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APPELLATE DIVISION.

APRIL 6TH, 1914.

*COOK v. GRAND TRUNK R.W. CO.

Railway—Death of Servant—Brakesman—Action under Fatal Accidents Act—Cause of Death—Fault of Deceased—Disobedience of Rule—Negligence of Railway Company—Joint Negligence of both—Findings of Jury—Efficient Cause of Accident—Proximate Cause.

Appeal by the plaintiff from the judgment of MIDDLETON, J., 5 O.W.N. 347, dismissing an action (tried with a jury) in which the plaintiff, the widow and administratrix of the estate of John R. Cook, deceased, claimed damages for the death of her husband, who was employed by the defendant company as a brakesman, and was killed while engaged in uncoupling cars, owing, as the plaintiff alleged, to the negligence of the defendant company.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

G. S. Gibbons, for the appellant.

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

MEREDITH, C.J.O. (after stating the facts):—One of the operating rules of the respondent company, approved by the Board of Railway Commissioners for Canada, and well-known to the deceased, is the following: "254. Every employee is required to exercise the utmost caution to avoid injury to himself or to his fellows, and especially in switching or other movement of trains. Jumping on or off trains or engines in motion, enter-

*To be reported in the Ontario Law Reports.

ing between cars in motion to couple or uncouple them, and all similar recklessness, is forbidden. Train-masters, yard-masters, conductors, station-agents, foremen, and all others in authority are instructed to enforce this rule and to punish all violations of it. No person who is careless of others or of himself will be continued in the service of the company."

The following are the questions which the jury was directed to answer, and the answers to them:—

"Q. 1. Was Cook's death the result of his going between the cars while in motion to uncouple them? A. Yes.

"Q. 2. Were the logs at that time projecting beyond the ends of the cars? A. Yes.

"Q. 3. Were the logs properly loaded in the first place? A. Yes.

"Q. 4. Was Cook killed by being crushed by the logs while between the cars in motion? A. Yes.

"Q. 5. Did the defendants permit Cook to engage in the operation of trains without first requiring him to pass an examination on train rules? A. No.

"Q. 6. Were the defendants guilty of any negligence which caused the death of Cook? If so, what? A. Yes. By allowing the logs to project over the end of the car.

"Q. 7. Quite apart from any rules or regulations of the company, was Cook guilty of negligence in going between the cars while in motion? A. No.

"Q. 8. Damages? A. $3,500."

After the jury returned their answers, according to the stenographer's notes, the trial Judge addressed the jury as follows: "Gentlemen: I do not know that I quite understand what you mean by number 6, that is: Were the company guilty of negligence which caused the death of Cook? And, if so, what? You have answered: 'Yes. By allowing the logs to project over the end of the car.' Is that by not finding out that they had broken loose and reloading them? Is that your meaning, or what is your meaning? I do not want some other Court to say it is something other than what you intend." To which the foreman of the jury is reported to have replied: "We thought, your Lordship, the company should have had a man to inspect these logs and make them right; that is what we thought—before they came to the accident."

The trial Judge is reported to have then said: "You think they ought to have had some oversight of the cars so as to see that the logs did not break loose;" and the foreman to have replied in the affirmative.

In my opinion, the judgment was properly entered on these findings for the respondent.

Reading the answers to the first and sixth questions together, the effect of the findings, viewing them most favourably to the appellant, is, that the deceased's injuries were caused by the negligence attributed to the respondent by the answer to the sixth question, and the violation by the deceased of the rule which prohibited his entering between moving cars, and, assuming that the violation of the rule was but a negligent act on the part of the deceased, is a finding that the injuries were caused by the joint negligence of the respondent and the deceased; and that finding is conclusive against the right of the appellant to recover.

I am inclined to think, however, that the finding is not so favourable to the appellant as I have assumed, and that the answers of the jury mean that, though the respondent was negligent, the efficient cause of the accident was the deceased's own act of entering between the moving cars in violation of the rule which forbade him to do so.

It was argued by counsel for the appellant that the jury have not found that the violation of the rule was the causa causans of the accident, and that, in the absence of such a finding, the judgment should not have been entered for the respondent. I am unable to agree with that contention; but, if it were well-founded, there was, in my opinion, no evidence upon which the jury could reasonably have found that there was the interposition between the act of the deceased and the happening of the accident of anything which severed the causal connection between his act and the injury which he met with.

As is said by Mr. Beven in his work on Negligence, 3rd ed., p. 88, the decision in Smith v. London and South Western R.W. Co. (1870), L.R. 6 C.P. 14, establishes that "when negligence is once shewn to exist, it carries a liability for the consequences arising from it, whether they be greater or less, until the intervention of some diverting force, or until the force put in motion by the negligence has itself become exhausted." . . .

[Reference also to the same work, pp. 89, 152, 155.]

The act of the deceased . . . his entering between the moving cars, was a negligent act, and it is immaterial . . . what his view of the possibilities of it was. . . .

Counsel for the appellant cited and relied on Lake Erie and Western R.W. Co. v. Craig (1896), 73 Fed. Repr. 642, as authority for the proposition that, unless it is found that the

injury which the deceased met with was one that he ought reasonably to have contemplated as a possible result of his entering between the moving cars, his negligence in so entering could not be said to be the proximate cause of his injury, and, therefore, contributory negligence, disentitling the appellant to recover.

That proposition is supported by the case cited, but is not in accordance with our law. . . . When once negligence is established, the question of the deceased's view of the possibilities of his act is immaterial, and to his negligent act all the consequences which are the direct and natural outcome of it are to be attributed, whether the injury is a consequence that was foreseen or not: Halsbury's Laws of England, vol. 21, p. 648.

Thus far I have dealt with the case as if the deceased's act of entering between the moving cars was but a negligent act; and, being of opinion that upon that hypothesis the appellant's case fails, it is unnecessary to consider whether his so entering, in contravention of the rule, and bringing himself into a situation where he had no right to be and the respondent had no right to expect him to be, was not the proximate cause of the accident, as to which see Grand Trunk R.W. Co. v. Birkett (1904), 35 S.C.R. 296.

I would dismiss the appeal with costs.

MACLAREN and HODGINS, JJ.A., agreed.

MAGEE, J.A., agreed in the result.

Appeal dismissed.

APRIL 6TH, 1914.

RAMSAY v. CROOKS.

Contract—Sale of Motor Car—Second-hand Car Taken in Part Payment—Credit of Fixed Amount, to be Increased when Second-hand Car Sold—Refusal of Offer to Buy Car—Evidence — Construction of Agreement — Finding of Trial Judge—Reversal on Appeal.

Appeal by the plaintiff from the judgment of the County Court of the County of Wentworth in favour of the defendant on his counterclaim.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

F. Morison, for the appellant.

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

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The counterclaim is based upon an agreement between the parties dated the 27th March, 1912, for the sale by the appellant to the respondent of a motor car. The price of the car was $2,705, and the respondent was given credit on the purchase-price for $1,050 for a second-hand car which the appellant had taken as part payment.

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

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

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

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

There was, in our opinion, no evidence that would warrant such a conclusion. Nothing was said by O'Connor to indicate that he was prepared to give more than $1,100 for the car. There was no reason why the appellant should refuse an offer in excess of $1,100, as the whole of the excess would belong, not to

him, but to the respondent, and there is no evidence from which it can properly be found that the appellant could have got more than $1,100 for the old car. The price asked by the appellant was $1,300, which was enough to pay him all he was entitled to receive, and to leave a surplus of $200 to go to the respondent. There is nothing to indicate that the appellant was not acting in good faith, and I do not see what possible motive he could have had in asking $1,300 except to benefit the respondent.

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

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

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

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

APRIL 6TH, 1914.

BROWN v. TORONTO R.W. CO.

Street Railway—Injury to Passenger Alighting from Car—Negligence—Contributory Negligence—Findings of Jury—Form of Question Left to Jury—Evidence.

Appeal by the plaintiffs, husband and wife, from the judgment of one of the Junior Judges of the County Court of the County of York, after the trial of an action in that Court, with

a jury, dismissing the action upon the findings of the jury. The action was brought to recover damages for personal injuries sustained by the wife by reason, as the plaintiff alleged, of the negligence of the defendant company, and for expense and loss incurred by the husband in consequence of his wife's injury.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

T. N. Phelan, for the appellants.

D. L. McCarthy, K.C., for the defendant company, the respondent.

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

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

In order to understand these answers, it is necessary to mention that an accident had happened near the place where the female appellant was injured, and a crowd had gathered at the scene of it. The car in which the female appellant was travelling was an open one, and, when it come to where the crowd was gathered, some of the passengers, attracted by the commotion, got off the car while it was still moving. The jury appear to have thought that she was misled by this into thinking that the car had reached its stopping-place on Jones avenue, and their idea appears to have been that, seeing what was going on, the conductor should have tried to stop the car by ringing the bell.

The contest at the trial was as to whether, as the female

appellant testified, the car had come to a stop before she attempted to alight, or, as the jury found, it was still in motion when she alighted. That was clearly pointed out by the learned Judge; and there could, we think, have been no misconception on the part of the jury as to its being the crucial question.

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

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

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

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

In order to understand the meaning of this observation, it is necessary to refer to the form which it had been proposed the question should take. The question as at first proposed was, "Was the car in motion at the time the plaintiff attempted to get off?" And it was changed to the form in which it was eventually put, by eliminating the words "attempted to get off," and substituting for them the word "alighted." In suggesting this change, counsel for the respondent pointed out that "attempting to alight" means "from the time a passenger rises from the seat until she gets on the ground," and asked if the question should not be made to read, "Was the car in motion at the time she alighted?" To this Mr. Godfrey objected, saying that he thought the question should be struck out altogether; that the female appellant's whole case was, that, "while she was alighting, the car was in motion, because they had started the car after it stopped." In answer to this the learned Judge is reported to have said: "Oh, no, that is not the point. The woman says the car had stopped, and she started to go down, and then it started. Now all the other witnesses say the car had never stopped."

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

All this took place in the presence of the jury, and it is im-

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

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

The appeal fails and must be dismissed.

APRIL 6TH, 1914.

PHILLIPS v. CANADA CEMENT CO.

Master and Servant—Injury to Servant—Negligence of Foreman of Works — Contributory Negligence — Findings of Jury—Failure to Find what Negligence of Foreman Consisted in—Supplemental Finding by Court.

