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APPELLATE DIVISION.

NOVEMBER 3RD, 1913.

ALLEN v. GRAND VALLEY R.W. CO.

Contract—Supply of Goods for Railway Construction—Action for Price—Guaranty—Defence of Sureties—Variation in Terms of Contract—Evidence—Term of Credit—Expiry before Action Brought—Counterclaim.

The following is a transcript of the oral judgment of the Court delivered by MEREDITH, C.J.O., at the conclusion of the argument, the result of which is noted ante 197:—Mr. Smith has very fully presented the case from the standpoint of the appellants, and it seems reasonably clear. The letter of the respondents of the 4th July, 1908, was simply a quotation of prices. In the letter of the 13th July, 1909, from the appellant company's superintendent to the respondents, accepting what is referred to as the tender of the 14th July, 1908, for the supply of points "in general accordance with tracings and sketches then submitted, but to be amended as necessary to agree with the requirements of our own engineer and that of the city engineer of Brantford," it was stated that, "as explained to your Mr. Ward and Mr. Hampton, there will be certain alterations and probably additional work in various job numbers, but the details of these alterations and additions can only be arrived at when your engineer comes here to prepare the working drawings." Then, after referring to the shipment of the materials, the importance of getting some of the "jobs" completed quickly, and the terms of payment, the letter concludes with the following statement: "Jobs Nos. 33, 34, and 35 are to be complete lay-outs, including the manganese steel rails curved to the required radius; prices of these three lay-outs to be arranged as soon as detailed drawings have been prepared."

It is quite clear from the terms of this letter that a great deal was left open. The work to be done was to depend upon the requirements of the company's engineer and of the engineer of the city of Brantford; and it was also in contemplation that additional work would be required. It is not pretended that what was supplied was not all required for the purpose of carrying out the undertaking with reference to which the contract was made; and it is clear that the statement as to changes, alterations, and requirements of the engineers applied to all the work, including jobs 33, 34, and 35.

It is manifest from the terms of the guaranty that it was in the contemplation of the guarantor that more than was mentioned in the list attached to the tender of the 14th July, 1908, would be needed to carry out the work that was to be done, for the order is stated to have been for work amounting "to some $60,000"—a sum considerably in excess of what the cost of the work would have been on the basis of the tender.

Everything supplied was supplied in accordance with the requirements of the company's engineer, and there is nothing in the correspondence or in the circumstances to warrant the conclusion that it was intended that it should not be open to the engineer to alter his requirements from time to time as occasion might render necessary.

For these reasons, and agreeing as we do with the reasoning and conclusion of the learned trial Judge, the judgment must be affirmed, and the appeal dismissed with costs.

NOVEMBER 10TH, 1913.

*LOWRY v. THOMPSON.

Motor Vehicles Act—Injury to Bicyclist by Motor Car—Identity of Car with that of Defendant—Evidence—Finding of Jury—Number of Car—2 Geo. V. ch. 48, secs. 19, 23—Liability of Owner of Car—Failure to Prove Violation of Act—Judge's Charge—Misdirection—General Verdict—New Trial.

Appeal by the defendant from the judgment of DENTON, Jun. Co.C.J., upon the verdict of a jury, in favour of the plain-

*To be reported in the Ontario Law Reports.

tiff, for the recovery of $150 and costs, in an action for damages for injuries and loss sustained by the plaintiff in a collision between a bicycle which he was riding and the defendant's motor car, upon Gerrard street, in the city of Toronto.

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

C. J. Holman, K.C., for the defendant.

C. M. Garvey, for the plaintiff.

MULOCK, C.J.:— . . . At about twenty-seven minutes past eight o'clock in the evening of the 27th December, 1912, a dark-coloured limousine automobile, bearing the number "Ont. 2636," was proceeding westerly along the north side of Gerrard street, in the city of Toronto, when it struck the plaintiff at the south-east corner of that street and Sumach street, causing the injury complained of. The only occupants of the car were the driver and a lady sitting alongside of him. It was admitted by the defendant that the number issued to him by the Provincial Secretary, under the provisions of the Motor Vehicles Act, for his (the defendant's) car, for the year 1912, was number 2636. There was no evidence establishing the identity of the driver of the car or his companion.

For the defence it was shewn that the defendant and his son James resided alongside of each other in Bay street, in the city of Hamilton, there being a space of from 60 to 75 feet between the two houses, and at the inner end of this space was the defendant's garage, where his car was kept. To go from the garage to the street, the car would have to proceed along this space, and within four or five feet of the defendant's "den."

. . .

Lionel E. Garrett was his chauffeur at the time of the accident, and had been in the defendant's service continuously from the previous month of May. . . . Neither the father nor son understood running an automobile.

James Thompson, the son, testified that the garage is kept locked with a Yale lock, furnished with two keys, one of which at the time of the accident was in his custody, and the other in that of Garrett, the chaffeur.

On the 27th December, the father and son were at home, and the son is positive that the car was not out of the garage on the evening in question, and that it could not have been taken out without some one in one or other house hearing it. Garrett, the

chauffeur, swore that he never was in Toronto in an automobile, that he had entire charge of the defendant's car, and was positive that it was not out on the night in question. He testified that . . . during the whole time of his service with the defendant, no one, except himself, had ever driven the car.

It was left to the jury to bring in a general verdict.

In his charge to the jury the learned Judge told them that, before finding for the plaintiff, they must be satisfied that the car was the defendant's.

The following is the report of the case after the jury's return to Court to announce their verdict:—

"The Foreman: We find this is the number of his car.

"The Court: That the car was the defendant's car?

"Foreman: And we agree to give him $150.

"The Court: Then, your verdict is for the plaintiff for $150, is that so?

"Foreman: Yes.

"Mr. Wardrope: On behalf of the defendant, I would like to call your Honour's attention to the fact that he says that the number of the car was the number of the defendant's.

"The Court (addressing the jury): Make yourself clear on that: what do you mean? Before a verdict can be given for the plaintiff, it is necessary for you to find, on this evidence, that the car that injured the plaintiff was the defendant's car.

"Foreman: By the number, that is all we can go by. We cannot tell by the evidence.

"The Court: It is necessary for you to find before you can give any verdict to this man that the car which injured this man was the car of the defendant. It is for you to say whether that is so or not.

"Foreman: That was the verdict the rest of them gave. So far as they can tell, by the evidence, this was the number of the car.

"The Court: Do I understand you all to agree that the car that injured the plaintiff was owned by the defendant Thompson?

"The jury: Yes, we all agree on that."

From the foregoing extract it would seem that the joint deliberations of the jury did not result in their finding that the car was the defendant's, but only that it bore the same number as the defendant's car. Such was their first verdict. . . .

Taking this report as a whole, I think it means that the jury disregarded the evidence for the defence, and that their

only real finding was that the number of the defendant's car was the same number as that of the car which injured the plaintiff. If the last remark of the jury, "Yes, we all agree on that," is a finding that the defendant owned the car, then that verdict was arrived at, apparently, as the jury sat in the box, and without any further joint deliberation.

When a jury, after mature deliberation in a jury room, renders, as here, a verdict for one party, giving, as here, reasons therefor, and is then instructed, as here, by the trial Judge on a crucial point to reconsider their verdict, such reconsideration should, I think, take place in the privacy of the jury room, and not in open court.

On the jury's first verdict in this case the plaintiff was not entitled to judgment. On the second, if allowed to stand, he is. Within probably a minute after their foreman had informed the Court that they were unable, from the evidence, to determine the ownership of the car, the jury, from their seats in the box, find that the defendant was the owner.

The evidence of the defendant was entitled to due consideration, but was apparently ignored by the jury, who seem to have based their verdict solely on the fact that the number of the car in question was the same as the defendant's.

That circumstance may have established a prima facie case, but the defendant adduced evidence the other way which should not have been ignored. . . . It was the duty of the jury to give due consideration to the important evidence adduced on behalf of the defendant. This, apparently, they have not done, and their verdict should be set aside and a new trial had. The costs of the first trial, and of this appeal, to be costs in the cause

SUTHERLAND, J., agreed in the result.

RIDDELL, J.:— . . . There being no pretence that the car which did the damage was upon the highway (or even out of Hamilton) with the knowledge or consent of the defendant, or that it was in charge of a servant of the defendant, the question comes up squarely whether the owner of a motor vehicle is liable for damage occasioned by his car when the car is not on the highway with his consent, express or implied, and not in charge of his servant. . . .

[Reference to sec. 19 of the Motor Vehicles Act, 1912, 2 Geo. V. ch. 48, the statute in force at the time of the accident.]

It seems to me that it is the clear meaning of the statute that

the owner of a motor vehicle shall be liable in damages for any damage done by his vehicle by reason of violation of the Act or regulation of the Lieutenant-Governor in Council. . . . This point was left undecided in Smith v. Brenner (1908), 12 O.W.R. 9 (see at p. 12), 1197, and other cases; and it is now passed upon for the first time.

But the statute goes no further to assist the plaintiff in this action—it is necessary to prove that the car was that of the defendant.

Nearly all, if not all, the evidence on this point was the number attached to the car, "Ont. 2636."

The statute requires every motor vehicle to be registered (sec. 3), and while being driven on a highway to have attached a marker furnished by the Provincial Secretary (sec. 8 (1)), and to have no number exposed other than that upon the marker furnished . . . under a penalty of fine or imprisonment (sec. 24), the driver being liable to arrest in the meantime (sec. 34). If this car was not that of the defendant, some one was committing a crime. With the ordinary presumption against crime, the evidence adduced was, in my view, such as to justify the jury in finding that the car was that of the defendant. . . .

[Reference to Trombley v. Stevens-Duryea Co. (1910), 260 Mass. 516.]

The jury at first seem to have found only that the car in question had the defendant's number upon it; but, in answer to the learned Judge's question, they find specifically that the car which did the injury was owned by the defendant. . . . The trial Judge had the right to ask questions to clear up the answers and to find exactly what the jury meant . . .; it is the final, not the tentative, answer which must govern: Herron v. Toronto R.W. Co., 28 O.L.R. 59, at pp. 77-78.

The learned Judge, however, both during the giving of evidence and in his charge, laid it down without qualification that "the moment a person suffers an injury by coming in contact with a motor vehicle on the highway, the owner . . . is liable for that injury, unless he proves that the damage did not arise through any negligence or improper conduct on his part or on the part of his chauffeur . . . ." This view of the law is based upon the provisions of sec. 23 of the Motor Vehicles Act, 1912, 2 Geo. V. ch. 48. . . .

In the present case, had the negligence charged been that of some one for whose negligence the defendant must answer in law (irrespective of sec. 19), I think that sec. 23 would apply;

but the alleged wrongdoer is not in such a case; and I do not think that the section can be invoked here.

Had it been proved, and found by the jury, that the accident in question had been caused by a violation of the Act or of a regulation of the Lieutenant-Governor, I think that the owner of the car could not escape liability; but that has not been proved or found. . . .

[Reference to Smith v. Brenner, supra; Mattei v. Gillies (1908), 16 O.L.R. 558; Ashick v. Hale (1911), 3 O.W.N. 372; Bernstein v. Lynch (1913), 28 O.L.R. 435; Verral v. Dominion Automobile Co. (1911), 24 O.L.R. 551; Babbit on Motor Vehicles; Huddy on Automobiles.]

