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APPELLATE DIVISION.

JUNE 14TH, 1913.

SHEARDOWN v. GOOD.

Vendor and Purchaser—Contract for Sale of Land—Dismissal of Action by Assignee of Purchaser for Specific Performance —Repayment of Deposit Paid by Purchaser to Agent of Vendor.

Motion by the plaintiff to vary the judgment of the Court, ante 1344.

The motion was made before MULOCK, C.J.Ex., CLUTE, SUTHERLAND, and LEITCH, JJ.

C. W. Plaxton, for the plaintiff.

L. V. McBrady, K.C., for the defendant.

THE COURT referred the motion to SUTHERLAND, J., in Chambers.

SUTHERLAND, J. (after hearing counsel):—Upon a careful consideration of the matter, I am unable to see that the judgment should contain any direction to the effect that the $100 paid to the real estate agent, by the purchaser, should be repaid by the defendant to the plaintiff. I have spoken to the other members of the Court, who agree also in this disposition of the matter, and of the costs as already made.

Motion refused.

JUNE 16TH, 1913.

DICARLLO v. McLEAN.

Master and Servant—Injury to Servant—Negligence of Fellow-servant—Engineer in Charge of Engine Operating Steam-shovel—Person in Charge or Control of Engine or Machine upon Railway—Workmen's Compensation for Injuries Act, sec. 3, sub-sec. 5—Findings of Jury.

Appeal by the defendant from the judgment of MIDDLETON, J., upon the findings of a jury, in favour of Carmine Dicarllo, the plaintiff, for the recovery of $1,500 in an action against his employer for damages by reason of injuries sustained in the course of his employment as a labourer in railway construction work, by reason of the negligence of the defendant or some person in his employment.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and LEITCH, JJ.

J. M. Ferguson, for the defendant.

B. H. Ardagh, for the plaintiff.

The judgment of the Court was delivered by CLUTE, J.:—The defendant is a sub-contractor for the Canadian Pacific Railway. The plaintiff was in the defendant's employ, and at the time of the accident was operating the jack which supported a steam-shovel when hoisting the load. The steam-shovel rested on wheels on a side track, and changed its position from time to time on the rails, in order to carry on its work of excavation in connection with the railway.

It became necessary, when operating, to give support by means of the jack, in order to meet and counterbalance the extra weight thus imposed upon one side of the steam-shovel.

For this purpose, it was the plaintiff's duty to operate the jack; and, while he was in the act of so doing, it is alleged, the engineer, in charge of the engine operating the shovel, started the machinery and steam-shovel without giving warning to the plaintiff, whereby a part of the hoist swung round and knocked the plaintiff on the jack and threw him against the cogs of the steam-shovel, which caught his coat and drew his left arm

therein, injuring and crushing the same, and rendering it necessary to have his left arm amputated. The following are the questions submitted to the jury, with their answers:—

"Q. 1. Did the accident to the plaintiff happen by reason of any defects in the works, ways, and plant of the defendant? A. Yes. If so, what? A. By not having the cogs sufficiently guarded.

"Q. 2. Did the accident happen by reason of any negligence on the part of the defendant? A. Yes. If so, what? A. Owing to the negligence of the engineer in not giving sufficient warning.

"Q. 3. Was the accident occasioned or contributed to by any negligence on the part of the plaintiff; if so, what? A. No.

"Damages, $1,500."

Upon these findings judgment was entered for the plaintiff for $1,500 and costs; against which the defendant appeals.

Upon the argument, the plaintiff's counsel conceded that there was no evidence to support the finding in respect of the cogs not being sufficiently guarded, but submitted that the plaintiff was entitled to retain the judgment upon the other findings.

There is sufficient evidence to support the finding as to the negligence of the engineer in not giving sufficient warning. The only question that remains is as to whether or not the case falls within sec. 3, sub-sec. 5, of the Workmen's Compensation for Injuries Act, R.S.O. 1897 ch. 160, the argument being that the engineer was not a person who had "charge or control of a locomotive, engine, machine, or train upon a railway."

In Murphy v. Wilson (1883), 52 L.J. Q.B. 524, it was held that "a steam crane fixed on a trolley and propelled by steam along a set of rails, when it is desired to move it, is not a "locomotive engine" within the Employers' Liability Act (1880), sec. 1, sub-sec. 5."

Sub-section 5 varies from the corresponding section in the English Act, as the word "machine" is not found in the English Act; and in the latter Act there is no comma between the words "locomotive" and "engine," as in the Ontario Act. As to the effect of the punctuation, see Barrow v. Wadkin, 24 Beav. 327. The question of punctuation may not be material here, owing to the introduction of the word "machine" in the Ontario Act.

As pointed out in McLaughlin v. Ontario Iron and Steel Co., 20 O.L.R. 335, the introduction of the word "machine"

has very much widened the scope of the Act, and quite distinguishes Murphy v. Wilson from the present case. See also Dunlop v. Canada Foundry Co., ante 791, at p. 796, where it was held that a hoist was a machine or engine and the rails upon which it ran a tramway, within the meaning of the Act.

Sub-section 5 applies to a temporary railway laid down by a contractor for the purposes of construction work: Doughty v. Firbank, 10 Q.B.D. 358; and applies to railways operated under the Railway Act of the Dominion: Canada Southern R.W. Co. v. Jackson, 17 S.C.R. 316.

I am of opinion that the plaintiff is entitled to retain his judgment upon the findings of the jury.

Appeal dismissed with costs.

JUNE 16TH, 1913.

*SPENCER v. CANADIAN PACIFIC R.W. CO.

Carrier—Railway—Passenger— Loss of Luggage Checked on Passenger's Ticket—Limitation of Liability—Condition on Back of Check—Absence of Knowledge or Assent on Part of Passenger.

Appeal by the defendant company from the judgment of DENTON, JUN. J. of the County Court of the County of York, in favour of the plaintiff for the recovery of $350.50 in an action for damages for the loss of a trunk and contents in course of carriage by the defendants.

The appeal was heard by MULOCK, C.J. Ex., CLUTE, RIDDELL, and SUTHERLAND, JJ.

Shirley Denison, K.C., and C. W. Livingston, for the appellant company.

J. W. Bain, K.C., and M. L. Gordon, for the plaintiff.

MULOCK, C.J.:—The facts are not in dispute. Mrs. Spencer, the plaintiff, at the Toronto office of the defendant company, paid the proper fare for a first-class passage for herself from Toronto to St. Thomas and return, and was thereupon handed a return

*To be reported in the Ontario Law Reports.

ticket by the company's agent. When about to commence her return journey, she drove to the St. Thomas station in a taxicab, having her trunk with her. On arriving at the station, she took her seat in the train, instructing the driver of the taxicab to check her trunk for Toronto, and to bring her the check therefor. This he did, handing her the check through the window of the car. Without examining it, she put it in her hand-bag, and arrived at the Toronto station at so late an hour (midnight) that the baggage transfer agent had left; and, accordingly, she did not apply to the defendant company for the trunk until the following morning. It was then ascertained that the trunk had duly reached Toronto and been placed in the company's baggage-room, and had disappeared between the time of its arrival—midnight—and the time next morning when Mrs. Spencer demanded it. It has not been found, and this action is brought to recover damages for the value of the trunk and contents.

The defence is, that the trunk was delivered to and received by the defendant company subjct to the condition on the baggage check in question, that the company "shall not be liable for loss or destruction of or damage to baggage for any amount in excess of $100 on an adult's ticket, and $50 on a child's ticket, unless the passenger stipulates valuation in excess of these respective amounts at the time of checking, and charges paid for the excess valuation in accordance with the current tariff;" and that, by sending the trunk under the said baggage check, the plaintiff entered into a contract with the defendant company for it to carry the trunk on the condition above-quoted, and that the defendant company is not liable for a greater sum than $100, which amount it tendered before action, and brings into Court now in satisfaction of its liability.

So far as appears, when the baggage check was delivered to the taxicab driver, the company's agent did not call the driver's attention to the condition in question, nor did the plaintiff when receiving the check know, or have any reason to know, of the condition printed on the check. She was evidently quite unaware of the existence of any such condition, and regarded the check as merely a receipt for her trunk.

In the absence of a special contract, the defendant company, as a common carrier, became liable generally for the safe delivery of the trunk. The onus, therefore, is on it to shew assent, actual or constructive, on Mrs. Spencer's part, to the condition pleaded in modification of the contract implied by law. Whether there has been any such assent is a question of fact: Henderson v.

Stevenson, L.R. 2 Sc. App. 470; Parker v. South Eastern R.W. Co., 1 C.P.D. 618, 2 C.P.D. 416; Bate v. Canadian Pacific R.W. Co., 18 S.C.R. 697; Richardson v. Rowntree, [1894] A.C. 217. .

In principle, it appears to me immaterial whether the condition which the common carrier seeks to have made part of the contract is on the face or back of the ticket, or wholly apart therefrom; the real question being, whether, in fact, the customer of the common carrier actually or constructively assented to such condition forming part of the contract and thereby varying the contract, which, in the absence of special conditions, the law implies. Such a question must be determined in accordance with the facts in each case; and, if the common carrier fails to shew such assent on the part of the customer, then the only contract governing the transaction is that implied by law. . . .

[Reference to Lamont v. Canadian Transfer Co., 19 O.L.R. 291.]

Here the findings of the learned trial Judge are in substance to the effect that no notice was given to the plaintiff or to the taxicab driver of the condition on the check; that the plaintiff supposed the check to be a mere receipt for the trunk; and that, obviously, she in no way, expressly or impliedly, assented to any contract except such as grew out of the delivery of the trunk to the defendant company (common carrier), and its acceptance by the company for carriage.

For each of these reasons, I am of opinion that Lamont v. Canadian Transfer Co. has no application to the present case. There was, in my opinion, ample evidence to support the findings of fact of the learned trial Judge, and no ground exists for disturbing them.

Having reached this conclusion, it is not necessary to express any opinion whether, after the plaintiff had received her ticket at Toronto and travelled thereon to St. Thomas, it was competent to the defendant company to limit their liability in respect of her baggage by the introduction of the conditions in question into the baggage check issued at St. Thomas.

The other members of the Court concurred; RIDDELL, J., giving reasons in writing.

Appeal dismissed with costs.

JUNE 16TH, 1913.

RE COLEMAN AND McCALLUM.

Municipal Corporations—Regulation of Erection of Buildings in City—Apartment House—Lodging House—Hotel—City By-laws—Municipal Act, 1903, *sec.* 541*a*—*Amendment by* 2 *Geo. V. ch.* 40, *sec.* 10—*Mandamus for Approval of Plans Granted on Terms—Reversal of Order on Appeal.*

Appeal by Robert McCallum and the Corporation of the City of Toronto from the order of LENNOX, J., in Chambers, ante 1127.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, and SUTHERLAND, JJ.

Irving S. Fairty, for the appellants.