Appeal by the plaintiff from the judgment of FALCONBRIDGE, C.J.K.B., 5 O.W.N. 549, dismissing the action.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

Eric N. Armour, for the appellant.

W. B. Northrup, K.C., for the defendant company, the respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The action is brought to recover damages for personal injuries sustained by the appellant, who was a workman in the employment of the respondent, owing, as the appellant alleges, to the negligence of the respondent.

The negligence complained of is thus stated in paragraphs 2 and 3 of the statement of claim:—

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

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

The appellant's injuries were caused by an air-drilling machine toppling over and striking him. This happened on the night of the 24th January. He was helper to a man named Schrieber, who was in charge of another drilling-machine. The drilling-machine, the toppling over of which caused the appellant's injury, was in charge of a man named Buck Brant, and Edward Titterson was his helper. This machine, which weighed between 300 and 350 pounds, was being moved from where it had been standing, in order to be set up in another place about 12 ft. away, and had reached the place where it was to be set up, which was sloping ground, falling towards where the appellant was sitting with his back towards the machine. The machine was in the form of a tripod, each leg of which had a species of foot, upon which, when the drilling was going on, were placed iron weights to hold it in position. As I have said, the machine was placed in the position in which it was intended to stand, but the weights were not attached to the feet of it. Titterson was engaged in putting in the steel, which I understand to mean the drill, and Brant had gone for the weights. After putting in the steel, Titterson started to tighten the bolts to keep the steel in place. He was using a wrench for this purpose, and, while engaged in this work, owing to the slant of the ground, the pressure in lifting on the machine to tighten the bolts, and the absence of the weights on the feet of the machine, it toppled over and struck the appellant, who was sitting about six feet away from it in a direct line and about the same distance to one side of it. The appellant had finished the work at which he had been engaged, and had sat down in front of the fire to dry himself and his mittens. Russell Fox was the night foreman in charge, and

was present and saw these operations going on, and saw the appellant sitting in front of the fire, but made no objection to his being there. Fox says that he did not apprehend any danger of the machine toppling over or that the appellant was in a place of danger. It was known to Fox that machines had toppled over before, and he knew or ought to have known the condition of the ground where the machine was being placed.

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

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

I am, with great respect, of opinion that judgment should have been entered for the appellant on the findings of the jury. The question as to contributory negligence was, on the evidence, for the jury, and their finding as to it was warranted by the evidence. Under ordinary circumstances and conditions, the appellant had no reason to apprehend that he incurred any danger by taking his seat before the fire. Having regard to the condition of his clothing and his mittens, and the season of the year, it was a most natural thing for him to do. Why he should be charged with contributory negligence it is difficult to understand, when Fox, the foreman, did not, as he testified, apprehend that there was any danger of the machine toppling over. The appellant had a right to assume that the work of moving the machine would be properly done. It does not appear that he knew that it was being placed on sloping ground or that the steel would be bolted in, without the weights being attached to the feet of it, and, in these circumstances, the jury were well warranted in acquitting him of contributory negligence.

It is argued, however, that the only negligence proved was that of a fellow-servant (Titterson). This argument overlooks the fact that Fox, the foreman in charge, was present and saw what was going on. As I have said, he knew or ought to have known that the machine was standing on ground which sloped

towards where the appellant was sitting, and that, if the weights were not on the feet of the machine, it would be more likely to topple over than if it were standing on level ground. He knew that machines had toppled over on other occasions. He must have seen that the bolting in of the drill was being done while the machine was yet unweighted; and the jury were warranted in finding that he was guilty of negligence in permitting the operations to go on under his superintendence without seeing that every available precaution was taken to prevent injury to any one if the machine should topple over, or at the least seeing, before proceeding with the work as it was carried on, that the appellant moved away from the place in which he was sitting.

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

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

APRIL 6TH, 1914.

*WHITNEY v. SMALL.

Partnership — Operation of Theatres—Pooling Agreement—Construction—Death of Partner—Dissolution of Partnership—Right of Personal Representative—Judgment — Account—Reference.

Appeal by the defendant from the judgment of BRITTON, J., 5 O.W.N. 160.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

*To be reported in the Ontario Law Reports.

J. H. Moss, K.C., and C. A. Moss, for the appellant.

G. F. Shepley, K.C., and G. W. Mason, for the plaintiff, the respondent.

MEREDITH, C.J.O.:—The agreement upon which the action is based is as follows:—

"Toronto, Canada, March 30, 1901.

"This agreement made this 30th day of March, A.D., 1901, betweeen Clark J. Whitney, of Detroit, Michigan, and Ambrose J. Small, of Toronto, Canada, witnesseth: Said Whitney being sole lessee of the property known as the Grand Opera House, Hamilton, Ontario, and said Small being sole lessee of the New Grand Opera House, London, Ontario, and the Russell Theatre, Ottawa, Ontario, it is hereby mutually agreed as follows:—

"That the said Whitney does hereby agree to give said Small an undivided one-half interest in the lease of the said Grand Opera House, Hamilton, Ontario, together with its profits and emoluments, in consideration of which the said Small does hereby agree to give said Whitney an undivided one-half interest in the lease of the said New Grand Opera House, London, Ontario, together with its profits and emoluments, it being understood and agreed that both parties hereto are to assume an equal one-half risk under each of the above mentioned leases.

"Said Small further agrees to equally divide with said Whitney his share of the profits of the Russell Theatre, Ottawa, Ontario, and to use his best efforts to acquire the lease of the contemplated New Grand Opera House at Kingston, Ontario, and if successful to give said Whitney a one-half interest in same.

"That this agreement shall extend from the commencement of the theatrical season of 1901-02, beginning about August or September, 1901, to the expiration of the present leases of the above-mentioned theatres and any and all renewals thereof.

"That neither of the parties hereto shall assume control of or become connected with any other theatrical enterprise in the cities of Ottawa, Hamilton, London, or Kingston; or book attractions for any theatre in the cities of St. Thomas, St. Catharines, Chatham, Woodstock, Guelph, Galt, Stratford, Brantford, Belleville, or any other city in the Province of Ontario, excepting Toronto, except with the distinct understanding that the profits of such additional interests, including all booking percentages or booking fees, shall be merged into the funds of

Hamilton and London and divided equally, viz., fifty per cent. (50%) to C. J. Whitney and fifty per cent. (50%) to A. J. Small.

"Said Small to do the booking and look after the general management of the theatres and to see that true and accurate accounts are kept and rendered said Whitney.

"Profits to be divided at the end of each season.

"And the parties hereto further agree that this agreement shall be binding upon their heirs, executors, or assigns as though they had been specially mentioned herein.

"In witness whereof the parties hereto have set their hands and seals on the day and year first above written."

Whitney died on the 21st March, 1903, and the respondent was appointed administrator of his estate on the 17th June, 1907. . . .

I am, with respect, of opinion that the conclusion of the learned Judge was erroneous.

The fact that the agreement provides that the partnership shall continue until the expiration or sooner determination of the existing leases has no greater effect than if the date at which the leases expired had been stated in the agreement, and it had been provided that the partnership should continue until that date; and, if that had been the case, it is clear that the ordinary rule is, that, in the absence of an agreement to the contrary, a partnership is dissolved by the death of a partner.

Nor has the provision at the end of the agreement to which I have referred the effect of an agreement that the partnership shall not be dissolved by the death of either of the partners to it. It is a provision frequently used, sometimes without an appreciation of the purpose it is to serve, to prevent the necessity of inserting the words "his heirs,, executors, and assigns" after the name of a contracting party which may occur many times in an instrument. . . .

[As to the effect of the death of a partner, reference to Halsbury's Laws of England, vol. 22, par. 168; Gillespie v. Hamilton (1818), 3 Madd. 251; Pearce v. Chamberlain (1750), 2 Ves. Sr. 33.]

Being, as I am, of opinion that the partnership was dissolved by the death of Whitney, I do not see why the rights of the parties cannot be worked out under a judgment so declaring, and directing that the partnership accounts be taken. If after the death of Whitney the partnership assets were employed by the appellant in connection with any of the theatres, the-

atrical arrangements, booking percentages, fees, etc., mentioned in the agreement, that will be a matter for consideration in taking the partnership accounts, and it will be open to the Master to charge the appellant with what he is properly chargeable in respect of these matters; and a judgment of that character should be substituted for the judgment of my brother Britton.

If it is desired by the respondent, though I do not think it necessary for the working out of the rights of the parties, the judgment may provide that the Master shall, at the request of the respondent, report specially as to any matter in respect of which it is contended that the appellant is liable to account, but the Master determines otherwise.

Further directions and the question of costs will be reserved until after the report, and the costs of the appeal will also be reserved to be dealt with on the hearing on further directions.

MACLAREN and MAGEE, JJ.A., concurred.

HODGINS, J.A.:—There does not seem to be any way to ascertain, before referring the accounts, what the surviving partner has actually done since the death of Whitney. The appellant has by his own procedure prevented it; and I can find no practice which would enable this Court to do otherwise than deal with the judgment as it stands. Nor is it possible to adopt any hypothesis and then construe the agreement upon the basis thereof. It may be that the principle of McClean v. Kennard (1874), L.R. 9 Ch. 336, is applicable, and that the accounts as to the leases and booking arrangements, if any, may be governed by it.

I reluctantly agree to the reference proposed, and trust that the appellant may not come to the pass reached by the plaintiff in Brown v. DeTastet, 4 Russ. 126, as related by the Solicitor-General in Docker v. Somes, 2 My. & K. at p. 658.

Appeal allowed.

MARCH 20TH, 1914.

*COWLEY v. SIMPSON.

Limitation of Actions—Possession of Land—Acts of Possession—Trespasser—Evidence—Conflict — Preference Given to Affirmative Testimony—Caretaker — Agreement — Corroboration—Evidence Act, sec. 12—Pedal Possession of Small Portions of Cleared Land—Delimitation.

Appeal by the defendants from the judgment of MIDDLETON, J., 5 O.W.N. 803, affirming the report of the Junior Judge of the County Court of the County of Carleton.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

J. E. Thompson, for the appellants.

W. J. Code, for the plaintiffs, the respondents.

The judgment of the Court was delivered by MEREDITH, C.J.O.:— . . . The action is brought by the respondents, who claim to be the owners of lot lettered F in the front on the Ottawa river, abutting on the 6th and 7th concessions of the township of Fitzroy, in the county of Carleton, for a declaration that they are the owners in fee simple of the lot except the "Lavan House" and land actually covered thereby; and that a deed dated the 24th November, 1908, from the appellant Campbell to the appellant Simpson purporting to convey the lot, except a part of it of two acres, upon which the Lavan House is erected, is a cloud on the respondents' title; and for an order that it be delivered up to be cancelled, "and removing the same" from the respondents' title to the lot; and for an injunction restraining the appellants from entering upon or otherwise dealing with the lot; and for damages for trespass.