The plaintiff did not obtain a finding that the accident was caused by a violation of the Act; and, therefore, this verdict cannot stand. Evidence was given which would have justified such a finding; and, consequently, the action should not now be dismissed, but should go down for a new trial. This new trial should be general, and the defendant thus enabled to adduce the evidence subsequently obtained.

As the mistrial was due to an error in matter of law by the trial Judge, the point being taken by himself, the costs of the former trial and of this appeal should be in the cause.

LEITCH, J., agreed with RIDDELL, J.

New trial ordered; costs in the cause.

NOVEMBER 10TH, 1913.

RE STEWART HOWE AND MEEK LIMITED.

MEEK'S CASE.

Company—Winding-up—Contributory—Subscription for Shares—Allotment—Payment by Assignment of Patent for Invention—Books of Company—Estoppel—Finding of Fact by Referee—Appeal.

Appeal by Charles S. Meek from the order of MIDDLETON, J., 4 O.W.N. 506.

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

H. E. Rose, K.C., for the appellant.
W. N. Tilley, for the liquidator.

SUTHERLAND, J.:—An appeal by Charles S. Meek from the order of Middleton, J., allowing an appeal by the liquidator from the order of an Official Referee, in winding-up proceedings, placing the appellant upon the list of contributories, as a stockholder of the company in respect of 100 shares, on which nothing had been paid. The company was originally incorporated with a capital stock of $100,000, and up to the 9th December, 1908, only eighty per cent. thereof, or 800 shares, had been subscribed.

The company desired to increase the capitalization to $150,000. The Companies Act, 7 Edw. VII. ch. 34, sec. 13 (a), requires that before such increase can be applied for it is necessary that ninety per cent. of the original stock shall have been subscribed.

A meeting of the stockholders was called for the date mentioned, at which Meek made a verbal application for 100 shares of the treasury stock, and a resolution was duly passed directing that a certificate or certificates for the same should forthwith be issued and delivered to him. At the same meeting, a resolution was passed authorising the increase of the capital stock to $150,000. At a meeting of the directors held on the same day, the 100 shares referred to were treated as subscribed for, as a by-law authorising the increase of the capital stock was passed, wherein it was recited that ninety per cent. of the original capital had been allotted and taken up. According to the evidence of Meek, before this date he had been negotiating with the company for the sale of a patent owned by him, but an agreement as to the price had not been arrived at. His evidence is, that it was well understood and agreed, when he subscribed for the 100 shares, that they were to be paid for out of the purchase-price for the said patent. The application for the increased capital stock was thereupon made and granted.

On the 23rd January, 1909, at a meeting of shareholders, a resolution was duly passed authorising the purchase from Meek of the patent, for the price or consideration of 260 paid-up shares of the common stock of the company, and authorising its issue to him upon the patent being duly assigned to the company. On the same day, a by-law was passed by the company which authorised the issue as preferred stock of 440 shares of the 500 shares by which the capital stock had been increased.

The patent was duly assigned by the appellant, and the 260 shares of fully paid-up stock were issued to him. . . .

The Referee has found that "this accounts for the whole capital stock of the company, namely: original issue 800 shares; issued on the 23rd January, 1909, to C. S. Meek in payment of his patent, 260 shares; preferred stock 440; total 1,500 shares," and, further, that the 100 shares in question are included in the said 260 shares.

Middleton, J., in his judgment refers to the subsequent conduct of Meek with reference to a further application for increased capital, and in connection with annual statements of the company rendered to the Government, as disclosing facts inconsistent with the present contention on his part that the 100 shares were included in the 260 and paid for by the patent. His decision appears to me to be, in effect, that Meek, in view of these things, cannot now be heard to say that the 100 shares of stock were ever paid for, and that he is estopped. He apparently declined to accept or give effect to his testimony.

The Official Referee, who heard the testimony and saw the witnesses, came to the conclusion that the evidnce of Meek that the subsequent and apparently inconsistent statements were the result of oversight and inadvertence and did not truly represent the facts, was to be believed and accepted. The reason for increasing the amount of the capital stock was to "bring in new capital." The company was "in need of more money."

It is evident that the expectation and intention was to sell part of the additional stock to outsiders and secure money in that way. It is most unlikely that Meek, under the circumstances, was willing to subscribe for the 100 additional shares, for which he would be liable to pay in cash. His own statement that he really subscribed for it at the time in order that the amount of stock subscribed would be sufficient to obtain the increase of capital, and on the understanding and agreement subsequently carried out that it should be paid for by the sale of the patent at a later date, appears to me a reasonable one.

I am unable to see that the learned Judge whose judgment is now in appeal was justified in reversing the Referee's finding of fact. I think that the latter was warranted in coming to the conclusion he did, if he gave credit to the testimony, as apparently he did. It is true that the books of the company are, under the statute, prima facie evidence for certain purposes,

but they are not conclusive; neither do I think that the other matters referred to are.

The appellant contends that, unless it is a case in which he is estopped, there is no other ground upon which the respondent can succeed. It is not, however, shewn that any one acted upon the subsequent statements to his prejudice. Indeed the respondent does not so much argue that it is a case of estoppel as of election. That is to say, he contends that, whatever the appellant's original intention was as to paying for the 100 shares by the assignment of the patent, he, at a date later than its transfer and the issue of the 260 shares given in payment therefor, elected to take the position and state that the 100 shares were unpaid, and must now be held to that.

I am unable to agree with this view, and think that the Master's finding of fact should not have been disturbed, and that the appeal should be allowed with costs.

MULOCK, C.J., and CLUTE, J., agreed.

RIDDELL, J.:— . . . The books of the company are not conclusive; and reports, etc., even if verified by affidavit, do not in themselves operate as an estoppel simply by the fact of their being made. These statements all go to credit, and the appellant would have no very great ground of complaint if the Referee had preferred the report verified by his affidavit to his oral testimony. That was, however, for the Referee, and he has seen proper to believe the oral evidence of Meek and his solicitor, and I can find no sufficient ground for saying that the Referee was wrong.

Where it is a matter of the credit to be given to witnesses who appear before the Master or Referee, it is the well-established practice in Ontario that he is the final judge of the credibility of these witnesses: Booth v. Ratté, 21 S.C.R. 637, 643, and other cases cited in Hall v. Berry, 10 O.W.R. 954.

Giving credit to the oral evidence of the appellant and his solicitor, it is manifest that, while the $10,000 stock was not paid for at the time of the allotment, it was paid for by the appellant by the transfer the following year of his patent. That the $26,000 stock paid-up, which he was to receive for his patent, included this $10,000 stock, is clear, not only from the oral evidence, but also from the undoubted fact that, to enable the company to give him $26,000 common stock, it was at the time necessary to count in this $10,000 stock.

I think, therefore, that the Master's judgment should be restored on this point. But the difficulty has arisen in the determination of the fact through the negligence (to use no harsher term) of the appellant, and he should have no costs here or below.

Appeal allowed with costs; RIDDELL *and* LEITCH, JJ., *dissenting as to costs.*

NOVEMBER 10TH, 1913.

RE NORTH GOWER LOCAL OPTION BY-LAW.

Municipal Corporations—Local Option By-law—Voting on—Qualifications of Voters—Scrutiny by County Court Judge—Deduction of Votes from Total and from Majority—Premature Final Passing of By-law by Council—Absence of Prejudice—Deputy Returning Officer—Interest—Bias—Ballots Marked for Incapacitated Voters—Neglect to Require Declarations—Municipal Act, sec. 171*—Irregularity Cured by sec.* 204*—Names Added to Voters' List by County Court Judge—Voters' Lists Act, secs.* 21, 24*—Irregularities in Procedure—Certificate of Judge—Finality.*

Appeal by the applicant from the order of KELLY, J., 4 O.W.N. 1177, refusing to quash the by-law.

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

F. B. Proctor, for the appellant.

C. J. Holman, K.C., for the Corporation of the Township of North Gower, the respondents.

The judgment of the Court was delivered by SUTHERLAND, J.:—The vote on the by-law, as stated in the declaration of the Reeve, was as follows: "297 for and 192 against (total 489);" and the by-law, on that shewing, was apparently passed by four and one-fifth votes beyond the necessary three-fifths. A recount and scrutiny of the ballots followed before the County Court Judge, with the result that the figures were altered to 295 for and 192 against the by-law (total 487). The Judge also decided that four persons who had voted had not the necessary qualifications, and he deducted these four votes, mak-

ing the final count, according to his certificate, dated the 19th February, 1913, to be, for the by-law 291, against 192 (total 483).

The first and second grounds are of a general character: (1) that the by-law did not receive the necessary three-fifths majority of votes; (2) that the voting was not conducted in accordance with the Acts in question, and that persons were allowed to vote whose names did not appear upon the last revised voters' list.

The third ground is to the effect "that unauthorised names were entered upon the list of voters of the said municipality, used in voting upon the said by-law, which names had not been entered upon the said lists of voters in accordance with the provisions and requirements of sec. 17 and subsequent sections of the Ontario Voters' Lists Act."

The evidence as to the way in which the names of two men, namely, Dalglish and McQuaig, appeared upon the list of voters used at the elections, is shortly put in the judgment appealed from in this way: "Their names not appearing on the original list, an application was made to the Judge of the County Court to have them added, and they were so added by him, after which he certified to the revised list, as required by sec. 21 of the Act." He then proceeds to say: "I do not think that I am required to go behind this certificate and examine into the sufficiency of the various steps by which the Judge arrived at his results."

It does not appear that the County Court Judge held any formal Court for the purpose of adding these names to the list. The men had made a written application to the clerk to have their names added, and the clerk informed the Judge of the fact. Their names then appear to have been added. It was apparently admitted, or, at all events, not disputed, that, in any event, the two men were persons who were entitled to have their names on the list. If their votes had been disallowed, this in itself would not have affected the result, as it would be necessary to disallow at least four votes to do this. I agree, however, with Kelly, J., in his view that he was not called upon to go behind the certificate of the Judge as to the voters' list: Re Ryan and Village of Alliston (1910-11), 21 O.L.R. 583, affirmed 22 O.L.R. 200.

The fourth ground of objection is, "that illiterate voters were allowed to vote on the by-law without first having taken the declaration required by sec. 171 of the Consolidated Muni-

cipal Act.'' Two of the voters were unable to read or write, and the third was blind. As to this objection, the learned Judge whose judgment is in appeal was right in holding, under the authority of Re Ellis and Town of Renfrew, 23 O.L.R. 427, that ''the omission to take the declaration is merely an irregularity in the mode of receiving the vote, and so covered by the curative clause of the statute, sec. 204.''

The fifth objection is, that the by-law was finally passed within one month after its first publication in a public newspaper, contrary to the provisions of sec. 338 (3) of the Consolidated Municipal Act.

Sub-section (2) of sec. 338 refers to the publication of the by-law, and sub-sec. (3) is as follows: ''Appended to each copy so published and posted, shall be a notice signed by the clerk of the council stating that the copy is a true copy of a proposed by-law which has been taken into consideration and which will be finally passed by the council (in the event of the assent of the electors being obtained thereto) after one month from the first publication in the newspaper, stating the date of the first publication, and that at the hour, day, and place or places therein fixed for taking the votes of the electors, the polls will be held.''

