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COURT OF APPEAL.

JANUARY 26TH, 1911.

LEITCH v. PERE MARQUETTE R.W.CO.

Railway—Injury to Brakesman—Switch-stand at Side of Track—Dangerous Position—Body of Brakesman Protruding from Side of Train—Negligence of Fellow-servants—Findings of Jury—Evidence—Workmen's Compensation Act—Notice of Injury under sec. 13*—Failure to Give—Reasonable Excuse—Absence of Prejudice—Damages—Ascertainment in Accordance with Statute.*

Appeal by the defendants from the judgment of BOYD, C., upon the findings of a jury, for the recovery of $4,000 damages, in an action for personal injuries sustained by the plaintiff, a brakesman in the employment of the defendants, by reason of the negligence of the defendants, as the plaintiff alleged. The plaintiff, in the performance of his duties on a train, was struck by the target of a switch-stand while the train was passing it, and was injured.

At the first trial of the action there was a nonsuit, which was set aside by a Divisional Court, who directed judgment to be entered for the plaintiff for $2,520. Upon appeal from the order of the Divisional Court, the Court of Appeal directed a new trial: I O.W.N. 562. The judgment now in appeal was given at the new trial so directed.

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

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

L. J. Reycraft, for the plaintiff.

MOSS, C.J.O.:— . . . In addition to disputing liability for negligence causing the plaintiff's injuries, and objecting

to the amount of damages, the defendants set up that no notice in respect of the injury was delivered to them in the form and manner required by sec. 13 of the Workmen's Compensation for Injuries Act.

The objection was not raised upon the former appeal, although the award of damages was manifestly based upon the Act; and, no doubt, the reason was, that the defendants had precluded themselves from making the objection by the arrangement made at the trial upon which the trial Judge entered judgment in their favour.

The objection was raised at the last trial, but was not finally dealt with by the learned Chancellor, for the reason, no doubt, that the amount of the damages awarded indicated that the case was not treated as one within the Workmen's Compensation Act.

It was contended for the plaintiff, before the learned Chancellor, that the circumstances shewn in evidence afforded reasonable excuse for the want or insufficiency of the notice. Whether this was so or not is a question that may be determined upon the appeal, if not earlier decided: sec. 13, sub-sec. 5.

There is no question that the defendants were not prejudiced in their defence by the want of the notice. Reports were made to them on the day of the accident by their officials, giving full details. Statements were obtained from the plaintiff giving his version of the affair within 6 days of the accident, and other reports and statements were received within 8 weeks of the accident. In addition, there are many circumstances shewn which make it proper to say at this stage of the case that reasonable excuse has been shewn, and that the defendants have not been prejudiced by the want or insufficiency of the notice.

There was evidence as to the manner of the construction and placing of the switch-stand and target with relation to the line of the rails, and also as to the effect of user and want of repair resulting therefrom, and from the sinking of the tie at the rail, and the neglect to restore the stand and target to their proper position and condition. Upon a question or direction addressed to the jury to state the manner and cause of the plaintiff's injury as follows: "3 . . . State in your own way how the plaintiff was injured?" they answered: "We find that the conductor coming down just at that point attracted the attention of the plaintiff, causing him to bend out, and, the target and stand being out of repair, struck him, causing him to be thrown off."

In answer to other questions, the jury stated their opinion that the switch-stand was dangerously close or too close and out of proper repair. But the controlling finding is that in answer to question 3, which is most in accord with the main body of evidence. Both upon the evidence and that finding, the case is one of negligence under the Workmen's Compensation Act, and the damages should be assessed upon the basis of its provisions.

In his charge to the jury the learned Chancellor referred briefly to the question of the damages recoverable under the Act, but the jury were not asked to find, and they did not find, the amount.

There is, however, evidence upon which a reasonable conclusion can be arrived at. The plaintiff was employed as a spare brakesman, and was paid according to the runs he made. For the months of March, April, May, and June he estimated that he made from $45 to $50 a month. But in July he made $80.75, and during August, the month in which he was injured, he appeared to be constantly employed, but what he would have made is, of course, only a matter of conjecture. Taking everything into consideration, it is reasonable to say that as a spare brakesman his prospects of continuous employment would not bring his average payments to more than $70 a month, or, say, for three years $2,600. This would be all that the jury could reasonably or properly have found, and it would be no advantage or benefit to him to direct a new trial or further inquiry upon the question of the quantum of damages.

The appeal should be allowed to the extent of reducing the damages to $2,600, and there should be no costs of the appeal.

MEREDITH, J.A., gave reasons in writing for the same conclusion.

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

JANUARY 26TH, 1911.

GEE v. EAGLE KNITTING CO.

Contract—Writing under Seal—Servant of Company—Transfer of Shares for Benefit of—Gift—Condition—Construction of Contract—Rectification—Evidence.

Appeal by the plaintiff from the judgment of SUTHERLAND, J., dimissing the action and allowing the defendants' counterclaim. The action was brought for a declaration that the plaintiff was the beneficial owner of 25 shares of the capital stock of the defendant company, under an agreement between him and the company dated the 6th October, 1904. On the 21st February, 1910, the plaintiff was discharged from the service of the defendant company, and at that time 25 shares were standing in the name of the defendant Moodie as trustee for the plaintiff. The counterclaim was for rectification of the agreement.

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

J. Bicknell, K.C., and G. S. Kerr, K.C., for the plaintiff.

G. T. Blackstock, K.C., and W. A. Logie, for the defendants.

MACLAREN, J.A.:—The plaintiff was for about seven years the manager of the company defendant, and about a year after entering the company's service they made an agreement under seal whereby the company, "as an inducement to and reward for faithful and loyal service in the future as in the past," transferred 50 shares of their paid-up stock to their president in trust, the dividends to be paid to the plaintiff, and 5 of the 50 shares to be transferred to him at the close of each year. The plaintiff was not to have the right to dispose of the stock, but, in the event of his death or ceasing to be in the service of the company, the company were to have the right to nominate a purchaser to acquire the stock at par.

The plaintiff bases his claim entirely upon the written agreement, and says that he is entitled to the 5 shares at the end of each year, whether he be then in the employ of the company or not. The company say that, under a proper construction of the writing, he is entitled only while he is in the employment of the company, but, if the writing does not clearly express this, they ask that it be reformed so as to conform to what was the real agreement and intention of the parties.

As pointed out by the authorities, if such a reformation is asked for, the party seeking relief undertakes a task of great difficulty, since the Court must be clearly convinced by the most satisfactory evidence, first, that the mistake complained of really exists, and next, that it is such a mistake as ought to be corrected. If there is no documentary evidence to support the claim for reformation, and the party seeking it relies wholly

upon oral testimony, then his position is put by some of the authorities as "well nigh desperate." The English cases are referred to and discussed in 2 Taylor on Evidence, 10th ed., secs. 1139, 1140, and by Strong, J., in Campbell v. Edwards, 24 Gr. 171, where the governing rules and principles are laid down.

