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APPELLATE DIVISION.

JANUARY 18TH, 1915.

TILL v. TOWN OF OAKVILLE.

Negligence—Death Caused by Electric Shock—Liability of Telephone Company — Evidence of Negligence — Finding of Trial Judge—Reversal on Appeal—Dismissal of Action as against one of two Defendants—Costs Ordered to be Paid by the Other.

Appeal by the defendant the Bell Telephone Company from the judgment of MIDDLETON, J., 31 O.L.R. 405, 6 O.W.N. 390.

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

D. L. McCarthy, K.C., and F. M. Burbidge, for the appellant company.

R. McKay, K.C., for the defendant the Corporation of the Town of Oakville, respondent.

M. H. Ludwig, K.C., for the plaintiffs, respondents.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—By the judgment of Middleton, J., it is ordered and adjudged: (1) that the respondent plaintiffs shall recover against the appellant and the respondent corporation $6,000; and (2) that the appellant and the respondent corporation shall pay to the respondent plaintiffs the costs of the action, and that they shall be liable as between themselves for these costs in equal shares.

The reasons for judgment of the learned Judge are reported in 31 O.L.R. 405, and the material facts are there stated.

As I understand the reasons for judgment, the learned trial Judge based his conclusion that the appellant was liable, upon his finding that the risers on the town's electric light pole were brought into contact while Whitney, the employee of the appellant who placed the rings on the messenger wire, was engaged in that work. He acquitted Whitney of any intentional displacement of the risers, but was not satisfied that he might not

have brought them into contact accidentally. Everything he said was consistent with the displacing of the risers while the rings were being placed on the messenger wire, and all other possible causes of the displacement had, he thought, been investigated without result.

I am, with great respect, of opinion that the finding of the learned Judge is not warranted by the evidence. Whitney, who was called as a witness by the respondent plaintiffs, testified that the displacement of the risers was not caused by him; that he noticed the condition of the risers, and realised that he could not come into contact with them without endangering his life, and that he carefully avoided doing so. There is no doubt, upon the evidence, that it was difficult—perhaps very difficult—to do the work in which Whitney was engaged—doing it in the way he said he did it—without his having come into contact with the risers; but it is not shewn that it was impossible.

It was suggested in the course of the examination of some of the witnesses that, owing to the swaying of the messenger wire to which Whitney was suspended, or to muscular contraction, his legs, or one of them, may have displaced the risers without his being aware of what had happened. I do not know whether that was the view of my learned brother; but, if it was, I cannot agree with it. The evidence of the expert witnesses—I refer particularly to the testimony of Mudge, p. 375—is, that it would require considerable physical force to have caused such a displacement of the risers as existed on the day the deceased was killed; and it is improbable, I think, that the movement of Whitney's legs in the way suggested would have brought sufficient force to bear on the risers to have caused that displacement. Any other act of Whitney's which could have caused the displacement must have been a conscious act, and of such an act Whitney is acquitted by the learned Judge.

I am unable to discover any finding, at all events a finding in terms, that the act which the learned Judge thought caused the displacement of the risers was a negligent act, though, no doubt, the learned Judge, when dealing with the legal aspect of the case, speaks of the deceased's death as having been the result of two independent acts of negligence on the part of the respective defendants; and I do not find anything in the evidence that, assuming the finding that the displacement was unconsciously caused by Whitney, warrants a finding that his act was a negligent act; indeed, the finding that it was an unconscious act rather implies that it was not. . . .

Counsel for the respondent corporation was evidently impressed with the difficulty of connecting Whitney's supposed act with the displacement of the risers, for an effort, which failed, was made to shew that the electric light pole bore the marks of spurs, recently made, and to connect these with something done by an employee of the appellant named Stewart, on the day before that on which the accident happened.

It appears to me also that it is unlikely that, if the displacement had been caused by Whitney, the condition of the risers would not have been noticed by those who had the superintendence of the town's electric light system, and the interval of time that elapsed between Whitney's supposed act and the happening of the accident is a circumstance—though, no doubt, not a conclusive one—tending to negative the theory which was put forward at the trial and adopted by the learned Judge. . . .

[Reference to the observations of Willes, J., in Lovegrove v. London Brighton and South Coast R.W. Co. (1864), 16 C.B. N.S. 669, 692.]

Upon the whole, I am of opinion that the respondent plaintiffs' case against the appellant failed, and that the appeal should be allowed, and judgment entered dismissing the action as against the appellant with costs.

It was contended by counsel for the respondent plaintiffs that, if we should come to that conclusion, the costs to be received by them from the respondent corporation should include all costs incurred against the appellant by reason of there being two defendants, and also the costs which they would have to pay to the appellant, and counsel cited in support of his contention Besterman v. British Motor Cab Co., [1914] 3 K.B. 181, in which such an order as to costs was made.

I am of opinion that a similar order should be made in this case. The test to be applied in determining whether such an order should be made is, "Was it a reasonable thing for the plaintiff in his action against a man who ultimately turns out to be in fact the wrongdoer to join the other defendant in order that the matter might be thoroughly threshed out?" . . .

In the case at bar, the respondent corporation in its statement of defence set up, and throughout the trial contended, that the act of the appellant was the *causa causans* of the death of the deceased, and that the appellant, and not the corporation, was liable to the respondent plaintiffs; and, in my opinion, it was reasonable for the respondent plaintiffs to join the appellant as a defendant.

JANUARY 18TH, 1915.

*POUCHER v. WILKINS.

Execution—Right of Renewal, when Judgment more than 20 Years Old—Limitations Act, 10 Edw. VII. ch. 34, sec. 49—Application of — "Civil Proceeding" — "Action" — Presumption of Satisfaction in Absence of Payment or Acknowledgment—Con. Rule 872 of 1897—Execution Act, 9 Edw. VII. ch. 7, sec. 10—Execution Kept Alive by Renewals.

Appeal by the plaintiff from an order dated the 20th November, 1914, made by a Junior Judge of the County Court of the County of York (DENTON), vacating and setting aside the writ of execution issued on the plaintiff's judgment.

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

W. N. Ferguson, K.C., for the appellant.

M. H. Ludwig, K.C., for the defendant, respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The plaintiff's judgment was recovered on the 7th March, 1891, and the execution was issued within 6 years after that date, and has been kept alive by renewals ever since; the last renewal having been made on the 15th October, 1913; and it is still in the hands of the Sheriff to whom it was directed, for execution.

The ground upon which the learned Judge proceeded was that, in the absence of payment or acknowledgment, there is no right to issue execution upon a judgment more than 20 years old, and he evidently treated the renewal of an execution that had been issued within that period as the issue of an execution on the day on which it was renewed.

Upon the argument before us, counsel for the respondent relied upon sec. 49 of the Limitations Act in force when the execution was renewed (10 Edw. VII. ch. 34) to support the order of the learned Judge, contending that the renewal of the execution was a civil proceeding within the meaning of sec. 2 of that Act; and that sec. 49 was, therefore, to be read as applying to such a proceeding; and, in the absence of part payment or acknowledgment, barring the right to take it after the expiration of 20 years from the date on which the judgment was recovered.

*To be reported in the Ontario Law Reports.

I am of opinion that this contention is not well-founded, and that sec. 49 has no application to anything but an action or a proceeding in the nature of an action.

The provisions of what is now sec. 49 were first enacted by sec. 3 of 7 Wm. IV. ch. 3, and were the same as those of sec. 3 of the Imperial Act 3 & 4 Wm. IV. ch. 42, which provided, among other things, that actions of covenant or debt upon a bond or other specialty should be commenced and sued within 20 years after the cause of such action arose.

No change, other than verbal, was made in this enactment in the consolidation of the statutes of Upper Canada in 1859 or in the revision of the statutes in 1877, 1887, and 1897, except that the words "covenant or debt" were eliminated in the revision of 1887—no doubt because forms of action had been abolished by the Judicature Act. In 1910, with a view to the revision of 1914, the various limitation Acts were consolidated by 10 Edw. introduced, which, so far as is material to the present inquiry, reads as follows: " 'Action' shall include an information on behalf of the Crown, and any civil proceeding;" and a group of sections, beginning with sec. 49, form Part III., which is headed "Personal Actions."

Does then this interpretation section extend the meaning of the word "action," as used in sec. 49, so as to include "any civil proceeding?" In my opinion, it does not.

It is quite clear that, at all events until the introduction of the interpretation section, the limitation of 20 years in the revision of 1887 was applicable only to actions, and it was so treated by the Chancellor in Chard v. Rae (1889), 18 O.R. 371.

The section is not applicable where it would give to the word "action" an "interpretation . . . inconsistent with the context" (the Interpretation Act, 7 Edw. VII. ch. 2, sec. 6, subsec. (2), added by 8 Edw. VII. ch. 33, sec. 1), and that would be the effect of applying it to sec. 49.

It is plain, I think, that the word "action" is used in sec. 49 in its ordinary sense. As I have said, Part III., of which sec. 49 is the first section, is headed "Personal Actions"—a well-understood term, which clearly does not include such a proceeding as the issue or the renewal of a writ of execution. The word "commenced" is the appropriate word to apply to the bringing of an action, and is inappropriate to the taking of such a proceeding as the issue or the renewal of a writ of execution; and the period from which the 20 years are to be reckoned is that at which the cause of action arose, meaning plainly, I think, the

cause of the "action" with which the section is dealing—an action of covenant or debt on a bond or other specialty. "Cause of action" is a well-understood phrase, and comprises "every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court:" per Lord Esher, M.R., in Read v. Brown (1888), 22 Q.B.D. 128, 131, and a "cause of action arises" (within the meaning of the Limitations Act) "at the time when the debt could first have been recovered by action:" per Lindley, L.J., in Reeves v. Butcher, [1891] 2 Q.B. 509, 511, following Hemp v. Garland (1843), 4 Q.B. 519.