The by-law was first published on the 13th December, 1912, and given its third reading on the 13th January, 1913.

The case of Re Duncan and Town of Midland, 16 O.L.R. 132, has application to this ground of appeal, and is, I think, conclusive against it. . . .

[Quotation from the judgment of Osler, J.A., at p. 155.]

The present case is really on the facts a stronger one, as a recount and scrutiny of the ballots was actually had.

The sixth ground of objection is to the effect that a deputy returning officer was disqualified by interest from holding that office. It is unsupported by any evidence that could properly sustain it.

Upon all grounds the appeal fails and should be dismissed with costs.

NOVEMBER 10TH, 1913.

BLACKIE v. SENECA SUPERIOR SILVER MINES LIMITED.

Principal and Agent—Agent's Commission on Sale of Shares—Agreement—Limitation to Shares Sold to one Person—Evidence—Pleading—Payment into Court—Costs.

Appeal by the defendant company from the judgment of LATCHFORD, J., in favour of the plaintiff, for the recovery of $1,238.75, and $10 paid into Court by the defendant company, and costs, in an action by a mining broker to recover $6,600, alleged to be the balance due to him by the defendant company as commission or remuneration for selling shares of the capital stock of the defendant company.

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

R. S. Robertson, for the appellant company.

J. W. Mahon, for the plaintiff.

The judgment of the Court was delivered by SUTHERLAND, J.:—The defendant company has a capital stock of $500,000, divided into 500,000 shares, of the par value of $1 per share. In the autumn of 1911, the company was in financial straits, and it was necessary to raise money in some way for development purposes, or otherwise it would be liable to lose certain rights under a lease. It was thought best to try to sell some of the stock of the company, and a written arrangement was entered into with the plaintiff on the 15th November, whereby, if he sold stock at a fixed price of 30 cents a share, he would be paid a commission of 15 per cent., on the stock being paid for. He apparently never sold any shares under that agreement. Nevertheless, he says: "I am claiming under that agreement, with the exception of the modification under which I am taking 5 per cent." He explains this by saying that, by a subsequent verbal arrangement made with the company, he agreed to reduce his commission to 5 per cent. upon all shares of the capital stock sold as a result of his efforts, the defendant company at the same time agreeing to reduce the selling price of shares to 17½ cents. He also says that, in negotiating with people at Rochester, N.Y., for the sale of stock, he was told by them that

there was no use making any proposition to them unless it included an amount of stock which would secure the control of the company. He also says that, after some preliminary negotiations with one Dewey, he got in touch with one Worth, already a stockholder, and his representative, Lyman, and, after some further discussion, the question of his commission finally came up for consideration. . . .

[Extracts from the testimony at the trial and from the correspondence between the parties.]

On the 29th February, 1912, a written agreement was entered into between Worth, of the first part, the company, of the second part, and Jackman and Segsworth, of the third part, under which Worth bought and the company sold to him 57,143 shares at 17½ cents, or in all $10,003—cash $5,000 and the remaining $5,003 on the 29th March, 1912. Under the agreement, Worth also secured an option to purchase all or part of 192,587 shares at the same price . . . Under the contract, the parties of the third part also gave Worth an option to purchase 1,000 of the shares held by them; so that Worth, under the agreement, immediately bought outright 57,143 shares and secured an option to purchase enough more shares to have ultimately 251,000 shares, that is, a controlling quantity of stock. . . . At or about the time the final agreement was entered into, the plaintiff was still considered a factor in the negotiations. . . .

The defendant company admits that as to those shares which Worth himself actually purchased under the agreement from the company, and a further 1,000 shares from the parties of the third part, in all 84,429, the plaintiff is entitled to a commission. The price of that number of shares at 17½ cents is $14,775, and the plaintiff's commission thereon would amount to $738.75. In his statement of claim he gives credit for $250 paid to him by the defendants on the 14th March, 1912, which would be the exact commission on the 28,572 shares, which up to that time had been issued to Worth himself. He also gives credit for two sums: $425, under date the 18th October, 1912; and $53.75, under date the 22nd February, 1913. The total commission on the remaining shares, namely, 55,857, issued to Worth, would amount to $488.75; and, deducting from this the $425 and the $53,75, there would be a balance of $10. In their statement of defence the defendants say that "the plaintiff never became entitled in any way whatever to commission on more than 84,429 shares," and further that they have already paid the plaintiff $728.79 for

commissions, and bring into Court the sum of $10 as sufficient to satisfy any further claim he may have against them. . . .

While it is perhaps somewhat doubtful whether the plaintiff could, on his own statement as to what the contract was, properly claim, as against the company, that he was entitled to any commission, the defendants recognised, and, I think, properly, that his services in the matter had been useful, and that he had been partly instrumental in interesting Worth again in the affairs of the company, and that in this way the latter ultimately was led to purchase 84,429 shares. If there was a contract at all, it was that indicated in Segsworth's letter of the 20th January, 1912, to the effect that they would pay him a commission of 5 per cent. "on the money realised from the deal, payable as it came in," and the plaintiff's letter of the 23rd January, in which he says that "he is agreeable to take 5 per cent. on cash as it is paid in."

It is plain, I think, that any shares sold beyond the 84,429 which Worth got, were not sold through the assistance or efforts of the plaintiff, but by the company through the work of Worth subsequent to the date of the agreement. I think the proper inference from the evidence is, that a commission on the 84,429 shares is the best which the plaintiff has any right to claim or be allowed for. He was paid all of this before action, with the exception of the $10 which the defendants brought into Court with their statement of defence.

I think that the appeal should be allowed; that the plaintiff should have his costs of the action down to the payment into Court by the defendants of the $10, on the Division Court scale, together with judgment for that sum only; and that the defendants should have their costs, on the scale of the Supreme Court of Ontario, of the action subsequently and of this appeal.

NOVEMBER 10TH, 1913.

*SHAW v. TACKABERRY.

Executor and Trustee—Sale of Land—Purchase by Agent of Executor — Ratification — Mistake or Fraud—Account of Profits—Action by Sole Beneficiary under Will—Locus Standi—Creditors' Claims—Claim by Executor as Creditor —Adjudication by Surrogate Court Judge—5 Edw. VII. ch. 14—Surrogate Courts Act, 10 Edw. VII. ch. 31, sec. 71—Conveyance by Beneficiary of her Interest in Land Sold—Evidence—Value of Property—Reference—Administration —Costs.

Appeal by the plaintiff from the judgment of FALCONBRIDGE, C.J.K.B., 4 O.W.N. 1369.

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

J. G. Kerr, for the plaintiff.

O. L. Lewis, K.C., and S. B. Arnold, for the defendants.

RIDDELL, J.:—Wallace B. Shaw died in November, 1910, having first made his last will and testament, wherein and whereby the defendant Tackaberry was appointed an executor, and the plaintiff, Shaw's wife, the sole beneficiary. Tackaberry took out letters of probate along with his co-executor, and took upon himself the whole burden of administration.

The estate was deeply involved, Tackaberry being amongst the creditors.

In the regular course of administration, it became wise to dispose of a house and lot, the property of the estate, in the village of Merlin; Tackaberry advertised it for sale. A day or two before the sale, he went to one Neal, who is described as an unlicensed conveyancer; and, as Tackaberry says in his examination for discovery (he did not give evidence at the trial), he told Neal to bid the property up. Neal says that, shortly before this, Tackaberry had seen him and told him that he would require him to look after some business; that upon the day in question he said to him, "Don't allow the property to be sold for less than $2,500;" and that, accordingly, he attended the sale

*To be reported in the Ontario Law Reports.

and bought the property at $2,200. He paid the deposit, $220, by cheque. He told Tackaberry that he (Tackaberry) must take the property; and Tackaberry, recognising a moral obligation, as he, Tackaberry, says, agreed to do so, because, as he says, "he bid for me." This is a clear ratification of the act of Neal as an agent in buying for Tackaberry. That Neal was acting as such agent is perfectly plain. Subject to what is said hereinafter, the transaction, then, is simply a sale by Tackaberry and his co-executor to Tackaberry; and there can be no question that Tackaberry took as trustee. Instead of the whole matter being open and above board, the form was gone through of a deed being made to Neal, Neal paying the balance of $1,980, and simultaneously Tackaberry gave his own cheque to Neal for the $2,200. This was on the 27th September, 1911.

In October, 1911, Tackaberry brought his accounts into the Surrogate Court of the County of Kent, in which he gave credit in his receipts for $2,200 for sale of the house and lot. Of the passing of these accounts, the plaintiff, the widow, had notice. No disclosure was made of the true situation of matters, and the accounts were allowed and passed.

In the fall of 1911 . . . property began to advance in value. The house in question had not been taken possession of by Neal. He sent intending tenants to Tackaberry; and, at least as early as the 1st January, 1912, Tackaberry had tenants in the house who paid him rent, $15 a month. Tackaberry had a sister, Mrs. Russell—his co-defendant—who had a note against him for $2,700. He directed Neal to make a deed of the property to his sister, and himself gave her a new note for $500. Tackaberry says in his examination for discovery that his sister knew about his being an executor and about his transaction with Neal; but there is no independent evidence as to that. There does not seem to have been any bargaining. "Mrs. Russell held a note against me for $2,700. She surrendered the note, and I gave her a deed of the place and a $500 note." This was on the 17th May, 1912, some time after the move in real estate matters, and was apparently without any attempt to procure a better price. Again the real transaction was concealed, the conveyance being taken from Neal to Mrs. Russell.

A sale was negotiated by Tackaberry to one Milton Shaw, on the 15th September, for $3,000.

The sister had been left a widow some twenty years ago . . . she came to live with Tackaberry, who looked after all her business. She made her home with him, and he charged her

nothing; any business deal would be altogether the result of Tackaberry's efforts or advice. He is a business man, built and owned an elevator, and is generally a man of capacity.

The plaintiff brings her action against Tackaberry and his sister, Mrs. Russell, calling upon them to account for profit made in connection with the house.

The position of Mrs. Russell need not be considered at any length. The only evidence offered against her was the examination for discovery of her co-defendant. That, we decided, could not be used against her; and all parties agree that the action should be dismissed against her, without costs of action or appeal. We pay no further attention to her, but consider Tackaberry the sole defendant.

The defence of Tackaberry is fourfold: —

1. Innocence on his part of any fraud or wrongdoing.

2. The defence of sec. 71 of the Surrogate Courts Act, 1910, 10 Edw. VII. ch. 31.

3. That the plaintiff has no locus standi, as she cannot benefit by any sum to be received by the estate, the debts being, it is said, far in excess of the amount of the whole estate.

4. That the plaintiff conveyed all her interest in the land.

There is another cause of complaint by the plaintiff. The defendant asserts that he has a large claim against the estate. In his accounts passed upon by the Surrogate Court Judge he set out a payment to himself of a dividend upon this claim. It was necessary for the Surrogate Court Judge to make an extended inquiry into the dealings between the deceased and executor for years; and he did so, adjudicating upon the defendant's claim.

The defendant sets up 10 Edw. VII. ch. 31, sec. 71.