J. T. White, for Alfred B. Coleman, the respondent.

The judgment of the Court was delivered by SUTHERLAND, J.:—The applicant is the owner of land situated at the corner of Sherbourne and Rachael streets in the city of Toronto, and desires to erect a building thereon. He had plans and specifications prepared by an architect originally for an apartment house, and applied to the respondents for a permit to erect it. The respondent McCallum is the City Architect and Superintendent of Buildings for the respondent corporation. The application was refused. Alterations were made in the plans, and further applications made and refused. Thereupon a motion was launched on the 20th March, 1913, "for an order of peremptory mandamus directing the respondents to forthwith approve and stamp the plans and specifications submitted by the applicant . . . and to issue a permit for the erection thereof."

The motion was heard before Lennox, J., and on the 19th April, 1913, he made an order to the following effect: "The applicant, for himself and his heirs and representatives in estate, now undertaking to amend the plans on file in the City Architect's Department of the City of Toronto, so as to provide that each of the bed-rooms in the apartment house which he proposes to build on the south-west corner of Sherbourne and Rachael streets in the city of Toronto, shall have a clear floor area of one hundred square feet at least, and the applicant by

his counsel now undertaking that the said building shall not at any time, without the consent of the respondents or of this Court, be diverted from the uses and purposes or occupied or used in a manner inconsistent with the uses and purposes now declared by the applicant, and that upon a sale of the property due notice of this undertaking and of this order shall be given to the purchaser, and that he will in and by the conveyance bind the purchaser, his heirs and assigns, to observe and abide by the conditions hereinbefore set out and such order as a Court of competent jurisdiction may make: it is peremptorily ordered that the respondents do forthwith approve of and stamp the plans and specifications submitted by the applicant for the erection of a building at the south-west corner of Sherbourne and Rachael streets in the city of Toronto, and do forthwith isue a permit for the erection thereof."

From this order the respondents now appeal.

The learned Judge who heard the motion says in his judgment: "After a very great deal of hesitation, I have come to the conclusion that perhaps the proposed building may be legitimately described as a 'Temperance Hotel.' Hotels, of course, are not prohibited. I prefer, however, not to rest my decision wholly or mainly upon this view of the question."

He also holds that the building proposed to be erected in conformity with the amended plans and specifications is a "lodging house," within the meaning of the definition of that term contained in by-law No. 4861 of the respondent corporation, which he states to have been in force at the time the notice of motion was served.

The appellants are relying upon an amendment to the Municipal Act contained in 2 Geo. V. ch. 40, sec. 10, and a by-law passed in pursuance thereof. The said sec. 10 is as follows:—

"Section 541*a* of the Consolidated Municipal Act, 1903, as enacted by section 19 of the Municipal Amendment Act, 1904, is amended by adding, after clause (*b*), the following clauses:—

"(*c*) In the case of cities having a population of not less than 100,000 to prohibit, regulate and control the location on certain streets to be named in the by-law of apartment or tenement houses and of garages to be used for hire or gain.

"(*d*) For the purposes of this section an apartment or tenement house shall mean a building proposed to be erected or altered for the purpose of providing three or more separate suites or sets of rooms for separate occupation by one or more persons."

The said Act came in force on the 16th April, 1912, and on the 13th May of the same year the defendant corporation passed its by-law No. 6061, "to prohibit the erection of apartment or tenement houses or garages to be used for hire or gain on certain streets." The first recital in the said by-law shews the intention thereof to be to pass a by-law under the express authority of the said amending Act.

A second recital is as follows: "And whereas it is expedient that the location of apartment and tenement houses, and of garages to be used for hire or gain, should be prohibited on the streets hereinafter named."

Clause 1 of the by-law is: "No apartment or tenement house, and no garage to be used for hire or gain, shall be located upon the property fronting or abutting upon any of the following streets, viz.:" and included in the list of streets are Rachael street and Sherbourne street.

The judgment of Lennox, J., is in 4 O.W.N. 1127, and the facts are fully set out therein. With respect, I am unable to agree with him. The moment a by-law was passed by the municipal corporation under the authority of sec. 10 of the Act of 1912, I think that upon the streets named therein the municipality had the right to prohibit, regulate, and control the location of apartment or tenement houses which answered to the description contained in sub-sec. (d) of sec. 10 of the said amending Act.

It is plain, in my opinion, from an examination of the plans as altered, that the building proposed to be erected thereunder is an apartment or tenement house providing three or more sets of rooms for separate occupation by one or more persons.

I am of opinion that this by-law, No. 6061, was in force at the time the application was made by the applicant to the respondents for their approval of the plans and specifications now in question, and for a permit for the erection of the building, the refusal of which by the respondents led to this motion.

I think that the respondents were within their rights thereunder in refusing. This is quite apart from any objection to the form of the order or other matters urged in support of the appeal, which I do not, in the circumstances, think it necessary to deal with.

Appeal allowed with costs.

JUNE 20TH, 1913.

LONG v. SMILEY.

Brokers—Dealings with Customers—Purchase and Sale of Shares in Mining Companies—Duty of Brokers—Fulfilment—Keeping Speculative Shares Ready for Sale—Allotment of Particular Certificates in Brokers' Books—Sale by Brokers without Regard to Allotment—Conversion—Agreement—Acquiescence—Costs.

Appeal by Georgina Long, the plaintiff in a High Court action brought against a firm of brokers to recover moneys intrusted to them for investment in mining stocks, from the judgment of RIDDELL, J., ante 229, dismissing the action.

The judgment of RIDDELL, J., dealt also with a County Court action brought by Kate Long, the sister of Georgina Long, against the same firm of brokers; but in the County Court action there was no appeal.

The plaintiff's appeal was heard by MULOCK, C.J.Ex., CLUTE, SUTHERLAND, and LEITCH, JJ.

A. J. Russell Snow, K.C., for the plaintiff.

T. N. Phelan, for the defendants.

CLUTE, J.:—The defendants, as brokers, purchased for the plaintiff certain mining stocks, which were paid for in full at the time of purchase. A bought note was, in each case, sent to either the plaintiff, Georgina Long, or her sister, Kate, and the number of the scrip was entered opposite the name of the plaintiff or her sister in the defendants' stock-book.

Subsequently there appear entries in the defendants' stock-book shewing that this particular scrip was sold, at a profit, and passed out of the defendants' hands.

The plaintiff, Georgina Long, now seeks to recover the proceeds of what she claims to have been her shares or scrip. The defendants answer, in effect, that they did not sell her shares, as they were not authorised so to do, but that they sold certain shares for other principals, and that the particular scrip representing her shares were handed out to such purchasers, the defendants always retaining sufficient scrip on hand, fully paid-up and of the same issue, to meet the plaintiff's demand for the same when made.

My brother Riddell has found "that when any stock was ordered to be bought it was intended to be left in the hands of the brokers in a convenient form for immediate sale, and that the plaintiffs quite understood and assented to it. Stocks which were paying dividends were of course to be transferred into the name of the purchasers, but not others. When dividend-paying stock was bought, it was so transferred." He further finds that sufficient of the scrip was held on hand to give every customer the amount held by him. He finds further that the plaintiff and her sister, Kate Long, quite understood that the stock had to be in such shape as that it could be delivered on a sale at a moment's notice. He expressly gives credit to the defendants' witnesses, and states that he cannot rely upon the accuracy of the memory of the plaintiff and her sister as to what took place between them and the defendants.

The evidence supports the findings of the trial Judge. As to the 500 shares of Otisse and 500 shares of Gifford, taken in the name of Kate Long, the defendant McCausland points out that they could not obtain it in lots of 250 shares at the market-price, and it was, therefore, taken in the name of the plaintiff's sister, Kate Long, instead of 250 shares in the name of each.

He further states that it was with the consent of the plaintiff and her sister that the shares were left with the defendants, for safe-keeping; that they never asked for delivery until 1911, when similar shares of the same issue were delivered to them. He further states that from the time the first purchases were made for the plaintiffs to the time the stock was finally delivered to them, there never was a "single moment" that they did not have on hand a sufficient amount of stock to meet their demands, and the demands of other customers who had a similar kind of stock; that they were never hypothecated or pledged or used in any way for the defendants' benefit; that these shares of their various principals were put in an envelope endorsed with so many shares for each principal, and that they were never short of any of the shares.

The plaintiff's case then is reduced to what the defendants admit, namely, that the defendants did not keep any particular certificate for the plaintiff, but on making a sale delivered the scrip that first came to hand, and in this way handed out those certificates which had been designated by their numbers as having been bought for the plaintiff in the stock-book.

Did this, on the facts, as found by the learned trial Judge, amount to a conversion? I think not. The effect of what was done between the parties was to authorise the defendants to keep the scrip of those stocks which were not paying dividends in such form as could be readily transferred in case of sale. That, in fact, was done, and scrip of the like amount was always on hand and ready for delivery to the plaintiff when demanded.

It is solely upon the findings of the trial Judge, in this particular case, and without giving effect to any alleged custom, that the plaintiff, in my opinion, fails.

If, at any time, the defendants had parted with the scrip, without retaining sufficient of a like issue to satisfy not only the plaintiff but all other principals for whom they were acting, a different question would have arisen. A pledging or any dealing with the scrip for the defendants' benefit and without the plaintiff's knowledge or consent, where, as in this case, the stock had been fully paid for, would have amounted to a conversion, but nothing of that kind took place.

I also think, as held by the trial Judge, "that the dealings of the two sisters were of such a character that transferring stock certificates to one of them, Kate, under such a form as that they could be easily divided between the two sisters, was a sufficient compliance with the duty of the brokers." See Sutherland v. Cox, 6 O.R. 505; Ames v. Conmee, 10 O.L.R. 159; S.C., sub-nom. Conmee v. Securities Holding Co., 38 S.C.R. 601; Langdon v. Waitte, L.R. 6 Eq. 165; Le Croy v. Eastman, 10 Mod. 499; Dos Passos, 2nd ed., pp. 250 to 255; Scott & Horton v. Godfrey, [1901] 2 K.B. 726; Wilson v. Finlay, [1913] 1 Ch. 247; Clark v. Baillie, 19 O.R. 545, 20 O.L.R. 611.

To what extent principals may be affected by the custom of brokers, is fully discussed in Robinson v. Mollett, L.R. 7 H.L. 802.

While I think that, under the circumstances of this particular case, there has been no conversion, and the plaintiff has not been damnified, yet the careless and irregular manner in which the business was conducted has led to this litigation, and ought not to be encouraged.

It is the duty of a broker to keep, and be ready at all times to give, a strict account of his dealings, so as to satisfy a reasonable principal. The manner in which the books were kept and the fact that the numbers of the certificates were placed opposite the plaintiff's name, and sales were

afterwards made of these numbered certificates, raised a natural but erroneous suspicion on the part of the plaintiff that the defendants had been selling the plaintiff's stock and keeping the proceeds, and had bought in the same number of shares, when the stock had fallen in the market, to meet the plaintiff's demand.

Under all the circumstances of the case, I think there should be no costs of this appeal.

MULOCK, C.J., and LEITCH, J., concurred.

SUTHERLAND, J., also concurred. He was of opinion, for reasons stated by him in writing, that there was either an absence of agreement to keep on hand the identical stock or there was acquiescence on the part of the plaintiff in the defendants dealing with the identical certificates as they did. He was of opinion that the appeal should be dismissed with costs.

Appeal dismissed without costs; SUTHERLAND, J., *dissenting as to costs.*

HIGH COURT DIVISION.

LENNOX, J. JUNE 17TH, 1913.