In the present case there is no other writing throwing light upon the contract; we are limited to the agreement itself, to the oral testimony, and the presumptions and inferences to be drawn from these, from the nature and character of the contract, and the conduct of the parties.

The plaintiff relies upon the second clause of the agreement, which, if it stood alone, would be conclusive in his favour. But the whole contract should be looked at and considered, and also its scope and design. The adoption of the interpretation of the plaintiff would lead to some strange results. The gratuity of the 50 shares (worth $5,000) is expressed to be an inducement to and reward for faithful and loyal service. He had been in the service of the company for only a single year, and the reward for such service is placed only as the second or minor ground for the gift; yet the result would be, if his interpretation be correct, that if he had, a month after the agreement, voluntarily left the company's service, or had been dismissed for good cause, he would, notwithstanding, be entitled to receive the 5 shares at the end of each of the 10 following years. This would wholly exclude the consideration and motive of an inducement to faithful service, which is put forward in the instrument as the chief ground for the gift. Can it be imagined that such a contract was contemplated by either of the parties? Who ever heard of such a contract between an employer and employee?

Again, the fourth clause of the agreement is, to my mind, wholly inconsistent with the interpretation put upon it by the plaintiff. The evident intention was that, in the event of his death or of his leaving the employment of the company, he should no longer have any interest in any of the 50 shares, on the company's nominating a purchaser who would pay par for them. His solicitors adopt this view in their letter of the 9th March, 1910; but a reference to clause 4 will shew that the only shares for which the company was to provide a purchaser were those that were standing in his name and which he was to assign and transfer to such nominee. The only shares to which this clause is applicable would be those that had been from year to year transferred to him by James R. Moodie at the rate of 5 shares per year. No provision is made in any part of the agree-

ment for the plaintiff dealing with or disposing in any way of the shares still standing in the name of Mr. Moodie in trust. A careful reading of the 3rd clause of the agreement shews that, while the first part of that clause prohibits the plaintiff from parting with any part of his interest in the 50 shares, yet, in the latter part, when it speaks of passing a title to a vendee or transferee or ear-marking the shares, only those shares which may have been actually transferred to him are there dealt with.

On the whole, I am of opinion that, while the instrument is manifestly defective and has ambiguities and inconsistencies, yet a proper interpretation of it as it stands is fatal to the claim of the plaintiff, and that his action was properly dismissed.

When, however, we come to the oral testimony, these ambiguities and inconsistencies are satisfactorily explained and cleared up, and it appears manifest that the real agreement between the parties was that set up by the defence. The findings of the trial Judge appear to be amply sustained by the evidence, and the appeal should be dismissed.

MEREDITH, J.A.:—Although I cannot think that the proper rule regarding the weight of evidence, in such a case as this, was applied at the trial, yet I have little doubt that a right conclusion was there reached.

An action for the reformation of a writing, and certainly none the less so when it is the "solemn deed" of the parties, is not to be determined upon the mere weight of evidence; as has often been said, such an action ought to be supported by irrefragable evidence if it is rightly to succeed. When intelligent persons enter into a plain agreement in writing, they ought to be bound by the agreement so expressed, unless, upon the plainest and surest evidence, it is shewn that it does not truly express the real agreement—a thing hardly to be done. But in cases in which the writing is not plain, where its meaning might have been misunderstood, evidence might very well be considered irrefragable, when in the plain case it could not.

This case is one of the latter kind: there might well have been a misunderstanding of the true meaning and effect of the writing upon the question involved in this action; its meaning may, to some minds, even after much discussion over it, seem to be far from quite free from doubt; but my interpretation of it accords with the plaintiff's contention.

Then the case is not one of a bargain; it is one of a gift; a gift which was to be only as extensive as the giver—the defendant Moodie—chose to make it; and it seems to me to be

very well proved that he intended to make it as extensive only as the defendants contend for; that is, that the plaintiff was to become the absolute owner of the shares only at the rate of 5 for each year of service rendered until the 50 were so acquired.

Under all the circumstances of the case, and upon all the admissible evidence adduced in it, there was, in my opinion, upon the principles applicable to the case, enough to justify the judgment, for the reformation of the writing, appealed against.

I would, therefore, dismiss the appeal.

MOSS, C.J.O., GARROW and MAGEE, JJ.A., agreed in the result.

HIGH COURT OF JUSTICE.

RIDDELL, J., IN CHAMBERS. DECEMBER 27TH, 1910.

*RE FARMERS BANK OF CANADA.

Bank—Petition for Winding-up—Winding-up Act, R.S.C. 1906 *ch.* 144, *secs.* 13 (2), 14—*Four Days' Notice—Power to Waive—Application of Con. Rules—Powers of Curator—Bank Act, secs.* 119, 121—*Right to Insist upon Statutory Notice—Power to Enlarge Hearing—Other Petitions Pending—Costs—Creditors and Shareholders Appearing upon Petition.*

Petition by George F. Reid for the winding-up of the bank.

Grayson Smith, for the petitioner.
J. Bicknell, K.C., for the curator.

RIDDELL, J.:—A petition was presented to me in Chambers on the 21st December, on behalf of George F. Reid, for the winding-up of the bank. Mr. Hunter appeared for the bank and admitted insolvency; also, as I understood, waiving the four days' notice required by the Winding-up Act. A curator having been appointed under the Bank Act, R.S.C. 1906 ch. 29, sec. 117, I required notice to be served upon him of the application, and enlarged the motion until the 22nd December.

The curator appeared on the motion by counsel, and many other counsel appeared representing creditors, etc.

*To be reported in the Ontario Law Reports.

The curator repudiated Mr. Hunter's action in toto, and refused to make any admission of insolvency or to waive the statutory time of notice. The insolvency, however, is sufficiently proved by affidavit.

It is provided by the Winding-up Act, R.S.C. 1906 ch. 144, sec. 13 (2); "Except in cases where such application is made by the company, four days' notice of the application shall be given to the company before the making of the same."

The practice has not been uniform in our Courts upon the point whether the company can waive the statutory time—orders have been made, to my knowledge, where the company did so waive. I have had an opportunity of consulting a number of my brethren, and most hold the view that the statutory provision cannot be waived. I concur in that opinion. . . .

[Reference to Re McLean Stinson and Brodie Limited, ante 294, and cases there cited.]

I do not think the Court has power to dispense with the time limited by the statute by reason of the provisions of the Con. Rules. . . .

[Reference to secs. 108, 124, 134, 135, of the Winding-up Act.]

I think that I have no power to make this order, the four days' notice required by the statute not having been given.

Even had there been any power to waive the time, in the present case the result would be the same.

By the Bank Act . . . the powers of the curator are very large. Sections 119 and 121, in my opinion, vest him with all the powers which directors and solicitor had before his appointment. After the appointment of a curator, the Board of Directors have no power to give a solicitor authority to consent to anything which may have any effect upon the rights and interests of creditors—and, a fortiori, the solicitor has no such authority derivable from his former retainer by the bank. It is the curator who has all the powers. . . .

The curator, who, for the purpose of resisting a winding-up order, is certainly vested with all the powers the bank itself would have had, may insist upon the statutory notice; he does insist; and the objection is fatal.