If the meaning which it is contended should be given to the word "action" were given to it, the result would be that a plaintiff who had issued his writ of summons within the prescribed period could not after that period had expired take any step in the action—which is reductio ad absurdum.

For these reasons, I am of opinion that the appellant's right to renew his execution was not barred by sec. 49 at the expiration of 20 years from the recovery of his judgment.

This conclusion is not opposed to what has been decided in any reported case. . . .

[Reference to Caspar v. Keachie (1877), 41 U.C.R. 599; Neil v. Almond (1897), 29 O.R. 63; In re Woodall (1904), 8 O.L.R. 288; McDonald v. Grundy (1904), 8 O.L.R. 113.]

In these cases the question arose on what was sec. 23 of R.S.O. 1897, ch. 133, or its prototype, the language of which differs materially from that employed in sec. 49. . . .

I am also of opinion that the order cannot be supported on the ground that, there having been no payment or acknowledgment in the meantime, it is to be presumed, at the expiration of 20 years from its recovery, that the appellant's judgment is satisfied. . . .

[Reference to 3 & 4 Wm. IV. ch. 42 (Imp.); Best on Evidence, 11th ed., p. 390; Oswald v. Legh (1876), 1 T.R. 270, 271; Statute of Westminster II. (13 Edw. I., stat. 1, ch. 45); Tidd's Practice, 8th ed., pp. 1152, 1153; the Upper Canada Common Law Procedure Act, 1856 (19 Vict. ch. 43), secs. 189, 203; 20 Vict. ch. 57, sec. 10; 27 Vict. ch. 13, sec. 2; Rule 872 of the Consolidated Rules of 1897; the Execution Act, 9 Edw. VII. ch. 7, sec. 10; Welden v. Greg (1862), 1 Siderfin 59; Simpson v. Heath (1839), 3 Jur. 1127; Tidd's Practice, 9th ed., p. 1103; Jenkins v. Kerby (1866), 2 U.C.L.J. N.S. 164; Du Belloix v. Lord Waterpark (1822), 1 Dowl. & Ry. 16, 17; Price v. Wade (1891), 14 P.R. 351.]

It is unnecessary to express an opinion as to the correctness of the decision of the Chancellor in Price v. Wade, as it has no application to such a case as this. Here no leave to issue execution was necessary. The respondent had issued execution in due time, and its renewal after the expiration of the 20 years was a mere ministerial act on the part of the officer of the Court by whom it was renewed, whose duty it was to sign the memorandum required by Rule 572, when the respondent produced the execution, while according to its terms it was still in force, and requested him to sign it.

Upon the whole, I am of opinion that the appeal should be allowed with costs and the order appealed from reversed, and that there should be substituted therefor an order dismissing with costs the respondent's motion to set aside the execution.

JANUARY 18TH, 1915.

KILBUCK COAL CO. v. TURNER & ROBINSON.

Contract—Supply of Coal by Brokers to Retailers—Prices Mentioned in Contract — Subsequent Variation — Evidence — Onus — Consideration — Account — Credits — Estoppel — Counterclaim — Findings of Trial Judge — Reversal on Appeal.

Appeal by the plaintiffs from the judgment of LENNOX, J., ante 158.

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

W. H. Harris, for the appellants.

H. L. Ebbels, for the defendants, respondents.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The action is brought to recover the balance of an account for coal sold and delivered by the appellants to the respondents. The matter in controversy is, whether the respondents are liable to pay for the coal at the prices charged in the account, or liable only to pay at the prices mentioned in a contract entered into between the parties on the 5th June, 1912; and there is no dispute as to the coal which was shipped to the

respondents on and before the 17th September, 1912, and was charged for at the prices mentioned in the contract.

By the terms of the contract the appellants agreed to sell to the respondents and they agreed to buy from the appellants "the entire requirements until April 1, 1913, approximately 1,500 tons," of the respondents, of anthracite coal, egg, stove, chestnut, and pea sizes, at stated prices per ton, and the coal was to be shipped only as requested by the respondents, and was to be delivered at Port Perry. The prices fixed were for "egg and stove $6.95, chestnut $7.15, pea $5.65," all per gross ton of 2,240 pounds, with, in each of the months of July, August, and September, an increase of ten cents per ton, and the shipments after the 1st October were to be at the same prices as those of September, and the terms of payment were "cash on the 15th of the month following shipments."

The contract also provides as follows: "Every effort will be made for the prompt and faithful fulfilment of contract, but seller will not be responsible for the delivery of the same if prevented by strikes or combinations of miners or labourers, accidents in the mines, or interruption of transportation, or from any cause or any occurrence beyond seller's control. In such cases obligations to deliver coal under this contract are thereby cancelled to an extent corresponding to the duration of such interruptions, and no liability shall be incurred by the seller for damages resulting therefrom."

The appellants are coal brokers, and not coal producers, and, before or simultaneously with the making of the contract with the respondents, placed an order with the Susquehanna Coal Company for the supply of coal which the appellants contracted to sell to the respondents. As I understand the evidence, there was no formal contract entered into with the coal company, but the company were notified of the contract which the appellants had entered into with the respondents, and, in accordance with the course of dealing between the coal company and the appellants, there followed from this an undertaking on the part of the company to supply the coal in accordance with the terms, as to delivery, of the respondents' contract, but subject to the like conditions as to strikes, etc., as are contained in that contract.

There had been a strike in the mines of the coal company, which had resulted in their mines being "shut down" during the months of April and May, 1912, and during those months they mined no coal. After a strike there is generally some delay in getting the mines into working order again, and owing to the

strike and this delay the season for shipping coal by water, which ended on the 1st December, was very much curtailed, with the result that the coal company were unable to meet the demands for their coal, and were unable or refused to fill the order that had been placed with them for the coal required by the appellants to enable them to fulfil their contract with the respondents.

When they were confronted with this difficulty, the appellants' manager had an interview with the respondent Turner at Port Perry in August, 1912, at which, according to the manager's testimony, he explained the situation to Turner and informed him that the appellants would not be able to supply the coal at the contract prices, but that anthracite coal could be purchased from other miners, though at higher prices than those at which the Susquehanna Coal Company were to fill the respondents' order, and that the appellants were willing to buy this coal and supply it to the respondents at an advance upon the price at which it should be bought of enough to cover a fair profit to the appellants, which, as I understand the evidence, was 25 cents a ton. I gather from the reasons for judgment of the learned trial Judge that he thought that the respondent Turner had met this testimony with a denial of its truth, and that he accepted Turner's evidence in preference to that of the appellants' manager. I do not find in the testimony of Turner, either upon his examination for discovery or at the trial, any satisfactory contradiction of the testimony of the appellants' manager. Turner's examination for discovery and his testimony at the trial were most unsatisfactory, and a perusal of them leads me to the conclusion that he was not a frank or truthful witness, or that his memory was so bad that his testimony cannot be relied upon. With the exception of a mild protest in his letter of the 4th October, 1912, and another in his letter of the 24th December, 1912, against being charged more than the contract prices, his conduct throughout and the correspondence which passed between him and the appellants is quite inconsistent with his statement that he always intended to hold the appellants to the contract prices, and is consistent only with such an arrangement as the appellants' manager testified was made having been made. . . .

The proper conclusion upon the evidence is, I think, that none of the coal for the price of which the appellants are suing was delivered upon the contract of the 5th June, 1912, but was purchased from time to time by the respondents at the prices which were quoted to them by the appellants. The conduct of the parties throughout and the correspondence make it

abundantly clear that that is what both parties thoroughly understood and intended. I say this notwithstanding the sporadic complaints of the respondents on the 4th October and 24th December, 1912, that the coal was being invoiced to them at prices differing from and in almost if not in every case in excess of the contract prices—complaints that were abandoned after explanations by the appellants and remonstrances from them as to the position which the respondents appeared to wish to take. . . . All the coal shipped before the 19th November, with the exception of one car of nut coal, was paid for at the invoice prices, and that without a protest or even a murmur from the respondents, and the payments which were made after that date, though not applied to any specific shipments, were made recognising that the coal was to be paid for not at the contract prices, but at the prices which were from time to time quoted; and I am, therefore, with great respect, of opinion that my brother Lennox erred in holding that the appellants were not entitled to recover anything beyond the prices fixed by the contract of the 5th June, 1912; and that the appeal should be allowed, and that there should be substituted for the judgment which has been entered judgment for the appellants for the amount of their claim as appearing in the record, subject to the small deductions to which I shall afterwards refer, with costs.

I may here remark that the appellants hold the promissory note of the respondents given on the 6th February, 1913, for $850, payable with interest at 6 per cent. 30 days after date, and it is difficult to see what answer the respondents would have had to an action on this note for the recovery of the balance of the appellants' claim.

There remains to be considered the contention of the respondents that, if they are liable to pay for the coal at the increased prices, they are entitled to recover from the appellants the difference between those prices and the contract prices as damages for breach of the contract in not delivering the coal in accordance with its terms.

There are, in my opinion, two answers to this contention.

By the terms of the contract the appellants were bound to deliver the coal if and when required by the respondents; and, if I am not right in my conclusion that the coal was purchased by the respondents at the prices from time to time quoted to them, there never was any request of the respondents for delivery of the coal under the contract of the 5th June, 1912; and, if there

was no such request, there was no default by the appellants in making delivery.

The other answer is, that, before any breach of the contract, it was mutually agreed that there should be substituted for the obligations of it on the part of the appellants an agreement that they would procure by purchase in the open market such coal as the respondents might require, and sell it to them at a small advance on the cost of it to the appellants; that this substituted contract has been executed on the part of the appellants, and that there was a sufficient consideration for the new agreement in the additional credit that was given to the respondents; or that, as the appellants acted on the new agreement to their prejudice, relying upon the agreement by the respondents that they would not call for performance of the contract of the 5th June, 1912, the respondents are estopped from claiming damages for failure to deliver according to its terms.