The appellants by their statement of defence deny the title of the respondents and plead the Limitation Act in bar of their claim.

The paper title of the respondents is not disputed, and the sole question for decision is as to whether the Limitation Act bars their claim.

The learned Junior Judge found in favour of the respond-

*To be reported in the Ontario Law Reports.

ents, and on appeal his finding was affirmed by my brother Middleton. . . .

Some time about the year 1858, Francis Lavan "squatted" on lot F. . . .

Lavan continued to live on the lot, except in the winter of 1873-4, when he and his wife lived in Arnprior, until his death, which occurred in the year 1891. His wife predeceased him in the previous year. An adopted daughter, Lucinda Bruyère, and her two daughters, lived with Lavan, and continued to reside in the house on the lot until 1898, when she died. After her death, her two daughters continued to live in the house until the appellant Campbell bought the lot for $150 on the 30th September, 1898, from Mary Frances, one of the daughters, to whom her mother had devised it by her will.

No change in the conditions I have mentioned appears to have occurred during all these years, except that the house was burned and rebuilt and an addition was made to it. . . .

Apart from the question as to whether Lavan's occupation was that of caretaker, and assuming that he was not, I am of opinion that, except of two small clearings . . . there was no possession of the lot by Lavan or those claiming under him sufficient to bar the right of the owners of the lot. Lavan, if he was not caretaker, was admittedly a trespasser; and he and those who claim under him cannot claim the benefit of the Limitation Act except as to the land of which they have been in actual occupation.

The latest case bearing upon the question of the nature and extent of the possession by a trespasser which will bar the right of the owner is Piper v. Stevenson (1913), 28 O.L.R. 379. It had been held in Coffin v. North American Land Co. (1891), 21 O.R. 80, that in the case of a trespasser who had enclosed the land by a fence, cropped it in the summer, but during the winter did nothing but draw some loads of manure upon it, his possession during the winter was not actual, constant, nor visible, and that "the right of the true owner would attach upon each occasion when the possession became thus vacant, and the operation of the Statute of Limitations would cease until actual possession was taken again in the spring by the plaintiff." This view was dissented from in Piper v. Stevenson, and it was held that in such a case the true owner is excluded from possession by the act of the trespasser, whose acts did not amount to an abandonment of possession, but, on the contrary, the possession was all along open, obvious, exclusive, and continuous.

Nothing was decided in that case which is opposed to the well-recognised rule that a trespasser cannot invoke the Statute of Limitations to bar the right of the true owner except as to the land of which there has been pedal possession for the statutory period.

In Harris v. Mudie (1882), 7 A.R. 414, this rule was applied, and it was held that the doctrine of constructive possession has no application in the case of a mere trespasser having no colour of title, and he acquires title under the Statute of Limitations only to such land as he has had actual and visible possession of by fencing or cultivating for the requisite period.

Applying this test to the possession of Lavan and those claiming under him, the evidence falls far short of establishing such a possession of any part of the lot, except of the two parcels which were cleared and fenced, as bars the right of the respondents.

I am of opinion, also, that it has been satisfactorily established that Lavan's occupation from 1873 was in the character of caretaker. . . .

Murphy's testimony as to the arrangement made with Lavan . . . is sufficiently corroborated to satisfy the provisions of sec. 12 of the Evidence Act, by the testimony of Sherriff. All that the statute requires is that the evidence of the party claiming be corroborated by other material evidence, and, as the cases establish, what this means is, that there shall be other material evidence sufficient to lead to the conclusion that the testimony of the party is true or probably true. It is, I think, clear from Sherriff's testimony that Lavan, in telling him that he was on Cowley's and Murphy's land, referred to lot F, and that he thought either that Sherriff was on the lot itself, or that the island on which Sherriff actually was formed part of lot F, and Lavan's statement that he would report indicates that he was acting in the discharge of his duties as caretaker.

It is immaterial whether or not, when the arrangement was made, Lavan had abandoned possession of the lot. . . .

[Reference to Greenshields v. Bradford (1881), 28 Gr. 299, 302; Ryan v. Ryan (1880-1), 4 A.R. 563, 5 S.C.R. 387.]

In their notice of motion by way of appeal from the report of the Junior Judge, the appellants ask for a new trial, on the ground that they were taken by surprise by the evidence of Murphy, and they gave notice that they would read in

support of the motion the affidavits of David Craig, John Lyon, and Joseph Gaudette.

These affidavits are directed to contradicting the testimony of Murphy that at the time of the purchase Lavan was living in Arnprior. They were answered by the affidavit of Joseph Des Sormier, who was cross-examined upon it. His testimony corroborates that of Murphy as to Lavan and his wife living in Arnprior at that time. My brother Middleton accepted Des Sormier's affirmative testimony in preference to the negative evidence of the other three deponents, and I see no reason for differing from the conclusion of my learned brother. I may remark that there is no mention of these affidavits or of the cross-examination of Des Sormier having been read on the motion; but it is clear for the reasons for judgment that they were.

The result of these findings of my learned brother and of the Junior Judge is, that it is established that, when the arrangement as to Lavan becoming caretaker was made, he and his wife were living in Arnprior; but the findings are, for the reason I have already given, as to an immaterial matter.

Upon the whole, I am of opinion that the defence fails, except as to the two small clearings, and that they should be excepted in the declaration of the respondents' right, and, if necessary, there should be a reference to delimit them; and I would vary the judgment accordingly, and, with that variation, affirm it, and the appellants should pay the costs of the appeal, as they have failed as to their contention, and the modification of the judgment which I would make was not asked for.

Judgment below varied.

APRIL 6TH, 1914.

*RE LAIDLAW AND CAMPBELLFORD LAKE ONTARIO AND WESTERN R.W. CO.

Railway—Expropriation of Land—Compensation and Damages—Ascertainment by "Valuers"—Agreement between Landowner and Company—Motion to Set aside "Award" of Valuers—Valuation or Arbitration—Railway Act, R.S.C. 1906 ch. 37, sec. 191—Misconduct of Valuers—Interview with Owner in Absence of Representative of Company—Validity of Decision not Affected—Mistake in Award—Ground for Setting aside—Failure to Shew Admission of Mistake and Willingness of Arbitrators to Review Decision.

Appeal by the railway company from the order of BOYD, C., 5 O.W.N. 534.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

Angus MacMurchy, K.C., W. N. Tilley, and A. M. Stewart, for the appellant company.

M. K. Cowan, K.C., and E. G. Long, for Laidlaw, the respondent.

MEREDITH, C.J.O.:—This is an appeal by the Campbellford Lake Ontario and Western Railway Company from an order of the Chancellor, dated the 18th December, 1913, dismissing an application by the appellant to set aside an award or valuation dated the 22nd August, 1913, made by His Honour Judge Morgan and Nicholas Garland, two of the persons who, by an agreement made between the parties and dated the 12th July, 1913, were appointed valuers; to whose determination the question of the amount of compensation payable under the Railway Act by the appellant "for the taking" of certain lands "for its railway, and for damages sustained by the" respondent "by the taking of said lands, and construction, operation, and maintenance of the said railway," was referred.

Two questions were argued: first, whether what the agreement provides for is an arbitration or a mere valuation; and, second, whether, if it is an arbitration, a case has been made for setting aside the award on the ground of the misconduct of the

*To be reported in the Ontario Law Reports.

arbitrators or of an admitted mistake by them in awarding compensation on an erroneous view as to the nature of the crossing by the appellant railway of the Whitby Port Perry and Lindsay branch of the Grand Trunk Railway.

I do not think that, even if what is provided for by the agreement is an arbitration, a case has been made for setting aside the award. It was argued that what took place at the meeting of the arbitrators on the land was in substance the giving of evidence by the respondent and his wife as to the matters to be determined, and that the arbitrators were guilty of legal misconduct in taking the evidence without the witnesses being sworn, as required by the Arbitration Act.

In my opinion, what was said by Laidlaw and his wife as to the value or cost to them of the land, the damage that would be done to it by the construction, operation, and maintenance of the railway, and the effect of the crossing by the appellant railway of the branch of the Grand Trunk Railway, was not at all in the nature of evidence in support of the respondent's claim, but was rather a statement made to the arbitrators as to the basis and nature of their claim, no different from such a statement by counsel acting upon his behalf of the nature of the claim and the case he intended to make before the arbitrators.

Notice of the meeting of the arbitrators had been given to the appellant, and it is expressly provided by the agreement that "either party shall have the right to have one representative present, if desired, at any meeting of the valuators, but failure of such representative to attend, whether through lack of notice or otherwise, shall not affect the validity of the decision."

There was, therefore, no impropriety in the respondent stating his case or in the arbitrators receiving his statement, notwithstanding the absence of the appellant or its representatives from the meeting.

Nor is the case brought within the authorities as to setting aside an award on the ground of an admitted mistake of the arbitrators in making their award. . . .

[Reference to McRae v. Lemay (1890), 18 S.C.R. 280, 294; Dinn v. Blake (1875), L.R. 10 C.P. 388, 390, where it is said that "the Court will not in case of a mistake send back the award without an assurance from the arbitrator himself that he is conscious of the mistake and desires to rectify it."]

There is no such assurance by Judge Morgan and none by

Mr. Garland, the other arbitrator who joined in the award, nor any admission by the latter that any mistake was made.

It is clear, I think, that, in order to bring the case within the exception in the case of an award made by two or more arbitrators, all of them must admit the mistake and state their willingness to review their decision on the point on which they believe themselves to have gone wrong. The principle upon which the exception rests is, that the tribunal has gone wrong, that it admits its mistake, and expresses its readiness to review its decision on the point on which it has gone wrong. It would be anomalous, indeed, if the exception were to be applied where one of two arbitrators admitted the mistake and the other denied having made it; and the requirement that the arbitrator must state that he is desirous of the assistance of the Court and willing to review his decision plainly indicates, I think, that the arbitrator or all the arbitrators who joined in the award must make the required statement. . . .