No doubt, I might have enlarged the hearing, etc., under sec. 14; it is said, however, that there are other petitions pending; and I think that in the race for the order, with its casual advantages, the first applicant who is wholly regular should not be deprived of any advantage to which his rigid adherence to the rules, statutes, and practice, entitles him.

As to costs, while . . . all creditors and shareholders have the right to appear upon the motion, they should do this at their own peril unless they are served with notice of motion. There may be cases in which it would be proper to award them their costs against an applicant failing, but this is not one of such cases. The curator is alone entitled to his costs under this order.

LATCHFORD, J. JANUARY 20TH, 1911.

KENNEDY v. KENNEDY.

Will—Construction—Direction to Apply Fund for Maintenance of Residence—Provision for Distribution of Fund if Residence Sold—Executory Interest of Distributee—Rule against Perpetuities—Status to Maintain Action—Summary Judgment on Pleadings—Application for Leave to Amend—New Cause of Action.

Motion by the defendant James H. Kennedy for judgment under Con. Rule 616 upon the pleadings, or for an order under Con. Rule 261 striking out the statement of claim as against the applicant, on the ground that it did not disclose any reasonable cause of action, inasmuch as the plaintiff had no interest in the estate of the late David Kennedy, whose will the plaintiff desired to have interpreted.

E. D. Armour, K.C., for the applicant.
A. J. Russell Snow, K.C., for the plaintiff.

LATCHFORD, J.:—The plaintiff was left $5,000 by the testator. She alleges that this legacy, and all other pecuniary legacies, and the debts of the testator, have been paid by the acting executor, the defendant now moving. One of the other executors named in the will was not of age at the time probate was granted, and the third, who was of age, renounced her right to probate.

The plaintiff is not one of the next of kin of the testator, but since this action was brought she has, it would appear, obtained an assignment from her father—who is one of the next of kin—of any interest he may have in certain residuary estate of the testator, as to which there may be, it is alleged, an intestacy.

Apart from the assignment referred to, the right, if any, of the plaintiff to maintain this action depends upon whether she

is entitled to anything out of the estate under a limitation, expressed in a clause of the will dealing with part of the testator's residuary estate. This clause, numbered 20, for convenience, in the statement of claim, will be found set forth in full under the same number in Kennedy v. Kennedy, 13 O.W.R. 984, at p. 985.

The testator devised his dwelling-house in fee simple to his son, the defendant James H. Kennedy. Other devises and bequests followed. The residue he devised, under clause 20, as pleaded, to his executors and trustees "to be used and employed by them . . . as far as it may go . . . in the maintenance and keeping up my house and premises herein bequeathed to my son James Harold . . . with power to sell my real estate . . . and the proceeds of such sales to devote . . . to keep up and maintain my said residence in the manner in which it has heretofore been kept and maintained."

Then the will proceeds: "If for any reason it should be necessary that the said residence should be sold or disposed of, I direct, upon any such sale being completed, that the residuary estate then remaining shall be divided in equal proportions among the several pecuniary legatees under this my will."

The plaintiff in this case is a pecuniary legatee, differing, both in that respect and in not being one of the next of kin, from the plaintiff in the case cited. But the contingency in which the plaintiff as a pecuniary legatee is, if at all, to be entitled to share in the residue has not arisen and may never arise. The residence devised in fee to James Harold Kennedy has not been sold. It may not be sold for many years. It may never be sold. Unless and until it is sold—if ever—the plaintiff, as a pecuniary legatee, is not under the terms of the will to become entitled to any share in the residuary estate appropriated by the will to the up-keep and maintenance of the residence devised to James Harold Kennedy. The limitation in favour of the pecuniary legatees, including this plaintiff, is, in my opinion, void, as in breach of the rule against perpetuities.

It is manifest that the executory interest of the plaintiff and the other pecuniary legatees may not arise within the limits of the rule. "A present right to an interest in property which may arise at a period beyond the legal limit is void:" Kay, J., in London and South Western R.W. Co. v. Gomm, 20 Ch. D. 562, 573. This statement of the law is expressly approved in the judgment of Jessel, M.R., and Lindley, L.J., reversing on other grounds the judgment of Kay, J. See also Worthing v. Heather, [1906] 2 Ch. 532, 542; and In re Bowen, Lloyd Phillips v. Davis, [1893] 2 Ch. 491, 494.

The plaintiff having no interest in the estate as a pecuniary legatee beyond what she has admittedly received, she has no status to maintain this action, which accordingly, as against the defendant James Harold Kennedy, must be dismissed with costs.

It was urged by the plaintiff's counsel that if she was adjudged upon the pleadings not to be entitled to maintain this action, she should, nevertheless, be allowed to set up by way of amendment the new right which she has acquired under the assignment from one of the next of kin. But what I am called upon to determine is, whether or not James H. Kennedy is entitled to judgment upon the facts disclosed by the pleadings before me. In view of the affirmative conclusion which I have just expressed, I should not, I think, allow the plaintiff to set up in this case an entirely new cause of action. If so advised, she is, of course, free to bring another action in her new capacity, and this judgment is without prejudice to her new right.

DIVISIONAL COURT. JANUARY 20TH, 1911.

*CANADIAN BANK OF COMMERCE v. ROGERS.

CANADIAN BANK OF COMMERCE v. HACKWELL.

CANADIAN BANK OF COMMERCE v. SIMPSON.

Promissory Notes—Payment for Shares in Foreign Company—Indorsement by Officers of Company to Bank—Holder in Due Course—Title—Company not Licensed to Do Business in Ontario—Extra-Provincial Corporations Licensing Act—Effect on Title of Bank—Retroactive Effect of License Obtained before Action—Irregularities in Formation of Company—Misrepresentations.

Appeal by the defendants from the judgment of RIDDELL, J., ante 45, in the three actions, in favour of the plaintiffs. The actions were upon promissory notes made by the defendants respectively.

The appeals were heard by BOYD, C., LATCHFORD and MIDDLETON, JJ.

F. H. Thompson, K.C., for the defendant Hackwell.

R. S. Robertson, for the defendants Rogers and Simpson.

G. G. McPherson, K.C., and Glyn Osler, for the plaintiffs.

*To be reported in the Ontario Law Reports.