For these reasons, I would dismiss the counterclaim of the respondents with costs.

The small items to be deducted from the appellants' account are the items of $35, $21.50, and $3, mentioned in the reasons for judgment. I have some doubt as to the right to a deduction of more than $16 in respect of the matters for which the $35 were allowed, but not sufficient doubt to justify me in reversing the finding of the learned Judge.

JANUARY 18TH, 1915.

JACKES v. MAIL PRINTING CO.

Libel—Pleading—Defence of Fair Comment—Error in Judge's Charge Induced by Defendant — Mistrial—Damages—New Trial—Costs.

Appeal by the defendant company from the judgment dated the 22nd October, 1914, which was directed to be entered by BRITTON, J., upon the verdict of the jury, after the trial before him at Toronto on that day.

The action was for libel contained in the "Mail and Empire," a newspaper published by the appellant company.

The article alleged to be libellous contained an attack upon a leaflet, or circular, which was circulated by the plaintiff during

the last provincial election, for the purpose of inducing the temperance voters of the riding of North-East Toronto to vote against the candidates supporting the Government, and upon the plaintiff in connection with the circular; and also upon the Rev. Canon Greene and the Rev. Ben. H. Spence for their action in publishing what was called a repudiation of the circular.

The appellant company, by its statement of defence, pleaded a general denial of the allegations contained in the statement of claim, and the defence of fair comment.

The defence of fair comment was not dealt with by the learned Judge, or left to the jury, but the case was left to them as if the defence of fair comment were a defence of justification, and the jury were told that if the statements of which the plaintiff complained contained a charge of forgery against him, and the defence of justification was not proved, the plaintiff was entitled to recover; and, on this direction, the jury found for the plaintiff, and assessed the damages at $5,000.

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

J. B. Clarke, K.C., for the appellant company.

W. J. McWhinney, K.C., and E. P. Brown, for the respondent.

The judgment of the Court was delivered by MEREDITH, C.J.O. (after stating the facts as above):—We have come to the conclusion that there was a mistrial because of the way in which the case was left to the jury.

The error into which the learned Judge fell was induced by the action of the appellant company, who insisted that its defence of fair comment was a plea of justification; and, if the case had been an ordinary one, and the damages moderate, this might have been an answer to the application for a new trial.

The damages were large—perhaps not so excessive as to justify the granting of a new trial if the only question were as to the damages; but, in view of the large damages awarded, and the importance of not impairing the right of the public press to comment fairly upon public matters, we have come to the conclusion that there must be a new trial.

In view of the course taken by the appellant company at the trial, to which I have referred, the costs of the last trial, and of the appeal, will be costs to the respondent in any event of the action.

JANUARY 19TH, 1915.

BARKER v. NESBITT.

Fraud and Misrepresentation—Sale of Plant and Business—Action for Balance of Purchase-price—Evidence—Failure of Defendants to Prove Misrepresentations.

Appeal by the defendants from the judgment of FALCONBRIDGE, C.J.K.B., ante 17.

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

E. G. Porter, K.C., for the appellants.

I. F. Hellmuth, K.C., for the plaintiff, respondent.

THE COURT dismissed the appeal with costs.

JANUARY 20TH, 1915.

FORT WILLIAM COMMERCIAL CHAMBERS LIMITED v. BRADEN.

FORT WILLIAM COMMERCIAL CHAMBERS LIMITED v. DEAN.

FORT WILLIAM COMMERCIAL CHAMBERS LIMITED v. PERRY.

Company — Shares — Subscription — Allotment — Acceptance —Conduct—Directors—Action for Calls—Liability.

Appeals by the defendants from the judgments of BRITTON, J., in three actions, 6 O.W.N. 24, 40, 41.

The appeals were heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

J. W. Bain, K.C., and Christopher C. Robinson, for the appellants.

I. F. Hellmuth, K.C., and C. A. Moss, for the plaintiffs, respondents.

THE COURT dismissed the appeals with costs.

HIGH COURT DIVISION.

FALCONBRIDGE, C.J.K.B. JANUARY 18TH, 1915.

FEE v. DORR.

Vendor and Purchaser—Sale and Conveyance of Land—Deficiency in Acreage—Compensation—Provision in Agreement for Sale—Misrepresentation not Amounting to Fraud.

Action by John J. Fee against Jennie A. Dorr and Thomas H. Bessey, executors of Adam Dorr, and Russell James Dorr, a beneficiary under the will of Adam Dorr, to recover compensation for deficiency in acreage of certain lands which the defendants agreed to sell to the plaintiff.

The land was described in the agreement as being in the township of Grantham and "containing by admeasurement between 66 and 67 acres of land be the same more or less and being all the property owned by the late Adam Dorr in the said township except those portions sold to Thomas H. Bessey."

The price was $12,250.

The plaintiff alleged a deficiency of 15½ acres in the parcel which was conveyed to him by the defendants.

The action was tried without a jury at St. Catharines.

E. D. Armour, K.C., and G. F. Peterson, for the plaintiff.

W. M. Douglas, K.C., and W. H. Clipsham, for the defendant Jennie A. Dorr.

A. W. Marquis, for the defendant Bessey.

FALCONBRIDGE, C.J.K.B.:—I find in favour of Mrs. Dorr's account of what took place during the verbal negotiations. The plaintiff admits on examination for discovery that he did not buy by the acre. I have no doubt that he had good reason to believe that the canal was going through the property. Mrs. Dorr honestly believed that there were 66 or 67 acres left after the deed to Bessey, and she said so to the plaintiff, but after he had made his lump offer for whatever they had.

The defendants are willing to return the money and take back the property, but the plaintiff wants to have his cake and eat it too. He is doing uncommonly well out of the expropriation, but he wants to recover, in addition, $4,000 odd from the defendants.

The agreement for sale (exhibit 1) contains the usual clause: "It is hereby expressly agreed that the said parties of the first part are not to be bound to furnish any abstract of title, or produce any title-deeds or other evidence not in their possession or control, or to give copies of any title-deeds, but that the party of the second part is to search the title at his own expense; and if said parties of the first part, without any default on their part, are unable to make a good title to the said land within 30 days from the date hereof (if the party of the second part declines to take such title as they are so able to make), then he may withdraw from this contract on the repayment to him of any sum of money paid on account of his purchase-money, and without being entitled to any compensation or expenses in connection herewith."

The contract is dated the 10th April, 1912, the deed the 7th May (registered the 11th July), 1913. This action is brought on the 1st June, 1914.

There was abundant time for the plaintiff to have had a survey made before completing the transaction. There is no contract for compensation, and the plaintiff is not now entitled to it: Clayton v. Leech (1889), 41 Ch. D. 103.

The present case is not a case of fraud or of misrepresentation amounting to fraud: Debenham v. Sawbridge, [1901] 2 Ch. 98, at p. 108; Follis v. Porter (1865), 11 Gr. 442; Carroll v. Provincial Natural Gas and Fuel Co. of Ontario (1896), 26 S.C.R. 181; Fry on Specific Performance, 4th ed., para. 1280 et seq.

The defendant Bessey is willing to convey to the plaintiff some 3 acres of surplusage on a proper survey and tender of a deed.

The action is dismissed with costs.

MIDDLETON, J. JANUARY 19TH, 1915.

RE LINDEN AND CITY OF TORONTO.

Costs—Expropriation Proceedings under Municipal Act—Distribution of Compensation Moneys—Payment into Court—Contestation as to Rival Claims—Discretion of Court—Obligation of Expropriating Body.

Motion by the claimant Bastedo for an order on further directions after the report of the Master in Ordinary upon a refer-

ence to ascertain the person or persons entitled to share in a sum of money paid into Court by the Corporation of the City of Toronto, representing the compensation for lands taken upon expropriation proceedings. The report was varied upon appeal: see Linden v. Bastedo, ante 603; and the applicant now asked for judgment upon the report as varied and for a disposition of the costs.

Shirley Denison, K.C., for the applicant.
H. Cassels, K.C., for the solicitor-claimant.
J. R. Roaf, for the claimant Lenschner, mortgagee.
A. C. Heighington, for the Bank of Ottawa.
Featherston Aylesworth, for the Royal Bank of Canada.
Irving S. Fairty, for the city corporation.

MIDDLETON, J.:—Statutes authorising the expropriation of lands frequently contain express provisions throwing all the costs of proceedings incidental to the taking of the lands, and the solution of questions necessary for the distribution of the price to be paid, upon the expropriating body; other statutes leave the costs in the discretion of the Court, and this is the case under the Act now in question. In all the cases where the Court has discretion, the principle seems clearly recognised that when the proceeding is entirely for the benefit of the expropriating body, and no factious opposition has been raised by any one, it is but just that that body should pay the costs as part of the price of the land. See, for example, Re Dolsen (1889), 13 P.R. 84.

A review of the cases under the different statutes would be tedious and idle.

This obligation does not extend to the costs of the contest in the Master's office.

The city should, I think, pay the costs of the order for payment in and of the advertisement and down to and including the first return of the appointment before the Master and of the motion for judgment on further directions.

The solicitor-claimant should pay the claimant Bastedo three-fourths of the costs of the contestation in the Master's office, including the report.

The other claimants (and Bastedo so far as his costs are not provided for) should add their costs of the reference to their claims.

There should be no costs of the first report or the motion founded thereon and no costs of the motion for a charging order.

I make no specific direction as to the costs of the motion to vary the original order—if these are included in the direction above given, I do not interfere.

The money should be paid out of Court in accordance with the report as varied on the appeal.

MIDDLETON, J. JANUARY 19TH, 1915.

RE WALLACE.

Will — Construction — Partnership between Father and Son— Bequest by Father to Son of Half Share in Property of Partnership and Division of Remaining Half among all Children Equally—Effect of—Election—Liability to Account.

Motion by Milton J. Wallace for an order determining a question arising upon the will of his father, Robert Wallace, deceased.