[Reference to Anderson v. Darcy (1812), 18 Ves. 447, 459; Story's Equity Jurisprudence, 2nd ed., par. 1456.]

For these reasons, I am of opinion that this ground of objection to the award fails; and it is, therefore, unnecessary to determine the first question, though, as at present advised, I incline to the view of the Chancellor, that what the agreement provided for is a valuation and not an arbitration. The language which the parties have chosen to express their agreement strongly supports that view. The reference is stated to be to the determination of the three persons named in the agreement as valuers, and throughout the agreement they are referred to as valuers. The agreement was evidently prepared by a solicitor who knew the difference between a valuation and an arbitration, and was apparently desirous of emphasising the fact that it was a valuation that was being provided for; the question for determination was one well fitted to be decided by a valuation; the valuer appointed by the appellant was a farmer; and there is no reason for thinking that the other two persons appointed were not chosen because they possessed qualifications which fitted them to decide such a question as was being submitted to them.

The provisions as to each party being entitled to have a representative present at any meeting of the valuers was quite unnecessary if an arbitration had been intended; and the further provision that the failure of the representative to attend, through lack of notice or otherwise, should not affect the valid-

ity of the decision, would be an unlikely one if a judicial inquiry and the examination of witnesses had been intended.

It is also significant as pointing to the same conclusion that witnesses were not called by either of the parties.

I would dismiss the appeal with costs.

MACLAREN, J.A., agreed.

MAGEE, J.A., also agreed, for reasons briefly stated in writing.

HODGINS, J.A., in a written opinion, cited Dinn v. Blake, L.R. 10 C.P. at p. 391; Flynn v. Robertson (1869), L.R. 4 C.P. 324; Allan v. Greenslade (1875), 33 L.T.R. 567; In re Keighley Maxsted & Co., [1893] 1 Q.B. 405; Lancaster v. Hemmington (1835), 4 A. & E. 345; Phillips v. Evans (1843), 12 M. & W. 309; and agreed that if an award had been made, there was no ground for setting aside or remitting the case to the arbitrators. He concluded as follows:—

I think, however, that the case may be decided upon the ground that the parties have chosen to deal with the matter under sec. 191 of the Dominion Railway Act, R.S.C. 1906 ch. 37.

That enables them to contract touching the lands or the compensation to be paid for the same, or for the damages, or as to the mode in which such compensation shall be ascertained. The parties have chosen valuation, and not arbitration. Valuation by agreement is just as much within the Railway Act as arbitration, if the parties choose to agree to leave the question of compensation under that Act to be ascertained by valuation as a mode of settling it. I think they have so expressed themselves here; and this disposes of the argument of Mr. Tilley that the expression "the amount of compensation payable under the Railway Act" points only to an arbitration under that Act.

The expression "valuer," the provision that there is no appeal, the arrangement for crossings, and other matters, all point to an agreement other than an arbitration under the Railway Act.

The appeal should be dismissed.

Appeal dismissed.

APRIL 6TH, 1914.

BELL v. COLERIDGE.

Partnership—Purchase of Farm by Syndicate—Profits Received by two Members—Non-disclosure to Third Member—Liability to Account—Judgment—Injunction—Direction for Payment into Court—Enforcement under Rule 534—Declaration—Lien—Dissolution of Partnership—Parties.

Appeal by the defendant Coleridge from the judgment of LATCHFORD, J., 5 O.W.N. 655.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

M. Wilson, K.C., for the appellant.

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

The judgment of the Court was delivered by HODGINS, J.A. (after setting out the facts):—The respondent has . . . a clear right to complain that, when the syndicate or partnership was formed upon the faith of which he paid his money, and by which the Pratt farm became partnership or syndicate property, his partner, the appellant, received, as did Smith, a profit of $50 per acre. They had failed to disclose to him that they were benefiting to that extent.

The respondent has, however, no cause to complain if he is held to the price he agreed to pay, save to the extent to which his partners have wrongly profited. The appellant has received $2,500 to which the partnership is entitled; and, fortunately for the respondent, Dr. Smith agreed to let the appellant use it, and the appellant is, therefore, still chargeable with it.

The appellant contends that he is not bound by the partnership agreement, because what he dictated to Ellis was changed by the respondent. But the change related only to a question of management and the extent to which the appellant should control it—a matter which no one says was part of the arrangement on the 18th or 20th May. The appellant cannot now recede from that to which he did agree, and on the faith of which he used the respondent's money. The latter's position has been changed, and he has embarked on a speculation, and is entitled to insist on his rights.

The judgment, however, seems to go too far in declaring what those rights are. It is not in accordance with the evidence that the appellant bought for the respondent. He bought for

himself, and it is his turning the thing bought into the partnership, at an amount which he was not, as between him and his partner, entitled to insist on without full disclosure, that gives the latter cause for complaint. While it is not possible to do complete justice owing to Dr. Smith not being a party, enough may be adjudged to protect the respondent.

Dr. Smith at the trial admitted that he had been invited into a syndicate, and agreed to go into it, but paid no money, because he had no agreement, and does not think that he is interested in the property.

There is nothing to prevent a declaration that the appellant, respondent, and Dr. Smith became partners or were jointly interested in the venture in which the Pratt farm was acquired from the other defendants, in the proportion of one-fifth, three-fifths, and one-fifth respectively, and restraining the appellant from dealing with it in any way inconsistent with the other partnership interests. An order should also be made directing the appellant to pay into Court to the credit of this action, for the benefit of the partnership, the sum of $2,500, wrongly received by him. This will enable the respondent to proceed under Rule 534. If the respondent so desires, he may also have a declaration that he has paid the sums agreed to be paid by him up to this time, and has a lien, for the excess already paid, or that he may hereafter pay to comply with the contract, upon the partnership assets, namely, the Pratt farm, and that the appellant has failed to pay what he had agreed to pay.

I do not think that the partnership can be dissolved or any further relief given in Dr. Smith's absence; but, if he agrees to be added as a party, a proper judgment may be pronounced for the dissolution of the partnership, the taking of the partnership accounts, and a sale of the lands. If Dr. Smith will not agree to be added, the respondent may take such steps as he may be advised by new action or otherwise. Pending this, the other defendants should not be restrained from taking steps to realise their claim; and, if they desire to proceed, there is nothing to prevent the respondent from making further payments to save the property until it can be properly brought to sale as partnership property.

The judgment in appeal should be varied in accordance with the above. The appellant partly succeeds, but fails as to his main contention, and should get no costs. The respondent may have his costs of action and appeal out of the partnership assets, without prejudice to Dr. Smith's right to object to the same in

the ultimate taking of the partnership accounts. If Dr. Smith agrees to be added and to be bound by the judgment, the usual partnership judgment for dissolution and winding-up may issue, with the declarations as stated herein.

Judgment below varied.

APRIL 6TH, 1914.

*McGREGOR v. CURRY.

Executors—Action against—Evidence to Establish Contract between Plaintiff and Testator—Corroboration—Laches—Acquiescence—Statute of Limitations — Trust — Company-shares—Delivery of—Reasonable Time—Specific Performance of Contract to Transfer Shares.

Appeal by the defendants from the judgment of LENNOX, J., 5 O.W.N. 90.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

E. F. B. Johnston, K.C., and A. C. McMaster, for the appellants.

I. F. Hellmuth, K.C., and A. R. Bartlet, for the plaintiff, the respondent.

MEREDITH, C.J.O.:—The action is brought to enforce specific performance of an agreement alleged to have been entered into between the respondent and John Curry, deceased, by which the latter agreed with the respondent that, in consideration of his services in procuring subscriptions to the capital stock of a company which was prepared to be incorporated for the purpose of acquiring the land of the Walkerville Waggon Company and carrying on the business of manufacturers of motor cars at Walkerville, the deceased would transfer to the respondent 10 out of the 25 shares of the par value of $100 each which were to be allotted to the deceased in part payment for the land.

The company was incorporated under the Ontario Companies Act, by the name of the Ford Motor Company, by letters

*To be reported in the Ontario Law Reports.

patent dated the 7th August, 1904, and the 25 shares were allotted to the deceased in May, 1905. Subsequently the company was reorganised under a Dominion charter, and its capital stock was increased from $125,000 to $1,000,000, and each shareholder received six shares of the capital stock of the reorganised company for each share held by him in the Ontario company.

The appellants, besides denying the alleged agreement, plead as a defence to the action the Statute of Limitations, and sec. 12 of the Statute of Frauds, 9 Edw. VII. ch. 43.

The learned trial Judge found that the agreement was proved; and there was evidence sufficient to support his finding. It was contended at the trial, and again on the argument before us, that, if any agreement was proved, it was not an agreement to transfer to the respondent 10 out of the 25 shares which were allotted to the deceased in part payment of the purchase-money of the waggon company's land but to transfer $1,000 worth of the stock, which the deceased might have satisfied by transferring any 10 shares of the capital stock.

Although, in testifying as to the terms of the agreement, the expression $1,000 worth of stock was used by the respondent and his brother, who testified that he was present when the agreement was made, the effect of the testimony of both of them, taken as a whole, is, that what was to be transferred to the respondent was 10 of the 25 shares which the deceased was to receive as part payment of the purchase-money of the land.

. . .

As I have said, the proper conclusion upon the evidence is that the stock which the respondent was to receive was to be part of the 25 shares which the deceased was to receive, and that it was a sufficient number of these shares at par to represent $1,000.

It was argued by the appellants that, assuming the agreement to have been proved, the respondent became entitled to have the 10 shares transferred to him so soon as the 25 shares were issued to the deceased. This view of the matter is not quite accurate. Where no time is fixed for the performance of a contract, the law is that it must be performed within a reasonable time, according to the circumstances; and that, in my opinion, was the obligation of the deceased.

It was also argued that the Statute of Limitations is a bar to the action, and that in any case the respondent has been guilty of such laches and delay as disentitle him to the relief which he seeks.

In order to ascertain how far, if at all, these defences are maintainable, it is necessary to inquire what were the rights of the respondent which arose out of the agreement.

I apprehend that, so soon as the services of the respondent which constituted the consideration for the deceased's promise were performed, the deceased became a trustee for the respondent of the 10 shares and the respondent the equitable owner of them.

The position of a purchaser of land before conveyance was considered by this Court in In re Flatt and United Counties of Prescott and Russell (1890), 18 A.R. 1, and it was held, upon a review of the authorities, that until the conditions upon which the conveyance is to be made are performed and the purchaser becomes entitled to the conveyance he does not become the equitable owner of the land or the vendor a trustee for him. Maclennan, J.A., was of opinion that this was the position of the parties from the making of the contract, but the other members of the Court did not think so.