At the trial, before the Chief Justice of the King's Bench, the case was decided adversely to the plaintiff as to the first claim, on ground number 3; and also on the second claim on the ground stated above: 4 O.W.N. 1369.

The plaintiff now appeals.

It will be convenient to dispose of the second claim first. The appeal is based on the case of Re Russell (1904), 8 O.L.R. 481, . . . After this decision, the law was amended by (1905) 5 Edw. VII. ch. 14; and, under that statute, a Divisional Court, Meredith, C.J. (now C.J.O.), writing the judgment, decided in In re MacIntyre (1906), 11 O.L.R. 136, that the Surrogate Court Judge has not the power to compel a creditor to prove his claim in the Surrogate Court and to allow it

or bar it. But the Court also decides that, if an executor has in good faith paid the claim of a creditor, the Surrogate Court Judge has a jurisdiction to consider the propriety of that payment and to allow or disallow the item in the accounts There can be no difference between a payment to another creditor and a retainer by the executor to pay his own claim.

I think, therefore, the learned Chief Justice of the King's Bench is right in this matter, and the appeal should be dismissed. On account of the manner in which the defendant has dealt with the estate, I think, in dismissing the appeal, that the plaintiff may have leave to appeal from the order passing the accounts, or to bring an action based upon mistake or fraud as she may be advised.

The chief claim of the plaintiff is, that the defendant should be held for the value of the property transferred to his sister.

It will be well to deal with the technical defences in the first place.

On the 19th June, 1911, the plaintiff made a deed of all her "estate, . . . whether by way of dower or otherwise," in the lands, to Tackaberry and Oliver, "the executors of the estate of Wallace Bruce Shaw." . . . The solicitor who acted for her says, "The only interest then which we were considering was her dower interest," and the object "was to enable the executors to go in and make clear title and sell the property." It is clear that no one intended the deed to be a conveyance of any money which might remain in the estate after the payment of creditors, and the only effect in law, as in intention, was to enable the executors, as executors, to dispose of the fee. The land remained the land "of the estate," and the proceeds were to come into and form part of the estate. There is no ground for the contention that the grant was made to the executors as trustees for the creditors only, or to them absolutely. So, even if we should concede that the deed is sufficiently wide to cover all money to be received by the grantor out of the sale of the land or otherwise, the defence is advanced no further. This money will still be held in trust for the widow after the creditors are paid. This consideration disposes of defence No. 4 above mentioned.

The defence is set up that, in any event, the plaintiff cannot participate in the fruits of the litigation, if successful, and therefore she cannot sue. . . .

Here the plaintiff is the sole beneficiary of the will, and is entitled to the surplus over and above what is necessary to

pay creditors. That a contingent interest (not being a mere possibility) will entitle an alleged cestui que trust to sue is clear: Bartlett v. Bartlett, 4 Hare 631; Governesses Benevolent Institute v. Rushbridger, 18 Beav. 467; Re Shepherd's Trust, 1 W.R. 704.

Prima facie the plaintiff has an interest; if it be not so, it lies upon the defendant to prove it—that he has wholly failed to do.

This disposes of the defence No. 3.

The defence under the statute may stand or fall with the main defence—if there was no mistake or fraud in the defendant asserting that the land had been properly sold, realising $2,200 only, it may be that the statute applies.

On the evidence it must be held that either the alleged sale to Neal was not a sale at all, as Neal had been employed by the vendor, Tackaberry, simply as a puffer, so that as between Neal and Tackaberry there was no real sale, or Neal was employed to bid as agent for Tackaberry, and his bidding and buying was afterwards ratified by the defendant adopting his act. What the defendant considered a moral obligation was probably a legal obligation. At all events, knowing that Neal had bought for him, Tackaberry approved and ratified the sale. In either case he would not be entitled to hold the property against the estate, and Neal, his agent, held the land in trust for the estate.

The defendant then dealt with the land as his own; he used it to pay his own debt with—or says he did—this was a fraud upon the trust. . . .

Mrs. Russell . . . is out of the action, and the only relief to which the plaintiff is entitled against the remaining defendant is an account and payment of the rents and profits received by him or which should have been received by him up to the time of the conveyance to his co-defendant, and also payment of the excess over $2,200 of the sum for which he should have sold the house when he caused it to be conveyed to his sister. That this relief should be granted is clear. A trustee for sale must inform himself of the real value of the land: Lewin on Trusts, 10th ed., p. 485. On the evidence before us, he made no inquiry, no endeavour to obtain the best price; it was notorious that land was looking up, and it is fairly clear that a considerable advance might be looked for. His clandestine dealing with the property is much to be reprobated. . . .

The representing to the Surrogate Court that $2,200 had been

received as the sale-price of the land was either a mistake or fraud on the part of the defendant; and, assuming that the Surrogate Court Judge had jurisdiction to pass upon the item, such a decision is not binding.

The plaintiff is entitled to judgment for the defendant to account to the estate for the difference between the real value of the land at the time he directed Neal to convey, and Neal did convey, to Mrs. Russell, and the sum of $2,200; also to an account of rents and profits.

It is to be hoped that the parties will be able to agree upon this value; if not, we fix $2,700 as the value, and either party may take a reference at peril as to costs. If a reference is had, on this head, the Master will dispose of the costs of the reference in view of what we have said.

The plaintiff is, as against Tackaberry, entitled to her costs of action and appeal; as against Mrs. Russell the appeal and action are dismissed without costs. The defendant Tackaberry will not be allowed to charge his costs or any of them against the estate.

NOTE:—The plaintiff has informed us that she prefers to take a reference as to the value of the property, even at the risk of costs. There will be a reference to the Master at Chatham as to this and the amount of rents and profits.

She suggests that there should be an order for administration of the estate. I cannot see any necessity for this; the defendant has acted improperly, but there is no reason to think him either unable or unwilling to complete the administration properly. Orders for administration are not granted as of course.

LEITCH, J., agreed with RIDDELL, J.

MULOCK, C.J., agreed in the result, for reasons stated in writing.

SUTHERLAND, J., agreed in the result.

Appeal allowed in part.

NOVEMBER 10TH, 1913.

*FLETCHER v. CAMPBELL.

Principal and Agent—Agent's Commission on Sale of Land—Commission to be Paid out of Purchase-money—Sum in Cash to be Paid to Agent as Deposit—Purchaser Making Cash Deposit but Failing to Complete Purchase, through no Fault of Vendor—Forfeiture of Deposit—Claim of Agent to Retain it for Commission.

Appeal by the plaintiff from the judgment of WINCHESTER, Co.C.J., dismissing an action, brought in the County Court of the County of York, to recover from the defendants, real estate agents, $200 alleged to have been paid to them for the plaintiff, and in favour of the defendants upon their counterclaim for $190.

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

J. E. Jones, for the plaintiff, the appellant.

H. H. Shaver, for the defendant, the respondent.

SUTHERLAND, J.:—The plaintiff, the owner of land in Toronto, placed it, through her son, in the hands of defendants, real estate agents, for sale. They procured a written offer from a purchaser, at a price and on terms to which the plaintiff assented, as shewn by her signing an acceptance thereof. She knew nothing personally about the vendor. A deposit of $200 was given by the purchaser to the defendants when the offer was signed. This offer contained the following clauses: "The agent's commission to be paid out of and form part of the purchase-money," and "$200 in cash to the said Campbell and Anderson as a deposit." It turned out that the proposed purchaser was wholly unable to carry out the contract, had no money of his own, and could obtain none. He never was a purchaser able, however willing, to complete the contract. It was in consequence put an end to.

The plaintiff asked the defendants for the deposit, but they, claiming it for commission, refused to hand it over, and in this action the plaintiff seeks to recover it.

*To be reported in the Ontario Law Reports.

The action was tried before Winchester, County Court Judge, and he seems to have come to the conclusion that, "$200 of the purchase-money having been paid," the defendants were entitled to succeed. He, therefore, dismissed the action. He supports his judgment by a reference to the following cases: Mackenzie v. Champion (1884), 12 S.C.R. 649; Copeland v. Wedlock (1905), 6 O.W.R. 539; and Smith v. Barff (1912), 27 O.L.R. 276.

But in none of these cases did the contract in question contain a clause such as is in the present document, to the effect that the agent's commission was to be paid out of the purchase-money.

It is conceded in this case that the carrying out of the contract was not prevented by any action on the part of the vendor, but that she was prepared to do everything necessary on her part to complete it. It was not carried out, but rendered abortive and abandoned by the defendant solely in consequence of his inability to perform it. He had never been a purchaser capable of carrying it out.

The contract providing that the $200 was paid as a deposit places the purchaser in the position that that sum was by implication a security for his completion of the contract, which would go towards the purchase-money if he carried it out, but, if he repudiated it or failed to do so, would be forfeited to the vendor: Howe v. Smith (1884), 27 Ch.D. 89.

The defendant must be held to have taken the $200 for the vendor on this basis. When the money became forfeited to the vendor by the failure of the purchaser, there had been in fact no money paid on the contract out of which the agents could be paid commission. The contract of sale they had obtained was thus ineffective to enable them to compel payment of their commission or retain for that purpose the money which came into their hands as a deposit: Robinson v. Reynolds, 3 O.W.N. 1262.

Upon this ground I am of opinion that the appeal should be allowed. At the time the contract was signed by the plaintiff, she received $10 from the defendants as expenses for coming to town in connection with the contract. The defendants will, of course, have credit for this, and there will be judgment in the plaintiff's favour for $190, with costs of action and appeal.

MULOCK, C.J., agreed.

RIDDELL, J., wrote an opinion in which he referred to Marriott v. Brennan, 14 O.L.R. 508, 509; Robinson v. Reynolds, 3 O.W.N. 1262; Hull v. Burrell, [1911] 2 Ch. 551; Palmer v. Temple, 9 A. & E. 508, 520, 521; Howe v. Smith, 27 Ch.D. 89; Beale v. Bond, 17 Times L.R. 280; Cornwall v. Henson, [1899] 2 Ch. 710, [1900] 2 Ch. 298; Smith v. Barff, 27 O.L.R. 276; and concluded:—

What I think comes to be decided and should be decided in the present case is, that where the only agreement for payment of an agent's commission contains the term that it is to be paid out of the purchase-money, the agent cannot recover if the sale falls through without the fault of his employer, and the only money the employer or agent receives on the purchase is the deposit which falls to be forfeited.

With that the law, the defendants had and have no right to retain the deposit, and the plaintiff should have judgment for $200, interest thereon from the teste of the writ, and her costs.

As to the counterclaim, I am wholly at a loss to understand upon what principle it is supposed to rest. The defendants had the $190, and it would be an extraordinary result if the plaintiff should be obliged to pay it over again. The counterclaim must be dismissed with costs here and below.

LEITCH, J., agreed.

Appeal allowed.

NOVEMBER 10TH, 1913.

PRESSICK v. CORDOVA MINES LIMITED.

Master and Servant—Injury to and Death of Servant in Mine—Action by Widow for Damages—Negligence—Statutory Duty—Absence of Guard—Breach—Mining Act of Ontario, 1908, sec. 164, sub-secs. 24, 25—Defective Condition of Tool—Contributory Negligence—Finding of Jury—Absence of Evidence to Support—Rejection of Finding by Trial Judge—Equal Division of Appellate Court—Dismissal of Appeal—Costs.

