The
Ontario Weekly Notes

Vol. I. TORONTO, JANUARY 12, 1910. No. 16.

COURT OF APPEAL.

DECEMBER 31ST, 1909.

REX v. FARRELL.

Criminal Law — Perjury — Failure to Shew Proceeding in which Perjury Alleged to have been Committed—Preliminary Inquiry before Magistrate—Necessity for Proof of Information—Objection Taken at Close of Crown's Case—Withdrawal of Case from Jury.

Case reserved, at the request of the Crown, by the Chairman of the Sessions for the county of Peel.

The defendant was indicted for perjury alleged to have been committed at a preliminary examination before Robert Crawford, police magistrate, of a charge of perjury against one Hugh Whitty.

According to the stated case, Crawford appeared as a witness at the trial of the defendant at the Sessions, and proved that an information was laid before him (Crawford) against Hugh Whitty on a charge of perjury, and that on the investigation of such charge the accused (Farrell) was duly sworn and gave evidence. The stenographer by whom the evidence was taken down also gave evidence to the same effect, and it was further proved by them that Whitty was committed for trial. After further evidence as to the commission of the offence of perjury, the Crown closed its case, and, on objection raised by counsel for the accused (Farrell), the Chairman withdrew the case from the jury, "on the ground that the Crown had failed to produce sufficient evidence by not producing any record of the hearing or the result thereof in the police court where the perjury was alleged to have been committed."

The question reserved by the Chairman was: "Was I right in withdrawing the case from the jury on the above ground?"

The case was heard by Moss, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

E. Bayly, K.C., for the Crown.

J. W. Roswell, for the defendant.

OSLER, J.A.:—The proceeding in which the alleged perjury was committed was commenced by information, and it is difficult to understand why the proper and well-known course of procedure in proving it by production of the information was not followed. Rex v. Drummond, 10 O. L. R. 546, Rex v. Legros, 17 O. L. R. 425, Regina v. Moore, 61 L. J. M. C. 80, and Regina v. Dillon, 14 Cox C. C. 4, . . . shew that the omission was fatal to the prosecution, and that the prisoner, for lack it may be, only of the formal but necessary evidence of the former proceeding in which the alleged perjury was committed, was properly acquitted.

See also Rex v. Eugene Brooks, 11 O. L. R. 525, Regina v. Gibson, 18 Q. B. D. 537, and Regina v. Moore, supra, which are strong to shew that the objection to the defect in the proof was properly taken, or that it was not too late to take it, as it was taken here, at the close of the case for the Crown.

The answer to the question submitted must, therefore, be in the affirmative.

MACLAREN, J.A., gave reasons in writing for the same conclusion, in which he referred, in addition to the cases cited by OSLER, J.A., to The Queen v. Hughes, 4 Q. B. D. at p. 628; Regina v. Coles, 16 Cox C. C. 165; Archbold, 23rd ed., p. 1053; Roscoe, 13th ed., p. 681; Phipson, 3rd ed., p. 497; Rex v. Yaldon, 17 O. L. R. at p. 182; Dove v. Benjamin, 9 A. & E. 644; Goslin v. Corry, 7 M. & G. 342; Reed v. Lamb, 6 H. & N. 757; Jacker v. International Cable Co., 5 L. T. R. 15; Webb v. Ottawa Car Co., 2 O. W. R. at p. 63; McLennan v. Gordon, 5 O. W. R. at p. 101; Regina v. Brittleton, 12 Q. B. D. 266; Regina v. Garneau, 4 Can. Crim. Cas. 69; Regina v. Saunders, [1899] 1 Q. B. 490; Taylor on Evidence, 10th ed., sec. 1881 (c).

MOSS, C.J.O., and GARROW, J.A., concurred.

MEREDITH, J.A., dissented, for reasons stated in writing, being of opinion that there could be no "record" of the proceedings be-

fore the magistrate, the police court not being a court of record; that it was immaterial whether there was or was not an information in the police court proceedings, and consequently proof of it was quite unnecessary; and also that in a case such as this in which the error could have been corrected when the objection was made, the proper course is to permit it to be corrected, not to aid in a miscarriage of justice.

DECEMBER 31ST, 1909.

REX v. PAILLEUR.

Criminal Law—Attempt to Commit Incest—Evidence of Children of Tender Years—Corroboration—Statement Made by Child—Evidence of—Indictable Offence.

The prisoner, with his own consent, was tried before the junior Judge of the County Court of Carleton, under the provisions of Part XVIII. of the Criminal Code, upon a charge of having attempted incest with his daughter Joliette Pailleur, and was found guilty.

Joliette Pailleur was between 7 and 8 years of age, and her evidence and that of Bessie Archansky, a child of 4, was received, though not given on oath, the learned Judge being of opinion that they were possessed of sufficient intelligence to justify the reception of their evidence, and understood the duty of speaking the truth.

It was objected on behalf of the prisoner that their evidence was not corroborated in the manner and to the extent required by the enactments governing its admission, but the learned Judge was of the contrary opinion.

The Judge also received in evidence a complaint or statement made by Joliette Pailleur immediately after the offence was committed, as alleged, it being objected on behalf of the prisoner that the complaint or statement was not made freely or voluntarily, but was the outcome of questions improperly addressed to her by one Richard Berthiaume.

It was also objected that, from the nature of the crime of incest, there could be no attempt by one person to commit it, and that the indictment or formal charge upon which the trial took place disclosed no indictable offence.

At the request of counsel for the prisoner, the Judge stated the following questions for the opinion of the Court of Appeal:—

1. Was the evidence of Joliette Pailleur and Bessie Archansky, not given upon oath, admissible?

2. Was such evidence corroborated by any other material evidence?

3. Was the complaint or statement made by Joliette Pailleur to Richard Berthiaume admissible?

4. Does the indictment or formal charge disclose an indictable offence?

The case was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

Gordon Henderson, for the prisoner.

J. R. Cartwright, K.C., and E. Bayly, K.C., for the Crown.

MOSS, C.J.O.:— . . . 1. At the trial sufficient appeared to lead to the opinion—and the learned Judge acted upon that opinion—that Joliette Pailleur did not fully understand the nature of an oath, and Bessie Archansky was of too tender years to be deemed capable of doing so, and the learned Judge having satisfied himself that in other respects they answered the requirements of sec. 16 of the Canada Evidence Act, the provisions of which are applicable to all criminal proceedings (sec. 2), their evidence was properly admitted.

2. No doubt, the evidence of Joliette Pailleur was in some respects at variance with that of Richard Berthiaume, but in the material particulars of his being present when the prisoner went upstairs and called the girl Joliette to come up to him, of her reluctance to go, of her having ultimately gone and remained for some time, and of her coming back with her clothing in disorder and shewing signs of agitation, there was no substantial contradiction between them. Then there was other evidence as to the condition of her clothing and person and of other facts, every inference from which tended to support the charge she made against the prisoner in her evidence at the trial.

The law does not require that every part of the evidence shall be corroborated, but only that it must be corroborated by some other material evidence: sec. 16 (2). And that requisite appears in this case.

3. The learned Judge, no doubt, accepted the statements made by Richard Berthiaume, set out in the case, beginning with the question, "When the little girl came out of the house, who spoke first, you or she?" The questions he deposed to having put to her were such as might properly be addressed to her by him, hav-

ing regard to the fact that the girl's mother had in a measure placed her in his charge during her absence. The questions were natural questions likely to be put under the circumstances by a person in charge, and there is no valid reason for supposing that the answers were not made freely or voluntarily.

4. Upon this question arises the question whether an attempt to commit incest is an indictable offence under the Criminal Code.

By sec. 204 of the Code, every one who commits incest as therein defined is guilty of an indictable offence and liable to 14 years' imprisonment. An attempt to commit the offence is not amongst the offences specially enumerated in the Code. But by sec. 570 it is declared that every one is guilty of an indictable offence and liable to 7 years' imprisonment who attempts in any case not thereinbefore provided for to commit any indictable offence for which the punishment is imprisonment for life or for 14 years, or for any longer term. And sec. 571 makes provision for the case of an attempt to commit an indictable offence for which the longest term of imprisonment is less than 14 years, where no express provision is made by law for the punishment of such attempt, and provides a term of imprisonment proportioned to the term to be imposed for the offence itself. The policy of the legislation seems to be to provide for the punishment of attempts to commit indictable offences, in addition to the cases where on a trial for an indictable offence the accused may be found guilty of an attempt, instead of guilty of the offence itself.

Is it open to doubt that under sec. 570 both the male and female within the prohibited degrees might be prosecuted for attempting to commit incest where the intention was plain, but the final act was frustrated? Then why not one of the parties under similar circumstances?

The principle seems to be that if a person intends to commit an offence and does all that lies in his power towards its committal, he is not excused because some impediment presents itself which prevents his attempt from being successful.

In this case the prisoner might have been prosecuted for an attempt to have carnal knowledge, but is there any reason for saying that carnal knowledge would not have completed the offence of incest?

The prisoner had the intention, the child was a party to his acts, but doubtless only by reason of his restraint and from fear or duress. If there had been accomplishment, the case as regards her would have fallen within the words of the proviso of sec. 204 of the Code.

The prisoner having done what he could to commit the offence of incest, sec. 570 applies to his case, and he was open to indictment under it.

Conviction affirmed.

MACLAREN, J.A., was of the same opinion, for reasons stated in writing. He cited Rex v. Daun, 12 O. L. R. 227; Parker v. Parker, 32 C. P. 113; Green v. McLeod, 23 A. R. 676; Cole v. Manning, 2 Q. B. D. 611; Rex v. Osborne, [1905] 1 K. B. at p. 556; Rex v. Kiddle, 19 Cox C. C. 77; Regina v. Cheeseman, L. & C. 140; Regina v. Eagleton, 5 Cox C. C. 559; Regina v. Connolly, 25 U. C. R. 317; Rex v. Fletcher, 10 Cox C. C. 248; Rex v. Vaughan, 4 Burr. 2494; Rex v. Plympton, 2 Lord Raym. 1377; Wade v. Broughton, 2 Ves. & B. 172.

OSLER, J.A., arrived at the same conclusion, for reasons to be stated in writing.