RE HARRISON.

Will—Construction—Devise—Restraint on Alienation during Life of Husband of Devisee—Validity—Partition or Sale.

Motion, under Con. Rule 938, for an order determining questions arising upon the construction of the will of Louisa Ann Harrison, deceased.

W. B. Raymond, for all parties interested.

LENNOX, J.:—Mr. Raymond, applying for construction of the will, states that he represents all the parties interested in the property. The person who took the life estate is dead. Mrs. Kemp, Mrs. Verner, and Mrs. Stringer are now entitled to a fee simple in possession. The question to be determined is, can they sell the property? At the time of the making of the

will in question, they were married women, and their husbands were alive. After the use of words sufficient to vest a fee in the lands in question in the three beneficiaries above-named, the will provides: "With regard to the property and estate hereby and hereinbefore given and bequeathed . . . I do hereby declare that the same is now hereby given and bequeathed to each of them for her ailment maintenance and support and the same is to be held and possessed by each of them free from the interference or control or management of any husband they or any of them have or may have . . . nor shall the same or any part thereof be liable or be subject to be seized attached or be otherwise taken from any of them either for her debts or the debts of any husband any of them may have nor shall the same be pledged disposed of mortgaged or alienated to any person or persons whomsoever on any condition or pretence whatsoever."

The intention of the donor is the thing which governs, provided that it does not purport to go beyond the limits allowed as to perpetuities and the like: In re Bown, O'Halloran v. King, 27 Ch.D. 411. The right to limit the estate during coverture in the way it is here attempted to be limited is recognised in Tullett v. Armstrong, 1 Beav. 21, and many other cases. When the coverture ceases, the widow can exercise the ordinary rights incident to separate estates and alienate the property. Two of these devisees are now widows. These two have the right and power to alienate their shares. The lady whose husband is still alive has not. As I intimated upon the argument, this property being physically indivisible, the parties may find a way of carrying out what they desire by partition proceedings, and a sale as incidental thereto. It is a case in which all parties would be benefited by disposing of the property, and I should be glad if I had an Act enabling me to remove the restraint, as the Court has in England—the Conveyancing and Law of Property Act.

Costs as between solicitor and client out of the estate.

MIDDLETON, J. JUNE 18TH, 1913.

SALTER v. EVERSON.

Private Way—Prescription — Easement — Evidence—User — Necessity—Tenants in Common—Dissolution of Interim Injunction—Undertaking as to Damages—Assessment by Trial Judge.

Action for an injunction restraining the defendant from closing a lane and to establish a prescriptive right of way over the defendant's lands in the town of Oshawa.

The action was tried by MIDDLETON, J., without a jury, at Toronto, on the 6th June, 1913.

H. H. Dewart, K.C., and J. F. Grierson, for the plaintiff.

A. R. Clute, for the defendant.

MIDDLETON, J.:—Malachi Quigley, who died on the 24th August, 1890, in his lifetime owned the whole block, and by his will devised to his son Samuel Quigley 30 feet of land on Bond street, marked on the plan exhibit 1 as A, and to Michael Quigley the parcel marked as B and C on Simcoe street, and also gave parcels D and E to other children.

The testator also devised the central part of the block or yard and a lane running to Bond street to his four children as tenants in common, "subject to the mutual rights of user of the same in common hereinbefore mentioned." This refers to the fact that the gift of each parcel was followed by a further devise of a right to use the lane and yard "in common with the owners and occupants from time to time of all and every other portion of the said lot which adjoin the said lane and yard or either of them together with a right of way over the said lane."

During the life of the testator he had built stores and cottages round this central yard, and used the parcel marked C as a means of access to it. That portion of the "lane" east of parcel A was enclosed by fences, and had never been used as a means of access to the yard.

The testator contemplated by his will a change in the mode of user—the "lane" being opened to Bond street—and the parcel C, being included in the land given to Michael absolutely, would then cease to be used as a way.

After the testator's death, matters were allowed to remain as they were for some years, but finally the lane was opened to

Bond street; and, since then, it has been and still is used as a means of access to the yard.

Michael did not close the entrance from Simcoe street, and it was freely used as a mode of access to the rear of stores which he owned upon parcel B, and upon parcel D, to which he had acquired title.

The defendant, having acquired title from Michael Quigley, contemplated erecting a block of buildings on Simcoe street, covering, inter alia, parcel C, and so closing it as a means of access to the yard. The plaintiff, claiming title under Samuel Quigley, now brings this action for an injunction, claiming to have acquired a title by prescription to a right of way from the lane and yard across the strip of land in question.

Samuel Quigley, on the 11th April, 1901, conveyed the 30-foot parcel (lot A) to one Hincks, "together with the rights of way and user in the will of Malachi Quigley . . . described, and thereby devised to the party of the first part and his assigns." This conveyance does not grant to Hincks the title of Quigley to the yard and lane as tenant in common—but only his right as owner of one of the dominant tenements to the easements appurtenant to the 30-foot parcel, as defined by the will.

The right of way now claimed by the plaintiff is not appurtenant to the parcel of which he is the owner, i.e., the 30-foot lot. Quigley may have been enjoying the use of the land in question as a means of access to the yard, and it may be that the title he was acquiring under the statute would have passed to his grantee of the yard; but he is still owner, as one of several tenants in common, of the yard and lane—subject to the various rights and easements created by the will.

Further, the right, if any, which Quigley was acquiring, was a right of way to and from the yard and lane, and of which he was a tenant in common, and not a right of access to the 30-foot parcel. The way is in no sense appurtenant to it.

The evidence as to user is most unsatisfactory. No doubt, a great deal of traffic went over this land—most, if not all, being to the rear of the stores—occasionally teams and passengers may have gone to the rear of the cottages on the 30 feet. No one who had any real knowledge of the facts was called to shew any such user during the last few years. The occupants of the cottages were not called—those who used the way were not called—and Allen, a most estimable man, who seemed to devote much time to watching the traffic, on cross-examination

had to admit that all he knew was, that teams drove into the yard, and that he had no knowledge whether this was on the business of the plaintiff's tenants or on the business of any of the other tenants whose premises backed on this common yard.

On the evidence, I cannot find that the alleged easement "has been . . . enjoyed by any person claiming right thereto without interruption for the full period of twenty years" next before this action—as I must find before I can declare that there is an easement by prescription.

The easement claimed is by no means essential to the beneficial enjoyment of the plaintiff's premises. The lane to Bond street affords an easy access to the yard at the rear of his houses.

For these several reasons, the action fails, and must be dismissed with costs.

I am asked to assess damages under the undertaking on the injunction motion. Why any interim injunction was sought, I cannot understand. There was no real inconvenience in using the Bond street lane pending the trial, and no object in preventing the erection of the buildings. The defendant would have gone on pending the action at his own risk. The delay has made the erection of the buildings more expensive, and has resulted in loss of rent. While anxious not to award too much, I cannot see how to cut the amount claimed down to less than $300.

BOYD, C. JUNE 18TH, 1913.

CAMERON v. SMITH.

Limitation of Actions—Mortgage—Foreclosure—Recovery of Land—Period of Limitation—Covenant for Payment—Default in Payment of Interest—Effect of Acceleration Clause—Costs.

An action upon a mortgage.

J. E. Thompson, for the plaintiff.
R. J. Slattery, for the defendant.

BOYD, C.:—I disposed of this case at the close of the evidence in favour of the plaintiff, but reserved the legal question as to the effect of the Statute of Limitations.

The mortgagee sues to foreclose and to recover money on the covenants. So far as foreclosure is asked, the action is for the recovery of land, and must be brought within ten years after the right of action first accrued: Heath v. Pugh, 6 Q.B.D. 364.

So far as the recovery of money due on the covenant to pay is concerned, the action must also be within ten years after the cause of action arose: 10 Edw. VII. ch. 34, sec. 49 (k). In mortgages made prior to 1894, the period of limitation was longer, but this mortgage is dated in 1901. The statutory form of mortgage is used, and it provides that, in default of payment of interest, the principal shall become payable. The principal of $1,500 was to be paid two years from the date of the mortgage, which would be on the 18th May, 1903; the payment of interest was to be annually, and the first payment was due on the 18th May, 1902, and was not paid, nor has anything been paid on the mortgage.

The action was begun on the 16th July, 1912, over ten years from the first default in payment of interest.

The effect of this acceleration clause on the Statute of Limitations has been considered in McFadden v. Brandon, 6 O.L.R. 247, and it was held that the cause of action in respect of the whole sum arose on the default respecting payment of the interest, and that the statute began to run upon that first default. This decision of Mr. Justice Street was affirmed by the Court of Appeal; S.C., 8 O.L.R. 610. The reason of the thing is fully discussed by the Court in Hemp v. Garland, 4 Q.B. 519 (1843), which has been a leading case ever since.

The inaction of the plaintiff for more than ten years since the first default has, therefore (under the statute), deprived him of all remedy upon this mortgage; and the action must be dismissed.

However, as the defendant raised various defences on the facts, which failed, I think that he should pay the costs in proportion; and, to avoid the trouble of apportionment, I would fix the extent of his success as equivalent to one-fifth of the whole, and direct that the defendant pay four-fifths of the plaintiff's costs.

BOYD, C. JUNE 18TH, 1913.

ELLIS v. ELLIS.

Husband and Wife—Separation—Consent Judgment for Alimony—Claim of Wife for Separate Moneys Intrusted to Husband as Agent—Gift or Trust—Evidence—Income of Wife Arising from Investment—Use by Husband before Separation — Effect of — Joint Household Expenditure — Res Judicata—Chattel Property of Wife—Recovery.

Action by wife against husband for the recovery of goods alleged to be detained by the husband and for an account of moneys of the wife received by the husband, and for other relief.

J. Rowe, for the plaintiff.
S. G. McKay, K.C., for the defendant.

BOYD, C.:—In the conflict of evidence which has arisen in the case between the parties themselves, I feel constrained to accept the recollection of the wife as more accurate than that of the husband. On various points of disagreement, she is so far corroborated by independent testimony that my best conclusion is to hold in the main that her version of affairs is correct.

Besides, as to the chief claim, the documentary evidence shewing the ownership of the money is in her favour. That she received considerable sums from her father's estate in Scotland after her marriage is not disputed: the contention is, how much? In the absence of other evidence to countervail, it must be taken that the face of the bank receipts shewing sums payable to her, expresses the fact that she was the depositor and owner of the moneys. I find on the facts that the husband handled these moneys, on her endorsement of the receipts, as her agent, and could not, against her will, apply any portion to his own use. She gave no consent to any such user as to the corpus or capital, but signed in order that the money might be more profitably invested.

From the marriage in 1888 till the 13th October, 1910, the parties lived together as man and wife and had children. On the 2nd November, 1910, an action for alimony was begun; and by the endorsement of the writ of summons the plaintiff also claimed "an account and payment of moneys received by the defendant on the sale of the plaintiff's lands and interest

thereon." On the 8th December, 1910, a consent judgment was obtained by which an allowance of $400 a year was to be paid by the defendant to the plaintiff on account of alimony. In addition to this, an agreement of separation was entered into between the parties on the 21st November, 1910, reciting the consent to allow alimony (afterwards put into the form of judgment), and agreeing that, when the land of the husband (being part of lot 15 in a lot in the village of Norwich) was sold, he would pay the wife one-third of the proceeds, and, upon such payment, she was to release her dower.