I know of no reason why the same rule should not be applicable to a purchase of shares in a joint stock company; and, if that be the case, the Limitations Act has no application, the shares being trust property still retained by the trustee, and, therefore, within the exceptions mentioned in sub-sec. 2 of sec. 47.

The respondent's claim may be also supported upon the ground that he is entitled to specific performance of the contract to transfer the shares to him. That such an action will lie is well settled: Fry, 5th ed., pars. 76 and 1497, and cases there cited. There is no Statute of Limitations applicable to an action for the recovery of personal property: Charter v. Watson, [1899] 1 Ch. 175; London and Midland Bank v. Mitchell, [1899] 2 Ch. 161; and, therefore, no statutory bar to such an action, though doubtless laches and delay for even a shorter time than the statutory period of limitation in the case of real property may be a bar to it.

It is to be observed that laches and delay, except in so far as they are involved in the defence founded on the Limitations Act, are not pleaded; but, even if they were, the explanations offered by the respondent for the delay in bringing his action, if true—and they have been believed by the learned trial Judge to be true—would be an answer to such a defence.

The testimony of the respondent as to the reasons for the delay was not corroborated by other testimony; but, in my

opinion, it was not necessary that it should have been, as his testimony as to the main question, the making of the agreement, was so corroborated, and the corroboration which the statute requires is not corroboration of every material fact which is required to be proved in order to entitle the party to succeed, but only of such material facts as lead to the conclusion that the testimony of the party is true. That I understand to be the rule as expounded in the cases to which the learned trial Judge refers.

There were, no doubt, circumstances and conduct upon the part of the respondent so inconsistent with the existence of the agreement which he alleges that, if unexplained, they would have been fatal to his success, and, even explained as they were, might have led to a different conclusion from that reached by the trial Judge; but that is no reason for reversing his judgment, unless we are satisfied that he came to a wrong conclusion; and that I am not able to say. The learned Judge was impressed with the truthfulness of the respondent's testimony; and his standing in the community and truthfulness, as well as those of his brother, were vouched for at the trial by the appellant Curry, and counsel for the appellants conceded that neither of them "would say anything he did not really believe."

There is no room for suggesting that they may be mistaken; their testimony was either true or false to their knowledge; and it is impossible to say that with this certificate of character in their favour, as well as the trial Judge's belief in their truthfulness, it should have been rejected as false.

I would dismiss the appeal with costs.

MACLAREN, J.A., concurred.

MAGEE, J.A., agreed in the result.

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

Appeal dismissed.

APRIL 6TH, 1914.

*CONNOR v. TOWNSHIP OF BRANT.

Highway—Nonrepair—Death of Person Travelling in Motor Vehicle—Liability of Township Corporation—Negligence—Duty to Keep Highway in Repair so as to be Safe for Motor Vehicles—Evidence—Questions Put to Witness by Trial Judge—Leading Questions—Findings of Fact of Trial Judge—Appeal.

Appeal by the defendant township corporation from the judgment of LENNOX, J., 5 O.W.N. 438.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

G. H. Watson, K.C., and O. E. Klein, for the appellant corporation.

D. Robertson, K.C., and G. H. Kilmer, K.C., for the plaintiff, the respondent.

MEREDITH, C.J.O.:—The action is brought by the widow and administratrix of Daniel Connor, deceased, on behalf of herself, to recover, under the Fatal Accidents Act, damages for the loss sustained by her owing to the deceased having met with injuries which resulted in his death, and were, as is alleged, occasioned by the failure of the appellant to keep in repair a highway under the jurisdiction of its council.

The deceased was a passenger in a Ford motor car, driven by a man named Robert Hunter, and the death of the deceased was caused by the car being overturned and his being crushed under it. The account given of the accident and the cause of it by Hunter was, that the car was going northward on the road in question, when the front wheels of it suddenly dropped into a hole in the road, jarring the car out of its course, throwing him to the side and smashing the glass of the windshield; that he was somewhat dazed by the sudden jar and the noise of the breaking glass; that, as far as he remembered, the car went on, and the hind wheels went into the hole; that the car went off to the side of the road; and that, after travelling some distance, he endeavoured to turn it into the travelled part, when it upset, and he and the deceased were thrown out of the car, which fell

*To be reported in the Ontario Law Reports.

upon them; and, according to his testimony, he was driving the car carefully and at a moderate rate of speed.

The car appears to have proceeded, after the wheels dropped into the hole, for a distance of about 26 feet without its course being altered, when it went off to the side of the road and continued to travel there for a further distance of about 59 feet, and it was at that point that, while apparently Hunter was endeavouring to get the car back into the travelled road, it overturned.

A man named McKeeman was also a passenger in the car. According to his testimony, when the car "hit" the hole it veered off to the left into the ditch, and as it went into the ditch he jumped out and fell, and when he got up and looked around "the car was on top of them." Hunter, he said, was driving very carefully. There was a culvert across the road at or near the hole, and, according toMcKeemon's testimony, the car "started in the ditch" when it was about 6 feet north of the culvert, "When it hit the thing" (i.e., the hole) "it bounced and went to the left."

When this witness speaks of the "ditch," I understand him to mean the side of the road.

Hunter and McKeemon were the only eye-witnesses of the accident, and the learned trial Judge gave credit to the testimony of Hunter, which, he says, "was given in a frank and unhesitating way," and he speaks of him as "a clear-headed, intelligent man."

An attempt was made by the appellant to shew that the car was being driven in a careless and reckless manner, and some witnesses testified that that was the case. It is to be observed, however, that they did not speak of anything which occurred at the place of the accident, but of what they said they saw when the car was at some distance from it; the witnesses for the defence differed, too, between themselves, some saying that the car was going at a high rate of speed, and others testifying to facts which are quite inconsistent with that having been the case; and the learned Judge was right, I think, in preferring the testimony of Hunter where it differed from that of these witnesses, assuming that his estimate of Hunter and of his testimony was correct.

Much was made during the argument of the testimony that before the accident the car was travelling on the side of the road, and not upon the travelled part of it, and of the fact that Hunter was unable to recollect whether, at the place spoken

of by the witnesses to whose testimony I have referred, the car was travelling on the side of the road; but there is nothing in this to indicate either that Hunter was untruthful or that he was driving the car recklessly or carelessly. It is not to me surprising that a man driving a car along a country road in the end of April should not, nine months after the occurrence, recollect on what part of the road he was travelling or whether he had turned off the travelled part of it, or if he had done so why he had done it. . . .

The finding of the learned Judge was vigorously attacked by counsel for the appellant as not supported by the evidence; and it was contended that there was nothing upon which to base it but the testimony of Hunter, when recalled at the close of the case, in answer to questions put to him by the learned Judge. The manner of questioning Hunter was also vigorously assailed, and it was argued that not only were the questions leading and calculated to suggest the answers which were given to them, but that they were based on the assumption that the witness on his previous examination had made statements which he had not made.

It does not admit of doubt that the learned Judge was acting within his right in questioning the witness for the purpose of clearing up anything that his former testimony had left doubtful, and indeed as to any relevant matter as to which further information not brought out by counsel was desired, in order to enable the learned Judge to reach a proper conclusion as to the facts. When and how far such course should be taken must necessarily depend much upon the circumstances of the particular case and the sound discretion of the Judge; and I know of no rule which forbids in such a case the putting of leading questions to the witness.

Some of the questions put to Hunter were open to the objections urged by counsel, and it would have been better if they had been put in a different form, and in considering the weight to be given to this testimony regard must be had to the form in which the questions were put and the considerations which were urged by counsel.

Reading the whole of the testimony of Hunter and eliminating all that he said when recalled, I am unable to say that the finding of the learned Judge which I have quoted is wrong and should be reversed. . . .

Hunter's testimony in chief and in cross-examination, without that given when he was recalled, is sufficient to warrant the

conclusion that the effect of the jar caused by the wheels of the car dropping into the hole and smashing the windshield was to deprive Hunter at least of the full possession of his faculties, and to make the want of repair of the highway the proximate cause of the overturning of the car, for his action was not the conscious act of a man in full possession of his senses, but of a man who, as the result of what happened, had become so dazed and frightened as to be incapable of applying his full senses to what he was doing. There was, therefore, in my opinion, no intervention, between what I may call the primary consequences of the accident and the overturning of the car, of any independent responsible human action to sever the causal connection between the negligent omission of the appellant to repair the highway and the injury which the deceased met with. . . .

That the highway was out of repair, and that the appellant was negligent in not putting it in repair, is beyond question, unless the somewhat startling proposition advanced by the learned counsel for the appellant, that the appellant owed no duty to keep the highway in repair so as to be reasonably safe for the use of motor cars, or at all events for Ford motor cars, is maintainable. With great respect for the argument, I am of opinion that it has no foundation either in reason or in law, and that the statutory duty to keep in repair the highways is a duty which is owed to persons using motor cars as well as to those using vehicles drawn by horses or other animals.

In my opinion, the appeal should be dismissed with costs.

MACLAREN and MAGEE, JJ.A., agreed.

HODGINS, J.A., also agreed, for reasons stated in writing, in which he dealt chiefly with the objection of counsel for the defendant, that the questions put to the witness Hunter by the trial Judge were leading and suggestive, if not hypnotic. The objection was not well-founded, but was based on a misconception of the position of a trial Judge. Reference was made to the following authorities: In re Enoch and Zaretzky Bock & Co.'s Arbitration, [1910] 1 K.B. 327; Taylor on Evidence, 10th ed., sec. 1477; Rex v. Remnant (1807), Russ. & Ry. 136; Regina v. Holden (1838), 8 C. & P. 606; Regina v. Cliburn (1898), 62 J.P. 232; Rex v. Watson (1834), 6 C. & P. 653; Rex v. Edwards (1848), 2 Cox 82; Coulson v. Desborough, [1894] 2 Q.B. 316; Phipson on Evidence, 5th ed., p. 464; Wigmore on Evidence (1905), para. 784; Epps v. The State (1855), 19 Ga. 111; Sparks

v. The State (1877), 59 Ala. 82; Best on Evidence, 11th ed., para. 116: "The forensic rules of evidence may in all cases be relaxed by a Judge, provided he observe the rules as to admissibility and inadmissibility of evidence."

