according to his recollection there were no repudiations of liability by the appellant until the following October.

On the 25th July, 1911, the following letter was written by the appellant to the construction company.

"Ottawa, Can., July 25-11.

The West End Construction Co.,
Ottawa, Ont.

Gentlemen;—Beg to enclose herewith bill from the Dominion Transport Co., for the moving of large crusher, which they have charged to us, also the correspondence we have had with them in reference to this bill. We think that this price is pretty stiff, and as you are acquainted with the facts, and as this should really have been charged to you direct, we think you had better take this matter up with them, as we think there is no need of us entering this in our books.

In the meantime we will also voice our complaint to Mr. Manners.

Yours truly,
The General Supply Co. of Canada Ltd.,
G. B. Harlock,
Sales M'g'r. Mchy. Dept."

In my opinion the appellant is not liable for the respondent's charges. There was, as between the appellant and the construction company, admittedly no liability on the part of the appellant to deliver the machinery at the construction company's works; the appellant's duty was at an end when the machinery reached the Ottawa station of the Canadian Pacific Railway Co. The contract for the transport of it to the construction company's works was made between that company and the respondent, and Claff and Grey did not act or assume to act for the appellant in making the contract. If either of these gentlemen had assumed to act for the appel-

lant it may be that the subsequent correspondence would amount to a ratification of their acts; but as they did not assume to act for anybody but the construction company, there was nothing to ratify.

The letters of the 19th and 25th July would seem to indicate that the appellant or the writer of the letters was under the impression that the appellant was liable for the respondent's charges, but that is clearly not enough to render the appellant liable.

It was argued for the respondent that the conduct of the appellant after the receipt of the respondent's bill of charges, and especially the letters of the 19th and 25th July, estop the appellant from denying its liability, but I am not of that opinion. At most they shew that the appellant entertained the belief that it was liable to pay the respondent's charges, but there is nothing to indicate that the respondent changed its position to its prejudice relying upon the appellant's conduct and letters, and in the absence of evidence of that having taken place no estoppel arose.

There is besides the evidence of Greene to which I have referred that at the interview between him and Manners he (Greene) repudiated liability on the part of his company.

I have not overlooked the fact that the appellant on a previous occasion paid the cartage charges in respect of a machine shipped to the construction company under similar circumstances to the shipment of the machinery in respect of which the action is brought. The charges in that case amounted to less than $5 and were paid as a matter of courtesy to the construction company, and there is nothing in this from which it can properly be inferred that a similar course would be taken in the case of subsequent shipments or which amounts to a course of dealing warranting the respondent in treating the appellant as liable to pay the cartage charges in question, but on the contrary the evidence shews, as I have said, that the contract for the delivery of the machinery to the construction company was made with that company.

The appeal should be allowed with costs and the judgment reversed, and judgment entered dismissing the action with costs.

MACLAREN, MAGEE and HODGINS, JJ.A., concurred.

APPELLATE DIVISION.

SEPTEMBER 21ST, 1914.

MUSUMICCI v. NORTH DOME.

7 O. W. N. 48.

Negligence—Master and Servant—Fatal Accidents Act—Explosion in Mine—Failure to Inspect—Mines Act R. S. O. 1914 c. 32 s. 164, Rule 10—Findings of Jury—Evidence—Appeal.

SUP. CT. ONT. (1st App. Div.) in an action for damages for the death of a workman by reason of an explosion in a mine *held*, that there was evidence to support the finding of the jury that defendants were negligent in inspection.

Judgment of LENNOX, J., affirmed.

M. K. Cowan, K.C., and J. W. Pickup, for appellant.

F. Denton, K.C., for respondent.

Appeal by the defendant from the judgment dated 4th May, 1914, which was directed to be entered by Lennox, J., on the findings of the jury at the trial at North Bay on the 7th of April, 1914.

The action was brought under the Fatal Accidents Act, on behalf of the widow and children of Salvatore Musumicci, deceased, who was killed by an explosion which occurred in the mine of the appellant, in which the deceased was working on the 21st of March, 1913.

HON. SIR WM. MEREDITH, C.J.O.:—The deceased was a helper to Marco Dementitch, another employee of the respondent who had charge of the drilling machine in No. 5 drift in the mine and operated it.

Thirteen holes had been drilled in his drift by Dementitch, and the charges in them had been exploded on the morning of Thursday the 20th March. According to the testimony of Dementitch, after the holes had been charged and the fuse lighted, he and the deceased ascended to the surface and listened for the reports of the explosion, and heard "all the shots go off," . . . i.e., satisfied himself that an explosion had taken place in each of the holes. Some of the timbers in the mine were displaced by the explosion, and, on the afternoon of Thursday, Dementitch was instructed by Grierson, the captain of the mine, to "fix" them. He and two

other employees, Cassidy and Orek, were engaged on that work until nearly midnight, when it was completed.