The account asked by the endorsement of the writ was in respect of house and land standing in the wife's name, which had been sold by the husband, and the proceeds of sale paid to the wife, except about $500, which he retained for repairs and improvements, made out of his money, on the property and house. The husband says that it was agreed that this should be deducted. The daughter says that the mother was apparently persuaded by the husband to let him keep this $500 when the house was sold in 1910.

I judge that this claim should not be entertained as things stand. The alimony suit, with its special claim for an account as to the sale of this house of the wife, was settled by the concession of alimony at the rate of $400 a year and a further concession of one third out and out of the proceeds to be derived from the sale of the husband's house when it was sold (which stands good for all the future); and that house is said to be worth at least $4,000. This term of the agreement was beyond her legal claim for dower: and, while technically it may be said that the matter is not res judicata, yet it must be considered that the claims and rights of both parties in respect to both houses were present in their minds when the quantum of alimony was settled. To put it strictly, it does not seem to be equitable now to disturb that settlement of 1910, unless the judgment for alimony is set aside, and the question of how much is to be paid is left open for inquiry and settlement, having regard to the altered condition of the defendant's estate.

I do not propose to have the amount of alimony reconsidered; and, for this reason, do not interfere in regard to this claim for $500.

But, on the other part of the case, as to the separate moneys of the wife, I think no obstacle arises based on the former action and the additional deed of separation.

That outstanding right of the wife to these moneys of her own taken by the husband was not alluded to or considered;

though it must have been known to both parties. The delay of the wife is not explained, but such a delay does not bar her right if a trust existed in regard to this money. Such a trust, I hold, did exist as to all the moneys received from Scotland which appear in the deposit receipts—but not necessarily so as to the income or interest derivable from the principal sums. On the 15th May, 1896, the wife consented to $650 being drawn out of the capital for investment by the husband. And again on the 6th October, 1896, a further sum of $500 for a like purpose. Finally on the 12th January, 1897, she endorsed to her husband the whole of the two amounts then on deposit in her name: one receipt for $1,721 and one for $589. The husband claims these two sums as a gift out and out from the wife. I cannot, having regard to all the surroundings, accept this conclusion. The parties were not on equal terms: she had already discovered his unfaithfulness to her, and was greatly disturbed and nervously unstrung. The matter was kept quiet, but her condition was such that the physician advised a rest and a journey to the old country: but to that her husband would assent only on condition that she turned over all this money to him, as he said he might have occasion to use it or some of it during her absence. In her weak and disordered condition on the eve of her departure, it needed much less than coercion to induce her to endorse the receipts and give them to her husband. He cannot be allowed to take advantage of such a surrender. His position as husband was to protect her even from herself; and, taking the receipts as he did and as she gave them, he did not cease to be her trustee for those sums, i.e., $1,721 and $589. He is also to be charged with the two other principal sums withdrawn for a special purpose which he does not seem to have fulfilled, but rather to have pocketed or otherwise expended the money (i.e., $650 and $500.)

The interest or income from the capital sums stands on a different footing, which should exempt him from liability as a matter of fairness between man and wife living together in family and household relations. The presumption is in such cases that the income of the wife's separate property is expended for the joint benefit of husband and wife and their household. That is supported by many circumstances which need not be detailed; except to say that she returned to her home from the journey in December, 1897; and, though he claimed the money as his own, they lived together supported by the husband till she left the house in 1910. Even in the absence of these details, I would not (having regard to the whole course of litiga-

tion and the manner of life of the now disputants) charge the husband with interest and rests as claimed. Did I feel obliged to do so, I should certainly vacate the alimony judgment and let an amount be fixed afresh, in view of the changed financial condition of the defendant. But, in charging only the amounts actually received by him as indicated, I do not feel pressed to disturb the consent judgment.

The distinction as between the receipt of the corpus and the interest or income by the husband of the wife's separate estate, when they were living together for many years, is well defined. If the husband claims that there has been a gift of the corpus, that must be made out clearly and conclusively or he will be held to be a trustee for her. As to the income however, the burden of proof is the other way. She must establish with like clearness and conclusiveness that this yearly increment expended for their joint purposes and advantages was dealt with by her husband by way of loan, and for which he was to be held to account: Rice v. Rice, 31 O.R. 59, affirmed 27 A.R. 121. The counsel for the wife stated in open Court that he only desired to charge against the husband that which was fair and just; and I think that my present ruling should satisfy him in this respect.

I find that the money of the wife was expended in the purchase of the piano in the pleadings mentioned—and that the sum paid was $325. This is to be allowed to the husband as a proper payment, and the piano is declared to be the property of the plaintiff and to be forthwith delivered to her.

The other chattels claimed were to be ascertained and their identity determined by the intervention of the daughter, who was accepted by both sides as a suitable referee to adjust the adverse claims, and her decision I do not propose to disturb. The articles should be handed over to the plaintiff according to the determination of the daughter, and they need not be mentioned in the judgment.

I would fix the amount of liability thus:—

Deposit receipts endorsed over to the defendant at the time the plaintiff left for England	$1,721
He had also drawn out before	587
On the 15th May, 1896	650
And on the 6th October, 1896	500
	$3,458
Less paid to her at sale of house	1,170
	$2,288

As to the piano, it cost and he paid $325; he got $225 of this from the wife when in England, and also drew out on the 12th January, 1897, $100 from her money, which will square this account and leave the piano as paid for out of her money, and to be handed over to her.

Judgment should be for delivery of the piano and the other chattels as designated by the daughter, and the payment of $2,288, with interest to run from the date of separation in October, 1910.

The defendant should pay the costs.

MEREDITH, C.J.C.P. JUNE 18TH, 1913.

COLLIER v. UNION TRUST CO.

RE LESLIE, AN INFANT.

Infant—Interest in Land—Settlement of Litigation Affecting Infant's Interest—Application for Approval of Court—Benefit of Infant—Delay in Selling Property Likely to Appreciate in Value—Circumstances of Infant—Refusal of Application with Leave to Renew—Judgment—Consent Minutes.

Motion for judgment in the action in terms of consent minutes; and petition for an order, under the Act respecting Infants, enabling the infant to take steps to carry into effect the settlement agreed upon.

A. K. Goodman, for the petitioner.
D. C. Ross, for the Union Trust Company.
J. MacGregor, for the plaintiff in the action.
F. W. Harcourt, K.C., Official Guardian, for the infant.

MEREDITH, C.J.C.P.:—The Court is asked to give effect to a judgment agreed upon between the parties to this action, in settlement of the matters in question in it. The settlement affects very materially the interests of an infant in the lands which are chiefly the subject of it; and so, to confer greater power upon the Court, an application is also made by the Official Guardian in the infant's behalf, under the Act respecting In-

fants, for leave to her to take such steps as may be needful to carry into effect the settlement.

The infant is the owner of two undivided shares of the land in question; her father, a defendant in the action, was the owner of the other undivided share; but, under a deed of settlement, by which the infant benefits largely, he conveyed that share to a trust company, who are the defendants in the action. The plaintiff is a creditor of the father, seeking payment of his demand out of the trust property.

Two questions are involved: one of law, the other of fact. Is there any power in the Court, either in the action or upon the application, to authorise or give effect to that which is sought, notwithstanding the infancy? If so, is it advisable to do so?

If the latter question cannot be answered in the affirmative, it is needless to consider the other; therefore, it may save time to deal with the last question first.

Two points are made by those who support—and no one opposes—the application. It is said, in the first place, that, unless this settlement be carried out, a sale, sooner or later, of the one-third undivided share in the land is almost unavoidable, and that ownership of it by a stranger would be detrimental to the interests of the infant. The property is situated in what is at present one of the most favoured and valuable business sections of Toronto, and is subject to a lease, which may be continued for eighteen years to come. At present valuations, the lease is unfavourable to the owner. And it is said, in the second place, that, in view of increasing values of land in the locality and of the favourable character of the terms upon which the infant can acquire the third undivided share of the land, the right to acquire it ought to be exercised; that no one sui juris would think of rejecting it.

But there are other things to be considered.

The infant is an invalid girl, still suffering from the effect of that which is said to have been an attack of infantile paralysis, when she was about two years old. It is hoped that the effects of that illness will, before long, pass away, and that normal conditions will come to her. In dealing with the case, the hoped-for and wished-for better health and strength must have due weight.

But it is yet the case of an invalid girl, not of an active, strong, ambitious boy, who could far better risk much to gain more; because, even if it were all lost in the venture, he would

still have that which might prove a greater asset—the health and strength of manhood, with which to win a fortune of his own.

To carry out the present scheme would reduce the infant's income materially until she attained the age of thirty-five years, should she live; the property being hampered with the lease before mentioned. But it is said that by that time it may nearly double its present selling value. That may be so; and it may not. If a piece of land having only forty-five feet frontage and having no especial value beyond the tens of thousands of feet of equally valuable land in the same and in other localities, should ever be worth any such sum, out of what is the rent to come? A merchant would need extraordinary profits upon his sales to make an initial expenditure of $50,000 a year for ground rent on forty-five feet frontage, with which to begin his expense account.

And for what purpose deprive the invalid of her income for so many years, only to have a greater capital when more than half of the span of life of those who live long is past?

Should the infant gain normal health and strength, marry and have children, different considerations would be applicable; considerations which can be taken into account when the time comes, if the property be then unsold.

Under existing circumstances, even a sale now of the whole property at the sum which it is said it would bring, would, as it seems to me, be preferable, in the interest of the infant; but I see no good reason why it should be now a sale or this scheme irrevocably gone. There are other means by which a sale may be avoided, at least until, as it is said, a year or so may tell whether the hopes of better health are to be realised.

If that which seems to be deemed the worst, to those who advocate this scheme, should come, the worst, which will bring with it over a quarter of a million dollars—as I understand the witnesses' calculations—can hardly be deemed an altogether unmixed evil. At present, if there were the power to do so, I would not carry into effect the proposed scheme.

So far I have dealt with the case leaving out of consideration the right intended to be conferred upon the infant, by the deed of settlement, to purchase her father's share when she attains the age of 21 years, on the same terms as, it is said, should now be accepted by her. If that right exists, and no one has yet questioned it, why should she buy now? Why not wait and make sure as to appreciation or depreciation in value of the land? If she have this right, what excuse could there be for exercising it

now, instead of leaving it till she is able to decide for herself, it being in the meantime substantially to her a case of heads I win, tails you lose?

Whether there is power or not need not be considered. Generally speaking, power to enable an infant to deal with land, as of age, exists upon statutory enactment only. I am, of course, leaving out of consideration any power over land of an infant in an adjudication in proceedings in which they are involved. Apart from legislation, law and equity seems to have considered it safer to go the whole length of preventing persons from dealing with their land during minority. There must be difficulty either way. It is hard that because one may be a day, a week, a month, a year, or more, under age, favourable opportunities should be lost; whilst to allow an infant to deal with lands as if of full age, even with the approval of a Court, would have its risks and disadvantages.