BOYD, C.:—These actions are by the bank, plaintiffs, as holders of promissory notes made by the defendants to the International Snow Plow Manufacturing Company, and indorsed by the *de facto* officers of the company to the bank. The company was a foreign company, incorporated at Oklahama, U.S.A., and had obtained no license to do business in Ontario prior to and at the time these notes were given. The notes were given in payment for shares of the stock of the company disposed of by the de facto officers of the company in Ontario. The giving of the note and the negotiation of it with the bank are both matters done in or for the carrying on of the business of the company which were prohibited by the statute 63 Vict. ch. 24, sec. 6—this corporation falling under class IX. mentioned in the statute. Being in violation of the statute, they were, in my opinion, illegal, and not recognisable or enforceable in any Court so long as the illegality continued. The Act provides for the removal of the illegality by the procurement of a license which is made to retroact so as to validate what has been done in violation of the Act. In this case the disability to sue which attached to the company in respect of the promissory notes was not removed by its transfer to the bank, if the bank had notice or reasonable ground to believe that the illegality existed. No doubt, the defendants, as makers of the notes, are, by sec. 185 of the Bills of Exchange Act, R.S.C. 1906 ch. 119, precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse. But that is to be read with sec. 58 (made applicable to notes by sec. 186), that if in an action it is proved that the instrument is affected with illegality, the burden of proof is cast on the plaintiff to shew that he has given value in good faith, *i.e.*, without notice of the illegality. That burden I do not think the plaintiffs have discharged in this case; but, as I agree with my brother Middleton on the curative and retroactive effect of the license issued to the foreign corporation before action, the result is that, as the illegality has been removed, there is no obstacle on that ground to the plaintiffs' right to recover.

The legal effect of the language used in the Extra-Provincial Corporations Licensing Act has been fully considered on the like legislation in British Columbia, in North-Western Construction Co. v. Young, 13 B.C.R. 297 (1907); and also the effect of such legislation on negotiable securities in Williams v. Cheney, 8 Gray 206. The same conclusion as in the American case is reached by Newlands, J., in Ireland v. Andrews, 6 Terr. L.R. 66, with which I agree.

I cannot usefully add anything to what is said by my brother

in the liability of the defendants. The bank, as holders in due course, are not affected by the various irregularities and misrepresentations which might be validly invoked were the action by the foreign corporation. Though the case is one of extreme hardship on the defendants, yet I can find no legal reason for exempting them from payment.

The judgment should be affirmed with costs.

LATCHFORD, J.:—I agree.

MIDDLETON, J., in a written opinion of considerable length, stated the law of Oklahama as to the formation of corporations, the steps taken to form the International Snow Plow Manufacturing Company, the facts with regard to the notes sued upon, and the nature of the defences to the actions. He then proceeded:—

It is said that the bank cannot claim the status of holder in due course, as the notes were merely "pledged." This is not so in fact. The notes were indorsed by the company generally (assuming for the present the validity of the indorsement) and lodged with the bank, and, while not discounted, they were held by the bank under the terms of the document of the 13th November (a "general letter of hypothecation"), upon the faith of which advances were made, and which entitles the bank to resort to all notes held by it on the customer's account for payment of the balance due upon advances made. No advance was made at the time of the deposit of each particular note in this collateral account (or, if so, the fact is not shewn), but the balance due the bank exceeds the amount due on these notes. The lien thus conferred makes the bank a holder for value: Bills of Exchange Act, sec. 54 (2).

Then it is said that the indorsement was a nullity, and conferred no title at all. Mobray and Lett (who asserted themselves to be the officers of the company and indorsed the notes) were not the company. . . . Their action in creating the offices, as well as in filling them, was of no effect whatever. Mobray and Lett were not strangers to the Oklahama company—they were two out of three of its members. The third, it was said, was the solicitor who incorporated the company for them. They assumed to act as and for the whole body—the three. Under the law, as two-thirds of the membership, they could make the initial code of by-laws without any meeting. What was done cannot be regarded as absolutely void and non-existent. . . . The defendants were becoming shareholders in a company carrying on

business, in a way, in Stratford, and represented by Messrs. Mobray and Lett, and it was this apparent organisation for which the makers of these notes were called upon to vouch by the statute in question. Business necessity abundantly justifies the policy of the Act.

The "capacity to indorse" also is to be presumed. This means, in case of a company, that the company has officers who can indorse—for only through officers or agents can a company exercise this function. This brings the case within Royal British Bank v. Turquand, 6 E. & B. 327, and the cases following it, collected in Palmer, 8th ed., p. 42.

If this view is not right, and the Oklahama company is still unorganised, then the company into which the defendants sought admission and to which the bank lent the money was a fictitious or non-existent body, and the notes became payable to bearer, and the defendants are liable: sec. 20 (5).

If the result is, that the company never having ben in any way incorporated—the assumption of Mobray and Lett that they represented the Oklahama company and completed its organisation being unfounded—then the defendants and their associates may have become liable as an unincorporated body carrying on business under the name of the company, and in that event their liability would be greater than that now alleged by the plaintiffs.

There remains the question of the effect of the absence of an Ontario license. I am inclined to think that the warranty of the capacity to indorse precludes the defendants from setting this up. . . .

I am prepared, however, to rest my judgment upon the construction of the statute and the effect of the license issued after the making of the notes and before action.

By sec. 6 of 63 Vict. ch. 24, no extra-provincial company shall carry on business within Ontario without a license. By sec. 14 a penalty is imposed, and, in addition, so long as it remains unlicensed, it shall not be capable of maintaining any action upon any contract made in contravention of sec. 6. Upon the granting of a license, any such action may be maintained as though a license had been duly obtained. I think the statute prescribes the penalty attaching to the failure to obtain a license, and that the right to sue given when the license is obtained is a right to sue effectually as though there had been no offence against the statute in the first place. . . . The statute is coercive, and to compel the issue of the license the remedy of the company is

suspended until obedience is yielded, when full right to enforce the contracts made is given. It is said that the right is given to the company only. This is too narrow. Whatever right is taken away or suspended by the statute as the effect of disobedience is restored upon obedience. . . .

The appeal . . . must be dismissed with costs. . . .

DIVISIONAL COURT. JANUARY 21ST, 1911.

*LONG v. SMITH.

Sale of Goods—Written Contract—Purchaser Induced to Sign by Oral Promise of Vendor—Return of Goods as not Answering Condition as to Value—Parol Testimony to Shew Promise and Condition—Inconsistency with Written Instrument—Printed Form of Contract—Clause Providing that whole Agreement Contained therein—Representation as to Value—Reliance on by Purchaser—Vendor's Knowledge of Falsity—Fraud—Enforcement of Contract.

Appeal by the plaintiff from the judgment of DENTON, Jun. Co. C.J., dismissing an action brought in the County Court of York to recover $565, the balance of the price of a Karn piano sold by the plaintiff to the defendant under a written contract. The sale price was $575, and $10 was paid on account.

The appeal was heard by BOYD, C., LATCHFORD and MIDDLETON, JJ.

W. E. Raney, K.C., for the plaintiff.

H. J. Macdonald, for the defendant.

The judgment of the Court was delivered by BOYD, C.:—The County Court Judge has held, and it is well proved in the evidence, that the written contract was signed upon this undertaking given by the plaintiff that if the defendant should find that the piano was not worth the price asked, viz., $575—that if he should find it was overcharged and not worth that money—then the plaintiff would take back the piano and refund the $10 that had been paid. As the defendant says, he signed the written contract on that "wordable understanding" (he appears to be

*To be reported in the Ontario Law Reports.

a foreigner). He asked to have this put in the signed agreement, but the plaintiff's excuse was that he could not put it in the contract, as the contract was a printed one and he could not change it, and that the defendant need not be afraid to sign as long as he promised to take back the piano and repay the money if the defendant found it was overcharged. The defendant wished to let the matter be open till the following Monday, when he could bring a man who was competent to look over the instrument and see if it was of the price-value, but the plaintiff said that if it was not closed that day it would be $650. In these circumstances, the defendant signed, saying that he did so on the faith of the "wordable understanding." The defendant and his wife knew nothing about pianos or their value, and trusted entirely to the plaintiff, who knew all about the cost and the worth of what he was dealing in.