Appeal by the defendants from the judgment of LATCHFORD, J., 4 O.W.N. 1334, upon the findings of a jury, in favour of the plaintiff.

The action was brought by the widow of John Arthur Pres-

sick, deceased, on behalf of herself and the infant children of the deceased, for damages for the death of the deceased, who was killed by falling down a winze or shaft in the defendants' gold mine, in which he was working on a drill, under the orders of the defendants' foreman.

The questions put to the jury and their answers thereto were as follows:—

1. Was the death of the plaintiff's husband caused by any negligence on the part of the defendants? A. Yes.

2. If so, in what did such negligence consist? A. The opening through which the man Pressick fell should have been guarded or protected in some manner.

3. Was the accident caused by any defect in the works, ways, machinery, plant, or premises of the defendants? A. Yes.

4. If so, what was such defect? A. That wrench used was defective, also the opening being unguarded or unprotected.

5. Was the opening through which Pressick fell dangerous by reason of its depth? A. Yes.

6. Was it practicable to cover or guard that opening, having regard to the work of breaking down the pillar of ore on which Pressick was engaged at the time of the accident? A. Yes.

7. Could Pressick, had he exercised reasonable care and diligence, have avoided the accident? A. Yes.

8. If so, in what did such negligence consist? A. Should of used more care in using a defective wrench.

9. What damages have the plaintiff and her children sustained by reason of the accident? A. $1,750.

Judgment was given for the plaintiff for that sum, and the defendants appealed.

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

H. E. Rose, K.C., and J. W.Pickup, for the defendants.

F. D. Kerr, for the plaintiff.

MULOCK, C.J., for reasons stated in writing, was of opinion that the place where the work was being carried on was a mine within the meaning of the Mining Act of Ontario, 1908, and that sec. 164 of that Act, as enacted by the Mining Amendment Act, 1912, sec. 18, sub-secs. 24 and 25, made it the duty of the defendants to guard the shaft or winze, and their failure to do so was a breach of a statutory duty; and, if failure to guard was the ultimate cause of the accident, then, irrespective of negligence, the defendants were liable: Groves v. Lord Wimborne, [1898] 2 Q.

B. 402. He was also of opinion that the jury's finding with regard to the wrench, in answer to question 4, could not, upon the evidence, be disturbed; and that the answers to questions 7 and 8 did not relieve the defendants of liability—having regard to the evidence and the charge they were meaningless; and there was no evidence that the deceased knew that the wrench was defective. The learned Chief Justice was, therefore, of opinion that the appeal should be dismissed with costs.

SUTHERLAND, J., agreed with MULOCK, C.J.

RIDDELL, J., was of opinion, for reasons stated in writing, that, if the jury meant by the answer to question 8 to find that the deceased knew that the wrench was defective, there was ample evidence upon which they might so find; and that, upon the finding of contributory negligence, the appeal should be allowed and the action should be dismissed, both with costs.

LEITCH, J., agreed with RIDDELL, J.

THE COURT being equally divided, the appeal was dismissed, and with costs, the dissenting Judges withdrawing their judgment as to costs, and agreeing that the appeal should be dismissed with costs.

NOVEMBER 11TH, 1913.

REX v. HAMILTON.

Municipal Corporation—County By-law Regulating Pedlars—Peddling on Boundary Line between Counties, without License—Magistrate's Conviction — Jurisdiction — Municipal Act, 3 & 4 Geo. V. ch. 43, secs. 433, 436, 439.

Appeal by Albert Whiteside, the informant, from the order of KELLY, J., ante 58, quashing the conviction of the defendant for peddling goods without a license, contrary to a by-law of the county of Huron.

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

W. Proudfoot, K.C., for the appellant.

J. G. Stanbury, for the defendant.

THE COURT dismissed the appeal with costs.

NOVEMBER 11TH, 1913.

*BUCHAN v. NEWELL.

Broker—Purchase of Shares for Customer—Notification by Post—Sufficiency—Delay in Delivering Shares—Refusal to Pay—Liability for Price Paid by Broker—Sale by Broker—Conversion—Damages—Market Price when Sold—Deduction—Set-off.

Appeal by the defendant from the judgment of the Junior Judge of the District Court of the District of Nipissing, in favour of the plaintiffs, in an action to recover $287.20, the balance remaining due of an amount advanced by the plaintiffs to purchase for the defendant 1,000 shares of the Standard Porcupine Gold Mining Company.

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

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

J. M. Ferguson, for the plaintiffs.

MULOCK, C.J.:—The plaintiffs were carrying on business in partnership as brokers in the town of Haileybury, and the defendant was a railway conductor residing in the town of North Bay.

On the 4th April, 1911, the defendant sent to the plaintiffs a telegram worded as follows: "Kelso, 4th April. Get me 1,000 Standard: draw on me Bank of Ottawa."

The plaintiffs telegraphed their Toronto agents to purchase shares. This was done, and on the 5th April the plaintiffs received a letter from their agents advising them of the purchase. Thereupon the plaintiffs, on the 5th April, 1911, sent by post to the defendant's proper post-office address a notice advising him of the purchase. The agents had also purchased other shares of the same stock for the plaintiffs and sent to them one stock certificate for all the shares purchased.

In order to furnish to the defendant a stock certificate for his shares, the plaintiffs were obliged to forward to Montreal the stock certificate received from their Toronto agents, in order, they say, "to get it split." When they received a separ-

*To be reported in the Ontario Law Reports.

ate certificate for the defendant's 1,000 shares, the plaintiffs, on the 12th May, 1911, drew on the defendant for the amount owing, attaching the stock certificate to the draft. The defendant refused to accept, and on the 20th September the defendants sold the plaintiff's shares, realising therefor $50, which amount, less commission and Government tax, they credit to the defendant on their claim, leaving the balance due $277.20; and for this amount, with costs, the learned trial Judge gave the plaintiffs judgment; and from that judgment the defendant appeals.

The defendant had had previous dealings with the plaintiffs in the purchase of other shares of mining stocks, and it is reasonable to assume that he was aware that it would be necessary for the defendants to purchase the shares in question through a Toronto broker. It is not shewn that the Toronto brokers selected by the plaintiffs for this purpose were not a competent and reputable firm, and, therefore, the plaintiffs did all that they were reasonably called upon to do when they instructed the Toronto firm to make the purchase.

It is not shewn that there was any unreasonable delay in the tender to the defendant of the shares in question; nor are the plaintiffs responsible for any delay occasioned by the stock certificate having been sent to Montreal to be "split." That course was occasioned by the action of the Toronto agents; but the plaintiffs, having been impliedly authorised by the defendant to make the purchase through a Toronto firm, and having made a proper selection of agents, are not responsible for the manner in which they filled the order.

I, therefore, think that the delay complained of by the defendant constitutes no defence. Further, such delay did not cause damage to the defendant. He must be held to have received the plaintiffs' notice of the 5th April advising him of the purchase; and, according to his own testimony, the defendant, with that notice in his hand, could have negotiated and sold his stock as readily as if the certificate had been in his possession.

The other ground of defence is, that the plaintiffs sold the defendant's stock. The plaintiffs were entitled to a lien on the stock for the price which they paid for it; but, as it was not pledged to them, they had no right to sell it, their only right being to retain possession. But they sold it at the market price. Although liable to the defendant in trover, the latter is entitled to recover only the value of the stock when sold by the plaintiffs, viz., $50, and the plaintiffs are to set off the same pro tanto against their claim.

For these reasons, I think that the defendant's appeal fails, and should be dismissed with costs.

RIDDELL, J., gave reasons in writing for the same conclusion. He referred to Hoffman v. Livingston, 14 J. & S. (N.Y.) 552; Prout v. Chisholm, 89 Hun 108, 21 App. Div. N.Y. 54; Bate v. McDowell, 17 J. & S. (N.Y.) 106; Rosenstock v. Tormey, 32 Md. 169, 178: as authority for the proposition that it is the duty of a broker who has been employed to buy stock to give reasonably prompt notice to his principal. The duty of the broker is completely performed in that regard, when the usual method of giving notice in such cases has been followed. The posting of a letter, properly addressed and stamped, is sufficient evidence of its receipt by the addressee: Saunderson v. Judge (1795), 2 H.Bl. 509; Warren v. Warren (1834), 1 C.M. & R. 250, 252; Shipley v. Todhunter (1836), 7 C. & P. 680; Woodcock v. Houldsworth (1846), 16 L.J.Ex. 40; Dunlop v. Higgins (1848), 1 H.L.C. 381; Household Fire and Carriage Accident Insurance Co. v. Grant (1879), 48 L.J.Ex. 577 (C.A.); Nesbitt v. London Mutual Insurance Co., Ontario High Court of Justice, Queen's Bench Division (not reported), referred to in Canadian Druggists' Syndicate Limited v. Thompson (1911), 24 O.L.R. 108, at p. 111. When one employs a broker to do business on a stock exchange, he should, in the absence of anything to shew the contrary, be taken to have employed the broker on the terms of the stock exchange: Forget v. Baxter, [1900] A.C. 467, at p. 479. . . . The plaintiffs did not assert ownership of the stock, and did not sell it as their own—they sold it under the belief that they might legally so deal with it under the rules of the stock exchange, but as the property of the defendant. This was a conversion, and they must account for the value of the stock, and cannot charge the defendant with commission, etc., as though the sale had been legal. . . . There is no evidence of employment to do business on any particular or any stock exchange.

The defendant is entitled to be paid by way of damages the full value of the stock, $50, without deduction. But the plaintiffs are entitled to their claim for $325 and interest; these may be set off, and the defendant will pay the costs of action and appeal.

As the result of calculating interest would be to give the plaintiffs more than the amount of the judgment already entered, and there is no cross-appeal, the order . . . will be simply to dismiss the appeal with costs.

LEITCH, J., agreed in the result and with the opinion of RIDDELL, J.

SUTHERLAND, J., agreed in the result, for reasons stated in writing.

Appeal dismissed with costs.

NOVEMBER 13TH, 1913.

ST. CLAIR v. STAIR.

Discovery—Affidavit on Production—Claim of Privilege for Reports—Identification—Sufficiency—Documents Obtained for Information of Solicitor—"Solely."

Appeal by the plaintiff from the order of FALCONBRIDGE, C.J. K.B., in Chambers, 4 O.W.N. 1580.

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

S. H. Bradford, K.C., for the plaintiff.

R. McKay, K.C., and A. R. Hassard, for the defendants.

THE COURT dismissed the appeal with costs.

NOVEMBER 15TH, 1913.

GORDON v. GOWLING.

Contract—Sale and Delivery of Hay—Breach of Contract—Damages—Reduction by Payment—Appeal—Costs—Counterclaim—Scale of Costs.

Appeal by the plaintiff from the judgment of the County Court of the County of Welland dismissing an action for damages for failure to deliver hay according to agreement; and awarding the defendant $76 on his counterclaim for damages for refusal to accept hay shipped by the defendant to the plaintiff.