While this work was going on, the deceased was engaged in "levelling down the drift to put down the air pipe," and mucking back.

After the repairing of the timbers was completed, the men ascended for their supper and returned to the mine about 1 o'clock on Friday morning for the purpose of proceeding with the work of drilling. Dementitch then began drilling, and had been engaged in that work for about two hours and a half, when an explosion occurred which killed the deceased and seriously injured Dementitch himself. After he had drilled two holes to the full depth, and while he was engaged in drilling the third and had got in to the depth of 13 inches, the explosion took place. This third hole was being drilled at the distance of about 6 inches from one of the holes that had been previously shot, and there was evidence from which the jury might reasonably infer—as they did,—that the explosion was caused by the drill coming into contact with some of the powder which had been used in charging the neighbouring hole and had not exploded when it was shot.

According to the testimony of Dementitch, when he went down to repair the timbers he looked at the holes that had been "shot," and found that some of them had not broken "very good" and these had broken off except 8 inches or a foot left in the "end of them," which I understand to mean the bottom of them.

How the drill came into contact with the unexploded powder in the neighbouring hole, Dementitch was unable to say; but it is, I think, a reasonable inference that one of these holes was not drilled straight and indeed that would seem to be the only way in which the drill could have come into contact with the powder.

There was no shift boss employed in the mine and no inspection of the drift had been made since the previous Wednesday by the mine captain, and nothing was done by him to ascertain the condition of the drift or of the holes that had been shot before the work of again drilling on the Friday morning was begun. The powder used in charging the holes was forcite, and that kind of powder had not been used before in the mine.

Although there was no evidence that any express order was given to Dementitch to go on with the drilling after the re-

pair of the timbers was completed, it is manifest that that is what he was expected and it was his duty to do. He was on the "night shift," and the only work he had to do after the timbers were repaired was to go on with the drilling, and it was for that purpose that he went down into the mine at 1 o'clock of the morning on which the explosion took place.

At the close of the case for the plaintiff, counsel for the appellant argued that negligence had not been proved and that there was nothing to submit to the jury, but the learned trial Judge refused to give effect to his contention, and left the case to the jury.

The jury found, in answers to questions put to them, that the death of the deceased was caused by the negligence of the appellant, and that that negligence consisted in the appellant "not having proper supervision of the men; for not making an inspection of the last blast especially after using a new kind of powder contrary to the Mining Law of Ontario."

The learned trial Judge left it to the jury to say whether the explosion was caused by the negligence of Dementitch, and their answers shew that they did not think so. While this removes one of the grounds upon which the respondent relied for fixing the appellant with liability, it also operates in her favour because it eliminates Dementitch's negligence as a factor in causing the death of the deceased.

Notwithstanding the able argument of counsel for the appellant to the contrary, I am of opinion that there was evidence to go to the jury and that their findings are supported by the evidence.

As I have said, the work in which Dementitch was engaged when the explosion occurred it was his duty to do, and the appellant is, I think, in no better position than if Dementitch had been expressly instructed to go on with the drilling, and the jury were, I think warranted in coming to the conclusion that the appellant was negligent in impliedly directing or sanctioning Dementitch's proceeding with the drilling without an inspection having been made of the condition of the drift and the holes after the blasting on Thursday, especially as a new kind of powder had been used on that occasion.

Rule 10, sec. 164 of the Mines Act, R. S. O. 1914, ch. 32, provides that "the manager, captain or other officer in charge of a mine shall make a thorough daily inspection of the condition of the explosives in or about the same. . . ." This rule was invoked by the respondent, and it may be that it is

wide enough to embrace the duty of inspecting the holes which had been blasted, but I prefer not to rest my judgment on that ground, for apart altogether from the rule, it was the duty of the appellant to take all reasonable precautions to prevent its employees from being exposed to unnecessary danger in the performance of their work; and the question is whether there was evidence that that duty was not performed, and that the death of the deceased was due to the failure to perform it, and in my opinion there was; an inspection of the holes would have shewn that some of them had broken badly and ought to have resulted in their being carefully examined by some person more competent to judge as to their condition constituting a source of danger when new holes were being drilled in close proximity to them, and that source of danger being removed; and if I am right in that view, the death of the deceased was caused by the failure of the appellant to make the inspection.

Upon the whole, I am of opinion that there was evidence to support the findings of the jury, and that the appeal should be dismissed with costs.

MACLAREN, MAGEE and HODGINS, JJ.A., concur.