In a day or two after the defendant discovered, and at the trial proved, that the worth of the piano was about $400, and that such a price would give a good profit to the dealer. The plaintiff refused to give any insight as to what the real value and cost of the instrument was, and relied mainly on legal objections and a contradiction that there was any such understanding as alleged. The defendant offered to return the piano and forfeit the $10, the down payment, and to pay $20 more for the plaintiff's trouble, and so end the dispute—but this was refused, and the action brought upon the written contract to pay $565. The piano has been sent back to the plaintiff.

The legal objection is that it is not competent to give oral testimony dehors the terms of the writing, because it is there printed, at the bottom: "This contract contains the whole agreement between myself and William Long" (the plaintiff). This form of expression is referable to the fact that the printed form is intended for the use of local agents, and provides that such persons are "not to make any promises, verbal or otherwise, outside of the agreement, or in any way to alter the same." The present contract was made with Mr. Long, the principal, who, of course, could modify the printed form. The evidence now given goes to shew that the writing does not contain the whole agreement. There was a condition or promise entered into upon the faith of which the contract was signed, which is not expressed therein. This assertion as to the whole being in writing cannot be used as an instrument of fraud; the plaintiff cannot ignore the means by which he obtained the contract sued upon, falsify his own undertaking, and by the help of the Court fasten an unqualified engagement on the defendant. The whole purchase

was to be nullified if it turned out as a fact that there had been a gross overcharge. And such appears to be now the actual situation.

Then, apart from this shackle upon the truth, it is argued that it is contrary to the rule of evidence and the decisions of the Courts to allow oral testimony to be given which is inconsistent with or repugnant to the terms of the written instrument. . . . There is a well-marked line of cases establishing this doctrine, that evidence may be given of a prior or contemporaneous oral agreement which constitutes a condition upon which the performance of the written agreement is to depend. The oral evidence may be such as to affect the performance of the written agreement by shewing that it is not to be operative till the condition is complied with. The enforcement of the contract may be suspended or arrested till the stipulation orally agreed on has been satisfied. Here there was to be, in substance and in essence, no bargain if the piano was not worth the price stated in the writing. At the outset and before the signing of the contract, the defendant was practically prevented from getting correct information as to value from a competent person, but it was left for him to satisfy himself on that point forthwith thereafter. Ten dollars he had paid, but there was no intention of paying any more till he was satisfied as to the truth of the representation as to value. The prosecution of the contract was in abeyance till the matter was cleared up to the satisfaction of the defendant.

The most recent case, cited by Mr. Raney, sanctions the admissibility of parol evidence to prove the existence of a collateral agreement in the nature of a condition upon which the contract sued upon was entered into by the defendant. That is said by Collins, M.R., at p. 12 of Henderson v. Arthur, [1907] 1 K.B. 10; and it is not necessary to refer to earlier cases, except perhaps to the judgment of Byles, J., in Lindley v. Lacey, 17 C.B.N.S. 578, 587. . . .

The purchaser was inveigled into signing the contract by the representation of the real value of the piano and the accompanying promise. The representation proving untrue, the failure to fulfil the promise introduces the element of deception and fraud on the part of the seller. This suggests another aspect of the case upon which the decision in favour of the defendant may be supported. The evidence here may very well support the finding that there was a deceitful representation as to the fair and reasonable value of the piano—a matter well known to the seller and not to the purchaser—and the prudence of the purchaser

laid asleep by the promise. Though this be not in writing, nor mentioned in the written evidence of the contract, it may be relied upon to protect the purchaser when sued for the price: Dobell v. Stevens, 3 B. & C. 623. See also, per Burton, J.A., in Ellis v. Abell, 10 A.R. 226 at pp. 256, 257; and Ontario Ladies College v. Kendry, 10 O.L.R. 324. In brief, this contract was induced by material representations which were untrue to the knowledge of the plaintiff, and he has no locus standi to enforce a contract so obtained.

Wemple v. Knopf, 15 Minn. 440, cited by Mr. Raney, is distinguishable. . . .

The judgment should be affirmed with costs.

TEETZEL, J. JANUARY 23RD, 1911.

LABELLE v. BERNIER.

Vendor and Purchaser—Contract for Sale of Land—Vendor Seeking Specific Performance—Dwelling-houses Infested with Cockroaches—Misrepresentation by Vendor—Reliance on by Purchaser—Means of Knowledge.

Action for specific performance of an agreement for the sale by the plaintiff to the defendant of two houses in Ottawa. The defendant refused to complete the purchase, on the ground that, before signing the agreement and in reply to a specific inquiry by the defendant, the plaintiff represented that the houses were free from cockroaches, whereas, in fact, the houses were, to the knowledge of the plaintiff, infested with cockroaches.

J. B. T. Caron, for the plaintiff.
T. A. Beament, for the defendant.

TEETZEL, J.:—There is no doubt, upon the evidence, that the houses were both infested with cockroaches, which are a disagreeable pest not easily got rid of, and, in consequence, the houses were to some extent impaired in value.

Although the defendant had heard a rumour that the pest existed in the houses, he implicitly relied upon the plaintiff's assurances to the contrary. The plaintiff was fully aware of this fact; and, although I cannot say that he made the statement fraudulently, it does appear that he knew some years before that

there had been cockroaches in the houses; but he assumed that they had been got rid of because the tenants had never complained of them.

On the ground that no man can complain that another has too implicitly relied on the truth of what he has himself stated, and on the ground that the representation was material and was untrue and induced the contract, I think the plaintiff must fail.

While the defendant might, by investigating for himself before signing the contract, have established the falsity of the plaintiff's representation, he did not do so, but relied solely upon the plaintiff's representation, as I think he was entitled to do.

In actions for specific performance the plaintiff cannot countervail the effect of his own misrepresentations by shewing that the defendant had the means of knowledge; but he must shew by conclusive evidence that the defendant knew or ought to have known that the representations were not in fact true. . .

[Reference to Cox v. Middleton, 2 Drew. 209, per Kindersley, V.-C., at p. 220; Central R.W. Co. of Venezuela v. Kisch, L.R. 2 H.L. 99; Aaron's Reefs v. Twiss, [1896] A.C. 273, 279; Fry, 4th ed., secs. 663, 664, 676, 688.]

Action dismissed with costs.

DIVISIONAL COURT. JANUARY 23RD, 1911.

*FARRELL v. GALLAGHER.

Mechanics' Liens—Failure of Contractor to Complete Work—Amount Due by Owner—Method of Ascertaining—Cost of Completion—Evidence—"In such Manner as the Architect may Direct"—Rulings of Architect—Liens of Wage Earners—Twenty per Cent. of Value of Work Done—Right of Owner to Resort to for Damages Sustained by Contractor's Breach of Contract—Amount Payable to Contractor—Rights of Lien-holders—Costs.