GARROW, J.A., concurred.

MEREDITH, J.A., dissenting, was of opinion that, under sec. 204 of the Criminal Code, the concurrence of both persons in the wrong is a necessary part of the crime; there cannot be the statutory crime of incest where rape has been attempted; and the crime of which the accused had, upon the evidence, been found guilty, was of an attempt to commit rape.

DECEMBER 31ST, 1909.

REX v. ELLIS.

Criminal Law—Vagrancy—Criminal Code, sec. 238 (l)—Gaming—Betting.

Case stated by one of the police magistrates for the city of Toronto.

The defendant was charged with vagrancy. He pleaded "not guilty," but counsel on his behalf admitted that he took personal bets on horse races with different individuals in the streets of Toronto, having no fixed place for taking the bets or paying them; that the defendant made his living for the most part thereby, having no other business; that he took these bets with individuals in his own behalf, and, if he lost, he himself paid. The magistrate

convicted, but reserved the question whether, upon the admissions, the defendant could be convicted as a vagrant under sec. 238 (l) of the Criminal Code: "Every one is a loose, idle or disorderly person or vagrant who,— . . . (l) having no peaceable profession or calling to maintain himself by, for the most part supports himself by gaming or crime, or by the avails of prostitution."

The case was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

T. C. Robinette, K.C., for the defendant.

E. Bayly, K.C., for the Crown.

MEREDITH, J.A.:—The conviction cannot be sustained. The charge against the accused was vagrancy, in "having no peaceable profession or calling to maintain himself by, but, for the most part," supporting "himself by gaming . . ."

The conviction is based entirely upon the admission of the accused, that he made his living, for the most part, by betting on horse races. There was no sort of admission, or evidence, of "gaming."

Gaming and betting on horse races are different things; and the difference between them, under the Criminal Code, is marked, as secs. 226 and 227 shew: the one is aimed against gaming, the other against betting, in the manner dealt with in them: and all of the provisions of the Criminal Code, touching the subject, indicate the intention of Parliament to steer clear of making mere betting a crime: see sec. 235 especially.

Having regard to the language employed in the sections of the Act to which I have referred, as well as to sec. 238, it seems plain to me that, if it had been intended to make such things as the accused admitted he had done a crime such as he was accused of, the vagrancy section of the Criminal Code, in the part from which I have quoted, would have, in conformity to other sections I have referred to, have had added to it the words "or betting" after the word "gaming." If this were not so, there would have been a great waste of energy in "barking up the wrong tree" in such cases as Saunders v. The King, 38 S. C. R. 382.

I would answer the question in the negative and direct that the accused be discharged.

OSLER, J.A., agreed, for reasons to be stated in writing.

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., also concurred.

DECEMBER 31ST, 1909.

RE LAKE ONTARIO NAVIGATION CO.

DAVIS'S CASE.

HUTCHINSON'S CASE.

Company—Winding-up — Contributory — Shares — Allotment—Right to Repudiate—Voting on Shares — Director—Misfeasance.

Appeals by Davis and Hutchinson from the order of TEETZEL, J., 18 O. L. R. 354.

The appeals were heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

F. J. Dunbar, for Davis.

I. F. Hellmuth, K.C., for Hutchinson.

M. C. Cameron, for the liquidator.

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

MEREDITH, J.A.:—The appellant Davis applied, in writing, for 130 shares at the price of $1,300. The whole testimony—to which credit has been given and which is not now questioned—makes it very plain that the full price of that which this appellant was to get was $1,300.

Instead of allotting to him any such shares, the diretcors of the company allotted 130 shares, the price of which was $13,000. The moment he became aware of that fact, he stopped the cheque he had given for the $1,300—the full amount of the purchase money; and refused to have anything more to do with the matter.

In the meantime he had given a proxy to vote upon the shares which he had applied for; and that proxy was acted upon; but there was no sort of acceptance of the stock actually allotted, nor any sort of intention to accept it; instead, there was the promptest rejection of the shares which were allotted.

In these circumstances, it would be extraordinary if the appellant were in law liable for the $13,000—liable to pay for something he never applied for, never bought, nor ever accepted.

It is not a case of buying the ordinary stock of the company under some mistake of law, or of fact, on the part of the purchaser, as to the legal effect of becoming such a purchaser.

I know of no difference in principle between a sale of personal property of this character and that of any other. There must be an actual sale; if one bargain for one thing, he cannot be compelled to accept another.

In this case the appellant applied for one thing and was offered another, which he promptly rejected. Authorising his proxies to vote upon the stock which he was to get—not that which was allotted—was in no sense an acceptance of that which was offered in lieu of that which was sought; nor could it have any legal effect, conferring no legal power to vote.

Ex p. Sandys, 42 Ch. D. 98, is not an authority to the contrary; indeed in that case it was held that there was no liability under the original contract, but it was held that subsequent conduct evidenced a subsequent contract to take the stock as allotted.

I would allow the appeal.

In Hutchinson's case there can be no liability if there be none in Davis's case. Davis should, and must, eventually have had the money returned to him if it had been actually paid over to, and been retained by, the company; so that any intervention by Hutchinson caused no loss or injury to the company.

MOSS, C.J.O., OSLER, GARROW, and MACLAREN, JJ.A., concurred; MACLAREN, J.A., stating reasons in writing.

DECEMBER 31ST, 1909.

FRALICK v. GRAND TRUNK R. W. CO.

Master and Servant—Injury to and Death of Servant—Negligence of Fellow-servant—Workmen's Compensation Act—Railway—Defective System — Liability at Common Law — Findings of Jury—Evidence—Amount of Compensation.

Appeal by the plaintiff and cross-appeal by the defendants from the judgment of MEREDITH, C.J.C.P., after trial with a jury.

The plaintiff, as administratrix of the estate of her deceased husband, sued for damages on account of his death in a collision near Brantford.

The jury found that his death was caused by the negligence of two of the defendants' servants, Gillen, a superintendent, and Maguire, a yardmaster, and assessed the damages at $8,250 at common law, and at $3,300 under the Workmen's Compensation

for Injuries Act. The trial Judge held that there could be no recovery at common law, and gave judgment for the $3,300.

The plaintiff appealed to increase the amount to $8,250; the defendants, who had admitted their liability under the Act and had paid $3,096 into Court, cross-appealed to have the judgment reduced to that sum.

The deceased was engine-driver on a train which, shortly after leaving Brantford station, collided with a pilot engine which had gone out from the Brantford yard a short time before to help up a heavy grade another train leaving Brantford on the Tilsonburg branch of the defendants' railway. By the company's rules, this pilot engine was under the direction of Maguire, the yard foreman at Brantford, and it was admittedly owing to his neglect in allowing the train on which the deceased was the engine-driver to go out before the pilot engine returned, that the accident happened.

In answer to questions submitted to them, the jury found that the system in use on the defendants' railway in respect to the pilot engine was not a reasonably safe and adequate one, but was defective and exposed their employees to unnecessary danger, and that the pilot engine, when away from the Brantford yard, should have been under the control of the train despatcher at London, and not under Maguire, the yard foreman. They further found that the adoption and use of this defective system was due to the negligence of the defendants' superintendent, Gillen, and their yardmaster, Maguire, and that the accident would not have happened but for the above defect in the system; also that the defendants' railway was managed and the rules for its operation made by competent officials; and that the deceased did not voluntarily undertake the risk involved in doing his work under the rules in question.

The appeal and cross-appeal were heard by Moss, C.J.O., Osler, Garrow, Maclaren, and Meredith, JJ.A.

G. C. Gibbons, K.C., and G. S. Gibbons, for the plaintiff.

D. L. McCarthy, K.C., and Frank McCarthy, for the defendants.

Maclaren, J.A.:— . . . It being admitted that the accident could not have occurred but for the negligence of Maguire, the question arises, were the jury justified, on the evidence in this case, or without evidence, in looking for and attributing it as well to another and a more remote cause? If Maguire had obeyed

the rule, the accident would not and could not have happened. Were the jury entitled to speculate and say that it was negligence on the part of the defendants not to have adopted at Brantford the practice of handling the pilot engine in use at London? . . .

The operation of a railway is something that requires the highest degree of skill and experience, and I am of opinion that an ordinary jury is not competent to pass on such a complicated subject without the best of skilled evidence. Here they purport to settle it not only without evidence but in the teeth of all the skilled evidence given. . . .

I am of opinion that the verdict of the jury as to what was called the system is not only not supported by any evidence, but is directly contrary to the only competent evidence before them, and that their answers on this point cannot stand. To my mind the case for the defence is much stronger than Lappage v. Canadian Pacific R. W. Co., 13 O. W. R. 118, or McDonald v. Grand Trunk R. W. Co., 14 O. W. R. 303. . . .

[Canada Woollen Mills v. Traplin, 35 S. C. R. 424, distinguished.]

I consider this even a stronger case for the defence than Jackson v. Grand Trunk R. W. Co., 2 O. L. R. 689, 32 S. C. R. 245. . . .

On the whole, I am of opinion that there is nothing in this case to make the defendants liable at common law; but that the principle enunciated in Wilson v. Merry, 1 H. L. Sc. 326, applies, and that consequently the plaintiff's appeal should be dismissed.

As to the defendants' cross-appeal, I think their evidence is not sufficient to justify us in reversing the decision of the trial Judge. Some of the reductions in the wages of those in the like employment with the plaintiff, for sickness, holidays, fines, and suspensions, are not properly included in the comparison. There is evidence to justify the finding of the jury upon this point, and the cross-appeal should be dismissed.

MEREDITH, J.A., arrived at the same conclusions, for reasons stated in writing.

MOSS, C.J.O., OSLER, and GARROW, JJ.A., concurred.

DECEMBER 31ST, 1909.

RE NIAGARA FALLS BOARD OF TRADE AND INTERNATIONAL R. W. CO.

Ontario Railway and Municipal Board — Jurisdiction — International Railway Company—Passenger Fares—Approval of Tariff by Park Commissioners—Ontario Railway Act, sec. 170, sub-sec. 5—Supervision by Board.