G. H. Kilmer, K.C., for the applicant.
R. McKay, K.C., for the applicant's adult brothers and sisters.
F. W. Harcourt, K.C., for the infants.

MIDDLETON, J.:—The testator and his son Milton J. Wallace were, it is said, in partnership. By his will the testator gives this son one-half of the property of the firm, and then directs the other half to be divided equally among all his children, seven in number.

The testator having no title to one-half of the partnership property, it seems to me a clear case in which the son is put to his election, and the effect of the devise, if he takes under the will, is to confirm his title to half the partnership assets and to confer upon him a one-seventh in the other half.

Mr. Kilmer suggests that this would be an admission that there was no partnership before the death, and that the son in this way would render himself liable to account for the money received during the whole partnership. This fear, it seems to me, is unfounded. The effect of election to take under the will is not to compel surrender of the devisee's own property, but to compel compensation if the devisee elects to retain his own.

The devisee must, to use the words of Talbot, L.C., in Streatfield v. Streatfield (1736), Ca. temp. Talbot 176, acquiesce in

the "tacit condition annexed to all devises of this nature, that the devisee do not disturb the disposition which the devisor hath made"—that is, the son Milton must allow each of his brothers and sisters to have a one-fourteenth share in the partnership assets.

That this is the true meaning of the will is shewn by what is stated in Rogers v. Jones (1876), 3 Ch. D. 688, and Pickersgill v. Rodger (1876), 5 Ch. D. 163.

So declare. Costs should be borne by the estate.

(If so desired, a clause may be added stating that the son Milton by electing to take under the will does not render himself liable to account for his share of the partnership earnings during his father's life.)

KELLY, J. JANUARY 19TH, 1915.

SASKATCHEWAN LAND AND HOMESTEAD CO. v. MOORE.

Company—Managing Director—Breaches of Trust—Account—Compensation — Interest — Compound Interest—Credits—Claims for Commission — Expenses and Disbursements — Master's Report—Appeal.

Appeal by the defendant from the report of the Master in Ordinary on several of the matters referred to him by the judgment given after the trial (5 O.W.N. 183), varied as to one item by the judgment of a Divisional Court of the Appellate Division (6 O.W.N. 100).

The appeal was heard in the Weekly Court at Toronto.

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

A. B. Cunningham, for the plaintiffs, respondents.

KELLY, J.:—The defendant has appealed against the findings of the Master in Ordinary on several of the matters referred to him by the judgment, the most important part of the appeal being that against the amount found to be due for interest on various sums for which the judgment is in the plaintiffs' favour, and against the mode of calculation adopted by the Master.

The amounts on which the interest has been calculated—though objected to in the notice of appeal—have already been

determined by the judgment, and are not now open to argument. The dates from which interest is chargeable are also fixed by the judgment, and as to these also there can be no controversy here.

The Master proceeded on the principle that what was to be aimed at was compensation to the plaintiffs for the loss they sustained through their chief administrative officer, who had under his immediate and intimate control the management of their affairs, having retained and appropriated for his own benefit moneys and assets of theirs. On some of the items interest at the rate of 6 per cent. compounded half-yearly is allowed. The Master found, and I think properly so on the evidence, that the plaintiffs had to pay and did pay that rate (compounded) on these sums. In one instance they paid at a still higher rate, but in that case the rate charged against the defendant is 6 per cent. (compounded). On all other items the rate at which the Master has calculated is the legal rate, 5 per cent., and here also interest compounded half-yearly is allowed.

The defendant argues that only six years' interest is chargeable (that, however, is disposed of by the judgment), and that in any event he should not be charged with more than 5 per cent. simple interest.

The principle to be applied in charging interest against a person holding the position of trustee should be regulated according to the circumstances surrounding the particular transaction in which the liability arises. In In re Honsberger (1885), 10 O.R. 521, the Chancellor, discussing the English practice in awarding interest against executors and trustees, defines (p. 526) the principle applicable in this Province; and, while stating the result of the judgment of the Court of Appeal in Inglis v. Beaty (1878), 2 A.R. 453, as being to modify some of the earlier decisions, he holds that the punitive element in awarding interest is now to be discarded, and that of compensation is to govern. In such cases regard is to be had to the character of the debtor's trusteeship and his misconduct or misfeasance in the use and disposal of the moneys with which he stands charged.

The judgment in Inglis v. Beaty, which is an exhaustive review of a great number of earlier decisions, while modifying the view expressed in some of these, does not go so far as to exclude the right to compound interest where a proper case is made out; and, while approving of the principle of compensation rather than of punishment, it recognises degrees of impropriety in the conduct of one whose position is that of trustee, and does not treat as improper the charging of compound interest under cer-

tain conditions, such as when a direct and positive breach of trust has been knowingly and wilfully committed. It was there found that compound interest was not properly chargeable, but for reasons that do not exist here.

The result, therefore, of the summing up in that case of the authorities is, that the rule for the guidance of the Court rests upon the basis of compensating the cestui que trust and depriving the trustee of advantages he wrongfully obtained, and that a charge of compound interest is in some instances the proper remedy.

The same can be said of Wightman v. Helliwell (1867), 13 Gr. 330, where it was held (p. 344) that "the principle and the object in every case is to make good the loss caused by the acts of omission or commission of the trustee, or to wrest from him any benefit he has, or is taken to have, derived from the use of the trust moneys;" but in that judgment, too, a distinction is drawn between the right to compound interest by way of compensation and the impropriety of so charging the defaulting trustee when to do so would be in the nature of punishment.

Two elements enter into the present case justifying such a charge—the character of the defendant's trusteeship, and the fact that the plaintiffs, in respect of some of the items charged, paid interest compounded half-yearly. The defendant's relationship to the plaintiffs involved a trusteeship of the highest character. For the many years of the plaintiffs' operations he was their managing director—a very active one too—having a direct and immediate supervision and control over their policy and financial operations and possessing the fullest knowledge of the details of the company's doings, with the capacity and ability thoroughly to understand their effect.

I have had the advantage of a study of the evidence at the trial, including that in the earlier action of the plaintiffs against the Leadlays, this defendant, and Annie A. Moore, and of the proceedings in the various appeals in that case; from all of which it can be safely asserted that the breaches of trust which the defendant has been found to have committed were not accidental or through ignorance. In that respect the degree of impropriety of his conduct, coupled with the character of the trust reposed in him, points to a quality of trusteeship which calls for full compensation for any loss sustained by the plaintiffs by reason of his retaining or not accounting for the moneys charged against him by the judgment. My opinion is, that, having regard to these facts, this is essentially a case where the principle to be

adopted is that of affording compensation for the moneys which the judgment has declared are due by the defendant, and that such compensation is given by the mode of calculation adopted by the Master.

The defendant also appeals against that part of the report which finds that he received a commission over and above his salary of $5,000 per year prior to the 30th September, 1890. On the evidence before the Master, as well as from the knowledge I acquired at the trial, I see no reason for disturbing this finding. The conclusion is irresistible that the defendant must have had knowledge that these items now charged against him should have been taken into account in favour of the plaintiffs and credited upon his salary of $5,000 per year from the beginning of his services; the express term being that this annual payment should include all claims for commission. Credit was not so given, and the two sums are now a proper charge against him.

The remaining ground of appeal is, that the Master wrongfully refused to allow a large number of items which the defendant contends come within paragraph 8 of the judgment, as sums due to him for expenses and disbursements made by him for and on behalf of the plaintiffs, and not included in other matters disposed of by the judgment. The Master was, I think, right in his finding. I need not go beyond the reasons which he has given to support his view.

After an exhaustive review of the whole evidence, in which I was aided by the knowledge acquired in dealing with the issues which were before me at the trial, I am of opinion that the appeal should be dismissed with costs.

FALCONBRIDGE, C.J.K.B. JANUARY 19TH, 1915.

LINCOLN ELECTRIC LIGHT AND POWER CO. OF ST. CATHARINES LIMITED v. HYDRO-ELECTRIC COMMISSION OF ST. CATHARINES.

Municipal Corporation—Distribution and Supply of Electrical Power—Public Utilities Act, R.S.O. 1914 *ch.* 204, *secs.* 34, 35, 36—*Management of Works and Operations Entrusted to Commission — Company Authorised to Supply Electric Power—Erection of Poles and Wires in Streets of Municipality—By-law of Municipal Corporation Authorising Use of Company's Poles for Stringing Wires of Corporation—Restriction to Supply of Power and Light for Use of Corporation—Interference with Company's Appliances — Declaration—Injunction—Damages.*

Action for a declaration that a certain by-law of the Municipal Council of the City of St. Catharines has conferred no right upon the defendant Commission to use the plaintiff company's poles and to string wires thereon, etc., and for an injunction and damages.

The action was tried without a jury at St. Catharines.

D. L. McCarthy, K.C., and H. H. Collier, K.C., for the plaintiff company.

E. D. Armour, K.C., and C. H. Connor, for the defendant Commission.

FALCONBRIDGE, C.J.K.B.:—The plaintiff is a company incorporated under the Ontario Companies Act and authorised to carry on the business of generation, distribution, and sale of electric power.

The defendant is a Commission established under the authority of secs. 34, 35, and 36 of the Public Utilities Act, R.S.O. 1914 ch. 204, controlling and managing the operation, maintenance, and works undertaken by the Corporation of the City of St. Catharines for the distribution and supply of electrical power or energy furnished and supplied by the Hydro-Electric Commission of the Province of Ontario.

The plaintiff company has been carrying on business since the passage of by-law number 1753 of the City of St. Catharines on the 26th September, 1905, and has, under the authority

thereof, erected poles and strung wires thereon in the various streets, etc., throughout said city.