This, however, is evident: that by virtue of different enactments very considerable power to deal with infants' lands has been conferred, and that that power is being from time to time increased, not curtailed; the Legislature of this Province in this year adding another word upon the subject.

Therefore, neither of the applications now before me will be granted; no order will be made in either of them; but both, or either, may be renewed at any time, if there be anything new to be shewn upon the subject in any of its features.

RIDDELL, J., IN CHAMBERS. JUNE 19TH, 1913.

*REX EX REL. FITZGERALD v. STAPLEFORD.

Municipal Election—Corrupt Practices by Successful Candidate—Bribery—Payment of Scrutineers—Inducement to Procure Return of Candidate—Municipal Act, 1903, *sec.* 179 (4)—5 *Edw. VII. ch.* 22, *sec.* 8—*Absence of Evidence of Payment by Reason of Scrutineer having Voted—Payment of Debt to Voter—Evidence—Suspicious Circumstances——Interest in Contract with Corporation—Municipal Act*, 1903, *sec.* 80—*Transaction with Crown—Absence of Benefit to Candidate—Conflict of Evidence—Costs.*

Motion by the relator, in the nature of a quo warranto, to set aside the election of the respondent as Reeve of the Village of Watford.

*To be reported in the Ontario Law Reports.

W. D. McPherson, K.C., for the relator.
John Cowan, K.C., for the respondent.

RIDDELL, J.:—At the recent municipal election at Watford, Sanford Stapleford was declared elected as Reeve of the village. Fitzgerald desires that he be unseated; evidence has been taken viva voce, and the matter has been very fully and carefully argued on both sides. There are four grounds of attack: two for paying scrutineers; one for an alleged corrupt payment; and one under sec. 80 of the Municipal Act, 1903.

1. The first case is that of one Bryson. He was a voter, who had not been taking very much interest in the election—he had acted as scrutineer before for Stapleford, and been paid for it. On the morning of the election, Stapleford asked him to act as scrutineer for him at No. 2, and he did so. Both parties say that of course he was to be paid—that from the general course of dealing in this village Bryson, being engaged as a scrutineer, was entitled to be paid. Nothing, of course, was said about payment: but this is of no importance. Rex ex rel. Sabourin v. Berthiaume (1913), ante 1201, is well decided and should be followed. Two or three days after the election, Stapleford paid Bryson $2 "for scrutineer"—"for acting as scrutineer." Bryson voted at the election; and Stapleford knew that he had a vote when he asked him to act as scrutineer, which was about the time the poll opened—close to 9 o'clock. . . .

The section of the Municipal Act, 1903, referred to in support of the application, is sec. 245 (2) . . . That the respondent did promise and agree to pay Bryson for acting as scrutineer is undoubted, and the only question is, whether this was done "in order to induce" Bryson "to endeavour to procure" his return.

Had it not been for recent legislation, I should have, without much hesitation, held that the payment of scrutineers, or the engagement of them on an agreement, express or implied, is in itself a corrupt practice. They are put at the poll to watch; and, while it is said not always to be the case that an elector votes as he prays, it must generally be that an elector will vote as he watches. . . .

[Reference to The Bewdley Case (1869), 1 O'M. & H. 16.]

It is not the custom in Ontario, as it seems to be thought to be in England, that a labouring man, as of course, spends in a public-house money paid to him. . . . It would be carrying judicial nescience to an absurd extreme to affect not to know

that a hiring of a man to represent one at the polls implies that man doing all he can for his employer, including casting his vote if he has one. A scrutineer who would act otherwise would be thought a "mighty mean man."

This case was approved in our own Supreme Court in Cimon v. Perrault (1881), 5 S.C.R. 133 (see p. 145); The Nottingham Case (1869), 1 O'M. & H. 246.

Whether a payment to one as a canvasser is a corrupt practice under the Election Acts has been the subject of many decisions. . . .

[Reference to Rex ex rel. Johns v. Stewart (1888), 16 O.R. 583; The East Toronto Case (1871), H. E. C. 70; The West Toronto Case (1871), H. E. C. 97; The Lennox Case, 1 Ont. Elec. Cas. 41; The North Ontario Case (1879), H. E. C. 785, 801, 4 S.C.R. 430.]

These decisions prevent me from holding that a payment to a voter who is for such payment to endeavour to effect the election of his employer, is necessarily corrupt.

The cases do not cover the position of a scrutineer: and I should have had no great difficulty in following my own judgment, in the absence of express authority. But it seems to me that the Legislature has indicated a different view.

In the Act of 1903, 3 Edw. VII. ch. 19, sec. 179 (2), the clerk of the municipality is prohibited from voting; but (3) all deputy returning officers and poll clerks are entitled to vote. An amendment was passed in 1905, 5 Edw. VII. ch. 22, sec. 8, which adds sub-sec. (4): "No person employed and paid by a candidate to act as scrutineer or for any other purpose in connection with municipal elections shall be entitled to vote at such election." There is no section invalidating the election in consequence of such a person voting—and it seems clear that the Legislature recognised the innocence of a hiring and paying of a voter as scrutineer, but put him in the same category as the clerk. The Legislature has said in effect: "You may hire and pay a scrutineer; but that scrutineer shall not vote." Nothing would have been easier than to declare the paying of a voter as scrutineer, a corrupt act, but this is not done.

I do not find anything to indicate that Bryson was not in good faith paid simply as a scrutineer; and, while I may be permitted to say that I regret the result of the legislation, I think it clears this act of the implication that it is a corrupt practice.

2. The case of Sharpe, also hired and paid as a scrutineer, is covered by what I have said.

In neither case is there any evidence of any payment by reason of the scrutineer having voted.

3. Then comes the Chapman charge. Mrs. Minnie Chapman is a widow, a voter who was canvassed by both candidates. She swears that she told the respondent that she would not vote for him unless he paid her; that he had owed her $5 for work; that she had tried to get it, and could get only $2. She had seen the respondent from time to time, a couple of times, about the balance, and he had said that before they (i.e., the firm composed of the respondent and his son) would pay it, they had to look through the books. She says that when, on election day, the respondent canvassed her, and she had replied as I have said, the respondent did not say anything, but went out, returned, and handed some money to one Warner, and Warner handed her $3, whereupon she went out with the respondent to vote and did vote. On cross-examination she says that the respondent did not speak to her, but to her father, and her father spoke to her, and it was then that she said that she would not vote unless she was paid—"I am not going along with none of them unless they pay me."

It seems that Warner had owed her $5, for which he gave an order on the respondent or his firm; when she asked for payment she was told that they would have to see Warner first; and that Warner has paid $2 on account of the debt since the election. . . .

The case is full of suspicion; but, consistently with the rules laid down in election cases, I cannot find this charge proven—I am not to be taken as holding that the payment even of an honest debt may not be a corrupt practice under the Act. Here, however, while there is much to suggest, there is nothing conclusively to prove, the improper object. The verdict then on this charge will be, "Not guilty but don't do it again."

4. The only remaining charge is based not on sec. 245, but on sec. 80: "No . . . person having by himself or his partner an interest in any contract with or on behalf of the corporation . . . shall be qualified to be a member of the council of any municipal corporation." I read this section as meaning: "Any person who or whose partner, as such partner, has an interest in any contract, express or implied, with or on behalf of the corporation"—and there should be no hair-splitting to the advantage

of the accused. "The object of the Legislature in passing sec. 80 was to prevent any one being elected to a municipal council whose personal interests might clash with those of the municipality:" per Teetzel, J., in Rex ex rel. Macnamara v. Heffernan (1904), 7 O.L.R. 289. A similar section in the Imperial Local Government Act, 1894 (56 & 57 Vict. ch. 73), was under consideration in The King v. Rowlands, [1906] 2 K.B. 292. . . .

[Reference to Martineau v. Debien (1911), Q.R. 20 K.B. 512, and McDonald v. Robertson, 35 N.S.R. 348.] . . .

The situation was this: the Village or the villagers had caused to be deeded to the Crown a lot worth $400; the responsible Minister of the Crown had agreed to pay $500 of a purchase-price of $900 for a new lot, giving back the old one; the Village could not legally acquire the new lot or pay for it; a number of public-minded citizens were willing to pay $500 of their own money for the benefit of themselves and their neighbours (not the municipality as a corporation, if that made any difference, and I think it did not); young Stapleford (the respondent's son) or his firm (consisting of the respondent and his son) bought the Elliott lot as agent for these citizens. At that moment, there was a contract between the firm (say) and Elliott, another between the firm (say) and the citizens, who were represented by one Brown, but none, direct or indirect, express or implied, with the corporation.

The remainder of the purchase-money of $900, that is, $400, had to be raised by other means. Apparently the old Armoury lot was not available—it had not been deeded back by the Crown. Accordingly, on the 7th February, 1913, a special meeting of the council was held at which a resolution was passed "that Reeve and Clerk issue order on Treasurer for $400 on account of purchase-price Elliott and Lawrence lots for public buildings, when our solicitor advises matter ready to close." This was for the purpose of having the balance, $400, available at any time, if necessary; this sum was to be contributed by the Village along with $500 by the citizens so as to procure a deed to the Crown of the two lots. The Minister looked upon it and spoke of it as a donation by the Village to the Crown—but, in my view, it would be absurd to press this language so far as to make it mean the corporation of the village, as distinguished from the citizens or inhabitants. In common parlance we speak of a donation from a city, when we mean a donation from those in a city, or in part by the corporation and

in part by the inhabitants. There was a scheme whereby the Village and some of its inhabitants joined in a gift to the Crown, the result of which was expected to improve the village. Nothing appears to bind the citizens to give this money—there is nothing in the way of an express contract—and I cannot find in evidence anything by which a contract can be implied between corporation and citizens. Even if there were, there is no evidence that the respondent or his son was one of these citizens. Judging from the position of the respondent and his public spirit, as shewn by his conduct, it is very probable that he was one of the contributors to the fund; but I shall not guess so as to be compelled by a strict reading of the law to punish a man for an act not only innocent in itself but praiseworthy. The Court has no option, in cases in which a violation of the law is proved, but so to find, with whatever results the law causes to follow from such finding—but it is always loath to stamp an act as a crime which is innocent in itself and is possibly not in contravention of the law. Here no one pretends that the respondent was seeking private gain, and all he did seems to me just what a public-spirited citizen and municipal councillor should do, if the law permits.

The conclusions of fact I have arrived at depend upon a conflict of testimony in some cases—a conflict always to be anticipated in proceedings relating to elections. We always look for a curious epidemic of deafness—"I did not hear"—at such periods, followed by another of amnesia—"I do not remember"—when an investigation is made. These phenomena are ill counterbalanced by an exhibition of unusual eagerness in calling to mind half-forgotten debts and a frenzied alacrity in paying them, not seen at other periods. There is rather less of these in this than in most cases, however; and I have had little difficulty in arriving at a conclusion, bearing in mind the rules laid down by binding authority.

There are such circumstances of suspicion that I shall, in dismissing the motion, do so without costs.

LENNOX, J. JUNE 19TH, 1913.

ONTARIO ASPHALT BLOCK CO. v. MONTREUIL.