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

F. W. Griffiths, for the plaintiff.
No one appeared for the defendant.

The judgment of the Court was delivered by RIDDELL, J.:— The plaintiff brought his action in the County Court of the County of Welland, but failed, and now appeals.

The facts as found by the trial Judge are as follows. The defendant sold to the plaintiff all his timothy hay and lucerne (except what he needed for his own use) at $12 per ton f.o.b. The plaintiff was to have notified the defendant when he wanted the hay delivered, but failed to do so. Some 22¼ tons of lucerne were delivered to and received by the plaintiff, and a draft for $268 in payment therefor was accepted and paid. The plaintiff complained: (1) of non-delivery of the timothy; and (2) of the alleged failure of the lucerne delivered to fill the contract. At the trial the County Court Judge found, and rightly found, against the plaintiff, holding that he should have given notice of the time at which delivery was required of the timothy, and further that the lucerne delivered was such as was contracted for. So far as these findings were concerned, we dismissed the appeal on the hearing. But the plaintiff also complains on this appeal that the trial Judge did not take into consideration the payment by the plaintiff of $50 at the time of the purchase. The point is specifically taken in the notice of motion; and we must, therefore, examine the proceedings as best we may without the assistance of counsel to determine the fact. That $50 was paid by cheque enclosed in the letter of the 13th September, 1912, is quite clear; it is sworn to and not denied. The sight draft for payment of the lucerne was also paid before receipt of the lucerne. Therefore, all the goods received were paid for, and $50 more was paid by the plaintiff to the defendant.

The Court below gives $60, being "damages to the defendant for 30 tons" of timothy, i.e., damages for non-acceptance of timothy sold; and also for "$16 for damages with reference to the lucerne." This $16 is shewn by the reasons for judgment to be $2 per ton for 8 tons of lucerne sold to the plaintiff but not accepted. The $50 is not taken into consideration at all, as it should have been.

Accordingly, the damages awarded the defendant should be reduced by $50; and the judgment on the counterclaim will be for $26 in all, with costs on the County Court scale.

"The costs of a counterclaim should be on the scale of the

Court in which the action is brought by the plaintiff, unless the Judge . . . makes a different order:'' Court of Appeal in Foster v. Viegel (1889), 13 P.R. 133. The appeal should be allowed to that extent.

As to costs, we cannot give the defendant costs—he did not appear on the argument. There is a double reason why the plaintiff should not have costs—he succeeds only in part, and he should have applied to the trial Judge to correct what is a mere oversight. There will be no costs of appeal.

HODGINS, J.A., IN CHAMBERS. NOVEMBER 11TH, 1913.

RE KETCHESON AND CANADIAN NORTHERN ONTARIO R.W. CO.

Appeal to Supreme Court of Canada—Judgment of Appellate Division on Appeal from Award under Railway Act, sec. 208—Right of Appeal—Supreme Court Act, sec. 36—Approval of Security—Undertaking to Apply to Supreme Court under Rule 1.

Motion by the railway company for an order approving of the security on a proposed appeal to the Supreme Court of Canada from the judgment of the First Divisional Court of the Appellate Division of the Supreme Court of Ontario, ante 36.

Featherston Aylesworth, for the railway company.
E. D. Armour, K.C., for the claimants.

HODGINS, J.A.:—If I were clear that no appeal lay, it would be my duty to refuse to approve of the security: see Townsend v. Northern Crown Bank (1913), 4 O.W.N. 1245. Appeals in cases of awards under the Railway Act, originating in other provinces, have reached the Supreme Court of Canada; but I am unable to find any instance from this Province. In the present state of the decisions, I do not think that I ought to prevent the appellants from testing their right to appeal, as they undertake to do, under Rule 1 of the Supreme Court, leaving that Court to decide the point involved.

Under sec. 208 of the Railway Act, R.S.C. 1906 ch. 37, an

appeal from the award of the arbitrators may be taken to a Superior Court in Ontario. The appellants had no choice but to appeal to a Divisional Court of the Appellate Division, and are, therefore, saved from the difficulty pointed out in Birely v. Toronto Hamilton and Buffalo R.W. Co. (1898), 25 A.R. 88; Ottawa Electric Co. v. Brennan (1901), 31 S.C.R. 311; James Bay R.W. Co .v. Armstrong (1907), 38 S.C.R. 511.

But none of these cases seem to me to involve any negative of the proposition that an appeal lies, under sec. 36 of the present Supreme Court Act, to that Court, from the highest Court of final resort, in any Province, where such Court is either a Court of appeal, or, if of original jurisdiction, is a Superior Court.

The right to revise, if necessary, the decision of the statutory appellate Court should exist, in view of the extensive power given to it "to decide any question of fact upon the evidence taken before the arbitrators, as in a case of original jurisdiction."

I, therefore, approve of the security.

HIGH COURT OF JUSTICE.

ALCORN, MASTER IN ORDINARY. OCTOBER 27TH, 1913.

RE FARMERS BANK OF CANADA.

MURRAY'S CASE.

SPROAT'S EXECUTORS' CASE.

Bank—Winding-up—Contributories—Subscribers for Shares — Action for Rescission of Subscriptions—Fraud and Misrepresentation—Settlement of Action—Order Dismissing — Recitals—Assignment of Shares—Completion of Settlement before Organisation Meeting of Shareholders—Subsequent Attempt to Allot Shares—Absence of Notice of Allotment —Finding that Subscribers never Became Shareholders.

In a proceeding for the winding-up of the bank, the liquidator presented a list of proposed contributories, among whom were James Murray, personally, and James Murray and John Murray, as executors of John Sproat, deceased.

The liquidator's application to have these persons' names settled on the list of contributories was heard and evidence thereon was taken before the Master in Ordinary.

James Bicknell, K.C., and Morley, for the liquidator.
George Bell, K.C., for the alleged contributories.

THE MASTER:—I think that the names of the above alleged contributories should be removed from the list as presented by the liquidator, and that they are not indebted for the amount said to be unpaid on their subscriptions or under the double liability imposed by the Bank Act.

By writ of summons, tested of the 22nd October, 1906, they brought an action against the Farmers Bank of Canada, its provisional directors and executive officers, asking by the endorsement, among other things, for a declaration that their subscriptions were void, for rescission, and for an injunction restraining the defendants from proceeding thereon, and alleging that such subscriptions were obtained by fraud and misrepresentation.

The liquidator now asks to retain James Murray on the list for double liability under two subscriptions, one for 25 and one for 10 shares of $100 each, and James Murray and John Murray, executors of John Sproat, for double liability for a subscription for 100 shares of like amount each, obtained from them by one W. J. Lindsay, an agent of the bank.

On the return of a motion by the plaintiffs for the injunction prayed, on the 27th October, 1906, an affidavit of Lindsay was filed, in which he says that, on the previous day, he had interviewed all the eleven plaintiffs, including Sproat and James Murray, with the concurrence of the manager of the bank and its solicitor; that he had at that interview paid back to each all moneys paid for stock, had given an undertaking to return notes for unpaid balances, and had obtained from each an assignment of his stock to him, Lindsay. He had in fact paid James Murray $300—all the latter had paid. Sproat had paid nothing. The assignments by James Murray and John Sproat so obtained are produced by the liquidator, each having annexed a writing intituled in the Court and cause, duly signed and witnessed, in which each states that he has "now no interest in this litigation, and desires that this action be not proceeded with."

James Murray was examined before me, and detailed the

grounds of fraud and misrepresentation alleged in his case, and his repudiation of his first subscription alleged to be for 25 shares, within a day or two days; he said that that subscription paper was then, on the spot, returned to him, when he destroyed it in Lindsay's presence, as he distinctly recollects, and signed one for 10 shares only.

W. R. Travers made an affidavit, filed on the said motion, in which he says that he produces the Murray subscription for 25 shares marked as exhibit N, and the Sproat subscription as exhibit D. The liquidator now produces such subscriptions. Neither is so marked. He further says (agreeing with James Murray's evidence) that the second Murray subscription, for 10 shares, was substituted for the first, for 25 shares, which was intended to be cancelled, and that he produces the former as exhibit O to his affidavit. The liquidator also produces this 10-share subscription, which is not so marked. A letter is put in, dated the 21st July, 1906, purporting to be from John Sproat, per his wife, charging that his subscription had been raised by Lindsay from 10 to 100 shares, and Lindsay's promise to make it right.

In answer, on the same motion, there were filed affidavits of the defendants Gallagher, Ferguson, Fraser, and Lown, provisional directors, stating that the proceedings in the action, and particularly the motion for an injunction, "are calculated to, and will, if proceeded with, very seriously injure and prejudice the Farmers Bank of Canada and seriously prejudice and injure the interests of the shareholders or subscribers for stock of the said bank, of whom there are now in all over 500," and each deponent adds his belief "that it is absolutely essential and in the interest of the said bank, and in the interest of the shareholders hereof, and also in the interest of the plaintiffs in this action, that the said motion and the proceedings thereunder should be forthwith stayed." Part of the "proceedings thereunder" was an endeavour (up to that point unsuccessful) to procure an examination before a special examiner at Toronto of the defendants in support of the motion for an injunction. The importance to the bank of preventing such an examination and of smothering the action is apparent. The assignments to Lindsay by the eleven plaintiffs, all produced as exhibits to his affidavit, as appears by those of Sproat and James Murray, produced before me, were, no doubt, prepared in typewriting in the office of the defendant bank's solicitor, and Lindsay took the bundle, accompanied by the written disclaimers above-men-

tioned, armed and ready with pen and ink, to the plaintiffs, and procured their execution the day before the plaintiffs' motion came on. So confronted—all moneys being repaid and notes provided against—the bank's solicitor had matters his own way. He astutely took, by consent, as upon his own motion for an order setting aside the subpœna and appointment for examination of the defendants, an order staying all proceedings thereon and on the plaintiffs' injunction motion, and concluding as follows: "And it appearing that the said plaintiffs John Sproat, George Castle, William A. Dixon, William McLean, Finlay McCallum, Robert Hume, James Murray, George Denoon, and John McLeod, have assigned and transferred their applications for the issue of shares of stock of the Farmers Bank of Canada and their right to shares in accordance with the said applications to one William J. Lindsay, and that the claims of the plaintiffs last above-named and also the obligations and liabilities of the said plaintiffs have ceased: it is ordered and adjudged that this action be and the same is hereby dismissed out of Court without costs."

The judgment carefully refrains from any statement or admission that the plaintiffs—including Sproat and James Murray—were shareholders. Both had promptly repudiated, and brought an action for a declaration that the subscriptions were void.

On the 27th October, 1906, W. R. Travers, acting general manager of the bank, wrote to James Murray a letter informing him of the judgment, expressing regret that the bank had lost Murray and Sproat as subscribers, and concluding: "You will understand that you are now relieved from any further responsibility to this bank." A copy of this letter is produced by the liquidator.

All the foregoing was complete a month before the organisation meeting and election of directors. Months afterwards, the directors apparently assumed to attempt to allot shares on the said subscriptions. There is no evidence that any notices of allotment or of calls were ever sent to either Sproat or Murray. I am of opinion, from the appearance of the books, that no notices were sent, and that there was no intention to send any to Sproat or Murray, but it served the purposes of the directors to proceed on the assumption—as Lindsay was their creature—that such shares existed, and they apparently, as shewn by the evidence of Mr. Frederick Clarkson, used those alleged shares, sold them, and probably got the money for them.