Clause 7 of the said by-law provides that, in order to prevent a monopoly by the company, and to avoid the erection of unnecessary poles in the city streets, the company shall, if requested by resolution of the city council, grant to any other company the privilege of stringing wires upon any poles erected by, belonging to, or under the control of the company for the supply and distribution of electricity for the purposes of light, heat, or power, such other company paying for the privilege such compensation as may be fixed by arbitration. The said section goes on to provide that the company, meaning the plaintiff company, shall allow the city corporation, without compensation, to string wires on their poles for their fire alarm or police signal systems, or for power or lighting purposes, whenever required to do so by a resolution of the council.

By an agreement bearing date the 1st December, 1913, between the Hydro-Electric Power Commission of Ontario and the Municipal Corporation of the City of St. Catharines, the Commission agreed to deliver electrical power to the corporation on the terms in the said agreement set forth.

On the 6th April, 1914, the following resolution was passed by the city council: "That, under and pursuant to section 7 of by-law number 1753, intituled 'A By-law respecting the Lincoln Electric Light and Power Company of St. Catharines Limited,' passed on the 26th day of September, 1905, the said the Lincoln Electric Light and Power Company of St. Catharines Limited be and they are hereby required to allow this corporation to string wires on their poles in the city of St. Catharines for power and lighting purposes; and that a certified copy of this resolution be forthwith transmitted to the said company."

The defendant Commission claims the right under the said by-law and resolution to use the plaintiff company's poles in the city of St. Catharines for the purpose of stringing wires thereon. The plaintiff company contends that, under the concluding clause of paragraph 7 of the said by-law, the right to string wires on the plaintiff company's poles, without compensation, exists only for the purpose of the city's fire alarm and police systems, and for supplying power and light for the city corporation's own use, and that such poles cannot be used in a commercial business, and for furnishing heat, light, and power to consumers in the city of St. Catharines, in competition with the plaintiff company; and the plaintiff company further complains that, even if the defend-

ant Commission has the right to string wires upon such poles, it has unlawfully, wrongfully, and unreasonably displaced, cut, and injured the plaintiff company's wires in different parts of the city.

I am of the opinion that the contention of the plaintiff company as to the construction of the last sentence of paragraph 7 is the correct one. I find also, upon the evidence, that the defendant Commission has unreasonably and wrongfully taken down, removed, and otherwise disturbed or interfered with the plaintiff company's appliances.

It was contended on the part of the defendant Commission that, under the said paragraph 7, the only remedy that the plaintiff company would have would be by arbitration. That would, no doubt, be so if the city council had by resolution requested the plaintiff company to grant to the defendant Commission the privilege of stringing wires upon the poles erected by and belonging to the plaintiff company; but the only resolution passed by the city council is the one which I have above referred to.

My judgment is therefore: (1) that the by-law aforesaid confers no right upon the defendant Commission to use the plaintiff company's poles or to string wires thereon for the purpose of distributing and supplying electric current to customers other than the city corporation; (2) that there shall be a reference to the Master to ascertain the damages the plaintiff company has sustained; (3) that the plaintiff company is entitled to an injunction restraining the defendant Commission from further injuring or interfering with the plaintiff company's poles, plant, and system; and (4) that the defendant Commission shall pay the plaintiff company's costs of this action.

MIDDLETON, J., IN CHAMBERS. JANUARY 20TH, 1915.

SCHUCH v. MELDRUM.

Practice—Late Delivery of Statement of Claim in Order to Avoid Early Trial—Irregularity—Motion to Set aside Statement of Claim and for Dismissal of Action—Refusal—Discretion of Master—Appeal—Costs.

Appeal by the defendants from an order of the Master in Chambers, dated the 14th January, 1915, refusing the defend-

ants' application for an order setting aside the statement of claim and dismissing the action for want of prosecution.

R. C. H. Cassels, for the defendants.
S. Davis, for the plaintiffs.

MIDDLETON, J.:—By the writ of summons the plaintiffs claim damages for libel and slander, and an injunction. The writ was issued on the 9th October, 1914; appearance being entered on the 26th October. The statement of claim was not delivered within the time limited by the Rules, but, without any extension of time being obtained, was delivered on the 8th January. This was not the result of oversight or of any slip on the part of the solicitor, but was a course deliberately taken with the view of avoiding a trial at the winter assizes at Toronto.

The libel alleged is, in substance, that the first-named plaintiff, who is the president of his co-plaintiff, the Ontario Metal Products Company Limited, is an alien enemy, and that for this reason Canadians ought not to do business with him. This, it is said, was defamatory, because the plaintiff was and is a British subject. The reason for avoiding the trial was the fear that strong feeling against alien enemies would prevent a fair trial being had. It may be observed that, if there was any such feeling, the plaintiff Schuch would not be injured, if, as he alleges, he is a British subject.

I do not think the course pursued was proper. If the excuse given was entitled to any weight, it ought to have resulted in a motion to postpone. The plaintiffs were not justified in adopting the irregular course they took, with a view of precluding the defendants from bringing the action to trial at the present sittings; but, admittedly, the defendants had no desire for an early trial, and I can see no good purpose which would be served by dismissing this action, where it is open to the plaintiffs, if so advised, to issue another writ immediately.

If the Statute of Limitations had intervened, I should have dismissed the action, as what was done is an abuse of the practice; but I do not think I should now interfere, for the Master has exercised his discretion in case of the plaintiffs.

The appeal fails and must be dismissed; but, in the circumstances, I do not give costs.

LATCHFORD, J. JANUARY 20TH, 1915,

LONG DOCK MILLS CO. v. DICKEY.

Fraudulent Conveyance—Husband and Wife—Insolvency of Husband — Voluntary Conveyance to Wife — Pretended Consideration—Evidence—Intent.

Action to set aside as fraudulent a conveyance of land made by the defendant William W. Dickey to his wife and co-defendant.

The action was tried without a jury at Cobourg.

K. F. Mackenzie, for the plaintiffs.

F. M. Field, K.C., and W. F. Kerr, for the defendants.

LATCHFORD, J.:—The plaintiffs, a New York corporation, in June, 1913, obtained a judgment for $3,689.51 in a Court of that State against the defendant William W. Dickey, a veterinary surgeon, who had for many years carried on a livery, boarding, and sale stable in the upper part of the city of New York.

They afterward brought action in Ontario upon their foreign judgment, and in October, 1913, were declared entitled to recover from Dickey $3,738.59 and costs. A writ of execution for the amount of the judgment was placed in the hands of the Sheriff of the County of Durham on the 6th October, 1913, and was returned *nulla bona*.

The debt for which the original judgment was recovered was for goods sold and delivered to Dickey in November and December, 1911, and January, 1912, for use in his stables.

On the 2nd January, 1912, Dickey executed in favour of his wife, the defendant Elizabeth Dickey, a conveyance in fee of two large and valuable farms in the township of Clarke, in the county of Durham. Subsequently, in October of the same year, his remaining lands in Clarke were conveyed to his wife's mother for the expressed consideration of $2,000. . . .

The plaintiffs attack the conveyance of the 2nd January, 1912, on the grounds that it is voluntary, made without good or valuable consideration, at a time when the grantor was insolvent or on the eve of insolvency, and with intent to defeat or defraud the plaintiffs in the recovery of their just debt. They also allege that Mrs. Dickey had knowledge of her husband's fraudulent intent and of the fact that he was, when he made the conveyance, insolvent or on the eve of insolvency.

Dickey denies everything material alleged by the plaintiffs. He says, *inter alia*, that at the date of the conveyance he was not indebted to the plaintiffs in any sum whatever.

Mrs. Dickey says that she is a purchaser for value without notice of insolvency or fraudulent intent, and claims the benefit of the Registry Act. The conveyance to her was duly registered, at her husband's instance, on the 16th April, 1912.

The circumstances relied on to support her contention that she is a purchaser for value are peculiar. Her father, Frederick Hess, died on the 14th October, 1909. She was not married to Dickey until the 5th October, in the following year. Her father and Dickey had, it appears in evidence, long been friends. Dickey, his wife, and his wife's sister Bertha, unite in deposing that Hess gave Dickey, on the 10th July, 1909, the sum of $2,200 to be invested in cattle, the profits on which were to be equally divided. Hess was ill at the time, and, it is said, took the money and cheques from a pillow, gave them to Bertha to count, and handed them then to his friend, receiving an acknowledgment in the form of a promissory note for $2,200. Mrs. Dickey—then affianced to Dickey—was present and knew the purpose for which the advance was made.

She says that immediately after her father's death, a few months later, she began to make deposits with Dickey of cheques and cash arising out of her father's business. On ten or twelve different occasions between the 19th October, 1909, and the 12th July, 1910, she and her sister Bertha journeyed at night from distant Brooklyn to 122nd street, in Harlem, to make the deposits and receive the notes produced at the trial to evidence the transactions.

The notes are all in the handwriting of Dickey. How careful he was to have documentary evidence of his financial transactions with his wife is clear from the promissory note which he gave her on the 14th December, 1911, when, as they say, he borrowed all the savings she had been able to put aside prior to her marriage.

Dickey was at the time largely indebted to the plaintiffs and others. The plaintiffs were insisting on payment. I find that at the beginning of 1912 Dickey was unable to pay his debts, and, if not insolvent, was on the eve of insolvency. It was at this juncture, according to him and his wife, that Mrs. Dickey asked him to pay her what they say he owed to the Hess estate, of which she had, in December, 1909, been appointed administratrix. The reason given for the pressure alleged to have been

exerted was that she wished to wind up the estate. But, when the conveyance was made, . . . Mrs. Dickey took not the first step towards dividing her father's property.

I find that no pressure was exercised by Mrs. Dickey. The conveyance was purely voluntary. It was not made to her as administratrix. . . .

I have no doubt that he was on the eve of insolvency when he conveyed the lands in Clarke to his wife. She pleads that he was unable to pay her. He had borrowed all her little savings. I have no doubt that she was aware that he was unable to pay his debts. He owed large sums for horses and feed, and his creditors were insisting on payment. The conveyance to his wife was made with the intent, common to the minds of both husband and wife, to put the two farms out of the reach of his creditors. It may be observed that Dickey's possession of the farms . . . continued as before the transactions.