Appeal by the railway company from an order of the Ontario Railway and Municipal Board, made upon the application of the Board of Trade, requiring the railway company to accept a 5 cent cash fare on their cars for conveying passengers for any distance not more than 3 miles south of Bridge street in the city of Niagara Falls.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

W. Nesbitt, K.C., and M. Lockhart Gordon, for the appellants.

F. W. Griffiths, for the respondents.

MEREDITH, J.A.:—This case has been treated as one affecting the jurisdiction of the Ontario Railway and Municipal Board: but I am by no means sure that it is a case of that character: that depends upon whether the Board acquired jurisdiction by misconstruction of an enactment conferring jurisdiction upon them, or merely misconstrued an enactment in a matter within their jurisdiction; as, however, there is a right of appeal to this Court upon any question of law, whether affecting jurisdiction or not, it is quite immaterial whether the questions involved affect, or do not affect, jurisdiction.

The questions involved present no great difficulty. The main one is whether sub-sec. 5 of sec. 170 of the present Ontario Railway Act applies to the appellants. That sub-section provides that the section shall not apply to a company whose tariff for passenger fares is subject to the approval of any Commissioners in whom are vested any park or lands owned by the Crown for the use of the public of the Province of Ontario. Under an agreement made between the appellants and the Commissioners of Queen Victoria Niagara Falls Park—Commissioners within the meaning of sub-sec. 5 — the appellants' tariff for passengers was made "subject to the approval of the Commissioners," and that agreement was by legislative enactment approved, ratified, confirmed, and declared to be valid and binding on the parties

thereto; though really I do not quite see how it makes any difference, for sub-sec. 5 does not require that the approval shall be under any statute or statute-conferred power.

So far the case seems to me to be a plain one; the case is plainly one within the very words of the sub-section. But it is said that by the enactment confirming the agreement the provisions of the Ontario Railway Act were, with some exceptions, made part of that enactment, including a section providing that no tolls should be levied or taken until approved by the Lieutenant-Governor in council, and published as therein provided; and that is so; but surely it is a non sequitur that the approval of the Commissioners is not also requisite. There is no difficulty in giving full effect to all the provisions of the enactments as well as the agreement. The tariff is subject to the approval of the Commissioners, parties to the agreement, in the interests which they specially represent; but it is also subject to higher approval in the interests of the public generally. There is nothing extraordinary or inconsistent in that, and it is a course which seems to have been in the past followed; the parties to the agreement must first act, and then the higher power must supervise.

Section 170 is not applicable, but, under sec. 169, besides approval by the Commissioners, approval by the Board, now taking the place of the Lieutenant-Governor in council, is required.

I would allow the appeal, but the case, having regard to all that has occurred in it, is not one for costs.

MOSS, C.J.O., reached the same conclusion; reasons to be given in writing.

OSLER, GARROW, and MACLAREN, JJ.A., also concurred.

DECEMBER 31ST, 1909.

PRINGLE v. CITY OF STRATFORD.

(TWO ACTIONS.)

Assessment and Taxes—Exemption of Factories—Municipal By-law—Validating Statute—Contract—Construction—"Exemption from Taxation"—School Taxes—General Act—Special Act—Mandamus—Declaratory Judgment—Remedy by Appeal to Court of Revision.

Appeals by the defendants and cross-appeal by the plaintiff from the judgment of MACMAHON, J., at the trial, in the nature

of a mandamus ordering the defendants the Corporation of the City of Stratford to assess and levy from the other defendants (the George McLagan Furniture Co. and the Whyte Packing Co.) proper school rates for the present and succeeding years, notwithstanding a by-law of the city corporation exempting these co-defendants from taxation for a term of 20 years not yet expired. The plaintiff was a ratepayer of the city, suing on behalf of himself and all other ratepayers.

On the 10th April, 1900, a by-law was submitted to the vote of the electors to enable the city to guarantee the payment of a loan of $30,000 to be obtained by the defendant companies in connection with agreements to be entered into between the companies and the city for the erection of factories. The by-law provided that, in the event of agreements satisfactory to the council being entered into, the lands whereon the factories should be erected should be exempt from taxation for the period of 20 years next succeeding the giving of the guarantee. The by-law was carried by more than the requisite majority, and by an Act of the Legislature, assented to on the 30th April, 1900, it was provided that the city should have power to pass the by-law which had been so assented to, and, subject to the passing thereof, the by-law was confirmed and declared to be legal and binding upon the city. The council passed the by-law on the 7th May, 1900, and thereafter entered into agreements, in expressed pursuance of the Act, by which the companies "are to be given exemption from taxation for the lands and premises described and the buildings, plant, and machinery thereon, for the term of 20 years from the 1st January next ensuing the date hereof. Provided always such exemption from taxation shall not be deemed to authorise exemption from taxation for school purposes from and after the amendment of said by-law 852 upon request of the company . . ."

The proviso was not in the form of agreement set forth in the schedule to the Act.

No amendment of the by-law was required, but from the execution of the agreement to the time of the action, under the assumed authority of the by-law and agreement, school taxes were not imposed or levied upon the companies.

MacMahon, J., made a mandatory order in respect of the present and future years, but refused relief as to past years.

The appeals and cross-appeals were heard by Moss, C.J.O., Osler, Garrow, Maclaren, and Meredith, JJ.A.

G. G. McPherson, K.C., for the defendant companies.

R. S. Robertson, for the defendant city corporation.

T. J. W. O'Connor and J. C. Makins, for the plaintiff.

GARROW, J.A., said that the matter was purely one of construction. And the words to be construed were "the said companies are to be given exemption from taxation." And the question is, do these words include exemption from school taxes, as well as from the ordinary municipal taxation. . . .

[Reference to City of Winnipeg v. Canadian Pacific R. W. Co., 12 Man. L. R. 581; Canadian Pacific R. W. Co. v. City of Winnipeg, 30 S. C. R. 558; and distinction pointed out.]

In view of the express prohibition against exemption from school taxes contained in 55 Vict. ch. 42, sec. 366, a prohibition contained in all subsequent statutes, it is of minor importance to come to a definite conclusion as to what the law was prior to the date of that enactment. And indeed its only importance is to assist, if it will, however slightly, to a proper understanding of what it was that the legislature probably intended to sanction when it validated the agreements, etc., in question. The longest term for which exemption could have been granted was, under our statutes, 10 years. The consent of the legislature was, therefore, necessary to extend this term to the 20 years agreed upon between the parties. If the same language had been used in a by-law within the competence of the council, i.e., for a term of 10 years, it must have meant "exclusive of school taxes." And in a by-law for a term of 20 years, which the statute has validated, it must, in my opinion, receive the same construction, unless we can clearly gather an intention on the part of the legislature, not merely to allow the extended term, but also a withdrawal of the express statutory prohibition against exempting from school taxes, which, if not always the law, as, in my opinion, it was, has been at least the declared legislative policy ever since 1892; and of any such intention I am unable to see a particle. . . .

But, while thus agreeing with MacMahon, J., upon the main contention, I incline to think that the proper measure of relief is, under all the circumstances, a declaration applicable to the future only. . . .

It was contended before us that the plaintiff's proper remedy was by an appeal to the Court of Revision. Such an appeal might, no doubt, have been taken by him or by any other ratepayer. But that, I think, was not his only remedy. He had also, I think, a right as a ratepayer to obtain a declaration in the ordinary

Courts, such as he seeks in these actions, of the true meaning and construction of the several documents under which the exemptions in question are claimed.

With the variations as to the mandamus which I have suggested, the appeals should otherwise, in my opinion, be dismissed.

MOSS, C.J.O., and MACLAREN, J.A., concurred.

OSLER, J.A., for reasons stated in writing, agreed with the judgment of MacMahon, J., as regards the construction of the by-law. He referred to Maxwell on Statutes, 4th ed., p. 122; Craies on Statute Law, 4th ed. (Hardcastle), pp. 173-4; Minot v. Leman, 20 Beav. 27; Canadian Pacific R. W. Co. v. City of Winnipeg, 30 S. C. R. 558; Regina ex rel. Harding v. Bennett, 27 O. R. 314, 318.

With respect to the contention as to the remedy by appeal to the Court of Revision, he said:—

Having regard to secs. 57, 62, and 63 of the Assessment Act, relating to the Court of Revision and its duties, and the right of a municipal elector to complain of the wrongful omission of any person from the assessment roll and the procedure provided for the trial of complaints, I think that, if I had been trying this case alone, I should have held that the plaintiff was bound to resort to the summary method of procedure provided for by the Act: Barraclough v. Brown, [1897] A. C. 615; Attorney-General v. Cameron, 26 A. R. 103; Canadian Land and Emigration Co. v. Township of Dysart, 12 A. R. 80, 83; Grand Junction Waterworks Co. v. Hampton, [1898] 2 Ch. 331; Offen v. Rockford Rural Council, [1906] 1 Ch. 342; and similar cases. Clearly, in an action constituted as the present, the utmost relief the plaintiff could have would be a declaration of the true construction of the Act and by-law, as the council does not assess and levy the rate. My learned brothers, or a majority of them, are of the opinion that, having regard to the discretionary power reposed in the Court as to making declaratory orders, the present is a proper case in which to make one: Elsden v. Hampstead Corporation, [1905] 2 Ch. 633, 642; West Ham Corporation v. Sharp, [1907] 1 K. B. 445. On the whole, though my doubts are not entirely laid, I will not dissent from that result, as, on the score of convenience at all events, it is persuasive, and the plaintiff as a municipal elector is interested and the term of exemption will not expire for several years.

MEREDITH, J.A., dissenting, was in favour of allowing the defendants' appeals and dismissing the actions.

The order of the Court was that the judgment of MACMAHON, J., should be varied by declaring that the defendants were not exempt from school taxes, and by striking out the direction for a mandamus. Plaintiff to have costs of the actions up to and including the trial. Cross-appeals dismissed. No costs of the appeals or cross-appeals.

DECEMBER 31ST, 1909.

WEBB v. BOX.

Appeal to Court of Appeal—Order of Divisional Court—Leave to Appeal—Amount Involved—Question of Law—Illegal Distress —Damages—Double the Value of the Goods.