Vendor and Purchaser—Contract for Sale of Land—Option to Lessee to Purchase at End of Term—Acceptance in Due Time—Tender of Price and of Conveyance for Execution—Time of Expiry of Lease—Dies non—Mistake as to Vendor's Title—Life Estate in Lieu of Fee in Land—Specific Performance with Abatement in Price—Stay of Reference to Enable Vendor to Acquire and Convey Fee—Knowledge of Vendor of State of Title—Silence—Invitation to Lessee to Continue to Make Improvements—Damages—Measure of—Full Amount of Loss.

Action for specific performance of an agreement for the sale by the defendant to the plaintiffs of land and land covered by water, and for damages.

D. L. McCarthy, K.C., and J. H. Rodd, for the plaintiffs.
M. K. Cowan, K.C., for the defendant.

LENNOX, J.:—The contract arises out of an option contained in a lease of the lands in question from the defendant to the plaintiffs for ten years from the 2nd February, 1903, as follows: "It is agreed between the parties hereto that the lessee, its successors and assigns, shall have the right to purchase the demised premises, at the end of the demised term of ten years, for the cash sum of $22,000, provided it shall have given six months' previous notice in writing of its intention so to do."

In strict compliance with the terms of this option, the plaintiffs, on the 5th January, 1912, gave notice to the defendant of their intention to exercise the option and to purchase the demised lands; and the right of the plaintiffs to exercise this option and to have these lands conveyed to them was never disputed until or after the expiration of the term.

On Saturday the 1st February, 1913, and again on the following Monday, the 3rd February, the plaintiffs tendered to the defendant the $22,000 and a deed of the lands in question for execution. On both occasions the defendant refused to accept the money or to convey. The form of the conveyance has not been objected to.

The defendant sets up in his statement of defence that the lease was obtained by fraudulent representations as to the nature

of the business to be carried on. There was no attempt made to prove this. The defendant also set up that the lease provided against the carrying on of any business that might be deemed a nuisance.

The defendant collected his rent for the whole term of ten years without complaint, and there is no evidence to shew or suggest that the plaintiffs ever carried on any business other than that for which the premises were expressly demised.

It is also set up by the defendant that the lease became forfeited by non-payment of taxes for a year and non-payment of rent for three months. There was no evidence in proof of this plea. . .

The answers set up at the trial were:—

(a) That the tender on Saturday the 1st February was ineffective, because there was a quarter's rent then in arrear, and, this rent having been paid later on in the same day, that the tender made on Monday the 3rd February was too late.

(b) That the defendant thought he had the fee, but finds that he has only a life estate in the portion of the lands in question which belonged to his father, that is, in the high land, and that, as to the land covered by water, although he holds this by patent from the Crown in fee, the Crown should only have granted to him a life estate therein.

(c) That the plaintiffs, if they are entitled to anything, are entitled to damages only; and, the breach of contract arising through a bonâ fide mistake of title, these damages are confined to solicitor's charges and the like.

I am of opinion that the tender made on Monday was clearly in sufficient time. The right to purchase is to arise "at the end of the demised term of ten years;" that is, at the end of Saturday the 1st February. On the strictest interpretation, the plaintiffs would have the whole of the following day within which to act; and, this being a dies non, they would have Monday, the day on which the second tender was made.

But, in my view, they were not confined to Monday. The one thing that they had to be careful about was to give the full six months' notice. Without this, no contract to purchase or sell would arise. This notice being given, and there being no condition making time of the essence of the contract, a contract of sale binding upon both parties, and to be completed within a reasonable time, arose.

If the matter ended here, the plaintiffs would be entitled to judgment for specific performance.

If a plaintiff has contracted for the purchase of more land than the defendant is able to make a good title to, the purchaser is entitled to that which the vendor has, with an abatement of the price in respect of that which cannot be conveyed; and with the addition of nominal or substantial actual damages, dependent upon the particular circumstances of the case.

I cannot entertain the defendant's objection to his own title to the water lot.

The plaintiffs in this case are entitled to a conveyance from the defendant in fee simple of such part of the land in question in this action as was granted by the Crown to the defendant by patent thereof dated the 7th October, 1874, and, as regards the residue of the lands agreed to be conveyed, to a conveyance of the defendant's life interest therein, with an abatement of the purchase-money in the proportion in which a fee simple exceeded this life interest in value, at the end of the ten years' term.

There will be the ordinary judgment for specific performance to this extent, with a reference to the Master at Sandwich to take an account upon that basis, to inquire as to damages as hereinafter provided for, and to settle the conveyance in case the parties cannot agree.

It is my duty to determine the character of the damages which the plaintiffs should recover. When the lease was executed, the plaintiffs' obligation to pay rent and taxes and to build a wharf, purchased, not only the right of occupation for ten years, but the option and its incident as well, namely, the right to the land in fee upon notice and payment of an additional consideration of $22,000. The defendant did not know of the limitations of his title when he made the lease; and there are decisions limiting the damages to actual outlay in favour of a vendor acting bonâ fide and without negligence in such a case.

But the defendant did know of the defect in his title in 1908. For ten years the plaintiffs have been bonâ fide expending money in improving this property, and in establishing and extending their business there, to the knowledge of the defendant. The defendant, with full knowledge of his position, and as well after as before the receipt of the plaintiffs' letters of the 2nd October and 24th December, 1908, and the notice of exercising the option served on the 5th January, 1912, by his deliberate and continued silence, invited and encouraged the plaintiffs to continue their improvements and expenditures and to believe, and they evidently did believe, that the defendant would be able to and would in fact carry out his contract.

This does not seem to me to be the case of a bonâ fide excusable mistake, in which all the loss is to be thrown upon the purchaser by an award of nominal damages or of solicitor's expenses only. But I am inclined to believe—although I have no actual evidence of it—that by a little exertion the defendant can obtain the title and carry out his bargain. This is what he should do if possible; and this, I believe, he can do with less expense to himself, if my judgment as to his liability is correct, than will be involved in a protracted reference and assessment of damages.

I direct that all proceedings be stayed for one month to enable the defendant to get in the title and convey the property to the plaintiffs, if the defendant determines to do so, and gives notice of his intention within fifteen days from the 19th June instant; and in this event there will be judgment against the defendant for specific performance of the contract according to its terms; the plaintiff paying interest on the $22,000 as being about equal to the rental, with costs, and a reference to the Master to compute the interest and settle the conveyance.

If this suggestion is not or cannot be acted upon by the defendant, then in the reference hereinbefore directed to ascertain and fix the abatement in price, will be included a direction to the Master to ascertain and report what amount the plaintiffs are entitled to as damages in addition to abatement in price, for breach of contract, calculated on the basis of the plaintiffs' loss.

The plaintiffs are entitled to costs down to and including the trial. Costs of the reference and further directions reserved.

BOYD, C. JUNE 20TH, 1913.

MATTHEWSON v. BURNS.

Vendor and Purchaser—Contract for Sale of Land—Option of Purchase Contained in Lease not under Seal—Consideration—Acceptance—Authority of Agent of Vendor—Power of Attorney—Revocation—Inadequacy of Price—Improvidence—Waiver—Execution of New Lease—Specific Performance.

Action for specific performance of an alleged agreement for the sale of a house and lot in the city of Ottawa.

J. I. MacCraken, K.C., for the plaintiff.
N. Champagne, for the defendant.

BOYD, C.:—I think credit must be given to the evidence of W. G. Hurdman, who acted as agent for the owner of the land in question, Thomas Burns, under power of attorney dated the 4th September, 1909. Burns, the owner, unmarried and invalid, was living in a hospital at the time at which he arranged, through the intervention of his agent Hurdman, to lease his house and land to the plaintiff. The terms arranged were in writing and signed by both parties. The term was to begin on the 1st June, 1910, and to extend to the last day of April, 1913, and the plaintiff was to have the option of purchasing at any time, on or before the expiration of the lease, for the sum of $2,800. This paper is dated the 30th April, 1910, and was signed by Hurdman as attorney for the owner on that day, and this was communicated by telephone to the plaintiff, who was at Montreal. Burns agreed that it would be enough if she signed on her return, and this she did in the first week in June. Possession was taken by her on the 11th and 12th June, and rent was duly paid.

Burns, forgetful apparently of the dealing between the plaintiff and his agent, signed a lease of the same house on the 6th May, 1910, to Mrs. Constantineau, for six months, at the same rent, $25, and with option to purchase (no price being named, however). A letter dated the 7th May, 1910, written by Burns to Hurdman, was received by the latter in these words: "The other day I gave you a power of attorney to act for me in connection with my property, on the understanding that you would not sell or dispose of any of it unless first approved of by me. I hereby revoke any power of attorney given by me to you, and you are hereby notified accordingly. Since seeing you, I have rented the place till fall, with option of purchase. Thanking you for your kindness."

Hurdman forthwith repaired to the hospital, and saw Burns, and shewed the letter. Burns spoke about some crooked work going on, and Hurdman had typewritten at the bottom of the letter these words, "I hereby cancel the above letter," which Burns signed, on the evening of the day that the letter reached Hurdman. A letter dated the 11th May was sent, signed by Thomas Burns, to Mrs. Constantineau, in these words: "I regret to inform you that my agent had rented my house, 134 Stewart street, previous to your renting from me, and to inform you that

you cannot have it. Enclosed you will find my cheque for $25, being the amount you paid in advance." Mr. Burns was aware of the lease to the plaintiff and its terms, and there is found in a book kept in his own writing a page headed: "Mrs. M. Matthewson: rent 134 Stewart St. from 1st June at $25 per month." It contains entries of payments of rent down to the 30th November, 1910, after which it is transferred to a pass-book (not in evidence).

Mr. Burns died on the 28th January, 1911, leaving a will by which he devised this house and land to his brother, the defendant.

The plaintiff took a lease of the house from the defendant, dated the 10th March, 1913, to commence on the 1st May, for 12 months, at the rate of $25 a month rent, i.e., the day after the first lease with the option expired (viz., the 30th April, 1913). It is disputed whether she spoke of the exercise of the option at the time when this last lease was made: but she signed without advice as to her rights, and with no intention of waiving the privilege of purchasing. The defendant and his solicitor were under the impression that the option to purchase was revocable; and, claiming that it had not been accepted by the plaintiff, they served notice of withdrawal, by letter without date, but in an envelope post-marked the 1st May. The defendant in his defence admits that on the 29th April the plaintiff tendered a conveyance of the land for signature, and the balance of the price, $2,800, after deducting the amount due on a mortgage. Even if there had been no prior statement of intention to act on the option, and even if it were revocable, this act would be sufficient to shew that the plaintiff claimed to exercise the right within the allotted time.

The defence is based on a denial of the authority of the agent to execute the lease with the option at $2,800; that the option was not under seal, and revocable, and was also withdrawn before acceptance; that specific performance should not be granted because the price is inadequate and the agreement made improvidently; that, if the plaintiff had an option, she waived it (presumably by executing the lease of the 10th March, 1913.)

The action was begun on the 1st May, 1913.

Upon the defence raised in the pleadings the plaintiff should succeed. Both parties agree that the deceased was well able to transact business, though physically disabled from attending to details in person.