I find that the conveyance was voluntary and fraudulent, in the face of positive evidence by both husband and wife that it was for valuable consideration. Apart from the demeanour of the narrators, the elements of falsehood may be perceived in the narrative itself. . . .

Mrs. Dickey, when applying for the administration of her father's estate in December, 1909, swore that its value was under $1,000. At that time, according to her evidence before me, she had personally entrusted to Dickey no less than $2,561.63 in cheques and moneys of the estate, which she had herself collected, and was aware that he owed her father $2,200 and interest. She accounts for the erroneous statement by saying that she had no knowledge of business and merely followed her attorney's instructions.

Mrs. Dickey impressed me as being an exceedingly shrewd and capable woman, who could not unwittingly be led to make a false affidavit. She swore, too, before me, that her father left no debts, as he bought for cash and only from farmers. But two or three accounts rendered to her father or herself, and left—no doubt inadvertently—in his ledger produced by her at the trial, shewed that he had debts and bought from commission merchants—facts which must have been known to his daughter.

Although a conveyance purports to be made in consideration of natural love and affection, evidence may properly be adduced to shew that there was some other consideration: Halsbury's Laws of England, vol. 10, p. 446.

Such evidence should be satisfactory and conclusive. "It

really must be proved beyond the shadow of a doubt that there was that additional consideration which the parties did not choose to express on the face of the instrument itself:" James, L.J., in Levy v. Creighton (1874), 31 L.T.R. 1, 3.

It was said by Vice-Chancellor Mowat in Merchants Bank of Canada v. Clarke (1871), 18 Gr. 594, 595, that transactions of this kind ought not to be held sufficiently established by the uncontroverted evidence of the parties themselves. But the rule thus stated must bend to circumstances: Peterkin v. MacFarlane (1878), 4 A.R. 25, 55.

In Rice v. Bryant (1880), 4 A.R. 542, 553, Chief Justice Moss said, in reference to a similar case: "If he" (the defendant) "has none but the statements of himself and the person with whom he deals, it is not meting out to him any hard measure to require that his story shall be both probable and self-consistent."

The evidence in support of the bona fides of this transaction is improbable, inconsistent, unsatisfactory, and inconclusive. The circumstances indicate clearly to my mind a fraudulent intent to defeat, hinder, delay, or prejudice the creditors of Dickey by a purely voluntary conveyance, made to a grantee aware of his intent and of the fact that he was on the eve of insolvency.

There will accordingly be judgment setting aside the conveyance with costs.

FALCONBRIDGE, C.J.K.B. JANUARY 21ST, 1915.

CLAVIR v. CANADIAN NORTHERN ONTARIO R.W. CO.

Railway — Injury to Neighbouring Property by Construction and Operation—Closing of Street—Subsidence of Building —Disconnection of Sewer — Loss of Rent — Damage by Blasting—Damage by Smoke, Noise, and Vibration—Construction of Subway.

Action for damages for injury to the plaintiff's property alleged to have been caused by the defendants in the construction and operation of their railway.

The action was tried without a jury at North Bay and Toronto.

G. H. Kilmer, K.C., and G. C. McGaughey, for the plaintiff.

A. J. Reid, K.C., for the defendants.

FALCONBRIDGE, C.J.K.B.:—At the request of, and accompanied by, counsel for both parties, I viewed the property. There is a note on the subject at p. 41 of the stenographer's extension of the evidence.

1. As to the closing of Commercial street, there is no object in considering the question of liability, because it is no damage to the plaintiff or his property.

2. The same remark applies to the subsidence of the plaintiff's building. This was not caused by any thing done by the defendants in the construction of their railway, or the excavation made by them for the retaining wall beside their right of way, at the bottom 7 ft. 6 in. from the plaintiff's foundation. That subsidence was due to defects in the plaintiff's own building causing it to settle down in the centre. This is clearly shewn by the evidence of the Devines and other witnesses, and is confirmed by the appearance of the ground, which shews no trace of earth having fallen into the defendants' excavation, which was a clean cut.

3. I allow for two months' loss of rent while the sewer was disconnected $70.00
and for a window or two broken by blasting..... 5.00

$75.00

4. There were no substantial damages proved arising from smoke, noise, and vibration in the operation of the railway, even if such were recoverable.

The defendants did not expropriate any of the plaintiff's land.

5. The evidence shews that the construction of the subway has damaged the property to the extent of $400. With some doubt, I think that item is recoverable in this forum.

Judgment for the plaintiff for $475 and costs.

LATCHFORD, J. JANUARY 22ND, 1915.

RE MCCLEAN.

Will—Construction—Devise to Wife for Life with Remainder to Son—Legacies Charged on Land—When Payable.

Motion by the executors of the will of Edward McClean, late of the township of Brantford, farmer, deceased, for an order de-

termining questions arising as to the proper construction of certain clauses of the will of the deceased.

The motion was heard in the Weekly Court at Toronto.

M. F. Muir, K.C., for the executors.

W. S. Brewster, K.C., for Martha Jane McClean.

F. W. Harcourt, K.C., for the infant children of Martha Jane McClean.

W. M. Brandon, for the surviving children of the testator.

LATCHFORD, J.:—The testator, who died in 1881, devised what was known as his homestead farm to his wife, Mary McClean, for her natural life, if she so long remained his widow. Upon her death or marriage, the farm was devised to a son, Francis McClean, subject to be charged with the lodging, maintenance, and support in the dwelling-house on the farm of any of the testator's children who should, upon the death or marriage of his widow, be minors, until they should respectively attain the age of 21 years or marry, whichever should first occur.

The will then proceeds: "And subject also to and charged with the payment of $500 dollars to my son James within one year after the decease or marriage of my said wife, if then of the age of 21 years but otherwise when he shall attain his majority, and with the payment of $400 each to my children Elizabeth, Catharine, Margaret Maria, Edward, and William Wellington, as they respectively become of the age of 21 years—which said sums I hereby give and bequeath to them respectively."

Mrs. McClean remained a widow and continued in possession of the farm until her death in 1913.

The children Catharine and Edward are dead—Edward leaving a widow and children.

It is urged, on the one hand, that the charge upon the farm in favour of the children Elizabeth, Catharine, Margaret Maria, and Edward, became payable to them when and as they respectively attained the age of 21; and, on the other, that it became payable only upon the death of their mother.

I am of the opinion that the legacies to the four children named were not payable to them on their attaining 21, except in events contemplated and mentioned by the testator, which did not previously occur. When they became of age, their mother had not died or remarried; and the farm at such times was held and enjoyed by her free from any charge whatever, and continued to be so held and enjoyed until her death. It

became subject to the various charges mentioned only when it passed by the will to the son Francis, and that was at the death of the testator's widow in 1913. The inconsistency said to result from the absolute form in which the legacies are granted, disappears when it is borne in mind that they are not charged upon the farm in the hands of the widow, but only in the hands of the son.

There will be judgment accordingly. Costs out of the estate.

LATCHFORD, J. JANUARY 23RD, 1915.

CANADIAN OHIO MOTOR CAR CO. v. COCHRANE.

Company—Calls—Authority of Directors—By-law—Quorum—Subscriber for Shares—Signature to Stock-agreement—Liability to Co-subscribers for Proportionate Share of Moneys Paid by them—Partnership—Agency — Conditional Subscription—Non-fulfilment of Condition—Waiver—Findings of Fact of Trial Judge.

Action by the company and certain individuals, directors of the company, to recover from the defendant $900, the balance of a call of 70 per cent. of his subscription for $2,000 worth of the shares of the company, or, in the alternative, for recovery by the individual plaintiffs of the share of the liability incurred by them, as the defendant's partners or agents, proportionate to the amount borne by his subscription to the subscriptions of the other parties to the original stock-agreement.

The defendant pleaded that no call was ever properly made upon him; that the conditions upon which he signed the stock-agreement were not fulfilled; that he never waived these conditions; and that he was not a partner of the individual plaintiffs, and did not authorise them to incur liability on his behalf.

The action was tried without a jury at Cobourg.

E. G. Porter, K.C., for the plaintiffs.

F. M. Field, K.C., and W. F. Kerr, for the defendant.

LATCHFORD, J. (after setting out the facts at length) :—I find that a proper call was not made at any time. Under the by-laws of the company, four directors were sufficient to form a

quorum, and a directors' meeting could be held without formal notice if all the directors were present or those absent had signified their consent to the meeting being held in their absence. No such consent was ever given by the Cincinnati directors. The letter from the president of the Ohio company purporting to waive notice on their behalf was not a signification by them of their consent to the meetings being held in their absence. The meeting of the 3rd August, 1913, was not a meeting of the directors of the company, but of four of such directors, who had no power, in the circumstances, to issue the call. The claim of the company, therefore, fails.

If any right of recovery exists on the part of the other plaintiffs, it is founded on the stock-agreement signed by the defendant, on authority given them subsequently by the defendant, or on ratification by him of their acts as his agents or partners.

The subscription for stock by the defendant and others was expressly conditional. At least $60,000 of preferred stock was to be subscribed for before any party to the agreement should be bound or liable to any or all of the other parties to it. This condition was, admittedly, not fulfilled. I find that it was not waived by the defendant. He understood at the meeting of the 22nd April that the $60,000 was subscribed, and more was about to be subscribed; and, acting upon what he understood, paid 25 per cent. of his subscription. Waiver exists only where one with full knowledge of a material fact does or forbears to do something inconsistent with the existence of a right or of his intention to rely upon that right: 40 Cyc. 261. The defendant, at the time he paid the final instalment of the $500, had no knowledge that the $60,000 had not been subscribed.