Motion by the defendants for leave to appeal to the Court of Appeal from the order of a Divisional Court, 19 O. L. R. 540, reversing in part the judgment of TEETZEL, J., at the trial.

The motion was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

J. C. Makins, for the defendants.

C. A. Masten, K.C., and W. R. Wadsworth, for the plaintiff.

MOSS, C.J.O.:—Upon consideration, it does not appear to us that the case is one presenting any good ground for treating it as exceptional and allowing a further appeal.

The amount actually involved is under $500, and the question of law does not seem to be a matter of sufficient doubt to justify prolonging the present litigation.

The application is refused with costs.

MEREDITH, J.A., agreed in dismissing the motion, and expressed the opinion that the right, under 2 W. & M., sess. 1, ch. 5 (R. S. O. 1897, ch. 342, sec. 18 (2)), to damages in double the value of the goods distrained and sold, was unquestionable, notwithstanding the change in the wording of the statute.

OSLER, J.A., also agreed in dismissing the application, for reasons to be stated in writing.

GARROW and MACLAREN, JJ.A., also concurred.

DECEMBER 31ST, 1909.

RE SPRAGGE.

Will—Construction—Devise—Church Societies — Sale of Lands Devised, Pursuant to Statute—Ademption or Extinguishment of Devise—Operation as to Proceeds of Sale—Interpretation of Statute—Lands Unsold at Death of Testator — Trusts — Power of Sale—Distribution of Proceeds.

Appeal by C. E. Spragge, son of William Spragge, and by the widow and child of Arthur G. M. Spragge, son of William Spragge, from the judgment of MEREDITH, C.J.C.P., 13 O. W. R. 741, determining certain questions arising upon the will of William Spragge.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

H. S. Osler, K.C., and Britton Osler, for the appellants.

J. H. Moss, K.C., and Featherston Osler, for the Synod of Toronto.

F. P. Betts, for the Synod of Huron.

R. S. Cassels, for three daughters of the testator.

R. C. H. Cassels, for the executors.

MOSS, C.J.O.:—There is no ambiguity or want of precision in the wills of Joseph Bitterman Spragge or William Spragge, so far at least as the dispositions in question are concerned.

It is plain that if the Blenheim property or "lands" had remained vested in specie in the trustees of the will of Joseph Bitterman Spragge up to the time of the death of his daughter Mrs. Lett, no difficulty would have arisen.

If the property had so remained there, in the events which have happened, upon Mrs. Lett's death a moiety of the lands would undoubtedly have passed to and become a part of William Spragge's estate, and his will would have taken effect and operated thereon so as to carry such share of the property in the manner and for the purposes to which he had devoted it.

Mr. H. S. Osler quite frankly stated that he could not contend in this Court that the devise made by the testator William Spragge was in itself open to question as void under the Statutes of

Mortmain, and so (saving the effect of the Act of the legislature and what was done under its authority) there is no reason why the dispositions of the Blenheim property made by the testator William Spragge should not take effect.

The question is, whether the terms of the Act, and the sales made by virtue of the authority to sell conferred upon the trustees under the will of Joseph Bitterman Spragge, have had the effect of cutting these dispositions out of William Spragge's will.

In construing an Act of Parliament, and more especially a private Act, care is to be taken to see that, only where the words employed compel it, is a wider meaning to be given to the language than is necessary to give effect to the objects of the legislature. The words are to be construed prima facie in their natural and grammatical sense, but with reference to the subject matter and the context. . . .

[Reference to The Duke of Buccleugh, 15 P. D. 86, at p. 96.]

In the Act in question here the object and intention are very apparent. The legislature was applied to, not to alter, vary, or destroy any of the trusts of the testator's will, but simply to enable the trustees to sell and put into and hold in the form of money the property which by the Act they were empowered to sell. The sole object apparently was to benefit the tenant for life, Mrs. Lett, who with her husband was the petitioner for the Act, by enhancing her income during her lifetime. This much may fairly be inferred from the preamble and the directions as to the investment of the proceeds of the sales. It is eminently a case for the application of the principle stated by Lord Justice James in the case referred to by the learned Chief Justice, of In re Barber, 17 Ch. D. 241, viz., that the presumption is, if the words of the Act really admit of that interpretation, that the legislature did not intend to interfere with any legal rights or any legitimate expectations whatsoever. In Campbell v. Campbell, 19 Gr. 254, the principle was applied by Spragge, C., in a case of sale of lands authorised by a special Act of the legislature.

It seems apparent that there was no intention to convert the property for all purposes. If that had been the intention it would have been very easy to have said so. The other persons beneficially interested in the property were not petitioners for or parties to the legislation. There is no reason for attributing to the legislature an intention to go beyond what was asked for. The language of the concluding part of sec. 2 repels the existence of any greater intention. Indeed, it indicates a contrary intention. And it is putting no strained construction upon the language to give it the meaning which it seems obvious it was intended to express, that

is, that the proceeds of the sales were not to be regarded otherwise than the lands would be if they still remained as realty in the hands of the trustees. That is a meaning which may fairly be gathered from the sentence as it stands.

That being so, the result must be that the appeal fails.

MEREDITH, J.A., agreed in the result, for reasons stated in writing.

OSLER, GARROW, and MACLAREN, JJ.A., also concurred.

DECEMBER 31ST, 1909.

HEES SON & CO. v. ONTARIO WIND ENGINE AND PUMP CO.

Negligence—Fall of Structure Erected on Plaintiffs' Premises by Defendants—Insufficient Foundation—Liability for Injury to Premises—Contributory Negligence — Contract—Illegality — Findings of Trial Judge.

Appeal by the defendants from the judgment of LATCHFORD, J., in favour of the plaintiffs.

Plaintiffs alleged that they entered into a contract with the defendants for the erection and construction by the defendants for the plaintiffs of a 40,000 gallon sprinkler tank and structures connected therewith, to be used by the plaintiffs in connection with their factory; that the defendants erected a sprinkler tank upon the premises, and the plaintiffs caused it to be partly filled with water; that when 37,000 gallons of water were placed therein, the structure erected by the defendants, under the contract, which supported the tank, suddenly gave way, and the tank and structure fell against the plaintiffs' factory, and with the water in the tank injured and destroyed a large part of the factory and the goods therein; and the plaintiffs claimed $18,000 damages by reason thereof. The defendants denied the contract; set up the Statute of Frauds; and alleged that the damage was caused by the wrongful and improper interference of the plaintiffs in filling the tank before it was ready.

LATCHFORD, J., found in favour of the plaintiffs, and directed a reference to ascertain the damages.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

G. H. Watson, K.C., and A. Ogden, for the defendants.

W. E. Middleton, K.C., and G. W. Mason, for the plaintiffs.

MEREDITH, J.A.:—The trial Judge, upon evidence abundant to support the finding, has found that the accident was caused by an insufficient foundation; that parts of it were built upon "made ground" and of defective material; and, if so, there can be no doubt of the defendants' liability. It is impossible, upon the whole evidence, to say that that finding was erroneous; on the contrary, one can very easily agree in it, and, perhaps, as easily have reached the same conclusion if there had been no such finding. The judgment cannot be disturbed on that ground.

The trial Judge, also very properly I think, found against that which was called "the defence of contributory negligence." If the watchman is to be judged as if he had, at the moment, all the knowledge we now have, two years after the event, and after a most protracted trial, it would be difficult to avoid condemning him for not having sooner turned off the water, or taken steps to do so, and so have, no doubt, stayed some of the injury; but the circumstances at the moment must be looked at; a very serious accident, a great flood of water from the fallen tank, a wall of the building broken into, and the place covered with the wreckage, as well as water; and, when so looked at, it is not very difficult to arrive at agreement with the trial Judge . . . .

So too in regard to the defence that the water was prematurely turned into the tank. The tank was, in all substantial things, finished, and the water was turned on, to the knowledge of the defendants, and, at the very least, with their tacit assent, after they had declared the work finished.

Lastly, the contention that the contract of the plaintiffs with the foreign corporation was illegal, and that the taint of its illegality vitiates the claim in this action, has, in my opinion, no force. The action is based upon the quite valid contract, between the parties to this action, for the construction of the tower and tank which fell; the foreign corporation is not in any sense a party to it, nor could properly be; and its contract with the plaintiffs is entirely separate and apart from that upon which this action is brought. It can make no difference that the plaintiffs have agreed, or intend, to give the foreign corporation the fruits of this litigation; they may change their minds; and, if they do so, what business is it of the defendants?

Appeal dismissed with costs.

OSLER, J.A., agreed in the result, for reasons to be stated in writing.

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., also concurred.

DECEMBER 31ST, 1909.

FRASER v. GRAND TRUNK R. W. CO.

Railway—Injury to and Death of Person Crossing Track—Level Highway Crossing—Open Gates—Absence of Watchman—Negligence—Evidence—Findings of Jury.

Appeal by the defendants from the judgment of FALCONBRIDGE, C.J.K.B., upon the findings of a jury, in favour of the plaintiff, the administratrix of the estate of John Fraser, deceased, in an action to recover damages for his death by the negligence of the defendants. John Fraser was killed by a locomotive of the defendants at the level crossing at the foot of Bay street, in the city of Toronto, when attempting to cross on the night of the 24th May, 1907. The jury found for the plaintiff with $6,000 damages, and judgment was given for that amount.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

W. Nesbitt, K.C., and D. L. McCarthy, K.C., for the defendants.

F. Arnoldi, K.C., and J. F. Grierson, for the plaintiff.

MEREDITH, J.A.:—The case was one for the jury; and who can say, upon the whole evidence, that the very truth has not been reached respecting the cause of the accident? Even if that were a question for this Court.

It was the admitted duty of the defendants to have provided gates and a watchman for the protection of persons passing over this level crossing. It was urged that that duty did not apply at night, during the time of the year when the lake was not navigable, when few persons would have occasion to pass that way at night. Assuming that to be so; navigation had opened at the time: and all that can now be said for the defendants on this ground is, that their officers were not aware of the fact; which is, of course, no excuse in law for failure to perform a statutory obligation, or one imposed, as that in question was, by a Board clothed, by competent legislation, with power to impose it.