An appeal by the defendant Gallagher and a cross-appeal by the plaintiffs from the judgment of an Official Referee in an action to enforce mechanics' liens in respect of a house erected for the defendant Gallagher in the city of Toronto. The Referee gave judgment for the plaintiffs for $793.90.

*To be reported in the Ontario Law Reports.

The appeal was heard by BOYD, C., LATCHFORD and MIDDLETON, JJ.

I. F. Hellmuth, K.C., and Z. Gallagher, for the defendant Gallagher.

F. Erichsen Brown, for the plaintiffs.

S. H. Bradford, K.C., T. H. Barton, and C. Evans-Lewis, for other lien-holders.

The judgment of the Court was delivered by MIDDLETON, J.:—Dealing with the figures as ascertained by the Referee, his conclusion cannot be supported.

The amount of the contract was	$3,905.00
Extras as ascertained by the architect	103.35
In all	$4,008.35
The defendant has paid	2,502.00
And is entitled to be allowed	
Omissions as certified	286.15
Rectification of defective work	311.20
Cost of completion	600.00
	$3,699.35
Balance remaining due	309.00

Instead of $793.90 as certified.

The Referee has erred by assuming that the price payable is not the contract-price, plus extras, but the amount of the progress certificates plus the amount spent by the contractor thereafter plus extras.

The four items involved in this statement are each attacked by both parties. We cannot disturb the finding of the Referee on the extras, omissions, or rectifications (the item respecting cost of completion we deal with separately). As to them the architect is made judge, and there is no reason to think he has not acted fairly. Quite apart from this, upon the evidence the amounts allowed seem reasonable and well warranted by the evidence. As to most of the items there is no conflict, and we cannot disregard the weight of direct evidence, in favour of mere inferences arising from more or less unsatisfactory statements made by the architect from time to time.

With reference to the $600 allowed for completion of the work: over $2,000 was actually paid for this and the rectifica-

tions; so that the Referee has in these two respects allowed only $911.20 out of an actual expenditure of $2,000. The reason for this, as given by the Referee is that the owner completed the work by day labour instead of by contract after advertisement and tender. We cannot agree with the construction placed upon clause 4. The clause is obscure. "In such manner as the architect may direct" must, we think, apply to the mode of completion, and, if the clause applies, makes his direction final. The evidence goes to shew that the difficulties surrounding the matter by reason of the defective work done made it impracticable to obtain tenders, and that no tender would have been for a lower price than that charged by Woodley. The amount by which the Referee has cut down the amount paid is more than ample to cover any possible extravagance in the remuneration of the new contractors and any matter as to which there is any room for doubt as to the necessity for rectification or any suspicion that the defendant was seeking better work than the contract calls for.

We are relieved from considering the question raised by the defendant, that she should not have had the amount actually paid out down at all, by the concession of her counsel, made for the purpose of the argument only, that he would not press his appeal if the amount due was reduced below the sum paid into Court, $350.

It is contended that this clause does not apply at all, because the time for the completion of the work had been extended, and also that the notices given were not in conformity with the requirements of the clause. If so, the dismissal was wrongful. Without expressing any assent to these contentions, we cannot see that they aid the plaintiffs. They would be entitled to recover as damages the amount that could be coming to them on the footing of the contract if they had been allowed to complete it; and, as the statement above shews that this is exactly what is allowed to them, they cannot complain. In ascertaining the damages sustained, it may well be that the architect's rulings must be disregarded; yet, as already said, these rulings are in accordance with the substantial weight of evidence, and no change can be made.

Then there remains the question arising on the statute with regard to the liens. It is admitted that the wage earners are entitled to their claims, and are so entitled in priority to other liens. Section 15 is clear as to their rights. These amount to $282.91.

The lien-holders (other than the wage earners) contend that

the owner must account to the lien-holders for 20 per cent. of the value of the work done, and cannot resort to this 20 per cent. to recoup herself for the damages sustained by the contractor's breach of contract.

Section 13 is by no means easy to construe. The 20 per cent. is to be based upon "the value of the work done," "on the basis of the contract-price." This contract, upon the evidence, was a losing one for the contractor, and the value of the work done, to him and those claiming under him, can, I think, be arrived at only in this way:—

The contract-price, plus extras		$4,008.35
Deduct omissions	$286.15	
Cost of completion (including rectifications)	911.20	
		1,197.35
Value of work done		$2,811.00
20 per cent. of this would be		562.20
Wage earners' liens		282.91
Balance		$ 279.29

This is the amount in issue upon this contention.

Russell v. French, 28 O.R. 215, is precisely in point. It is there held that the 20 per cent. is a fund for the payment of lien-holders, not subject to be affected by the failure of the contractor to perform his contract. This view is in conflict with the reasoning of Goddard v. Coulson, 10 A.R. 1, and the decision in Re Sear and Woods, 23 O.R. 474, which are said to be no longer applicable by reason of changes in the statute.

The statute has since been revised and in some particulars changed, but we cannot find any real ground upon which Russell v. French can be distinguished. However, the soundness of the decision is challenged, and, according to Mercier v. Campbell, 14 O.L.R. 639, it is not conclusive authority; and we are bound to make an independent examination of the statute and earlier cases and to act upon our own opinion. . . .

[Reference to secs. 4, 10, and 11 of the Mechanics' Lien Act.]

Each of these sections makes it plain that the owner is not to be called upon to pay more than the amount actually due by him, unless the claimant can find something in the statute bringing him within the words "save as herein otherwise provided." . . .

[Reference to R.S.O. 1877 ch. 120; 41 Vict. ch. 17; 45 Vict.

ch. 15, sec. 4; R.S.O. 1887 ch. 126, secs. 9, 10; R.S.O. 1897 ch. 153, secs. 14 (1), 15 (4); Re Cornish, 6 O.R. 259; Goddard v. Coulson, 10 A.R. 1; Re Sear and Woods, 23 O.R. 474; 59 Vict. ch. 35, sec. 10 (1); 60 Vict. ch. 24, sec 2; Russell v. French, 28 O.R. 215.]

In Russell v. French the Court have assumed that the change made in the basis upon which the 20 per cent. is to be computed now shews such a clear indication of intention on the part of the legislature as to warrant a finding making the owner liable for 20 per cent. more than he agreed to pay for the work contracted for, when he has been in no way in fault. We cannot agree with this. The section still recognises that the charge is a charge upon money to become payable to the contractor. When, by reason of the contractor's default, the money never becomes payable, those claiming under him and having their statutory charge upon this fund, if and when payable, have no greater rights than he himself had, and their lien fails.

In the result, the appeal succeeds; and the judgment must be varied by reducing the amount due the contractor to $309, which must be applied in payment of the amount due the wage earners, $282.91. No personal order should be made against the lien-holders for the costs. The amount paid into Court in excess of $309 should be returned to the owner. The difference between $282.91 and $309 should be applied on the owner's costs, and the contractors should pay the owner's costs (subject to the statutory reductions as to amount) throughout (less their credit). The personal order for payment by the owner to the contractors should stand.