No case is made as to inadequacy or improvidence. The evidence given as to the present values does not count because the prices of land began to go up in the fall of 1910. In 1909, one witness was ready to offer $3,500 for it, but it was then valued at $4,000. The testator told the witness Hurdman, his agent, that the best he had been offered for it was $2,700. The fall before, he had told the plaintiff that he was willing to take $2,800 for the place: and she, when the lease was made, was willing to pay that at the end of the term, and would not have taken the lease unless on that condition. The price, as things were in 1910, was not so low as to give rise to any suspicion of unfair dealing.

This option being obtained as I have said, it follows that the option was not given without consideration, and that it is not a revocable concession terminable at the will of the landlord. I base this conclusion on the view taken in American authorities discussed by Falconbridge, C.J., in Davis v. Shaw, 21 O.L.R. at p. 481. The agreement to pay rent and the payment of rent under the lease (though not under seal) are applicable to the whole agreement. The lease for the term would not have been taken by the plaintiff, unless it was accompanied by the option, and the whole contract stands or falls together: one part cannot be separated and eliminated at the will of the landlord; the right to buy exists exercisable at any time during the period specified: Pyke v. Northwood, 1 Beav. 152.

There is no evidence of any waiver by the plaintiff of the option to purchase. The taking of a new lease, to begin at the termination of the other, was merely a provident act in case she did not think fit to purchase. Had she elected to purchase during the former lease, that would ipso facto have determined the relation of landlord and tenant, and a new relation of vendor and purchaser would have arisen. None other follows in regard to the second lease; it did not become operative on the plaintiff electing to purchase at the end of the first term.

Next and last as to the power of the agent to enter into a contract giving the option to purchase. He acted under a power of attorney most comprehensive in its terms: power was given to let, set, manage, and improve the lands: to sell and absolutely dispose of the land "as and when he shall think fit:" he shall execute and do all such things as he shall see fit for any of the said purposes and generally to act in relation to the estate, real and personal, as fully and effectually in all respects as the principal could do personally.

These ample powers per se would cover selling by way of option, during the term, at a fixed price. The option is a possible prospective sale, and is a manner of dealing which was not foreign to the way in which Burns himself managed the property. Besides, Burns was told of this very arrangement with the plaintiff, and in fact ratified it by his letter of the 11th May, 1910.

It was further urged that there had been a revocation of the power of attorney. That, however, was an act which was itself revoked and cancelled by Burns on the same day that the agent was informed of the revocation. There was no withdrawal of the signed and sealed power of attorney, which remained always with the agent. And Burns recognised the tenancy created under that power, on till his death, by the receipt of rent. Another answer to this contention is, that the first lease had been made and signed by the agent before this attempted revocation took place.

On all grounds, therefore, I think that the plaintiff is entitled to specific performance, with costs. The usual reference, if desired, as to the amount, if the parties cannot agree.

BOYD, C. JUNE 20TH, 1913.

*MATHERS v. ROYAL BANK OF CANADA.

Company — Shares — Certificate — Restrictive Endorsement in Blank—Authority to Broker—Improper Dealing by Broker —Pledge of Shares to Bank—Sale of Shares by Bank— Notice of Restriction—Absence of Inquiry—Liability of Bank to Account to Holder for Full Value of Shares—Custom or Usage of Brokers.

Action for the detention or conversion of certain shares of a mining company.

W. N. Tilley and D. McCormick, for the plaintiff.
Geo. F. Henderson, K.C., for the defendants.

BOYD, C.:— . . . What is the nature of the transaction which is at the root of this litigation? This, that the plaintiff, being registered owner and holder of 46 shares of preferred

*To be reported in the Ontario Law Reports.

stock in the Lake of the Woods Milling Company, was minded to sell 25 shares, at the current rate of 124, and so instructed Sparks & Co., Ottawa brokers, who were not of the Stock Exchange. He handed the certificate for 46 shares to that firm, and endorsed it in blank, adding in writing the word "twenty-five," as being the number of shares to be dealt with. As it left his hands, the endorsement read thus: "For value received . . . hereby sell, assign, and transfer unto . . . twenty-five shares of the capital stock represented by the within certificate and do hereby irrevocably constitute and appoint . . . attorney to transfer the said stock on the books of the within-named company, with full power of substitution in the premises."

The brokers, on the 31st March, 1911, gave the plaintiff a receipt for 40 shares (a mistake for 46), "twenty-five to be sold." The plaintiff applied two or three times to the brokers as to the sale, then went off somewhere, and, on his return in May, 1912, withdrew the direction to sell, and asked for a return of the certificate. Excuses of one kind and another were made (all at variance with the truth), and the plaintiff did nothing further, except to receive the quarterly dividends, till he heard of the brokers' failure in November, 1912. He then found out that the certificate had been deposited as security by the brokers with the Traders Bank of Canada; and, that bank having amalgamated with the defendants, the Royal Bank of Canada, the certificate passed into their hands. This security was realised by the bank's broker striking out the words "twenty-five" in the endorsement, and selling the stock. By another mistake, the sale was of 40 shares, and not 46, but this matter has been adjusted between the parties, leaving the main question open.

About contemporaneously with the order from the plaintiff not to sell, the brokers assigned to the Traders Bank of Canada as collateral security for a prior advance to N. C. Sparks (who was not a member of the brokers' firm) the certificate No. 1362 for 46 shares obtained by the brokers from the plaintiff. To make good this advance to N. C. Sparks, the shares of the plaintiff were sold. This sale and the deletion of the words of restriction "twenty-five" are sought to be justified by the alleged customs of brokers and of banks and of the Stock Exchange.

The injustice of the transaction appears manifest. The initial wrongdoing began with the brokers using the certificate as

a means of securing the private debt of N. C. Sparks to the Traders Bank of Canada. An officer of that bank says that he did not notice the words "twenty-five," limiting the endorsement, when the certificate was handed to him. His carelessness cannot imperil the plaintiff's rights. The manner of endorsement gave plain notice to all concerned that only 25 shares were to be used—and that for the purpose of selling, not of pledging. The owner of the certificate endorses in blank prospectively in view of an intended sale, assignment, and transfer of the 25 shares (part of the whole). The emphatic word is "sale;" the assignment and transfer is in view of a previous sale; and power to pledge or to procure a loan is not contemplated by the language of the endorsement. Nor was it the intention of the original parties. To my mind, the obvious meaning of the endorsement as limited expressed that contract of agency. The certificate was endorsed in blank in order that a sale might be made of 25 shares for the benefit of the plaintiff. No other or greater power was given to the brokers; and, unless by the introduction of some transforming effect attributable to usage or custom, modifying the contract, no other power should be exercisable by the agent. . . .

[Reference to Palmer's Company Precedents, 10th ed., vol. 3, p. 195.]

The evidence is, that this was the first occasion on which the plaintiff did business of this kind, and that he knew nothing and was informed nothing as to the customs of brokers or bankers. On the other hand, as to the alleged usages relied on in the pleadings, the witnesses called, even by the defendants, did not agree, and for the good reason that no custom existed as to certificates with limited endorsement. This particular endorsement was a novel variation from the usual endorsement in blank—as all the witnesses said. This being the plain result according to first principles, I turn briefly to the authorities cited. . . .

[Reference to Smith v. Rogers (1898), 30 O.R. 256, distinguishing it.]

So far as I have been able to examine the other cases cited, they are all instances of blank endorsements without any restrictive words; and, having regard to the evidence, as well as to the reason of the thing apart from the evidence, I do not regard them as in point.

The endorsement critically examined does not warrant the transfer of anything but the whole amount of stock represented

by the certificate. The blank left for the number of shares is meant to be filled up with the same number as appears on the face of the certificate, and then the appointment of the attorney is to transfer "the stock," i.e., the whole capital stock represented by the certificate—on the books of the company. That is the reason why the Montreal agent of the bank undertook to strike out the words "twenty-five," put in by the plaintiff to define what he was dealing with. This act of hardihood did not change or diminish the plaintiff's rights, however it may have facilitated the effort of the bank to sell the stock.

The experts (Mr. Baird particularly) speak of this certificate as endorsed not being in proper form. The technical phrase is "not in order"—meaning thereby that business men would not take it without inquiry. In this aspect of the case the decision of the Lords in Colonial Bank v. Cady, 15 App. Cas. 267, is applicable in favour of the right of the plaintiff to recover: Lindley's Law of Companies, 6th ed., vol. 1, p. 666.

I may just refer to what sort of inquiry should have been called forth by this endorsement. Mr. Lees says that he would have questioned Sparks. But, seeing that Sparks had attempted to use the whole certificate for 46 shares, instead of the lesser sum of 25 shares, confidence in his explanations would be so lessened that resort to the plaintiff himself was the only reasonable and safe course. I adverted to this at the close of the case.

I adhere to the reasons then given; and further consideration and examination has satisfied me that justice is entirely on the side of the plaintiff; and my judgment is, that the bank shall account to the plaintiff for the full value of the shares sold by them. No evidence was given on this head; and, if the parties cannot agree, it will be referred to the Master. The defendant should pay the costs of the action, and also of the reference (unless the Master reports otherwise as to the reference).

JORDAN v. JORDAN—MASTER IN CHAMBERS—JUNE 16.

Discovery—Examination of Defendant—Officer of Court—Place of Examination—Expense.]—The defendant was the Local Registrar of the Court at Parry Sound. The plaintiff moved for an order for his examination for discovery at such time and place as might be directed or could be conveniently arranged for. The Master said that, the parties not being able to agree, it devolved on him to dispose of the matter. Following Marcus v. Macdonald (1904), 3 O.W.R. 411, and cases

cited, it seemed proper to direct that the defendant should attend for examination before a special examiner at Toronto, at such time and place as he should appoint. This would be far less expensive to the parties and more likely to prove satisfactory than if a special examiner was appointed to go to Parry Sound; or if the defendant was ordered to attend at some other county town, as Bracebridge or Barrie or North Bay. Conduct money from Parry Sound to Toronto would be $7.50; with allowance for two days or even three, the whole costs would not exceed $10 or $11.25. Costs of this application to be costs in the cause. The plaintiff in person. H. W. A. Foster, for the defendant.

NORTH AMERICAN EXPLORATION AND DEVELOPMENT CO. v. GREEN —KELLY, J.—JUNE 16.

Trusts and Trustees—Property Conveyed to Officer of Company—Declaration of Trust in Favour of Company—Evidence.] —Action for a declaration that the defendant is a trustee for the plaintiff company of a property conveyed to him by one Thomas Graham, for a conveyance of the property to the plaintiff company, for an account, payment, etc. The defendant was a director and secretary of the plaintiff company. KELLY, J., reviewing the evidence, said that there was not a shadow of a doubt in his mind that the transaction was entered into on behalf of and for the benefit of the plaintiff company. The defendant made use of his position as an officer of the company to obtain a personal benefit and advantage which belonged to the company. There was a deliberate design on the defendant's part to deprive the plaintiff company of the benefits and to obtain them for himself. Graham did not knowingly aid the defendant in carrying out his design. The position of the defendant now was that of trustee for the plaintiff company of the property conveyed to him by Graham, and he must convey it to the plaintiff company, account to it for his dealings with the property and the moneys derived therefrom, and pay to it whatever amount should be found to be due. Reference for that purpose directed to the Local Master at Lindsay. The defendant to pay the costs of the action. H. J. Macdonald, for the plaintiff company. J. T. Mulcahy, for the defendant.