The defendant's participation in the meeting which authorised the plaintiffs Webb and Matthews to proceed to Toronto, and in the meeting upon their return approving what they reported they had done, is relied on to support the contention that, as principal or partner, the defendant is liable to them. What the defendant, with others, authorised the plaintiffs Webb and Matthews to do was to secure an industry for Colborne. He understood them to report that they had done this. He did not understand that they had agreed to purchase and sell 40 motor cars. There is nothing in the evidence, I find, to support the plaintiffs' contention on the question of partnership or agency.

The action fails on all grounds, and is dismissed with costs.

LENNOX, J. JANUARY 23RD, 1915.

SMALL v. DOMINION AUTOMOBILE CO. LIMITED.

Contract—Agreement for Purchase of Vehicle—Cancellation—Action for Return of Deposit—Collateral Agreement—Evidence—Findings of Fact of Trial Judge.

Action to recover the sum of $1,000 paid by the plaintiff to the defendants in 1906 as a deposit upon a contract to buy from the defendants a motor car for $4,200. The plaintiff assumed to cancel the contract, and refused to take delivery of the car. There were subsequent negotiations and agreements between the parties; but the deposit remained with the defendants, and the plaintiff did not accept the car or any car from the defendants. The plaintiff also alleged an agreement by the defendants to sell for him a car which he had previously purchased, and breach of that agreement.

The action was tried without a jury at Toronto.

C. A. Moss, for the plaintiff.

T. J. W. O'Connor, for the defendants.

LENNOX, J. (after setting out the facts at length):—The first question, of course, is the question of fact: is the plaintiff's story to be believed? But it is not the only question, as, even if found in the plaintiff's favour, I would find difficulty in concluding that it was binding upon the defendants, or that it should modify or amend the written contract which the plaintiff, after the refusal and explanation he deposes to, deliberately signed, sent in to the company, and invited them to act upon, without knowledge or notice of any kind. Much more would I have difficulty in giving effect to this alleged collateral arrangement, by reason of the fact that, when the plaintiff obtained a concession and sent in his second order in 1907, he knew that an attempt had been made to sell his car and had failed, and still not one word was said to intimate that the contract was other than as stated in the written order, but, on the contrary, this order expressly stated, as the language of the plaintiff, that "there are no promises, verbal understandings, or agreements, of any kind, pertaining to this order, that are not clearly stated in it."

But this consideration does not arise, for I cannot find as a

fact that the agent Thompson did during the negotiations for the sale to the plaintiff, or on the day of the signing of the order, make any promise or undertake to sell the plaintiff's car for $4,500, or at any price. . . .

The onus is upon the plaintiff. The alleged agreement is contrary to the contracts and inconsistent with the letters and conduct of the plaintiff. The alleged agreement was never mentioned to the defendant company until the plaintiff was about to sue, and was not then followed up. The plaintiff has not established his contention upon this issue.

Then, is he entitled to recover back the money he paid? I am of opinion that he is not. Aside from the law governing deposits—treating the $1,000 simply as a part payment—I cannot see how he can recover.

The defendants have always been ready and willing to carry out the contract upon their part. . . . The plaintiff wholly repudiated the contract by letters, and followed this repudiation by action. Even after the action, the company, by letter of the 2nd June, repeat their repeated offers of delivery; and again offer delivery in their statement of defence. The plaintiff replies that the order is cancelled. The plaintiff was expressly bound to pay the balance when the car was ready for delivery. He is the party in default—the only party in default. The Court cannot assist him in breaking his contract. If the matter were reversed, and the defendants were refusing to complete by reason of delay, the Court might relieve them, upon the principle of Kilmer v. British Columbia Orchard Lands Limited, [1913] A.C. 319, and the majority judgment in Snell v. Breckles (1914), 49 S.C.R. 360. But the plaintiff is not asking to be relieved from the harshness of an opponent inequitably setting up a forfeiture. He is seeking to take advantage of his own wrong. The plaintiff relied upon the Breckles case. It cannot be invoked to help the plaintiff. It has no application to this case except as an illustration upon reversed conditions.

But this is "a deposit." It is so treated in the contracts, in the receipt, in all the plaintiff's letters, and in the plaintiff's statement of claim and reply; and for this reason, too, the plaintiff, being the defaulter, cannot get the money back: Howe v. Smith (1884), 27 Ch. D. 89, where the history of earnest and deposit is reviewed by Fry, L.J.; Hall v. Burnell, [1911] 2 Ch. 551; Collins v. Stimson (1883), 11 Q.B.D. 142, where Baron Pollock said: "According to the law of vendor and purchaser the inference is that such a deposit is paid as a guarantee for the performance of the contract, and

where the contract goes off by default of the purchaser, the vendor is entitled to retain the deposit:" Halsbury's Laws of England, vol. 25, p. 133, para. 245, note (*d*), and p. 237, para. 418, note (*t*); and it is none the less a deposit because it is a part payment: Howe v. Smith, supra.

I was disposed to suggest that the plaintiff might still avoid loss by the company applying the deposit as part payment upon a car now to be delivered to and accepted by the plaintiff; but counsel for the plaintiff anticipated me in this, and pointed out that present delivery would not be entertained—that a 1915 car would not be accepted. Be it so.

There will be judgment dismissing the action with costs.

McKinney v. McLaughlin Carriage Co.—Falconbridge, C.J. K.B.—Jan. 20.

Arbitration and Award—Consent of Parties to Disposition of all Matters in Question by Judge as Quasi-arbitrator—Equitable Award—Costs.]—Action to recover $1,000 damages for the conversion of a car purchased from the defendants, and $100 damages for trespass. The action came before the Chief Justice on a motion for judgment on the pleadings. The parties afterwards consented to the Chief Justice, as quasi-arbitrator without appeal, making a final disposition of all matters in question between them. Pursuant to the consent, the Chief Justice awarded and adjudged that the defendants should retain the car and pay the plaintiff $250 and costs of action on the scale of the Supreme Court of Ontario; the defendants' Division Court plaint to be dismissed. A formal award may be drawn up, if necessary. The Chief Justice adds to the written memorandum of his award or judgment, that, as it is a purely equitable and, as he thinks, a just judgment, it will probably displease both parties. W. Laidlaw, K.C., for the plaintiff. L. F. Heyd, K.C., for the defendants.

St. Jean v. Laurin—Falconbridge, C.J.K.B.—Jan. 22.

Promissory Note—Action on—Payment—Onus—Failure to Satisfy — Interpleader Issue — Assignment of Chose in Action — Validity — Evidence — Fraudulent Intent — Creditors under Foreign Judgment — Proof of Judgment — Right

to Share in Fund in Court.]—Action on a promissory note, and interpleader issue. In regard to the action on the note, the learned Chief Justice said that the defendant failed to satisfy the onus of proving payment. Judgment for the plaintiff for $484.33, plus $83.15 costs in the Superior Court, District of Montreal, with interest on $484.33 from the 16th June, 1913, and costs of this action, less the defendant's costs of the adjourned hearing of the 29th December last.—In the interpleader issue, the Bell Telephone Company of Canada filed an exemplification of a judgment of the Circuit Court of the District of Montreal, dated the 9th May, 1914, in favour of that company against the defendant Laurin for $93 debt and $36.70 costs. The Chief Justice said that the company would be entitled to share in the fund in Court, if judgment should pass in favour of creditors. But he finds that the plaintiff has failed to attack successfully the assignment to the defendant Lefebvre on any of the grounds alleged. The extraordinary evidence given on commission as to the credibility of the defendants (particularly of the defendant Lefebvre) did not, for reasons apparent on the face of the examination, impress him at all. The statement of the defendant Laurin in his examination for discovery in the suit against the Canadian Pacific Railway Company as to the ownership of the goods was not so startling as it would at first sight appear to be. What he assigned to the defendant Lefebvre was not the goods but the sum of $2,741.25, which the railway company owed him. The circumstances looked suspicious, but the allegations of fraud and fraudulent intent and knowledge by the defendant Lefebvre of the defendant Laurin's insolvent condition had not been proved. Judgment for the defendants in the issue, with costs, if the trial Judge has power to award costs. G. H. Sedgewick, for the plaintiff. W. N. Tilley and H. G. Smith, for the defendant Laurin. G. Grant and J. M. Adam, for the defendant Lefebvre. D. T. Symons, K.C., for the Bell Telephone Company of Canada.

CHRISTIE v. LONDON ELECTRIC CO.—BRITTON, J.—JAN. 22.

Master and Servant—Death of Servant—Negligence — Evidence—Findings of Jury—Motion for Nonsuit.]—The husband of the plaintiff was in the service of the defendants, and was killed by a fall from a pole of the defendants, which he had climbed up for the purpose of removing wires, as the pole was considered by the defendants unfit for service, and a new pole had been erected near the old one. The plaintiff brought this

action to recover damages for the death of her husband, charging negligence in sending an employee up this pole when in a defective condition—not using guy ropes in such a way as to prevent the pole from falling. The plaintiff further said that, if the defective condition of the pole was not known, and if the pole was considered a fair pole, the defendants were guilty of negligence in their want of proper inspection. The action was tried with a jury at London. Very little evidence was given; the defendants called no witnesses. At the close of the plaintiff's case, counsel for the defendants asked for a dismissal of the action. The learned Judge reserved his decision, and submitted questions to the jury, which were answered as follows: that the defendants were guilty of negligence which occasioned the death of John Christie; that the negligence was that of the pole inspector "in reporting the pole to be in a fair condition, when from the evidence produced it was shewn to be rotten for some time, and quite unsafe for a man to work on." The damages were assessed at $2,500. The learned Judge said that further consideration of the motion for a nonsuit led him to the conclusion that the case could not properly have been withdrawn from the jury; and he directed judgment to be entered for the plaintiff for $2,500 with costs, apportioning the money, one-half to the widow (the plaintiff), one-quarter to each of the two children, viz., John Roy Christie and Edith Christie; the infants' money to be paid into Court. Sir George Gibbons, K.C., and G. S. Gibbons, for the plaintiff. D. L. McCarthy, K.C., and W. R. Meredith, for the defendants.