DIVISIONAL COURT. JANUARY 24TH, 1911.

*CARTER v. CANADIAN NORTHERN R.W. CO.

Contract—Payment of Money—Condition—Non-fulfilment—Return of Money—Authority of Agent—Parol Evidence to Shew Condition upon which Written Contract Signed—Admissibility—Consistency or Inconsistency with Terms of Written Contract.

Appeal by the defendants from the judgment of LATCHFORD, J., 1 O.W.N. 892, in favour of the plaintiff for the recovery of $480 paid by the plaintiff in April, 1908, to one Webster, as

*To be reported in the Ontario Law Reports.

agent of the defendants, in connection with a proposition of the defendants that a syndicate should be formed in Findlay, Ohio, where the plaintiff resided, to purchase from the defendants 10,000 acres of land in Saskatchewan. If the syndicate was not completed, the money of the subscribers was to be returned, as the plaintiff alleged. The syndicate was not completed. The plaintiff subscribed for 960 acres, and handed Webster a cheque for $480, payable to the defendants, who cashed it. The defendants set up that the $480 had become forfeited. LATCHFORD, J., found that Webster represented to the plaintiff that the defendants would return the money in the event of the syndicate not being completed, and gave judgment for the return of the money.

The appeal was based upon two grounds: (1) that Webster was not the agent of the defendants, nor authorised to make the bargain found to have been made by him with the plaintiff, and that the defendants were not bound by it; (2) that parol evidence of the bargain was inadmissible, as the effect of it was to contradict or vary the agreement which the plaintiff had signed.

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

I. F. Hellmuth, K.C., and G. F. Macdonnell, for the defendants.

W. J. Elliott, for the plaintiff.

TEETZEL, J.:—The substantial question on the appeal is, whether the parol evidence was properly admissible upon which my learned brother found that the defendant's sub-agent, Webster, agreed with the plaintiff, at the time the written agreement was signed and the $480 paid, that, if the plaintiff would subscribe for 960 acres and pay a deposit of 50 cents an acre thereon, the deposit would be returned by the defendants in the event of a sale of 10,000 acres of this land to the proposed syndicate, of which the plaintiff was to be a member, not being completed, or in the event of the proposed syndicate not being filled by a sufficient number of subscribers.

While not so expressed in the judgment, the effect of the finding is, that the obligations contained in the agreement signed by the plaintiff to select the land subscribed for and make the payments therefor were to be subject to the condition that the agreement should be signed by a sufficient number of other persons to fill the proposed syndicate, and that the deposit was to be returned upon that condition not being performed.

The syndicate was not completed, as the signatures to the agreement, including the plaintiff's, represented only a subscription for 2,880 acres.

How far the evidence was properly admissible depends, of course, upon whether its effect is to contradict, vary, add to, or subtract from the terms of the written contract, in which case it is clearly not admissible; or whether it proves only a condition subject to which the contract was entered into, and upon which its performance is to depend.

While one cannot say that such a condition as that alleged by the plaintiff to have been verbally agreed upon can be implied from the contract itself, yet from its general terms it is plain that the parties contemplated that a syndicate consisting of several persons was to be formed, and that there should be a total subscription by its members for at least 10,000 acres at $10 per acre. It would be quite inconsistent with the spirit of the contract to hold that, if it was signed by only one person for a small portion of the land, he should be irrevocably bound, and the defendants entitled to abandon further effort to get more subscribers. While a person might be willing to subscribe for a block of unimproved land in a distant country, at a certain price, if his friends were to join in acquiring a large tract in the same neighbourhood at the same price, it does not follow that he would be ready to embark in such a venture single-handed. The absence of any express provision in the agreement to protect him if his friends should not join in the venture lends strength to the suggestion that no prudent man would sign the agreement without a condition that until the fundamental design of the agreement was accomplished, he should not be bound by his signature.

The agreement makes express provision giving the defendants an option to return to each purchaser the moneys paid by him and to cancel the agreement in the event of a certain number of acres not being purchased before a certain date; and, while it is silent as to the rights of any purchaser in the event of the whole 10,000 acres not being purchased, I do not think it follows that evidence to prove such a condition as was found to have been agreed upon in this case can be said to contradict, add to, vary, or subtract from the agreement as signed; but that it simply established that a condition was agreed upon, subject to which the agreement was entered into, and upon which the performance of it by the plaintiff should depend. In other words, it does not amend or work a defeasance of the signed agreement, but simply suspends its operation until the

terms of the conditions are complied with; and, when that is once accomplished, the purpose and scope of the condition is spent, and the agreement in its entirety remains unaffected by it.

It is unnecessary to review the numerous cases which establish that parol evidence is admissible to prove a condition subject to which a written agreement has been entered into, and upon the fulfilment of which the performance of the written agreement is to depend. . . .

[Reference to Pym v. Campbell, 6 E. & B. 370, 374; Commercial Bank of Windsor v. Morrison, 32 S.C.R. 98; Wallace v. Littell, 31 L.J.N.S. C.P. 100, 102; Murray v. Earl of Stair, 2 B. & C. 82; Latch v. Wedlake, 11 A. & E. 965; Evans v. Bremridge, 8 De G. M. & G. 100; Davis v. Jones, 17 C.B. 625; Kidner v. Keith, 15 C.B.N.S. 43; Lindley v. Lacey, 34 L.J.N.S. C.P. 7; Clever v. Kirkman, 33 L.T.R. 672; Pattle v. Hornibrook, [1897] 1 Ch. 25; Trench v. Doran, 20 L.R. Ir. 338; Fitzgerald v. McGowan, [1898] 2 I.R. 1; Choteau v. Sydam, 21 N.H. 179; Faunce v. State Mutual Co., 101 Mass. 279; McFarlane v. Sykes, 54 Conn. 250; Reynolds v. Robinson, 110 N.Y. 654; Lyons v. Stills, 97 Tenn. 514; Caudle v. Ford, 72 S.W. Repr. 270.]

Appeal dismissed with costs.

CLUTE, J., gave reasons in writing for the same conclusions; referring in addition to some of the cases cited by TEETZEL, J., to the following: Ontario Ladies College v. Kendry, 10 O.L.R. 324, 328; Leake on Contracts, 5th ed., pp. 124, 125; Henderson v. Arthur, [1907] 1 K.B. 10; Moore v. Campbell, 3 Ex. 323.

MEREDITH, C.J., dissented, for reasons stated in writing. He agreed with the trial Judge's finding that the defendants were bound by the undertaking of Webster, if it could be shewn; but he was of opinion that extrinsic evidence of the undertaking was not admissible because it contradicted the written agreement: Henderson v. Arthur, [1907] 1 K.B. 10.

FOXWELL v. KENNEDY—BRITTON, J., IN CHAMBERS—JAN. 23.