The accident occurred at night, upon a dangerous level crossing—exceptionally dangerous, for even a level crossing, by reason of the number of tracks upon it and the great number of trains passing over them. The deceased was a Scotsman, but recently come to Canada, who probably had no great knowledge of the

greater risks existing in this country, than in Great Britain, by reason of level crossings and the lack of safeguards at them.

It seems probable that more than one train, as well as a shunting engine with a "caboose" attached, passed over the crossing about or not far from the time when the man was killed. Four other persons were injured at or about the same time, upon the same crossing: one of them evidently by the same instrument that caused Fraser's death. It does not appear whether any of these four persons were in company with one another at the time, though probably the two who appear to have been struck by the same instrument were.

Under all the circumstances of the case, it cannot be said that reasonable men could not find that the absence of the watchman was the real cause of the accident; that, if he had been there and had performed his duties, it would not have happened.

But it was urged . . . that the deceased had not been struck upon the crossing, but a short distance from it, while walking eastward upon the tracks. All that was relied upon for that contention, however, is consistent with the view that the deceased and the other man were struck upon the crossing, and each carried or thrown to the place where he was found; and it is plain, from the money scattered along the track, that one of them must have been carried some distance. That would be quite possible in efforts to save themselves, and in other ways.

Again it was urged that, in the absence of great want of care, the deceased must have been able easily to have avoided injury; that any one possessed of his senses, and taking the least care of himself, might have seen, and, by a step or two, have avoided, all danger. But there may have been more than the one train passing at the time; it was well on in the night, and head-lights, and the numerous other lights on numerous railway tracks, are known to be very bewildering to many persons; and . . . the open gates might well be deemed by this young Scotsman an intimation that it was safe to cross—an invitation to cross— . . . and might not unreasonably have put him off his guard.

I am unable to perceive any way in which the verdict can be disturbed; and there is no contention that it is insufficient to support the judgment.

Appeal dismissed with costs.

OSLER, J.A., agreed in the result, for reasons to be stated in writing.

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., concurred.

DECEMBER 31ST, 1909.

KENT v. OCEAN ACCIDENT AND GUARANTEE CORPORATION.

Accident Insurance — Disability — Payment of Claim for Short Period—"Receipt in Full"—Release—Injuries Subsequently Developing—Claim for Permanent Disability—Terms of Policy—Liability Confined to one Claim for one Accident.

Appeal by the defendants from the judgment of CLUTE, J., 13 O. W. R. 1072.

The action was brought to recover compensation, under an accident policy issued by the defendants, for injuries sustained by the plaintiff on the 3rd September, 1907, while a passenger upon the Canadian Pacific Railway.

The defendants paid the plaintiff's claim under the policy for disability during a short period, and the plaintiff signed a receipt as follows: "Received the sum of $425 in final settlement of my claim, including double liability, under policy No. 64276 for injuries received on the 3rd September, 1907, and I hereby acquit and discharge the"—defendants—"from all and any further claim under said policy which I have or may hereafter have as a result of said injuries."

The plaintiff afterwards made a demand for $500 a year as for permanent disability from the same accident, and, his claim not being allowed, brought this action.

CLUTE, J., held that he was entitled to recover.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

H. E. Rose, K.C., and G. H. Sedgewick, for the defendants.

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

GARROW, J.A. (after stating the facts):—I am, with deference, unable to agree with the statement of the trial Judge that what both parties intended was merely to settle for the particular items set forth in the claim without reference to the future. The account had to be itemised because what was claimed was a weekly indemnity, and even the plaintiff admits . . . that he intended to give and understood he was giving a receipt in full of his whole claim arising out of the accident. From that position he very honestly makes no attempt in his evidence to escape, his

whole case resting upon this, that such receipt in full should not be binding because he afterwards discovered that he was not as fully recovered as he thought he was at the time of the settlement.

The receipt (whether he read it or not is of no consequence, for, if he did not read it, he should have done so) of course creates no estoppel, but is merely evidence of an agreement: Ellen v. Great Northern R. W. Co., 17 Times L. R. 453. But the case does not, I think, in any degree turn upon its exact terms. The plaintiff's claim is based upon a written or printed contract, binding upon both parties, whereby the defendants agreed, for a stated premium, to insure him from the injurious consequences of accident, upon certain clearly stated terms . . . that the defendants should not be liable for more than one claim on account of any one accident, that the entire amount payable to and claimed by the assured should be ascertained and admitted before any part thereof was paid, and that the amount so paid should be in diminution of the total amount assured in case of a subsequent claim in the same year.

Notice of the injury was required to be given within 21 days after the accident, and particulars of the claim itself were to be sent within two months of the time when the same became a claim within the meaning of the policy, that is, as I read it, within two months after the total disability which the plaintiff intended to claim had occurred. And my difficulty is to see how, in the face of these provisions, relief can be given to the plaintiff because he prematurely sent in his claim. He knew of the terms of his policy—a knowledge which, in the circumstances, would, in any event, be properly imputed to him. He intended to comply, and to make only the one final claim, and to give a receipt in full. He need not have sent in his claim when he did. He was under no compulsion to do so. He could at least have waited for the two months allowed after the claim had matured. He and his medical advisers were the judges of when that period had arrived. They both knew, as the evidence shews, that the recovery was not complete on the 16th December, 1907. And the plaintiff must have known that in sending in his claim then he was taking the risk of the anticipated full recovery turning out to be ill-founded.

Unfortunately these provisions in the contract appear not to have been brought to the attention of the learned Judge, or at all events are not discussed or even referred to in his judgment. But, in my opinion, they, and not the mere receipt alone or by itself, form the real barrier in the plaintiff's way—a barrier which to me seems insurmountable unless we are to disregard the contract altogether.

Reference is made in the judgment to the subsequent correspondence between the parties, but not, as I understand it, as supporting a waiver by the defendants of any kind, which it clearly would not do. And if it would not do that, it is, in my opinion, of no consequence.

For these reasons, the appeal should, in my opinion, be allowed and the action dismissed, both with costs.

OSLER, J.A., concurred; reasons to be stated in writing.

MOSS, C.J.O., and MACLAREN, J.A., also concurred.

MEREDITH J.A., dissented, for reasons stated in writing.

DECEMBER 31ST, 1909.

BEAUDRY v. RUDD.

Principal and Agent—Negligence of Agent — Fire Insurance — Agent not Securing Valid Policy for Principal — Principal Compromising with Insurance Company—Failure to Establish Agency.

Appeal by the defendant from the judgment of RIDDELL, J., 14 O. W. R. 197, in favour of the plaintiffs in an action by principals against agent for the negligence of the agent in failing to secure a valid policy of fire insurance for his principals.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

G. H. Watson K.C., for the defendant.

A. W. Anglin, K.C., and Glyn Osler, for the plaintiffs.

MACLAREN, J.A.:— . . . The specific negligence with which the plaintiffs charge the defendant, as argued before us and as put in their reasons against appeal, "consisted in forwarding to the insurance company an application not disclosing the fact of prior insurance."

In Baxter v. Jones, 4 O. L. R. 541, 6 O. L. R. 360, there was no question about the defendant having undertaken and agreed to look after the plaintiffs' insurance, and particularly to give notice to other companies of the subsequent insurance, or of the damages sustained by the plaintiffs flowing directly from his admitted negligence in not giving such notice. The mandate or agency of the defendant was not in question. The only question was whether his undertaking was purely voluntary, and whether

his promise was subsequent to his employment and without consideration. It was held by all the Judges, trial and appellate, that it was at least contemporaneous, and, he having undertaken the work and having done it negligently, with damage resulting to the plaintiffs, the principle of Coggs v. Bernard, 2 Ld. Raym. 999, applied, and the defendant was liable.

Here the agency was denied by the statement of defence, in the reasons of appeal, and in the argument before us. . . . The only agency of the defendant as regards the plaintiffs that I can find in the evidence is the undertaking to forward to the insurance company in Toronto the application which the plaintiffs had signed; and this he fully performed.

According to the evidence, the defendant did not claim to be an insurance expert; and it is abundantly clear that the plaintiffs did not deal with him as such, or even rely upon his opinion in any way. . . . .

Having come to the conclusion that there was no agency or undertaking on the part of the defendant towards the plaintiffs, as alleged by the latter, and no breach of duty and no actionable negligence, it becomes unnecessary to consider the second question, as to the propriety of the settlement made by the plaintiffs with the insurance company, or indeed anything subsequent to the forwarding of the application by the defendant to the company.

Appeal allowed with costs, and action dismissed with costs.

MEREDITH, J.A., was of the same opinion, for reasons stated in writing.

OSLER, J.A., was also of the same opinion, for reasons to be stated in writing.

MOSS, C.J.O., and GARROW, J.A., concurred.

DECEMBER 31ST, 1909.

RE TOWNSHIP OF DOVER AND TOWNSHIP OF CHATHAM.

Municipal Corporations—Drainage Scheme—Municipal Drainage Act, sec. 75—Petition—Necessity for—Alteration of Outlets—Original Assessments, Interference with—Necessity for By-law—Compliance with sec. 5 — Consent of Railway Company — Dominion Railway Act, secs. 250, 251.

Appeal by the Corporation of the Township of Dover from the judgment of a Drainage Referee affirming the report of an engineer

appointed by the Corporation of the Township of Chatham to report upon certain proposed drainage works affecting the townships of Camden, Chatham, and Dover.

The appeal was heard by Moss, C.J.O., Osler, Garrow, Maclaren, and Meredith, JJ.A.

M. Wilson, K.C., and J. M. Pike, K.C., for the appellants.

A. H. Clarke, K.C., and J. S. Fraser, for the respondents.

Garrow, J.A.:— . . . The main objections relied on by Dover in the argument before us were:—

1. The scheme is really a new scheme, and not a work falling under sec. 75, and a petition was, therefore, necessary.

2. If intended to fall under sec. 75, it is illegal because it proposes to interfere with and alter the outlets of more than one prior drainage area, running all together, without regard to the original assessments.

3. A by-law adopting the scheme was necessary before serving the report upon Dover.

4. Section 5 was not complied with.

5. The initiating municipality should have procured the consent of the railway company before serving the report.

6. The engineer failed to comply with sec. 12 by distinguishing in the assessment between benefit outlet and injuring liability.