Neither Sproat to the date of his death, the 25th June, 1910, nor James Murray, before or since, had anything further to do with the matter—never received dividends, never attended meetings, voted, or knowingly allowed their names to appear on the bank's books, nor did they, or either of them, receive any certificate of shares or other communication from the bank until notice by the liquidator claiming to put them on the list.

The touchstone is, did they or either of them ever become shareholders? I think they did not. Counsel for the liquidator bases his long and luminous argument and instructive exposition of the banking law on the assumption that they did. He opens his argument by saying: "Undoubtedly Mr. Sproat and Mr. Murray subscribed for shares. Undoubtedly they became shareholders. Undoubtedly they executed to their attorney, Mr. Lindsay, transfers of their shares or some of them," etc. If his assumption were correct, then his elaborate argument, that they could not and did not legally assign under the Bank Act and could not and did not rid themselves of their liability, including the double liability, but got only Lindsay's guaranty, has the greatest force. I, however, do not agree that they became shareholders, and I think it not very material what the form of the judgment relieving them was. The plainly evident intention of what took place, which I have detailed, shewed feverish haste by the provisional directors to get rid of the plaintiffs and their action, on any terms. I do not think that any argument against Sproat and Murray can be built on the assignments which Lindsay obtained not complying with the Bank Act. There was nothing to assign, and the idea of assignment came wholly from the bank. At that time the matter rested wholly on the application—there were no directors or books or certificate allowing the bank to commence business for a month afterwards. When the directors were elected, there was no attempt, as I think, to allot to Sproat or Murray, and no notice of allotment. There is a right to go behind the words of the judgment and shew the real transaction: Cockburn v. Kettle (1913), 28 O.L.R. 407; Sauermann v. E. M. F. Co. (1913), 4 O.W.N. 1510.

The requirement of sec. 13 of the Bank Act is, that there be $500,000 *bonâ fide subscribed,* and that $250,000 *thereof* has been paid to the Minister. If, as I gather, Sproat's and Murray's alleged subscriptions were used, it is impossible to say, in the light of the judgment and what preceded it, that their subscriptions were *bonâ fide* or that any part thereof had been paid. All that Sproat and Murray had under the subscriptions

was a right (if the subscriptions had been *bonâ fide*) to receive shares from the directors when elected. The judgment wiped out the right, and neither the provisional directors nor the directors had a right to deal further with or recognise those subscriptions. The bank should not have taken the assumed transfer to Lindsay, or made the subsequent transfer, and Sproat and Murray are not responsible for acts of the bank assuming to deal with shares that did not exist. The subscriptions never ripened into shares. The effect of the judgment was to find no binding subscriptions, and that the subscriptions were, as alleged in the endorsement of the writ, void. No authority is, or I think can be, cited holding that one who signs a subscription never can be relieved of his liability otherwise than under the formalities of the Bank Act. Fraud can be, and I think in this case was, relieved against to the extent of declaring in effect that there never was a binding subscription.

The names of James Murray, and of James Murray and John Murray, executors of John Sproat, deceased, should be struck off the list of contributories as submitted by the liquidator.

LENNOX, J. NOVEMBER 10TH, 1913.

RE MAIR AND GOUGH.

Vendor and Purchaser—Contract for Sale of Land—Objections to Title—Will—Construction—Devisees for Life — Executors—Implied Power of Sale—Remainderman Joining in Conveyance.

Motion by the vendors, under the Vendors and Purchasers Act, for an order disposing of objections to title arising upon a contract for the sale and purchase of land.

C. W. Plaxton, for the vendors.
G. Keogh, for the purchaser.

LENNOX, J.:—Authorities, of course, are often useful, sometimes exceedingly useful, in determining the construction of a will; but, before worrying about what has been decided in some other case, the initial question to be taken up is, what did the testator intend to do with his property, taking his words and judging of them according to recognised rules of construc-

tion? Upon a very careful perusal of the will of Matilda Elizabeth Mair, I fail to find an intention to confer an absolute beneficial estate in fee simple upon her brothers John and George. There is a gift over in this case—a manifest intention to confer a benefit, at least contingently, upon her nephew David Lansing Mair; and, although the rule is clear that, once a defined estate is clearly conferred in the earlier part of a will, it cannot afterwards be narrowed or cut down except by clear or express words, I cannot find any words anywhere that give a fee simple to these two men.

Then comes the question, not raised upon the argument of the motion, however, what rights, if any, beyond the simple specific use or enjoyment of this property for life, does the will confer, and, although not conferring a fee simple beneficially, does the will confer the power to sell and convey a fee simple? With a good deal of hesitation, I have come to the conclusion that the vendors have power to convey a fee simple estate to the purchaser, assuming, of course, as it seems to be conceded, that the testatrix was seized in fee. The vendors, in addition to being beneficiaries, are the executors of the will. The testatrix says that she is leaving the estate "entirely in their hands." She intended to give them more than a mere life estate. She says that they may use "the corpus for their own benefit," and that "any balance which may be left," which would be equivalent to "the balance, if any, which may be left," is to go to her nephew. They cannot use the corpus and diminish it, as it is clearly intended they may do, without effecting a sale. I think that a power of sale is, therefore, to be implied. When a sale is effected, they will have a right, if they require it, to encroach upon the principal money. Beyond this requirement, it is the intention of the testatrix that the residue shall go to the nephew.

This is very similar to, but not so definite as, the will in Re Davey, 2 O.W.N. 467.

If I am correct in this conclusion, it becomes immaterial as to the joinder of David Lansing Mair in the conveyance; but, even if it were otherwise, although I cannot say that a desirable method of conveyancing has been adopted, I have no doubt at all that the devisee, releasing and quitting claim in a deed by which the vendors by earlier paragraphs purport to convey a fee, will effectually convey the estate and interest of this residuary devisee, as well as of the vendors. The recital and release will also be available for the purchaser and those claiming under him as an estoppel against the residuary devisee and persons claiming through him.

For these reasons, there will be an order declaring that the objections made by the purchaser touching these matters are not well-founded, and that the conveyance tendered (with the declaration of David Lansing Mair) is sufficient.

There will be no costs.

BOYD, C. NOVEMBER 10TH, 1913.

DAVIS v. BROTHERHOOD OF LOCOMOTIVE ENGINEERS.

Accident Insurance—Death Claim—Death from Hæmorrhage—Evidence as to Cause of Hæmorrhage—Whether "Accident" or Disease—Finding of Domestic Tribunal.

Action by the widow of Frederick Davis to recover $2,000 upon a policy of accident insurance, the plaintiff's husband, the assured, having died, as the plaintiff alleged, from the effect of an accident.

C. St. Clair Leitch, for the plaintiff.

L. F. Heyd, K.C., and R. H. McConnell, for the defendants.

BOYD, C.:—The defendants are a fraternal benefit society, incorporated in the United States, but doing business in Canada, made up of policy-holders with certificates of membership, and confined to locomotive engineers who are in the Brotherhood.

Policies are issued for life insurance and accident insurance, and the deceased Davis was insured in both kinds.

He died on the 15th November, 1910; proof of death by disease, certified by the physician as "disease of the heart and vessels causing heart failure," was sent in by the local secretary of his division, 132, on a printed form furnished and used by the defendants, and the claim was promptly passed and ordered to be paid by the home or head office at Cleveland. Payment was to be made of the amount insured, $3,000, out of the fund raised for that purpose, in the following February.

In the case of "accidental death" the procedure of the association is, that the local secretary must notify the home office, and thereupon a form will be furnished for "proof of death to be made, also full particulars as to the cause of death."

Claims for the principal sum because of accidental death must be approved by the local secretary and three members of

the division, with seal attached, also a statement from the attending physician, before they can be entertained by the home office and officially approved by the president and general secretary and treasurer; the latter being authorised to determine whether or not any claim is valid: by-law 17 (1908).

The method provided by the association, which is binding on its members, is, that all claims for insurance should be made to and worked out by the secretary of the local division and its members, and should be presented in completed form for ultimate determination by the head office. This was observed in the case of the death claim, but was disregarded in the case of the accident claim.

The course pursued by the insured and his beneficiary, the plaintiff, was throughout of unusual character and not in conformity with recognised procedure. Manifestly the scheme of insurance was that the validity of each claim should be canvassed by the members of the local Brotherhood, who would know or learn of the accidents or ailments of their comrades, and be better able to judge of its truth and honesty than any outside body.

The peculiarity of this claim is that it was not made till over a month after the death, and then by lawyer's letter to Cleveland (the head office), and, further, the fact of there being an accident or accidents as now claimed was not disclosed by the deceased or known to his fellow-workmen during his life: one accident was said to be on the 28th April, 1910, and a second on the 21st May, 1910. The death was on the 19th November, 1910, and the first claim was by letter of the 16th December. The sole proof offered at the trial that the deceased had been injured rested on what he is said to have told his wife, and is evidenced by her alone.

The course provided for by the by-laws is, that the member, in case of accidental injury, must at once notify the local secretary, giving full particulars, and the latter must then immediately forward the notice to the head office, whereupon proper forms will be furnished by return mail, on which the injured member must make his claim for weekly indemnity: by-law 16.

The deceased had another accident and benefit policy besides this in question, and from both he would have drawn a larger monthly payment than his regular wages when on duty. The excuse given for his not giving notice of the injury and making claim for weekly benefits was that he was afraid of having to pass a medical examination and that he would be pronounced physically unfit for service on the railway. . . .

[Examination of the evidence.]

I am satisfied that the Brotherhood took the utmost pains to get at the facts of the case, and honestly reached the conclusion that no valid claim on account of death by accident was made out. After perusal of all the papers, and with the further light cast upon the claim and the proceedings by the evidence at the trial, I am constrained to say that I do not disagree with the result arrived at by the domestic tribunal.

The conduct and inaction of Davis and the beneficiary increased the difficulty of making satisfactory proof of the claim, even if it was a bona fide one. After the lapse of time allowed to pass, before the claim assumed its final shape, it was no easy matter for the associates of the deceased to get clear information as to the essential matters that ought to have been made perfectly plain by those who had the means of accurate knowledge, assuming the reality of the alleged injuries on the dates finally fixed upon.

Though the deceased may, without infringing the letter of the by-laws, have been able to waive his claim for weekly indemnity, yet his abstention from making such a claim under the circumstances must have caused suspicion of its bona fides in the minds of those so closely associated with him, who had not the slightest inkling of his injured condition until death and burial had removed all means of verification by autopsy or other personal examination. The widow objected to the body being exhumed. . . .

I have dealt with the facts only, and do not deem it needful to discuss the legal and other questions relating to the applicability of the statutes and the by-laws to this case.

The cause of death was hæmorrhage; but how occasioned? The one apparently certain datum would seem to be that this condition began or existed on the 30th April; but this is not coupled with any accident, except a vague statement that the man was strained in some way some time before, in getting under an engine to oil it. My impression is, from all the material, that the man was in a critical state of physical deterioration, sufficient to cause his death as and when he died, without any accident. If any intervening accidental cause induced or accelerated his end, that should have been indicated with some reasonable certainty by the evidence of competent physicians or experts. At present, all is, to my mind, vague, confused, and unsatisfactory.