Appeal dismissed.

APRIL 6TH, 1914.

*NORTHERN ELECTRIC AND MANUFACTURING CO. LIMITED v. CORDOVA MINES LIMITED.

Company—Mortgage Made by Mining Company to Promoters and Owners of Stock—Action by Creditor to Set aside—Advances Made by Promoters—Judgment in Separate Action for Enforcement of Mortgage—Ultra Vires Transaction—Status of Plaintiff to Attack—Winding-up of Company—Judgment Declaring Mortgage Void in Part—Mortgage to Stand as Valid Security for Liabilities of Company Cancelled when Mortgage Executed.

Appeal by the plaintiff company from the judgment of MIDDLETON, J., 5 O.W.N. 156, dismissing the action.

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

R. McKay, K.C., for the appellant company.

J. M. Clark, K.C., for the defendant company.

G. F. Shepley, K.C., and W. N. Tilley, for the defendants Hughes and Mackechnie, respondents.

CLUTE, J. (after setting out the facts):—The questions to be decided in this appeal are: (1) Was the giving of the mortgage in question ultra vires? (2) If so, does the fact that consent judgment has been signed in the action on the mortgage prevent it being declared ultra vires? (3) May the mortgage be regarded as valid for advances amounting to about $43,000? (4) If so, how is the $19,000 to be applied? And (5) has the plaintiff, as a creditor, suing on behalf of himself and all other creditors, a locus standi to maintain this action, and,

*To be reported in the Ontario Law Reports.

if not, is the defect cured by the amended statement of defence of the Cordova Mines Limited?

First, as to the question of ultra vires. The Cordova Mines Company was incorporated on the 10th July, 1911, under the Ontario Companies Act, 7 Edw. VII. ch. 34, now R.S.O. 1914 ch. 178. The directors are thereby empowered to mortgage or pledge any or all of their real or personal property to secure any liability of the corporation.

The term "*ultra vires,*" as defined in Halsbury's Laws of England, vol. 5, p. 285, in its proper sense, denotes some act or transaction on the part of a corporation which, although not unlawful or contrary to public policy if done by an individual, is yet beyond the legitimate powers of the corporation as defined by the statute under which it is formed or the statutes which are applicable to it, or by its charter or memorandum of association (sec. 466); Ashbury Railway Carriage Co. v. Riche, L.R. 7 H.L. 553; Attorney-General v. Great Eastern R.W. Co., 5 App. Cas. 473.

Any departure or attempt at departure from the objects of the company is ultra vires of the company, and cannot be validated either by the consent of a general meeting of the members or of every individual member, or by taking judgment against the company by consent, or by estoppel: ib., sec. 467; Mann v. Edinburgh Northern Tramways Co., [1893] A.C. 69.

It was urged in the present case that, the company having power by statute to contract debts and to secure them by mortgage, and there being in fact outstanding liabilities to the extent of $43,000 for which the company was liable, and the effect of the mortgage being, having regard to the whole transaction, to have these debts and all other liabilities discharged and to provide the means whereby the company might carry on its mining operations, the mortgage was valid and given for good consideration; that it was made in the interests of the company, and the amount of the consideration ought not to be inquired into, or, at all events, is a matter to be disposed of in the Master's office.

Had the mortgage been given to pay off the company's indebtedness of $43,000, and for further advances made or to be made for carrying on the business of the company, there is no doubt that it would be valid; but the transaction, both in form and substance, is something quite different. Under the agreement of the 23rd April, 1912, Mackechnie and Hughes agree to

sell to Kirkegaard their stock for $60,000; payment to be secured by a first mortgage on the property without personal covenant on the part of Kirkegaard; so that, while the company mortgaged their whole assets for the full price of the stock, the purchaser, Kirkegaard, did not become responsible himself to pay the whole or any part of it. The stock was to be delivered only upon the execution of the mortgage; and, so far from Kirkegaard being in any way responsible, the agreement further provided that all the ore mined during the period of payment, over and above what is used in actual mining expenses, should be applied on payment of the purchase-price of the stock until fully paid.

This agreement was supplemented by that of the 30th April, made between Mackechnie and Hughes and Montgomery, the trustee, as purchaser of the stock. It provides that the stock shall be held by the purchaser until the 1st August, 1912, or until the sum of $10,000 has been paid by the Cordova Mines Limited, upon its mortgage to the vendors. It further provides that the purchaser is to provide for the proper working of the mines, "the understanding being between the parties that at least $3,000 per month shall be expended upon the development of the said mines. This agreement is not to supersede that of the 23rd April, but is in addition thereto." The purchaser covenants that all costs, expenses, and charges and accounts made by the Cordova Mines Limited from the 1st May to the 1st August, 1912, and up to such further time as the $10,000 is paid, will be paid by the purchaser and his associates, and shall not be a lien or charge upon any of the property of the Cordova Mines. It will be seen that this is made in the interest of the vendors, Mackechnie and Hughes, in order that their security which they took by the mortgage might not be impaired. There is no agreement which the company could enforce by which it might be recouped for any payments made upon the mortgage. It is not Kirkegaard or his trustee Montgomery who is to pay off the mortgage. There is no covenant on their part with the company to pay. The agreement of the 23rd April provides that the management of the property shall remain in the hands of Kirkegaard "until payment is completed"—presumably the payment of the mortgage for their stock—and it provides that the parties of the second and third parts (Montgomery and Kirkegaard) "assume all charges and expenses from and after the 1st May, 1912, and the parties of the first and third parts (Mackechnie, Hughes, and Kirkegaard)

are to forthwith settle all liabilities up to date," that is, up to the 1st May, 1912, from which time Kirkegaard and Montgomery became responsible. As it does not appear that there were any debts prior to the 1st May that were outstanding, except the advances made by Mackechnie, Hughes, and Kirkegaard, their agreement to pay prior liabilities operated, on completion of the transaction, as a cancellation of their several claims against the company. As these advances had been made to and for the benefit of the company for the development of its mines, there can be no doubt, I think, that the company was responsible for these liabilities. They were so recognised by the company and entered in their books as amounts owing to these parties; and the result of the transaction may be fairly stated in this way:—

The three owners of the stock having made large advances and refusing to make further advances to the company, owing to a disagreement among themselves, Hughes and Mackechnie desired to sell their stock to Kirkegaard for $60,000, this to include the advances which they had made to the company. The purchaser, it appears, was unwilling to become personally responsible, and so it was arranged that the stock should be secured by a mortgage to be made by the company, to which all the shareholders assent, all outstanding liabilities being then provided for.

This, I think, is the most favourable way, upon the facts, that the case can be stated for the vendors of the stock. Can a mortgage under these circumstances be supported?

The obvious and natural effect of the transaction is that Montgomery, as trustee for Kirkegaard, becomes the holder of that two-thirds stock, to be secured and paid for by the company, and for this mortgage of $60,000 the utmost compensation that the company was to receive was the discharge of its indebtedness to the shareholders and an agreement by the trustee with the vendors that certain advances would be made to carry on the mine.

Under the cases it seems to me impossible to support the mortgage, for the whole $60,000. Its validity must be considered having regard to the condition of affairs at the time it was given. . . .

[Reference to Trevor v. Whitworth, 12 App. Cas. 409, 414, 415, 417.]

Brice on Ultra Vires, 3rd ed., p. 133, thus broadly lays down the law: "Corporations cannot, whatever the nature of

their business, purchase, acquire, or otherwise deal in their own shares."

The case most nearly resembling the present, not cited on the argument, is that of Great North-West Central R.W. Co. v. Charlebois, [1899] A.C. 114. That was an appeal to the Privy Council from the judgment of the Supreme Court of Canada, 26 S.C.R. 221. . . .

I am unable to distinguish in principle the present case from the authority just cited. All the cases, I think, shew that a company cannot legally devote its capital to purposes not contemplated by its charter. To do so is ultra vires. What was done here may or may not have amounted to traffic in its own stock. It certainly did not buy stock, but it did guarantee the payment of the stock upon its sale to a third party, and its assets were, and were intended to be, depleted, at all events to the amount of the mortgage beyond the liabilities which were, by the arrangement, cancelled. It was, therefore, in my opinion, ultra vires, at all events to the extent by which its capital was depleted, that is, to the amount over and above its debts which were cancelled.

What, then, becomes of the mortgage? Should it be declared wholly invalid, or may it stand as security for the advances for which the company were actually liable?

A question very similar to this is dealt with in the case last cited; and, although in that case the contract was declared wholly void, yet from what is there said, there would seem to be no insuperable difficulty in holding that the mortgage should stand for the actual indebtedness of the company. It is there said ([1899] A.C. at p. 124): "The next question is how to deal with a contract vitiated in such important respects. The Courts in Ontario held that the payments ultra vires could be so separated from the lawful payments for construction, that it was open to them to maintain the contract while disallowing wrongful payments. The appellants object to that course, and so do counsel for Charlebois, both preferring that the contract should be wholly set aside, and that Charlebois should be left to recover the value of his work. Not only is that the more direct and usual course, but it seems to their Lordships that to resolve the consideration for the contract into its component elements is not a simple thing, and they are not satisfied that justice is done by it."

From this it would seem that where, as here, there is no difficulty in separating the indebtedness from that portion of the

mortgage which represents security for the stock, it may be allowed to stand for such indebtedness.

In the present case, not only is there no difficulty in ascertaining what such indebtedness was; there is in fact no dispute about it, nor is there any dispute that, by the terms of the agreement, such indebtedness was to be cancelled; but there is a further reason why, in the present case, if possible, the mortgage should not be declared void *in toto*. The defendants Mackechnie and Hughes have no security except the mortgage. The interests of other persons who have made large advances are involved, and these persons are not before the Court. It is difficult to see how entire justice could be done to all parties if the mortgage contract is wholly set aside. In my view, this is a case where the unusual course should be followed of permitting the mortgage to stand as a valid security for such liabilities of the company as were cancelled at the time the mortgage was given.

As to the plaintiff's right to bring this action; it was decided in Mills v. Northern Railway of Buenos Ayres Co., L.R. 5 Ch. 621, that a simple contract creditor cannot sustain a bill to restrain the company from dealing with their assets as they please, on the ground that they are diminishing the fund for payment of his debts. . . .