7. The evidence disclosed that the proposed scheme would not relieve Chatham, and would injure without benefiting Dover.

After some doubt, I have reached the conclusion that the proposed works fall within sec. 75, and so did not require to originate under the authority of a petition. . . .

The chief objection urged against the scheme as proposed is, that it affects other drainage schemes, that it is in effect a combination and enlargement of three distinct drainage schemes . . —an objection which, if well founded in fact, would require very serious consideration. . . .

[Reference to Re Sombra and Chatham, 18 A. R. 252, 256.]

The question here is largely one of fact, and, so viewing it, I agree with the Referee that, although the scheme proposed incidentally touches, and to some extent may affect, but not, I think, injuriously, the town line drain which it crosses, and will also affect the Little Bear Creek drain, but only to its advantage, it is essentially a scheme to relieve the Prince Albert Road drain by furnishing a new and better outlet, and is, therefore, a work falling within sec. 75. See Re Jenkins and Enniskillen, 25 O. R. 399, at p. 403.

As to objection No. 3, I am inclined to think that strictly a by-law is necessary. . . . That the point was open to the appellants without the leave of the Referee appears to be doubtful, for, among all the 25 objections set out in the notice of appeal, nothing is said about the absence of a by-law. And, indeed, its absence was apparently not even known to the appellants until after the hearing before the Referee had been entered upon; in the course of which, on his suggestion, a by-law was passed, and the objection, so far as it could be, cured. There is, therefore, now a by-law which fully commits the respondents to the scheme; and the appellants, failing on the merits, should not be allowed, under the circumstances, to succeed upon this objection, now so purely formal.

As to objection No. 4, this, in my opinion, fails upon the evidence. . . .

There is nothing in objection No. 5. The right to obtain drainage against a Dominion railway is now regulated by secs. 250 and 251 of the Railway Act, R. S. C. 1906, ch. 37. And it was in no way the duty of the respondents to have made any application under these sections before serving the report upon the appellants, if their proceedings had been otherwise regular.

The remaining objections do not, I think, call for extended remark. . . .

Appeal dismissed.

MOSS, C.J.O., and MEREDITH, J.A., each gave reasons in writing for the same conclusion.

OSLER and MACLAREN, JJ.A., concurred.

DECEMBER 31ST, 1909.

DEWEY AND O'HEIR CO. v. DEWEY.

Covenant—Restraint of Trade—Breach — Evidence—Damages—Extent of Business Done — Profits — Reference—Scope of — Judgment.

Appeal by the plaintiffs from the order of a Divisional Court, 13 O. W. R. 32, varying the order of ANGLIN, J., 12 O. W. R. 726, made upon an appeal to him from a report of the local Master at Hamilton.

The judgment at the trial declared that the defendant was liable under a covenant for the damages which the plaintiffs had sustained by reason of the acts of the defendant's husband, Daniel R. Dewey, and referred it to the Master to ascertain and state what damages the plaintiffs had sustained by reason of the breaches of the defendant's covenant, reserving further directions and costs.

The Master reported that he found that the plaintiffs had sustained damages to the extent of $5,000, and his report was upheld by ANGLIN, J., upon appeal by the defendant, who then appealed to a Divisional Court. That Court reduced the damages to $32; and the plaintiffs now appealed.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

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

A. M. Lewis, for the defendant.

MOSS, C.J.O.:— . . . In dealing with the question of damages, which was the only one referred to him, it was the Master's duty to have regard to the pleadings and proceedings at the trial, but he could not disregard the express declarations and directions of the judgment.

The pleadings shew that the plaintiffs complained that a covenant entered into by the defendant to the effect that her husband . . . would not be interested in or carry on any business of dealing in ice, fuel, or any other commodity to be dealt in by the plaintiffs, and that he would not be employed by or work for any person, firm, or company, nor hold stock in any company, engaged in dealing in ice, fuel, or any other commodity to be dealt in by the plaintiffs, for 10 years, within a radius of 30 miles from the city of Hamilton, had been broken, thereby causing great injury to the plaintiffs' business and consequent damage to them.

Beyond a general denial of the allegations of the statement of claim, no defence was put forward, except (by amendment) that the defendant in entering into the covenant acted without independent advice, in ignorance of and without understanding her position or rights.

At the trial this issue was determined against her, and the judgment already mentioned was pronounced.

Having before him the declaration of the defendant's liability to the plaintiffs for damages sustained by reason of her husband's acts, and the direction to ascertain these damages, the Master would not be warranted in assuming that such a reference was

made upon an admission of a technical breach of the covenant. If there was nothing but a technical breach with nominal damages, that should have sufficed to dispose of the case at the trial.

The Master could only treat the case—as the parties had apparently treated it—as one involving substantial damages. He could not limit the scope of the inquiry to nominal damages. His inquiry had necessarily to extend to ascertaining the nature of the defendant's husband's acts, and their proximate and probable effect on the plaintiffs' business. And, should the evidence lead him to the conclusion that the new business was that of the defendant's husband, and not that of her son, he should not be deterred from acting upon that conclusion although neither the husband nor the son was a party to the action.

The consequence to the plaintiffs' business was the material question. The actual relations between the husband and the business which the defendant now asserts is her son's is not in question. The effect upon the plaintiffs' business of the husband's acts done with reference to and in relation to the new business may be the same, whether done as a principal or as an agent. And the extent of the effect is not to be ascertained or wholly measured by the amount of profit of which the plaintiffs were deprived by reason of the transfer of the customers who proved the direct interposition of Daniel R. Dewey. Regard must be had to what manifestly appears throughout the evidence of the influence generally upon the customers of the old business of the knowledge that he was interesting himself in and associating himself with the new business. There is no doubt that it was "in the air" that there had been a split in the management of the old business, and that the Dewey family were taking up and intending to carry on a new business in the same line. This impression was to a considerable extent due to the acts and conduct of Daniel R. Dewey. And it does not appear that after the injunction proceedings any steps were taken to remove it, even if it were not then too late so far as the year's business was concerned.

It is, of course, difficult to gauge accurately or with absolute certainty the effect of Daniel R. Dewey's acts upon the plaintiffs' business for 1907. . . . The Master seems to have assumed that but for the new business the plaintiffs would have made a profit as in 1906, but this does not seem to be correct. . . . It would not be reasonable to attribute to the new business the whole loss the plaintiffs sustained on the year's transactions. . .

Looking at the whole evidence, and taking into consideration the fact that after the injunction proceedings Daniel R. Dewey

ceased actively to concern himself in the new business, the damages which the defendant should pay may be fairly put at $500.

Appeal allowed to this extent, and Master's report varied by fixing the damages at $500. No costs to either party of any of the appeals.

MEREDITH, J.A., agreed in the result, for reasons stated in writing.

OSLER, GARROW, and MACLAREN, JJ.A., also concurred.

DECEMBER 31ST, 1909.

BARBER v. WILLS AND KEMERER.

Contract — Transfer of Shares — Condition — Sale of Shares — Notice—Conversion—Damages.

Appeal by the plaintiff from the judgment of RIDDELL, J., dismissing the action, which was brought by the assignee for the benefit of creditors of the firm of Stewart & Lockwood, to compel delivery of 705 shares of the capital stock of the Nipissing Mines Limited, or for conversion thereof and an account.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

Shirley Denison and A. R. Clute, for the plaintiff.

W. R. Smyth, K.C., and M. P. Vandervoort, for defendant Wills.

M. H. Ludwig, for defendant Kemerer.

MEREDITH, J.A.:—The trial Judge has found, upon testimony which, however much it might arouse suspicion, is not contradicted by any other testimony, that there was no obligation, on the part of either of the defendants, to transfer the stock in question until every indebtedness of Stewart to Wills was paid. That finding cannot be disturbed. One may be doubtful whether it is in accordance with the actual fact; and if the opposite had been found at least equally doubtful.

Starting with that fact established, the rest of the case presents no great difficulty to my mind.

The firm of Stewart & Lockwood were not the purchasers from Wills. Stewart alone was the purchaser, and it was quite within Stewart's power to enter into an agreement to purchase upon the terms that all such indebtedness should be paid before he should become entitled to a transfer of the stock.

It is quite clear that the sale was made to Stewart only, not to the firm of Stewart & Lockwood; the bill of sale shews that; Wills's testimony is positive on the subject; and even the articles of co-partnership between Stewart & Lockwood, executed by each of them, recites the fact.

In these circumstances, there seems to me to be only one reasonably suggestable way in which liability would attach to either of the defendants, namely, that he stood by and permitted Stewart to transfer to Lockwood an interest in the shares in question, as if unincumbered by any such right respecting them as he had under the agreement with Stewart; and no such case was made at the trial, nor is there any evidence sufficient to support such a case, even if one may be suspicious.

But it is said that, even if that be so, the stock in question was sold without sufficient notice. It is, however, enough to say that the sale was made upon a falling market, which has not recovered; and that the defendant Wills has always been, and is, ready and willing to restore the stock on payment of the amount due to him. Neither Lockwood nor his assignee ever would have paid, and will not, so that no length of notice would have prevented a sale. There could then be no damages, even if there could be a cause of action.

I would dismiss the appeal.

OSLER, J.A., agreed, for reasons to be stated in writing.

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., also concurred.

MOSS, C.J.O., IN CHAMBERS. JANUARY 6TH, 1910.

LETCHER v. TORONTO R. W. CO.

Appeal to Court of Appeal—Order of Divisional Court—Leave to Appeal—Findings of Jury.

Motion by the defendants for leave to appeal to the Court of Appeal from the order of a Divisional Court, ante 273.

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

Alexander MacGregor, for the plaintiff.

Moss, C.J.O.:—In view of the not entirely satisfactory position in which this case appeared to be left by the findings of the jury in answer to the questions put to them in writing and orally upon their return to Court, I delayed disposing of this application until I had an opportunity of reading the evidence, the learned Chief Justice's charge, and the other proceedings at the trial.

The real issue upon the evidence was clearly and pointedly explained to the jury in a manner entirely satisfactory to counsel for the defendants; and, while there is evidence which the jury have chosen to accept sufficient to support their findings against the defendants, it must be conceded that, if their findings had been the other way, it would have been hopeless to expect to reverse them. However, it was for the jury to determine.