I may add that several respectable witnesses gave evidence

before me to the effect that the deceased did not regard himself as suffering from the effects of an accident, but from some chronic stomach trouble. . . .

I may also recommend the defendants to revise their by-laws and forms of policy, and to correct many blunders or errors, some of which were pointed out at the trial.

I agree with the Local Division that the claim fails; and I dismiss the action—with costs, if asked.

MIDDLETON, J. NOVEMBER 11TH, 1913.

JONES v. HAMILTON RADIAL ELECTRIC R.W. CO.

Street Railways—Injury to Passenger Alighting from Car on Wrong Side—Invitation—Injury Caused by Unguarded Hole in Running-board—Negligence—Damages.

Action by husband and wife to recover damages for injury to the wife and expense and loss to the husband by reason of the negligence of the defendants, as alleged, when the wife was a passenger upon an open car of theirs, and in alighting from the car sustained the injury complained of by putting her foot into a hole in the running-board.

The action was tried before MIDDLETON, J., without a jury, at Hamilton.

W. S. McBrayne, for the plaintiff.

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

MIDDLETON, J.:—The cars operated on the defendants' railway are open cars, to which access may be had from a running-board on either side. Part of the line in question was operated as a double-track line. These two tracks merged into a single track, extending some considerable distance. The cars run to the end of the line, and are not then reversed; but, when the direction is to be changed, they are operated from the other end of the car.

For the purpose of preventing passengers alighting from the side adjacent to the opposite track, the cars are provided on each side with bars which can be placed along the sides of the car, thus preventing the passengers from alighting at that side.

When not in use, these bars are lifted to the top of the car, where they are hooked up.

At the time of the happening of the accident, a portion of the double track was flooded. This necessitated the passengers alighting, crossing over the obstruction resulting from the flood, and then continuing their passage in another car beyond the obstruction. When the car in question reached this transfer point, there was much confusion, owing to the alighting of all the passengers in the car and the embarking of passengers coming in the opposite direction. When the car reached this point, the bar was raised, probably by some of the passengers; and the plaintiff, attempting to alight, was injured.

As an additional means for the protection of passengers, and to secure the use of the proper side of the car while operating upon double tracks, the running-board or step along the side of the car is hinged, and when not in use is turned up against the side of the car and hooked in that position. When the car in question started upon its journey, this running-board was turned up and hooked; but it had been unhooked and turned down long before the point of transfer was reached.

Mrs. Jones, the injured plaintiff, was seated nearest to this side of the car. She waited until most of the passengers had alighted, and other passengers were embarking, when she followed others in getting off the car at this side. In the running-board there was a hole, four inches by ten inches; cut, it was said, to allow access to some parts of the truck; more probably cut for the purpose of allowing a freer motion to the truck on rounding a curve. This hole the plaintiff did not notice; and, putting her foot into it as she stepped down, her leg passed through it, and she fell forward, injuring her knee. She was suspended there until extricated. From the injury then sustained she suffered much, and may possibly yet have to undergo an operation, the cartilage of the knee being broken.

The defendants contend that there is no right to recover, as the accident happened while the plaintiff was getting off the wrong side of the car. I do not think that this is a defence, because the fact that the step was down and the bar raised amounted to an invitation to alight. It is true that, while the company is clearly responsible for the fact that the step was down, the reason of the bar being up may be attributed to an officious act by a passenger; but I think that it was the duty of the company's officers in charge of the car to see that the bar was not raised or that the bar was so fastened as to prevent its being readily interfered with by any intermeddler.

The object of closing the one side of the car was to avoid danger to the passengers from a car approaching on the other track; and, when the car was used on a single track line, both sides were left open. The portion of the road where the accident happened was at this time used as a single track line, because the car had to return for some distance upon the track on which it came, before it could reach any cross-over. The accident did not result from an occurrence such as the company's regulation was intended to guard against.

The existence of this unguarded opening in the step was entirely improper; and, finding, as I do, an invitation to alight, the plaintiff's right to recover is, I think, clear.

The amount to be recovered has given me much anxiety. It is always difficult to assess damages when the exact extent of the injury and its permanence cannot be ascertained. I have concluded to allow $2,000, to be apportioned $1,600 to the wife and $400 to the husband.

LATCHFORD, J., IN CHAMBERS. NOVEMBER 14TH, 1913.

REX v. McELROY.

Liquor License Act—Selling Intoxicating Liquor without License—Magistrate's Conviction — Motion to Quash—Evidence of Sale—Agency of Defendant for Purchaser.

Motion to quash a conviction of the defendant, made by the Police Magistrate for the Town of Collingwood, for unlawfully selling liquor without a license.

A. E. H. Creswicke, K.C., for the prisoner.
J. R. Cartwright, K.C., for the Crown.

LATCHFORD, J.:—A witness named McDonald deposed that he bought a bottle of whisky from McElroy, paying $1.25 for it. This is the only evidence of the purchase. On cross-examination McDonald put the matter in quite a different way. He said: "I gave $1.25 to McElroy to get me a bottle . . . He got the liquor."

It is contended on behalf of McElroy that the two statements must be taken together—the first as explained by the second—

and, accordingly, that McElroy was but the agent or messenger of McDonald and not liable to conviction: Rex v. Davis (1912), 4 O.W.N. 358. Before the magistrate such an argument would, no doubt, have great force; and it might be effective before me were I sitting in appeal from his decision; but, as I have to be convinced, before I can quash the conviction, that there was no legal evidence of a sale, the contention fails. There was undoubtedly some evidence of a sale. The magistrate believed that evidence, and rejected all evidence to the contrary. He did not credit what the witness said on cross-examination, and accepted his evidence in chief—and that evidence warranted the conviction.

The motion must be dismissed with costs.

BOYD, C. NOVEMBER 14TH, 1913.

*GLYNN v. CITY OF NIAGARA FALLS.

Highway—Electric Lighting Plant Operated by Municipal Corporation—Poles in Streets—Electric Shock Received by Person Leaning against Pole — Dangerous Condition — Notice of, to Corporation—Findings of Jury—Notice of Action — Want of — Time for Bringing Action — Public Authorities Protection Act—Application of—Public Utilities Act—Nonrepair of Highway— Nonfeasance — Misfeasance—Municipal Act, 3 Edw. VII. ch. 19, sec. 606—3 & 4 Geo V. ch. 43, sec. 2—Nonretroactivity—Damages—Infant Plaintiff—Payment into Court.

Action by Bernard J. Gynn, an infant, to recover damages for injuries caused by an electric shock received by him while leaning against an electric light pole in the city, and by his father, Patrick Glynn, to recover damages for nursing and medical expenses incurred by him in consequence of his sons injury and for loss of his services. The defendants, the city corporation, owned and operated the street electric lighting plant.

The action was tried before BOYD, C., with a jury, at Welland.

*To be reported in the Ontario Law Reports.

A. C. Kingstone, for the plaintiff.

E. E. A. DuVernet, K.C., for the defendants, the city corporation.

BOYD, C. (after setting out the facts):—The jury were entitled, in dealing with the facts, to utilise their knowledge of the world and of the usages of the day, and to invoke the aid of what had passed before their own eyes and at their own doors. See Regina v. Sutton, 4 M. & G. 542, and Pearce v. Brooks, L.R. 1 Ex. 215, 219. The answers of the jury shew that the defendants were notified of this source of danger within less than six months before the plaintiff was injured, and took no steps in the way of amendment. They find that the lad was exercising reasonable and proper care with regard to the pole—when the danger was latent.

The damages were certainly assessed on a very moderate scale, at $1,500 for the lad and $500 for his father.

The defence raises legal questions: first, that no notice of action was given and no action brought within three months after damage; and, further, by way of application to amend at the trial, that the action is barred by sec. 13 of the Public Authorities Protection Act, 1 Geo. V. ch. 22 (1911), and sec. 29 of the Public Utilities Act, 3 & 4 Geo. V. ch. 41 (1913).

This amended defence should not be allowed. First of all, the Public Authorities Protection Act does not apply to a municipal corporation (see sec. 17); and next, the Public Utilities Act (if it applies, which I do not consider), was not in force when the action was begun. The writ issued on the 22nd March, 1913; the Act received the Royal assent on the 6th May thereafter.

Dealing with the defence on the record: it rests upon the Municipal Institutions Act, 3 Edw. VII. ch. 19, sec. 606, which provides that an action lies against a municipal corporation in case of accident sustained by default to keep the highway in repair. That by a line of decisions is restricted to cases wherein the default is attributable to nonfeasance. Cases of misfeasance were held to lie beyond the statute and untouched by its preliminaries as to notice and time of suing. True it is that, owing perhaps to the many subtle distinctions which have been drawn between nonfeasance and misfeasance, the Legislature has, by 3 & 4 Geo. V. ch. 43, sec. 2, limited the time for bringing actions occasioned by municipal default, whether the want of repair was the result of misfeasance or nonfeasance; but I cannot

accede to the argument that this provision is retroactive, particularly as the Legislature has declared that the Act shall come into force on the 1st July, 1913.

It remains, therefore, to see whether, on the findings, this action is for nonfeasance or misfeasance. It appears to me plain that the cause of action was a piece of wrong-doing, "misfeasance;" the act of placing and keeping this long chain within 4 or 5 feet of the ground was a source of danger—a menace to the public from the time of its installation. Nothing was out of repair; there was nothing to be repaired; what was needed was a structural change by which the danger would be altogether taken away out of reach and touch of those who use the streets.

Besides this conclusion, which is decisive of the case, I am impressed with the plaintiff's argument that this electric light danger is not a matter within the purview of the Municipal Institutions Act, in the clauses relating to the liability to repair roads and bridges.

Judgment should be entered, with costs of action, for the $500 payable to the adult, and $1,500 to be paid into Court for the benefit of the infant, payable out to him on attaining majority or otherwise if otherwise ordered.

STEWART v. BATTERY LIGHT CO.—FALCONBRIDGE, C.J.K.B., IN CHAMBERS—NOV. 11.

Evidence—Motion for Foreign Commission—Examination of Plaintiffs Abroad—Nature of Action—Refusal of Motion.]—Appeal by the plaintiffs from the order of HOLMESTED, Senior Registrar, in Chambers, ante 195, in so far as it dismissed a motion for an order for the examination on a foreign commission of some of the plaintiffs. The learned Chief Justice said that, after much consideration and with some doubt, he was of the opinion that, under all the circumstances of the case, the Registrar's order ought to be affirmed. Appeal dismissed; costs of appeal to the defendants in any event. Grayson Smith, for the plaintiffs. W. G. Thurston, K.C., for the defendants.

McVEITY v. OTTAWA CITIZEN CO.—LATCHFORD, J., IN CHAMBERS —Nov. 14.

Particulars—Statement of Claim—Immaterial Allegation—Libel.]—Appeal by the defendants from the order of HOLMESTED, Senior Registrar, in Chambers, ante 237, dismissing the defendants' motion for particulars of paragraph 3 of the statement of claim. The appeal was dismissed with costs. Stanley Mills, for the defendants. J. T. White, for the plaintiff.