So far as I have been able to find, this authority has not been in any way overruled or impugned. It is referred to in Coxon v. Gorst, [1891] 2 Ch. 73. Nor is this case within Evans v. Coventry, 8 DeG. M. & G. 835, where the plaintiff as one of the assured had a contract affecting the capital of the insurance company or partnership.

In the present case the plaintiff had no lien or claim upon the assets of the company. I do not think, however, that, as the case now stands, this is an insuperable objection to the trial of the issue as to whether or not the giving of the $60,000 mortgage was ultra vires. On the opening of the case, counsel for the defendant the Cordova Mines Company Limited stated that there had been a change of solicitors, and applied to amend the defence of the company so as to repudiate the mortgage. The application was for the time reserved, and the case proceeded. The plaintiff proved that a number of the creditors had liens registered on the 26th April, 1913, aggregating some $5,000. The writ in this action was not issued until the 29th August, 1913.

Later in the case, Mr. Tilley said: "We are quite content

that Mr. Wood should make any amendment he desires for the company;" and the trial Judge observed that it was better to go into the whole matter. "I want to know what the company will say about it as a company, because all the shareholders are here, and the company, while it is a different entity, is well represented by Mr. Wood representing them, and the liquidator would have no other rights probably, so the outcome, if there has to be a winding-up order, would be that the winding-up order would be made and the liquidator brought into the action if judgment is pronounced."

It may be noted here that an application to wind up the company had been enlarged and was pending before the trial Judge. No order has yet been made on that application. The company's amended defence was then filed. All parties being before the Court, if it were necessary, an order for winding-up could be made and the liquidator brought into the action. Whether the plaintiff, representing lien creditors, among others, whose claims were filed prior to the commencement of the suit, has a right to bring action, assuming that the principle in Evans v. Coventry would apply, notwithstanding Lord Hatherley's decision in the Mills case, it is not necessary to decide, inasmuch as the company seeks to join the plaintiff, and by their defence ask to have the mortgage declared void. All parties are before the Court, and there is no reason that I can see why that issue should not be determined.

The appeal should be allowed, in so far as the judgment below dismisses the plaintiff's action, declaring the mortgage for $60,000 *ultra vires* to the extent that the same exceeds the liabilities of the company which were cancelled by the arrangement made at the time the mortgage was given. There is evidence that Kirkegaard paid on the mortgage directly $15,000, and possibly more; but the amount paid, or what part of the payment was out of the funds of the company, does not sufficiently appear upon the evidence. This is a matter that can be cleared up in taking an account of the amount due upon the mortgage. As proceedings are now pending, in an action upon the mortgage, before the Master to take the accounts, a reference in this case would seem to be unnecessary. The account there can be proceeded with, having regard to the rights of the parties as decided in this action.

As to the question of costs: having regard to the position and rights of the parties when the action was brought, and the fact that the company for the first time at the trial sought to

join with the plaintiff to set aside the mortgage, and as both the plaintiff and the company take the position that the mortgage was void *in toto*, and the defendants insisted that it was valid, and that the action ought to be dismissed, there should be no costs up to and inclusive of this judgment.

The costs of the reference may be disposed of in the mortgage action.

MULOCK, C.J.Ex., and SUTHERLAND and LEITCH, JJ., agreed.

RIDDELL, J., was of opinion, for reasons stated in writing, that the judgment of MIDDLETON, J., should be affirmed with a slight variation.

Appeal allowed; RIDDELL, J., *dissenting.*

HIGH COURT DIVISION.

MIDDLETON, J. APRIL 6TH, 1914.

STUART v. TAYLOR.

Will — Construction — Devises — Estates for Life and in Remainder — Contingent Remainder upon Contingent Remainder—Rule against "Double Possibilities"—Intestacy as to Second Remainder—Right of Heirs of Testator, Ascertained at his Death—Improvements under Mistake of Title—Lien for—Alternative Retention of Lands on Payment of Value—Possession of Land—Title—Limitations Act—Partition.

Action for a declaration of the rights of the parties in regard to a parcel of land, for partition thereof, and for possession against the persons now in possession.

The action was tried without a jury at Sandwich on the 28th March.

J. H. Rodd, for the plaintiff.

A. R. Bartlet, for the defendant Taylor.

F. D. Davis, for the defendants Strong, Chevalier, and Duby.

MIDDLETON, J.:—The late Pierre Charron, as he appears to have written his name, was admittedly the owner of the entire parcel designated on the plan as lot A, bounded by Tecumseh road, the concession road, the extension of Broadway, and 11th Street. This contained about 100 acres.

By his will, dated the 21st October, 1860, Charron attempted to dispose of the land in question. This will has been already the subject of litigation, and is set forth in the report of Re Sharon and Stuart, 12 O.L.R. 605, where an application was made under the Vendors and Purchasers Act, and Sir Glenholme Falconbridge, C.J.K.B., interpreted the will in such a way as to indicate that a good title could not be made to the portion now owned by Stuart.

On the hearing of this case, all parties agreed to accept the facts as stated in that report, and supplemented the facts there stated by fresh evidence and admissions.

By the will, clause "secondly," the testator gave "to my three sons Gilbert, Oliver, and Joseph the south part of lot lettered A . . . containing fifty arpents (not acres as stated in the report) to have and to hold to them as is aforesaid mentioned." By another clause, also numbered "secondly," the testator directs that the "land covered with water running through lot lettered A as aforesaid, that is, the marsh land, be used in common by all my sons for the purpose of hunting, fishing, and keeping swine or cattle."

Shortly after the death of Charron, the sons by common consent set apart three portions of the easterly end of lot lettered A. These contain, together, almost the fifty arpents. Gilbert took the easterly portion, and it is admitted that Stuart has acquired the interest of all the children of Gilbert in the fifty arpents. If this partition stands, then Stuart will be entitled to retain the portion of land of which he is in possession. In the same way it is admitted that Strong has acquired the interest of all the children of Oliver, who took the more westerly of the three portions. Joseph took the central portion, and his interest has been conveyed to the defendant Taylor, but she has not acquired the interest of Joseph's only child.

The sons, it appears, assumed that the whole of the westerly portion of the land passed to them as tenants in common, and this, containing about sixty acres, was subdivided into fifths—Chevalier, who lives on the portion between the fifty arpents and the creek, having acquired two one-fifth interests, thus giving him the 24 or 25 acres remaining on that side of the

stream after setting off the 50 arpents. Those claiming under the other three sons have taken similar shares in the land west of the stream.

It was agreed by all that the 50 arpents should be taken from the east end of the lot in question, so as not to interfere with the partition which has heretofore been made, particularly that dealing with the land to the west.

It is contended that the testator used the words "arpents" and "acres" interchangeably, and that 50 acres should be measured from the east end of the lot, instead of 50 arpents; the difference being between 7 and 8 acres. I do not think this is so, and I think the line shewn as the 50-arpents line upon the plan put in is the governing line.

The first real difficulty arises upon a clause of the will which I have not referred to, which, the Chief Justice held, interprets the words "to hold to them as aforesaid" found in the gifts to the sons. The testator had previously given to each son other parcels of land, following the gift by this provision, "to have and to hold to each of them for and during their natural life respectively and if they should marry after and after their and such of their decease to have and to hold to their surviving wife respectively, on the demise of their or each of their wives to hold to their children respectively and their heirs forever."

The question raised before the learned Chief Justice was the applicability of this clause to the devise of the shares in the 50 arpents, and as to the effect of the clause. The learned Chief Justice held that each son took an estate for life, his widow, if he left one, an estate for life after his death, and his children the remainder in fee after her death, or if no widow was left then in fee after the death of the life-tenant. He negatived the contention that the case was governed either by Wild's Case or Shelley's Case. The result was simply a declaration that the vendor could not make a good title.

Upon the argument before me the effect of the devise was attacked upon a totally different ground. It is said that the gift to the children is void for remoteness. Manifestly the wife of the son then unmarried might be a person not born at the time of the testator's death; so that the gift to the children is a contingent remainder dependent upon the life estate of a person not yet born. It is true that these children are also the children of the son, who was of course in esse at the time of the death; and at first I was inclined to think that this might make a difference. I do not think that the true principle applicable

is really so much remoteness as the fact that the estate given to the children is a contingent remainder, preceded by an estate which is also a contingent remainder. There cannot be a contingent remainder upon a contingent remainder.

The latest case upon this is a judgment of Mr. Justice Eve in In re Park's Settlement, [1914] W.N. 103, where he held that under a settlement by which property was settled upon a bachelor for life, after his death to his widow, on the death of the widow to his issue, the rule applied and rendered void the gift to the issue; stating the point thus: "As the limitations were to John Foran's widow for life, with remainder to issue who might be born to her as his wife, and John Foran being a bachelor at the time of the deed, that wife might be a person not born at the date of the deed, and there was a 'double contingency' and a limitation, which offended against what was called 'the rule against double possibilities'."

In In re Nash, [1910] 1 Ch. 1, Mr. Justice Farwell puts the matter, in a way, more simply. According to the rule against perpetuities, all estates and interests must vest indefeasibly within a life in being and 21 years thereafter.

At the time of Pierre Charron's death, the wife of the son, as already pointed out, might not have been born. She might well outlive the son twenty-one years. So that it is plain that the interest of the children, whether regarded as the children of the father or mother, might not vest within the time limited.

This being so, upon the death of the sons and their wives—which has now happened—the estate in this fifty arpents is not dealt with by the will; and, as there was an intestacy as to this remainder, it passed to the heirs at law of Pierre Charron, that is, to those who were his heirs at his death.

According to the statement in the report, there were ten children, and they took share and share alike. Some of these have died, and probably left no issue, so that the number of shares will be somewhat reduced. The three defendants claiming under the sons have acquired, not merely the estate of the son under the devise of the will, but also the estate of the son in the residue of the estate which at the date of the conveyance any of these sons had acquired owing to the intestacy of any of the brothers and sisters then dead or otherwise.

The three defendants in possession of the lands have, no doubt, made improvements under a mistake of title; and I think the case is one in which they should be at liberty either to take the portions of the land of which they are in possession, paying

its value at the date of the termination of the life-tenancies, or to claim a lien for improvements: R.S.O. 1914 ch. 109, sec. 14. I would trust that, the rights having been ascertained, the parties may come to some fair arrangement preventing further litigation. If no arrangement can be made, there must be a partition, leaving the Master to deal with the details.