BERLIN LION BREWERY CO. v. LAWLESS—RIDDELL, J., IN CHAMBERS—JUNE 17.

Summary Judgment—Motion for, under Con. Rule 603—Judgment Granted, but Execution Stayed until after Trial of Counterclaim—Account—Reference.]—Appeal by the plaintiffs from the order of the Master in Chambers, ante 1441, dismissing the plaintiff's motion for summary judgment under Con. Rule 603. By consent, appeal allowed, and judgment ordered to be entered for the plaintiffs for the amount of the promissory note sued upon, but execution thereon not to issue until the defendant has had an opportunity to have his asserted counterclaim tried and an account taken before the Local Master at Berlin, to whom a reference is directed. Costs here and below to be in the discretion of the Local Master. W. H. Gregory, for the plaintiffs. H. J. Macdonald, for the defendant.

ST. CLAIR v. STAIR—MASTER IN CHAMBERS—JUNE 18.

Pleading—Statement of Claim—Leave to Amend—Charging Acts in Furtherance of Conspiracy—Materiality.]—Motion by the plaintiff for leave to amend his statement of claim by adding clauses setting up that, after the publication of the report by the plaintiff of the performance at the theatre of the defendant Stair, the latter acquired control of the "Jack Canuck" newspaper, with a view to making the defamatory statements of which the plaintiff complained. See ante 645, 731. In the draft of the proposed amendments, the Master said, facts were alleged which were not material and might prejudice the defendants; these should be eliminated, but the plaintiff should not be prevented from alleging any fact which, in his opinion, was material to his case and which might be held to be so at the trial. The Master suggested apt words in which the amendments might be made, and made an order allowing the plaintiff so to amend, subject to what might be said on the settlement of the order. Costs of and incidental to the motion to be costs to the defendants in the cause. W. E. Raney, K.C., for the plaintiff. A. R. Hassard, for three defendants. E. E. Wallace, for the defendant Stair. D. O. Cameron, for the defendant Rutherford. R. McKay, K.C., for the other defendants.

PHERRILL v. HENDERSON—MIDDLETON, J.—JUNE 19.

Judgment—Motion for—Default of Defence—Application to be Let in to Defend—Deliberate Default—Prejudice to Plaintiff by Delay.]—Motion by the plaintiff for judgment on the statement of claim, in default of defence, in an action to set aside a deed. The defendant appeared by counsel upon the motion and asked to be allowed to deliver a defence. MIDDLETON, J., said that any accidental default or slip should always be relieved against, when a motion was made promptly, and fair terms could be imposed. Here there was no accidental slip in any way, but deliberate default; and, when relief was offered, upon most reasonable terms—the only condition sought being that the plaintiff should be in the same position as to trial as if the defence had been filed when due—nothing was done for more than two weeks. It was now impossible to have a trial till the autumn, and the plaintiff would be prejudiced in many ways that could not be compensated for by any terms which the Court could impose. If the transaction was not now set aside at the instance of the plaintiff, creditors would attack it. There was nothing in the facts shewn calling for indulgence. The defendant might be ill, but her son was not, and he seemed to have had the matter in charge for his mother. Judgment for the plaintiff as claimed, with costs unless the plaintiff was ready to waive them. A. J. Russell Snow, K.C., for the plaintiff. O. H. King, for the defendant.

RE CORR—MIDDLETON, J.—JUNE 19.

Costs—Inquiry as to Next of Kin of Intestate—Disposition of Estate—Escheat to Crown.]—Motion by the administrators of the estate of Felix Corr, deceased, for an order on further directions and as to costs. See 3 O.W.N. 1177, 1442; ante 824. MIDDLETON, J., said that the Attorney-General should have his costs of the commission to Ireland out of the $400 paid into Court. The parties agreed that the sums named, $200 and $40, for the costs of the appeal to Mr. Justice Kelly were reasonable; and these sums should be paid out of the $400, and the balance should go to Mary Elizabeth Donnelly. The costs not already dealt with of the applicants and the Attorney-General should come out of the fund. The balance should be paid to the Crown. J. P. Crawford, for the administrators. G. S. Hodgson, for Mary Elizabeth Donnelly, a claimant. J. R. Cartwright, K.C., for the Crown. Grayson Smith, for Patrick Rogers.

RUNDLE v. TRUSTS AND GUARANTEE CO.—MIDDLETON, J., IN CHAMBERS—JUNE 20.

Discovery — Production of Documents — Better Affidavit — Identification of Documents—Issue as to Release—Account—Relevancy of Documents.]—Appeal by the defendants from the order of the Master in Chambers, ante 1438. Order varied by directing production of the documents mentioned in part 2 of schedule 1 of the defendants' affidavit on production. Affidavit to be made as to the documents produced being all the documents. Casey Wood, for the defendants. W. E. Raney, K.C., for the plaintiff.

WILSON v. SUBURBAN ESTATES CO.—FALCONBRIDGE, C.J.K.B.—JUNE 20.

Fraud and Misrepresentation—Sale of Land—Action for Damages for Deceit—Failure of Proof.]—Action to recover $590 damages for alleged false and fraudulent representations of the defendants whereby the plaintiffs were induced to purchase two lots in the town of Port McNicoll. The learned Chief Justice said:—In the consideration of this case I have entertained much doubt and hesitation. Perhaps the very fact that I doubt and hesitate furnishes a reason why the plaintiffs cannot have judgment. For he who alleges fraud and misrepresentation must clearly and distinctly prove the fraud which he alleges. The onus is on him to prove his case as it is alleged in the statement of claim. Then, too, the plaintiffs do not ask for rescission, but only for damages, and there is no satisfactory or cogent evidence of the difference between the present value of the lots and the price paid for them. There was evidence both ways on this point —some of it of a bright and vivacious character. I shall dismiss the action; but, under all the circumstances, without costs. J. P. MacGregor, for the plaintiffs. Grayson Smith, for the defendants.

KREHM BROTHERS FUR CO. v. D. H. BASTEDO & CO.—LENNOX, J. —JUNE 20.

Sale of Goods—Action for Price—Payment to Holder of Promissory Notes Given for Price—Counterclaim—Breach of Contract—Evidence.]—Action to recover $1,652, the price of furs

alleged to have been sold and delivered to the defendants. Counterclaim for damages for breach of contract. LENNOX, J., said that the action involved questions rarely arising; but there was no difficulty in determining the conclusion to be reached. The defendants said that they settled the claim sued on by delivering to the plaintiffs negotiable instruments for the amount; and, these instruments having passed into the possession, and apparently into the ownership, of one Abraham Schacher, that they took them up before maturity and paid Schacher the amount, less a discount allowed for the time they had to run; and that this was done with the knowledge and approval of the plaintiffs. The learned Judge saw no reason to doubt the truthfulness of Mr. Bastedo's evidence or the bona fides of the transaction he deposed to; and he was clearly corroborated by an independent witness. In addition to this, the documentary evidence, the way in which the plaintiffs launched their claim, their suit against Schacher, and their entirely unjustifiable charge of conspiracy, all went to confirm what the defendants alleged. It was quite true that the plaintiffs had been overreached, and were probably committed to a serious loss; but this all arose out of matters wholly unconnected with the defendants. There was a small item of from $15 to $30 for samples, not included in the vouchers given; and in connection with this the defendants alleged a breach of contract and claimed damages. There was very little said about this part of the claim or the counterclaim at the trial; and it seemed wise and fair to leave it out on both sides. Judgment dismissing the action with costs and the counterclaim without costs. A. J. Russell Snow, K.C., for the plaintiffs. Gideon Grant, for the defendants.

ROGERS v. WAHNAPITAE POWER CO.—ROGERS v. IMPERIAL PORTLAND CEMENT CO.—MASTER IN CHAMBERS—JUNE 21.

Trial—Application for Direction that two Actions be Tried together—Evidence Common to both—Jury Notice in one only—Application to Trial Judge.]—The first action was to recover the price of cement sold by the plaintiffs to the defendant company. This claim was resisted on the ground of the defective quality of the cement; and the defendant company counterclaimed for damages arising from such defect. This cement was said by the plaintiffs to be a part of what was bought by them from the Imperial Portland Cement Company—against whom the

plaintiffs brought the second action for the price of bags supplied to that company. That company refused to pay, and set off the price of the cement which the plaintiffs had refused to pay until after the determination of the question as to its quality and sufficiency for the purposes for which it was bought by the Wahnapitae company. The plaintiffs alleged that the main question in each action was as to the quality of the cement, and moved for an order directing that the two actions should be tried together. A jury notice had been given by the defendants in the first action. The place of trial in each was Toronto. The Master said that there was a difficulty as to making any order. Either the jury notice already served must be struck out, or the plaintiffs must be given leave to serve a jury notice in the second action. Even then, it did not seem possible to make any order of greater effect than would be gained by the plaintiffs setting the cases down together, and then applying to the trial Judge to have the evidence common to both (if such there were) given once only. Whether there was such evidence could be determined only at the trial. The cement furnished to the Wahnapitae company was only a part of that supplied by the Imperial Cement Company to the plaintiffs. It did not necessarily follow that the quality of the part sold to the Wahnapitae company was the same as that of the rest bought from the Imperial Cement Company, even if it was part of the same output. They could always have been subject to the same conditions after leaving the works of the Imperial Portland Cement Company—even if the whole product was made at the same time, and both parts were as similar as wheat taken from the same elevator. The only order possible now was to allow the plaintiffs to file a jury notice in the second action—if the defendants in the first action desired to retain their jury notice. When this was made known the suitable order would issue, with costs to the defendants in any event. Smith v. Whichcord (1876), 24 W.R. 900, is very different in its facts from the present case and under a different state of the practice. Even there, the only order was, in substance, what the plaintiffs can now apply for to a Judge of the High Court, as was done in the case cited. M. L. Gordon, for the plaintiffs. J. T. White, for the defendants in the first action. H. S. White, for the defendants in the second action.

CLARY v. GOLDEN ROSE MINING CO.—FALCONBRIDGE, C.J.K.B.—JUNE 21.

Company—Directors—Reduction of Number—By-laws—Election of Directors—Postponement of Annual Meeting of Shareholders—Validity of Proceedings—Costs.]—Action by a shareholder in the defendant company for a declaration that the individual defendants were illegally holding the offices of president, vice-president, and secretary-treasurer of the defendant company, and for an injunction, a mandamus, and an accounting. The learned Chief Justice said that the case at the trial narrowed itself down to a question of the validity of the reduction of the number of directors from five to three and of the election of the three individual defendants as directors. The president's reasons for causing the general meeting to be put off from July to November, viz., inability to get an auditor and lack of funds, seemed to be good ones, and by-laws for these purposes were accordingly passed by the directors. All of these resigned, and it was necessary to appoint directors to carry on the company. The plaintiff contended that, in any event of the cause, he should have some special consideration as to costs, because he claimed that his action had the effect of compelling the defendants to do their duty as to some matters complained of in the statement of claim. Townsend, the president, denied this under oath, and gave his own explanations. Therefore, there was no reason for departing from the usual rule of giving the spoils of war to the victor. Action dismissed with costs. R. R. McKessock, K.C., for the plaintiff. A. D. Meldrum, for the defendants.