ONTARIO RAILWAY AND MUNICIPAL BOARD.

JANUARY 18TH, 1915.

RE KEMP AND CITY OF TORONTO.

Municipal Corporation—Local Improvement—Construction of Roadway—Petition of Land-owners for Relief from Assessment—Local Improvement Act, R.S.O. 1914 *ch.* 193, *sec.* 9, *sub-sec.* (2), *Added by* 4 *Geo. V. ch.* 21, *sec.* 42—*Construction and Meaning—Petition Launched after Execution of Work but before Confirmation of Assessment by Court of Revision.*

Petition by W. A. Kemp and others, under the Local Improvement Act, R.S.O. 1914 ch. 193, sec. 9, sub-sec. (2), added

by 4 Geo. V. ch. 21, sec. 42, for relief in respect of the pavement of East Roxborough street, in the city of Toronto.

James S. Fullerton, K.C., for certain of the petitioners.
R. J. Maclennan, for other petitioners.
Irving S. Fairty, for the city corporation.

The opinion of the Board was delivered by the Chairman:—This is an application under sub-sec. (2) of sec. 9 of the Local Improvement Act, as enacted by 4 Geo. V. ch. 21, sec. 42, which became operative on the 1st May, 1914. Objection was made to the Board's entertaining the application, on the grounds: (1) that sub-sec. (2) was passed subsequently to the execution of the work, and was not retroactive; and (2) that, before the application was made, the work has been fully executed, and a special assessment roll had been prepared, and a sittings of the Court of Revision had been held for imposing the assessment, although the Court has not as yet confirmed the assessment roll.

On the 16th June, 1911, under sec. 11 of the Local Improvement Act, notice was given to the applicants by the corporation of its intention to construct a 24-foot macadam roadway, with concrete kerbing and brick gutters, on a portion of East Roxborough street, as a local improvement, and to make a special assessment of a part of the cost upon the land abutting directly upon the work. The notice contained the particulars of cost required by the Act, and, furthermore, intimated that persons desiring to petition against undertaking the work should do so on or before the 21st July, 1911. Subsequently a petition was presented to the city council by the applicants protesting against the work.

On or about the 7th September, 1911, a notice was served by the corporation on the petitioners to the effect that the city engineer had reported that the construction of a 24-foot macadam roadway with concrete kerbing and brick gutters was desirable and necessary on the portion of East Roxborough street named: that the council had power by a two-thirds vote of all the members to pass a by-law to undertake the work, notwithstanding any petition or protest against the same, and that the lands to be specially assessed consisted of all real property fronting or abutting on the proposed work. The notice contained the particulars of cost required by the Act, and intimated that a by-law to undertake the work would be considered by the council at a

meeting on the 18th September, 1911, and that at such meeting all property-holders affected by the work would have the right to be heard, before the council finally decided upon proceeding therewith. It is alleged that on the 18th September, 1911, the petitioners, with others liable to be assessed for the work, appeared before the council and protested against its cost being assessed against them, on the ground that they were not liable to be assessed, their lands not being benefited.

Notwithstanding the hostile attitude of the applicants, and their fellow-protestants, the council on the 31st October, 1911, passed by-law No. 5867, declaring that it was desirable that the work in question should be undertaken, and authorising its construction.

Subsequently, the work was executed, and an assessment roll was prepared, and on the 13th March, 1914, the corporation notified the applicants of the sittings of the Court of Revision to be holden on the 31st March, 1914, to hear complaints against such roll, all in pursuance of the provisions of the Local Improvement Act.

For some reason, the assessment roll was withdrawn from the Court of Revision by the officers of the corporation, and on the 30th October, 1914, the corporation notified the applicants of a sittings of the Court of Revision to be held on the 17th November, 1914, to hear complaints against the proposed assessment of the cost against the property-owners. It would appear that in the interval between the two sittings of the Court of Revision there had been a new computation and apportionment of the cost of the work, with the result that the roll was altered, and the burden upon both the corporation and the property-owners was slightly increased. At this latter sittings of the Court of Revision, it is alleged, the officers of the corporation were not prepared to go on, and the consideration of the assessment roll was adjourned till the 8th December, 1914. No further action was taken by the Court of Revision on this latter date, as the Board understands, and on the 21st December, 1914, this application was made.

Upon this statement of facts, whether or not the Board has jurisdiction to entertain this application, must turn upon a consideration of the provisions of the Local Improvement Act as amended. This enactment contains a detailed code of procedure for the initiation and prosecution of the local improvement work from its inception down to the act which finally determines the incidence of the cost upon all the taxable interests. Three stages

are clearly expressed or implied in the evolution of the work; (1) the undertaking of the work; (2) the execution of the work; (3) the imposition of the special assessment to meet the cost of the work.

A local improvement work may be "undertaken" by a municipal corporation in various ways. This work the council elected to undertake in the way authorised by sec. 9. To the validity of its being undertaken under this section a by-law of council was necessary, passed by a two-thirds vote of all the members, declaring that its construction was desirable, while a prerequisite to its validly passing was publication of the notice of the council's intention, under sec. 11. Upon these provisions being observed, and until the passing of the amendment of 1914, the authority of the corporation to proceed with such a work so undertaken could not be questioned, the foundation for the work so laid was unassailable—the statute expressly providing that the owners of the land affected should not have the right to lodge a counter-petition with the council. This deprivation of the right of counter-petition, or other effective protest, was anomalous when the work was undertaken on the council's own motion, the one exception being the case of such subsidiary works as private drain connections. For instance, where the council proceeds on the initiative plan under sec. 13, the right of counter-petition is vested in a majority of the property-owners representing one-half in value of the lots liable to be specially assessed. Under sec. 7, in the case of a work, however undertaken, falling in one of the several enumerated catagories and exceeding in cost $50,000, any person whose land is to be specially assessed may give notice that he objects on certain grounds to the work being undertaken, and thereafter the work cannot be proceeded with until the approval of this Board has been obtained. It is to be noted that in these cases the action of the corporation is arrested at the preliminary stage of the work, and the objector is remediless, once the work has been executed.

The Board is of the opinion that the amendment of 1914 is intended to remedy the anomaly above noted, and to give to dissentient land-owners a remedy analogous to those given by counter-petition under sec. 13, and by notice to the council under sec. 7. As, however, the latter remedies are exercisable and effective at the earliest stage of the work, and before it has been actually executed, so the Board is of opinion that under the amendment of 1914 its intervention may be invoked only at that stage. True, secs. 7 and 13 prescribe a time-limit for action by

the dissentient land-owners, while the amendment of 1914 is silent as to the period within which the intervention of the Board may be invoked. Notwithstanding this omission, obviously at some point of time the right of appeal to the Board is gone. It would scarcely be contended that, after the work had been executed and the assessment roll finally confirmed, the Board could reopen the question of the assessment as between owners and corporation. To fix the point of time at which the remedy by appeal is gone, it is necessary to ascertain the intention of the Legislature in this respect from a consideration of the general scheme of the Local Improvement Act. The council is authorised to undertake such a work, then to execute it, and then to procure an assessment roll to be made for imposing the tax. Once the work has been authoritatively undertaken and fully executed, as this work has been, it seems to the Board that the final step of imposing the assessment in terms of the by-law follows automatically, and without any appeal, except that provided from the Court of Revision. In short, the amendment of 1914 seems to be intended to provide an appeal from the discretion of the council in undertaking the work at all, or in respect of some detail of the work, such as the character or kind of the pavement, the apportionment of the cost as between the owners and the corporation, etc. But, when the work has been executed in assumed conformity with the council's declared intention, then, in the opinion of the Board, the time has gone by to question the council's discretion as exercised and expressed in the by-law.

This conclusion seems warranted by the fact that the amendment of 1914 is an amendment of a section whose subject-matter is concerned with "procedure for undertaking the work;" implying that what the amendment aims to confer is a right to question the soundness of the foundation on which the council proposes to build, but necessarily exercisable before the superstructure is raised. Besides this, the amendment of 1914 provides that an application to the Board can be made only by a majority of the owners representing one-half the value of the lots to be specially assessed—precisely the requisite qualification of a counter-petition under sec. 13—thus furnishing an argument for the analogy above suggested. Furthermore, the amendment expressely provides that, after notice to the clerk of such an application as this, and pending its determination, the council shall not proceed with the work—indicating clearly that the work is yet in the initiatory stage.

The Board is also affected by the consideration urged by Mr. Fairty that the Legislature could scarcely have intended by this enactment to authorise the Board to interpose and remodel the general scheme of assessment proposed by the council under the powers vested in it by sec. 23, at a stage in the prosecution of the work when it was too late for the council to withdraw. A material inducement to the council to undertake a work might well be its declared intention to assess the cost, or the major part of it, on the abutting land-owners. If, however, after the work is executed, and the debt incurred by the corporation, the Board may intervene and alter the apportionment of the tax, not only is there disturbance of the financial arrangements of the corporation—greater or less according to the magnitude of the work—but possibly the very intention of the council, inducing it to undertake the work, is frustrated.

In the opinion of the Board, it is not without significance that sec. 36(2) of the Act provides that the Court of Revision shall not have authority to review or alter the proportions of the cost which the lands to be specially assessed, and the corporation, are respectively to bear, according to the provisions of the by-law for undertaking the work. That is to say, when a work has reached the stage this had reached when the application was made to the Board, the financial scheme of the council, on the faith of which it undertook the work, cannot be altered by the Court of Revision.

In view of the conclusion reached by the Board as to the general application of the amendment of 1914, it is not necessary to discuss the question of its retroactivity raised at the hearing.

The petition will be dismissed; there will be no costs to either party, but the petitioners will pay $10 in stamps on the order.