So far I have not dealt with the question raised concerning the rights of the defendant Duby. Duby purchased the lands immediately south of the property in question. Lot 1 undoubtedly ran, according to the earlier plans, as far south as the centre line of Broadway street. There was some intention to extend Broadway, taking one-half of the extension from the land in question and one-half from the land to the south. Possession was taken, and has been held for a long time; but, as this was after Charron's death, the right of his heirs and those claiming under them, which only arose upon the death of the last surviving life-tenant, would not be defeated, the statutory time not having run since that death.

The judgment will, therefore, be for partition of the fifty arpents in question, with a reference to the Master, who will deal with all questions arising out of the right of the present occupant to a lien for improvements or otherwise. The costs will come out of the estate, save that as to Duby there will be no costs. The judgment will declare that he has not acquired possessory title to the strip of land in question.

SUTHERLAND, J., IN CHAMBERS. APRIL 7TH, 1914.

HEAMAN v. HUMBER.

Writ of Summons—Service out of the Jurisdiction—Order Permitting—Irregularities—Rules 26, 28, 32, 298 — *Setting aside Order and Service.*

Motion by the defendants for an order setting aside the order of a Local Judge allowing the issue of a writ of summons for service out of the jurisdiction and the service thereof.

T. G. Meredith, K.C., for the defendants.

J. M. McEvoy, for the plaintiffs.

SUTHERLAND, J.:—The action is on an agreement for the sale of lands in the Province of Manitoba. The order of the

Local Judge was based on an affidavit of one of the plaintiffs, wherein it was stated that the plaintiffs were desirous of bringing the action for damages for a tort committed in the Province of Ontario by fraudulently inducing the plaintiffs to enter into the contract of sale; that the defendants were British subjects, resident in Winnipeg, in the Province of Manitoba; and that it was a proper case for service out of Ontario under the Rules of Court.

The order gave leave to issue the writ, and the writ was issued. The affidavit, order, and writ are dated respectively the 9th March, 1914.

In support of the motion, the defendants read a certificate of the state of the cause, from which it appears that the affidavit on which the order was made was not filed until the 31st March, 1914. An affidavit was also filed by the defendants verifying a copy of the writ issued and apparently served, and stating also that no statement of claim was served therewith.

The certificate already referred to shews that no statement of claim has yet been filed. The writ makes no reference to any fraudulent representation, but is endorsed with a bare claim to have the agreement cancelled or set aside and the moneys paid thereunder refunded. A statement of claim was produced by the plaintiffs on the motion, purporting to be dated the 18th March, 1914, in which express allegations of fraudulent representations are set forth.

The grounds set out in the notice of motion are as follows:—

(1) The affidavit on which the order was obtained did not disclose facts sufficient to justify the making of the order, and was not filed as required by and was not according to the Rules. The affidavit was not filed before being used, as required by Rule 298. It did not contain a statement that, in the belief of the deponent, the applicants had "a right to the relief claimed," as required by Rule 26.

(2) That the writ issued was not justified by the order. If the material, however, disclosed a proper ground for asking leave to issue the writ, Rule 32 would probably apply and make it unnecessary that "the precise ground of complaint" should be set forth in the endorsement.

(3) That the writ had not endorsed upon it a minute shewing that it was issued in pursuance of the order.

(4) That the writ is not a specially endorsed writ, and a statement of claim should have been served therewith, as provided by Rule 28.

On the hearing of the motion, the plaintiffs asked leave to file a supplementary affidavit to the effect that, in the opinion of the deponent, the plaintiffs have a right to the relief claimed, and after the argument handed such an affidavit in.

I reserved the matter to see if I could or should make an order which would prevent what has been done being entirely abortive.

Upon consideration I am of the opinion, however, that the irregularities are of such a character that the proper disposition of the matter, in the circumstances, is to set aside the order and service, leaving the plaintiffs to commence their action afresh, if so advised.

The order and service will, therefore, be set aside with costs.

GNAM v. MCNEIL—BRITTON, J.—APRIL 6.

Contract—Settlement of Action—Intervention of Stranger—Promise to Pay Costs—Withdrawal of Action—Performance of Promise—Failure to Prove Promise to Pay Damages—Statute of Frauds.]—The plaintiff, who was the parish priest of Wyoming, in the Roman Catholic Diocese of London, Ontario, sued upon an agreement alleged to have been made between the plaintiff, by his solicitor, Mr. D. S. McMillan, and the defendant, the Archbishop of Toronto. The plaintiff and the Bishop of London had some differences, which resulted in an action instituted by the plaintiff against the Bishop. That action was ripe for trial in March, 1913, when the defendant intervened. The agreement, whatever it was, was not in writing. The plaintiff alleged that the agreement was, that, in consideration of his withdrawing the action against the Bishop of London, the defendant would pay the costs, fixed at $650; that the plaintiff would be restored to his parish; that the defendant would personally "look after the damage end of it." The action against the Bishop of London was ended by an agreement between the solicitors on both sides that no further proceedings should be taken, and that there should be no costs to either party. The evidence was conflicting. The learned Judge accepts the defendant's statement as to what was promised—that nothing more was promised than that the defendant would pay the costs and would do what was in his power to procure for the plaintiff a hearing or trial by the Rota at Rome in reference to the whole case; and the learned Judge finds that the defendant has done all that he promised to do. At the trial leave

was granted to the defendant to amend his defence by setting up the Statute of Frauds. The learned Judge further finds that the parties were not ad idem as to payment of damages. Action dismissed without costs. R. I. Towers, for the plaintiff. D. L. McCarthy, K.C., and T. L. Monahan, for the defendant.

McKERCHEN v. McCOMBE—LENNOX, J.—APRIL 6.

Vendor and Purchaser—Agreement for Sale of Land — Building Restriction—Erection of Buildings—Distance from Street Line—Restriction Limited to Street on which Lot Fronts —Specific Performance.]—Action by the vendor to compel specific performance of an agreement for the sale and purchase of the easterly 67 feet 10 inches of lot 99 on the north side of Burlington crescent, in the city of Toronto. There were certain building restrictions affecting the property, which, so far as important in this action, were: "(3) No house or outbuilding shall be erected which shall be nearer the street line than 20 feet at any part thereof. (4) No detached house shall be erected on lands of less frontage than 30 feet, and no semi-detached houses shall be built on lands less than 50 feet frontage." The defendant contended that he was not bound to accept a conveyance and complete the purchase if the building restrictions compelled him to keep his buildings back 20 feet from the street line of Alberta avenue—a side street—as well as 20 feet back from the street line of Burlington crescent. Held, that restriction No. 3 does not prevent the owner of the easterly 30 feet or more of lot 99 from erecting a dwelling-house, or other building of the class defined in the restrictions, adjoining to and along the westerly side of Alberta avenue, and that the restriction as to 20 feet from the street line applies only to Burlington crescent, upon which lot 99 fronts. Judgment so declaring and for specific performance. No costs. H. J. Martin, for the plaintiff. C. M. Garvey, for the defendant.

HEDGE v. MORROW—LENNOX, J.—APRIL 6.

Title to Land—Improvements—Timber—Basis of Settlement—Conveyance upon Payment of Half of Value of Property and Rent Chargeable—Costs.]—The judgment of LENNOX, J.,

after the trial of the action, 5 O.W.N. 903, does not finally dispose of the action, but suggests a settlement. Counsel not having been able to agree upon a settlement, the learned Judge now gave judgment. He stated that the plaintiff did not propose to take out letters of administration, and did not ask to add parties or amend. The lasting improvements made upon the property would be about equal to the value of the timber taken off, and one should be set off against the other. At the time the defendant purchased, $2,700 was a fair value for the property. The present actual value of the farm was $3,000, and the defendant was chargeable with $800 for rent, making a total to be accounted for of $3,800. The plaintiff was now in a position to get in the two outstanding shares; and, having done this, she and the defendant would each have an undivided half interest in the farm and rent, or what was equal to an interest of $1,900 each; and this action should be settled upon that basis. The costs of administration and of a judicial sale should be avoided. The judgment is as follows: (1) If the defendant, within 15 days, notifies the plaintiff or her solicitor that he is willing and prepared to pay the plaintiff $1,900, upon the execution and delivery to him of a conveyance and assignment of all the estate, interest, and claim of all the heirs-at-law and next of kin of Isabella Gilchrist, afterwards Johnston, in the land in question and in and to their share of rent, and if, within 30 days after the giving of such notice, or such further time as a Judge may allow, the plaintiff executes and tenders, and, upon payment of $1,900, delivers, to the defendant a conveyance and assignment as above, all intermediate conveyances to the plaintiff being first duly registered, or if the defendant neglects or refuses to avail himself of the provisions of this paragraph, the action will be dismissed without costs. (2) If the action is not disposed of under the provisions of paragraph (1), it will be dismissed with costs. (3) Steps hereafter taken by either party to bring about a settlement in pursuance of paragraph (1) will, if unsuccessful, be without prejudice to the right of appeal, and, so far as the Judge has power so to provide, without prejudice to the status of either party upon an appeal. G. A. Stiles, for the plaintiff. D. B. Maclennan, K.C., for the defendant.

ROSSWORM v. ROSSWORM—MASTER IN CHAMBERS—APRIL 9.

Husband and Wife—Interim Alimony and Disbursements—Motion for—Wife Possessed of Means—Delay in Prosecuting Action—Foreign Divorce.]—Motion by the plaintiff, in an action for alimony, for an order for the payment by the defendant of interim alimony and disbursements. The action was begun on the 11th February, 1913, but the statement of claim was not delivered until the 2nd March, 1914. The parties were married in 1879. In May, 1906, the plaintiff left the defendant's house, and has not since returned. She alleged cruelty and violence and apprehension that her life was unsafe. The Master said that interim alimony should be granted, if necessary, to enable a wife to procure justice by being provided with her costs and her maintenance until the trial or determination of the action: Knapp v. Knapp, 12 P.R. 105. In this case it was perfectly plain from the plaintiff's own affidavit in reply that she had at the present time in the bank a sum of about $450, which was sufficient for her support until the trial and for the interim costs and disbursements. On this account and on account of her unexplained delay in proceeding to trial, the motion should be refused. It was not necessary to consider the effect of a divorce which the plaintiff had obtained in a foreign country, as to which Swaizie v. Swaizie, 31 O.R. 324, and Rex v. Hamilton, 2 O.W.N. 394, 22 O.L.R. 484, might be referred to. Motion dismissed with costs. E. F. Raney, for the plaintiff. H. H. Davis, for the defendant.