The only other question, viz., the effect of the jury's answer to the 5th question, supplemented by their statement as to the plaintiff's position when the car started, is not one likely to be of frequent occurrence, nor does it involve any principle of general application and importance. It turns in this case wholly upon the particular facts and the findings of the jury.

The amount of damages is moderate; and on the whole it does not appear to me to be a case which should be treated as exceptional so as to take it out of the general rule of the statute.

Application refused with costs.

HIGH COURT OF JUSTICE.

MEREDITH, C.J.C.P. DECEMBER 31ST, 1909.

RE WATKINS.

Will — Construction — Trust Fund Set apart and Invested—Interest to be Paid to Cestui que Trust—Accretion to Capital by Profit on Investment—Benefit of Remainderman.

Motion under Con. Rule 938 for the determination of certain questions arising upon the will and codicils of Thomas C. Watkins, deceased.

The only question ripe for determination was as to the right of Edgar H. Watkins, a son of the testator, to the profit made by the

trustees on the sale of land purchased by them for the Edgar H. Watkins trust, under the powers conferred on them by the will, which land realised $6,000 more than the price at which it was purchased.

By the will the principal part of the property of the deceased was given to Thomas W. Watkins, charged with an annuity of $2,000 per annum to the testator's wife, and with, among other sums, $35,000, which was to be paid to the trustees and held by them for the purposes of the Edgar H. Watkins trust; the payment was to be made in annual instalments, and Thomas W. Watkins was to pay interest at the rate of 5 per cent. per annum on so much of the sums charged upon the property given to him as from time to time remained unpaid.

The scheme of the will was, that the bulk of the testator's property should go to his son Thomas W. Watkins charged with the payment of the annuity to the testator's widow and of $150,000 to the executors, by yearly instalments of $5,000, or more if Thomas chose to pay more, and with interest at the rate of 4 per cent. per annum on the amount from time to time remaining unpaid, except in the case of the $35,000, which was to go to the Edgar H. Watkins trust, and as to that sum at the rate of 5 per cent. per annum.

The $150,000 was to be applied as follows: $35,000 to make up a trust fund to be called the Edgar H. Watkins trust; $25,000 in payment of a legacy of that amount to the testator's daughter Emily; $25,000 to make up a trust fund to be called "the Mrs. Reasner trust;" $25,000 to make up a trust fund to be called "the Mrs. Annis trust;" and the residue to make up a trust fund to be called "the Park trust," with a provision that Thomas should not be required to make any payment towards the capital of this latter trust within 23 years from the date of the testator's death.

Clause 21 of the will: "I direct that the $35,000 hereinbefore referred to as 'Edgar H. Watkins trust' shall be held by my trustees in trust to invest and keep the same invested in securities of the class hereinbefore directed, and Thomas W. Watkins . . . shall . . . pay interest at 5 per cent. per annum quarterly on the said $35,000 from the date of my death on such portion of the said $35,000 as shall from time to time be unpaid by him, and the interest to be received by my trustees from Thomas W. Watkins and from said investments respectively from time to time as payments on account of the capital by said Thomas W. Watkins shall be paid in quarterly payments reckoning from the day of my death to my son Edgar H. Watkins during his life and from and after his decease in trust to divide and pay over the capital amongst

all his children alive at the time of his decease equally or if any of them be dead . . . . Provided always that should my son Edgar H. Watkins die leaving his son Harry his only child surviving him, only $15,000 of the Edgar H. Watkins trust shall be paid to the said Harry Watkins, and the remaining $20,000 shall be applied and paid over to the Park trust to be used for the purpose of such trust as set forth in this will."

The directions of the testator as to investments referred to in clause 21 were contained in clause 20, and were that the trustees should invest all moneys which under the terms of the will they were required to invest in, among other things, in the purchase of real estate in Ontario yielding a rental of at least 6 per cent. per annum, with power from time to time to alter and vary the "securities" into others of a like nature, as the trustees might deem prudent.

By the codicil of the 8th May, 1890, $5,000, to be provided by Thomas W. Watkins, was added to the Edgar H. Watkins trust.

S. F. Washington, K.C., for the trustees.

G. F. Shepley, K.C., for Thomas W. Watkins.

C. J. Holman, K.C., for Edgar H. Watkins.

MEREDITH, C.J., referred to Schofield v. Redfern, 32 L. J. Ch. 627; Hemenway v. Hemenway, 134 Mass. 446, 453; New England Trust Co. v. Eaton, 140 Mass. 532, 539; Re Gerry, 103 N. Y. (58 Sickells) 445, 18 Abbott N. C. 178; Stewart v. Phelps, 71 N. Y. App. Div. 91, 173 N. Y. 621; Re Pollock, 3 Redfield 100; Townsend v. United States Trust Co., ib. 220; Whitney v. Phœnix, 4 Redfield 180; Scovel v. Roosevelt, 5 Redfield 121; Boardman v. Mansfield, 66 Atl. Rep. 169; In re David Park's Estate, 173 Pa. St. 190; and proceeded:—

The rule generally adopted in the United States is that profits arising from the realisation of an investment in shares or bonds or in land are accretions to the capital of the trust fund and do not belong to the tenant for life. . . . I adopt as my own the reasoning upon which the rule is based.

The general rule cannot, of course, prevail where the language of the instrument by which the trust is created indicates that it was intended that greater rights should be conferred on the tenant for life. I am unable, however, to find in the will and codicils . . . any indication of such an intention on the part of the testator. It is true that when he is dealing with the destination of the fund of $35,000 in the event of Edgar H. Watkins leaving only his son Harry surviving him, he speaks of what in that event

is to go to the Park fund after paying to Harry $15,000, as "the remaining $20,000." The use of such language has been held not to prevent the application of the rule that the remainderman is entitled to the benefit of an accretion to the capital of the trust fund: Paris v. Paris, 10 Ves. 185; Hooper v. Rossiter, McCl. 527; Claflin v. Dewey, 177 Mass. 166. . . .

The direction of the testator as to investments in the purchase of land, that only real estate in Ontario yielding a rental of at least 6 per cent. per annum on the capital investment was to be purchased, indicates, I think, that he had in contemplation that the only benefit that the life tenant was to be entitled to was the income of the invested funds.

Upon the whole, I am of opinion that Edgar H. Watkins is not entitled under the direction in paragraph 21 of the will to be paid, as part of the "interest" which the trustees are directed to pay to him, the profit realised from the money invested by the trustees in the purchase of land, and there will be a declaration accordingly.

Costs out of the corpus of the "Edgar H. Watkins trust."

DIVISIONAL COURT. DECEMBER 31ST, 1909.

KELLY BROS. & CO. v. TOURIST HOTEL CO.

Mechanics' Liens — Building Contract — Progress Estimates — Architect's Certificate — Condition Precedent—Right Arising after Action — Insurance Premiums — Delay in Completing Work—Extent of Lien — Amount Due under Contract—Percentage Withheld—Lien not Presently Enforceable—Disposition of Surplus Proceeds of Sale.

Appeal by the plaintiffs from the judgment of the local Master at Kenora in an action to enforce a lien under the Mechanics' and Wage-Earners' Lien Act for work done and materials supplied by the plaintiffs in connection with the building of an hotel for the defendants at Kenora.

The plaintiffs sought to increase to $10,029.76 the amount for which judgment was given and their lien declared.

The work was done under a sealed agreement in writing, dated the 26th June, 1907, whereby the plaintiffs undertook to complete the whole of the work under the direction and to the satisfaction of an architect, in accordance with the specifications and drawings prepared by the architect and with the conditions of the agreement,

for $115,000, which the defendants were to pay as the work progressed in monthly payments representing 85 per cent. of the amount of the work done and materials supplied on the ground, and for this percentage the architect was to issue progress estimates, etc. The final payment was to be made on the expiration of 31 days after the plaintiffs had fully carried out the agreement. All payments were to be made only upon the written certificates of the architect that such payments were due. The plaintiffs were to complete the first and second flats and the basement by the 1st January, 1908; the remainder of the work except the outside finishing by the 1st April, 1908; and the whole work by the 15th May, 1908.

A large amount of work was done and 9 progress estimates, the last of which was dated the 1st June, 1908, were given to the plaintiffs by the architect, and for the amount of these, after deducting payments made on account, judgment was given in favour of the plaintiffs.

Pending the action and 10 days before the trial, which began on the 29th July, 1909, the architect gave the plaintiffs another progress estimate, in which he estimated the cost of the work to the date of the estimate at $64,263.49, from which he deducted $57,533.36, the amount of the previous estimates, leaving a balance of $6,730.13.

In February or March, 1908, the defendants refused to make further payments on the progress estimates, on the ground that plaintiffs were in default in not procuring and delivering to the defendants a bond in $1,000 "for and conditional upon" the performance of the agreement by the plaintiffs, which by the agreement the plaintiffs undertook to do within 15 days from the date of the agreement.

The appeal was heard by MEREDITH, C.J.C.P., MACMAHON and TEETZEL, JJ.

E. D. Armour, K.C., and G. R. Geary, K.C., for the plaintiffs.

Casey Wood, for the defendants.

The judgment of the Court was delivered by MEREDITH, C.J.:—We agree . . . that the defendants' refusal to make further payments was not justifiable, and that the plaintiffs were not justified in discontinuing work on the building. . . . It follows that the plaintiffs were not entitled, at all events at the commencement of the action, to be paid anything but the sums for which the architect had given them progress estimates, in accord-

ance with the provisions of the agreement . . . . The claim to recover for the amount of the estimate of the 19th July, 1909, must, therefore, be disallowed.

The Master charged the plaintiffs with $991 paid by the defendants for fire insurance on the building subsequent to the 1st January, 1908, and in this we think he erred. Paragraph 13 of the agreement provides that the defendants will pay "the cost and expense" of the insurance after the 1st January, 1908, but the plaintiffs have been charged with the $991 because they had not completed the first and second flats and basement . . . by that date . . . and because of the opening words of the paragraph, which provides that the insurance shall be maintained during the progress of the work by the defendants, but at the cost and expense of the plaintiffs. We do not think that there is anything in the paragraph which warrants cutting down the clearly expressed provision at the end of it, that "the company will pay the cost and expense of said insurance from and after the 1st January, 1908." . . .