Pleading—Statement of Claim—Joinder of Causes of Action—Will—Executrix—Maintenance——Parties—Con. Rule 235.]—Appeal by the defendant James H. Kennedy from the order of the Master in Chambers, ante 565. BRITTON, J., said that, in order to avoid multiplicity of actions, the claim made by the

plaintiff in paragraph 23 of the statement of claim ought not to be struck out, unless its remaining was clearly in violation of Con. Rule 235. This claim was alleged to have arisen with respect to the estate represented by the defendant James H. Kennedy in the action. The paragraphs 15 to 22 led up to 23. The plaintiff's claim was a long and continuous story in reference to the estate; and all could well be tried in one action. The claim was one within Con. Rule 235. Appeal dismissed. Costs to the plaintiff in the cause against the defendant James H. Kennedy. The defendants to have one week additional time to plead. E. D. Armour, K.C., for the appellant. W. A. Skeans, for the plaintiff.

NELLES v. HESSELTINE—MEREDITH, C.J.C.P.—JAN. 23.

Damages—Breach of Contract to Deliver Company Shares and Bonds—Ascertainment of Value at Fixed Date—Evidence—Report—Variation on Appeal.]—Appeal by the defendants the Windsor Essex and Lake Shore Rapid Railway Company from the report of the Local Master at Sandwich, made in pursuance of the reference directed by the judgment of CLUTE, J., pronounced on the 16th March, 1907, as varied by the judgment of the Court of Appeal dated the 21st April, 1908. By the judgment of CLUTE J. (paragraph 1), it was adjudged that the defendants other than Brien should, within thirty days, "deliver to the plaintiffs $72,000 face value of paid-up capital stock and $45,000 face value of first mortgage bonds of the defendants the Windsor Essex and Lake Shore Rapid Railway Company." This paragraph was varied "by directing that the plaintiffs are only entitled to a transfer and delivery to them by the appellants the Windsor Essex and Lake Shore Rapid Railway Company of their proportion of the $72,000 face value of said paid-up capital stock and $45,000 face value of first mortgage bonds of the defendant company . . . such proportion to be ascertained by the Local Master . . . ;" and by the Court of Appeal judgment it was further adjudged "that, in the event of the failure by the said the Windsor Essex and Lake Shore Rapid Railway Company to transfer and deliver to the plaintiffs tiffs the said proportion of capital stock and mortgage bonds, or either of them, provided for herein, after it has been ascertained as aforesaid, the plaintiffs shall recover from the said appellants the Windsor Essex and Lake Shore Rapid Railway Company damages for non-delivery thereof, said damages to be the

value of their proportion of the said stock and bonds, or either of them;" and the 4th paragraph of the judgment of CLUTE, J., was varied "by directing that such value be ascertained as of the 19th October, 1905;" and a reference was directed to the Local Master to ascertain and report the value of the stock and bonds on that date. By the report the value of the stock and the value of the bonds as of the 19th October, 1905, were found to be respectively $25,200 and $40,500, and the proportions in which the parties entitled to them are interested have been found to be: A. J. Miller, $29,998.90; William Newman, $27,702.20; and the executors of James Brien, $16,998.90. According to these figures, the Master found the value of the stock to be 35 per cent. of its face value, and the value of the bonds to be 90 per cent. of their face value. The appellants contended that on the 19th October, 1905, when but little of the construction work of the railway had been done, the stock and bonds were practically valueless. The learned Chief Justice, after reviewing the evidence at considerable length, said that he had reached the conclusion that the Master placed too high a value on the bonds and stock, and that a fair value on the 19th October, 1905, would be 20 cents in the dollar for the stock and 45 cents in the dollar for the bonds. The appellants had deliberately broken their contract to give to the respondents the bonds and stock which they contracted to give to them, and had put it out of their power to do so; and they now contended that they were entitled to go scot free because the bonds and stock were of no value. That result should not follow, unless it clearly appeared that the bonds and stock were valueless; upon the evidence, the contrary of that appeared; and in assessing the damages the case was eminently one for the application of the principle upon which a Divisional Court proceeded in Goodall v. Clarke, 21 O.L.R. 514, since affirmed by the Court of Appeal, ante 567. Appeal allowed in part and report varied in accordance with the above conclusion. No costs of the appeal. M. Wilson, K.C., and J. M. Pike, K.C., for the appellants. H. L. Drayton, K.C., for the respondents.

WILKINSON v. HAMILTON SPECTATOR CO.—WILKINSON v. MAIL PRINTING CO.—MASTER IN CHAMBERS—JAN. 25.

Trial—Postponement—Grounds—Costs.]—Motions by the defendants in each case to postpone the trial of the actions. Since the orders made by the Master, ante 471, the defendants had furnished particulars. The ground upon which the present

motions were made was that it had been understood (if not arranged) that the action of the plaintiffs against the publishers of the Montreal "Star" for a similar libel should be tried first as a test action, and that by the result in that case the defendants in the many other actions (nearly thirty) would largely be governed. But a settlement had since been made of that action, and the defendants in these two actions found themselves in an unexpected difficulty. The Master referred to Perkins v. Fry, 10 O.W.R. 954; Re Gabourie, 12 P.R. at p. 254; Sievewright v. Leys, 9 P.R. 200; Langdon v. Robertson, 12 P.R. 140; Con. Rule 312; and said that, in the interests of justice, the trial should be postponed till the sittings beginning on the 6th March next. Costs to the plaintiff in any event. J. B. Clarke, K.C., and Featherston Aylesworth, for the defendants. James Hales, for the plaintiffs.

SHUMER v. TODD—MASTER IN CHAMBERS—JAN. 26.

Pleading — Statement of Claim — Contract—Construction—Specific Performance—Relevancy of Allegations.]—Motion by the defendant, before delivery of the statement of defence, for particulars of paragraph 5 of the statement of claim and to strike out paragraphs 6, 7, and 8 as being improperly pleaded. The action was for specific performance of a contract for the exchange of lands. In the statement of claim the agreement and the description of the land were set out; by paragraph 5 it was alleged that the plaintiff made frequent application to the defendant for the purpose of obtaining specific performance of the agreement; and by paragraphs 6, 7, and 8, the differences of opinion that had arisen between the parties, on three different points, as to the effect of their contract, were set out. The plaintiff asked for a declaration of his rights and for specific performance. The Master said that there did not seem to be any necessity for particulars of paragraph 5, at least at this stage; at most, if at all, the falsity of this statement would only affect the question of costs. As to the other paragraphs, there was no reason for their excision. The parties were invoking the equity jurisdiction of the Court, and these paragraphs were useful as shewing what points of difference had arisen as to the meaning of the contract: Foxwell v. Kennedy, ante 565, 642. They did not really anticipate the defence, but only shewed how the action had arisen, and what were the points for decision by the Court, and were relevant to the prayer for

construction of the agreement. It might well be found at the trial that the parties were never ad idem, and the Court would not enforce the agreement against either party: see 36 Cyc. 605 ("Ambiguity of Contract.") Motion dismissed; costs to the plaintiff in the cause. E. G. Long, for the defendant. W. A. Proudfoot, for the plaintiff.