It was contended that, under sec. 4 of the Act, the lien is given in respect of the work or service performed and the materials furnished, and for the value of these, irrespective altogether of the terms of the contract under which the work or service is performed or the materials are furnished and of the conditions it contains as to payment, and that the plaintiffs are, therefore, entitled to a lien for the value of the work performed and the materials furnished by them after deducting the payments that have been made. . . . This contention is not well founded. . . . [Reference to the provisions of secs. 4 and 9 of the Mechanics' Lien Act.] It would be most extraordinary if it were otherwise, and that, although by the terms of the agreement the contractor was not entitled to more than a stipulated sum or was not entitled to any payment unless he had performed some condition precedent to his right to call for payment, the terms of the contract are to be disregarded, and the contractor entitled to be paid on a quantum meruit.

Nor, in our opinion, does the mere failure of the defendants to pay the amount which the plaintiffs were entitled to present payment of, in respect of the progress estimates, entitle the plaintiffs to claim present payment of the percentage which was to be retained until the final completion of the agreement, and to enforce their lien for the percentage. . . . The plaintiffs may have a lien for it, but a lien not presently enforceable. The plaintiffs' right to enforce their lien . . . can stand on no higher ground than does their right to sue for the amount they have earned under

the agreement. . . . See Sherlock v. Powell, 26 A. R. 407. . . .

The judgment should be varied by providing that any surplus (after sale, &c.) shall remain in Court subject to further order. and by reserving leave to the plaintiffs to apply as they may be advised in respect of the lien, if any, which they have for work done or materials furnished for which payment has not been made or provided for by the judgment.

The judgment must also be varied by increasing the amount which the plaintiffs have recovered and for which their lien is declared, by $991, the amount of the insurance premiums. . . .

With these variations appeal dismissed without costs.

DIVISIONAL COURT. JANUARY 4TH, 1909.

BLAKEY v. SMITH.

Assessment and Taxes—Tax Sale—Invalid Assessment—Indefinite Description of Lots—Joining two Lots in one Assessment—Lands of Non-resident — Occupant Assessable — Purchaser at Tax Sale—Application of Curative Clause of Statute—Ejectment—Mesne Profits.

Appeal by the defendant from the judgment of RIDDELL, J., 14 O. W. R. 241, in favour of the plaintiff for the recovery of possession of part of the land in question in the action and $325 for mesne profits.

The only questions involved in the appeal were as to the validity of the tax sale of 9 feet on the north side of Lennox street, in the city of Toronto, which took place on the 11th April, 1906, and in pursuance of which the 9 feet were conveyed to the defendant on the 15th June, 1907, and as to the amount allowed for mesne profits.

The warrant under the authority of which the sale took place was dated the 28th December, 1905, and the sale was for the taxes of 1901 and 1902, and the land advertised for sale was "part of lots 18 and 19, plan 120, 42 x 53, commencing at S. E. angle of lot 18, thence westerly." Upon the assessment roll of 1901 the land was set down thus: "Bathurst street; Jones, Joseph; Jones, Jane M.; rear 767-9; 53 x 50-3; 265, vacant. And upon the assessment roll of 1902: "Bathurst street; vacant lot; Smith, Jane M. N.E. part rear 767-9; 53 x 7-5; 265; vacant lot; Jones, Joseph; Jones, Jane M.; E. pt. rear, 767-9; 53 x 43-5; 265."

Bathurst street runs at right angles to and crosses Lennox street, and neither lot 19 nor lot 18 on the north side of Lennox street has any frontage on, and neither lot touches, Bathurst street.

In the list of lands liable to be sold for arrears of taxes in 1905, dated 19th January, 1904, the land was described as being "on the east side of Bathurst street, owned by Joseph and Jane Jones, in arrear for the taxes of 1901, 53 x 50 in size, and rear Nos. 767 and 769."

In the assessor's return the land was stated to be owned by Angus Macdonell, 478 Dufferin street, to be then assessed on Lennox street, north side S. pt. 18-2 x 53 and S. E. pt. 19, 17 x 53, included in one assessment of 42 x 53—and not occupied.

The trial Judge found that at the time the assessment was made the land was occupied and built upon, and held the sale invalid because the proceedings taken in the way of sale were those applicable to property which was vacant and not built upon, and not to property which was in fact occupied and built upon.

The appeal was heard by MEREDITH, C.J.C.P., MACMAHON and CLUTE, JJ.

W. C. Chisholm, K.C., and J. H. Spence, for the defendant.

J. R. Roaf, for the plaintiff.

MEREDITH, C.J.:—In our opinion the sale was invalid because there was no valid assessment of the land in the years 1901 and 1902, and therefore there were no taxes legally imposed for which it could be sold for taxes for those years.

Lots 18 and 19 were . . lots fronting on Lennox street, and not fronting on or touching Bathurst street, and were not therefore the rear part of any lot on Bathurst street. Such a description of the land assessed was not only inaccurate, but was so indefinite that it would be difficult, if not impossible, to ascertain what was the land intended to be assessed. If the assessment could be treated as an assessment of lots 18 and 19, these, being separate and distinct parcels of a subdivision, a plan of which was registered, should have been assessed separately, and the joining of them in one assessment was improper, and the assessment was therefore invalid: Christie v. Johnstone, 12 Gr. 534.

. . .

As the land was occupied by the defendant when the assessment was made, and was owned by a person not resident in the province, who had not required her name to be entered on the assessment roll, it should have been assessed in the name of and against the

defendant, and she, for the purpose of imposing and collecting taxes upon and from the land, was to be deemed the owner of it: R. S. O. 1897, ch. 224, sec. 22. Had the assessor done his duty, the defendant would have been the person liable for the taxes for which the land was sold, and I do not see how, that being the case, she was entitled to become the purchaser at the tax sale and by means of her purchase to deprive the owner. . . .

Many of the objections which before the Assessment Act of 1904, 4 Edw. VII. ch. 23, would have been fatal to a tax deed, have been removed by sec. 172 of that Act. . . . This change in the law renders many of the decided cases no longer applicable, but it does not cure a defect such as I have found exists as to the assessment for 1901 and 1902. . . .

The mesne profits have been allowed on a liberal scale, but we cannot say that the amount awarded is so excessive as to justify our interference.

Appeal dismissed with costs.

SCHRYVER v. YOUNG—DIVISIONAL COURT—DEC. 31.

Boundary—Broken Concession—Centre.]—Appeal by the defendants from the judgment of BRITTON, J., 14 O. W. R. 530, in favour of the plaintiff in an action for a declaration that the plaintiff is entitled to half of the total quantity of land contained in lot 12 in broken concession B. in the township of Murray, and for damages for trespassing upon and removing timber from the plaintiff's land. The Court (MEREDITH, C.J.C.P., MACMAHON and TEETZEL, JJ.), agreed with the conclusions of fact and law of the trial Judge, and dismissed the appeal with costs. The defendants' costs of the motion for leave to adduce further evidence and incidental to it, including the taking of the evidence, to be taxed to him and deducted from the costs to which the plaintiff is entitled. S. J. Arnott, for the defendants. W. S. Morden, for the plaintiff.

LACROIX v. LONGTIN—DIVISIONAL COURT—DEC. 31.

Deed—Estoppel—New Trial.]—Appeal by the plaintiff from the judgment of CLUTE, J., dismissing an action for the reformation of a conveyance. The plaintiff, at the argument of the ap-

peal, rested his right to relief on the ground of estoppel, which was not presented at the trial. The Court (MEREDITH, C.J.C.P., MACMAHON and TEETZEL, JJ.), thought it not unreasonable that an opportunity should be afforded to the plaintiff of establishing the estoppel upon which he relied, and directed a new trial; costs of the last trial to be costs to the defendants in the cause, and costs of the appeal to be costs in the cause. W. E. Middleton, K.C., for the plaintiff. J. A. Macintosh, for the defendants.

GOODISON THRESHER CO. v. TOWNSHIP OF MCNAB—C.A.—DEC. 31.

Appeal to Supreme Court of Canada—Leave—Extension of Time.]—The Court of Appeal (MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.), on a motion by the plaintiffs for leave to appeal to the Supreme Court of Canada and to extend the time for appealing from the judgment of the Court of the 13th May, 1909, 19 O. L. R. 188, thought it a proper case for an application to the Supreme Court for leave to appeal; and, in order to give the plaintiffs an opportunity to move the Supreme Court, ordered that the time for appealing be extended until the expiration of the next sittings of that Court, commencing in February, 1910. Costs of this application to be costs in the proposed appeal. T. C. Robinette, K.C., for the plaintiffs. W. M. Douglas, K.C., for the defendants.

BROWN v. WARNOCK—C.A.—DEC. 31.

Will—Lawful Widow—Contestation — Costs.]—An appeal by the defendant Agnes Wilson Warnock from the order of a Divisional Court affirming the judgment at the trial in favour of the plaintiffs, executors propounding the will of James Gregory Warnock. The appellant claimed to be the lawful widow of the deceased. The testator gave certain legacies to the children of the appellant, and the residue of his estate to the defendant Eva Warnock, whom he had married after his alleged marriage to the appellant. The Court (MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.), at the hearing (16th November, 1909), dismissed the appeal, being of opinion that the trial Judge

and the Divisional Court were right in holding that there was no evidence to justify the contention that the testator was under the undue influence of any one, or that he was non compos mentis, or was not deliberately and intelligently taking the position, even if wrong in his belief that he had never been lawfully married to the appellant. Judgment was reserved as to the costs of the appeal, and the Court now directed that the appellant should pay to the plaintiffs and the defendant Eva Warnock the costs of the appeal, and that the costs of the guardians of the respective infants should be paid to them out of the estate. I. F. Hellmuth, K.C., for the appellant. E. E. A. DuVernet, K.C., for the plaintiffs. G. H. Watson, K.C., for the defendant Eva Warnock. A. H. F. Lefroy, K.C., for the infant J. G. Warnock. J. R. Meredith, for the other infants.