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COURT OF APPEAL.

8TH MARCH, 1911.

*RE ELLIS AND TOWN OF RENFREW.

Municipal Corporations—Local Option By-law—Voting—Declaration by Clerk—Scrutiny by County Court Judge—Motion to Quash By-law—Inquiry into Validity of Votes—Illiterate Voters—Ballots Marked by Deputy Returning Officers—Municipal Act, 1903, *sec.* 171—*Secrecy of Voting—Names Improperly on Voters' List—Voters' Lists Act, sec.* 24—*Finality of List—Clerk Acting as Deputy Returning Officer—Vote of Clerk—Irregularities—Curative Provisions of sec.* 204.

Appeal by A. A. Ellis from the order of a Divisional Court, ante 27, affirming the order of RIDDELL, J., 21 O.L.R. 74, 1 O.W.N. 710, dismissing the appellant's motion to quash a local option by-law.

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

W. M. Douglas, K.C., and J. E. Thomson, for the appellant.

W. E. Raney, K.C., and A. Burwash, for the respondents.

GARROW, J.A.:—A number of objections were argued on the motion before Riddell, J., but in his judgment he states that all were abandoned except objections numbered 1, 8, 13, and 16.

Number 1 consisted of a general statement that the election was not conducted in accordance with the principles of the Consolidated Municipal Act, 1903, followed by the particular instances relied on. . . .

Number 8, that the town clerk, although the town is divided into three polling subdivisions, acted as returning officer in poll No. 2.

*To be reported in the Ontario Law Reports.

Number 13, that the secrecy of the ballot was violated in many instances in polls No. 1, 3, and 16.

Number 16, that the clerk did not declare that the by-law had received the assent of three-fifths of the electors voting thereon, and alternatively, if he did so declare, he did so illegally, because of his failure to comply with the law in that behalf. . . .

We were told that the Divisional Court, in dismissing the appeal, followed Re Schumacher and Town of Chesley, 21 O.L.R. 522. . . . The only specific objection which the two cases have in common, so far as I can see, is that numbered 11 in the head-note in the Schumacher case, namely, that a number of persons voted openly, in the presence of unauthorised persons. There are, in addition, of course, other objections in both cases consisting of irregularities which, while not identical, are evidently more or less in the same class, and as to which the provisions of sec. 204 of the Consolidated Municipal Act, 1903, would apply. . . . This section has hitherto, in cases where the general intention to follow the statutory provisions is apparent, been, very properly, construed liberally so as to cover all objections not fundamental or in the nature of statutory conditions precedent, or which have not affected the result, the idea, no doubt, being that an honest vote should not be lost because of the ignorance or carelessness of those whom the law has appointed to receive it.

Agreeing as I do with the result arrived at by Riddell, J., the only points which, in my opinion, are material and would justify further discussion, are: (1) the case of the illiterate voters from whom declarations were not obtained, as required by sec. 171; (2) the violation of the policy of secrecy in the case of the two elderly women; and (3) the fundamental question whether there was the necessary statutory majority of valid votes in favour of the by-law.

Before dealing with these, it may, however, be useful briefly to refer to two of the other objections which are of general interest.

It was objected that the clerk did not sum up and declare the result of the polling, as required by sec. 181. That he should do so in every case, I have no doubt. I expressed this opinion in Re Duncan and Town of Midland, 16 O.L.R. 132, at pp. 157, 158; and the provisions of 8 Edw. VII. ch. 54, sec. 143(a), seem to confirm that view. The clerk is the official returning officer, and he only can properly communicate the result of the poll to the council. Section 178, which requires him to sum up

and declare the result is one of the group of sections made applicable by sec. 351 to the taking of the vote upon a by-law; and I see no reason why its provisions are not as applicable and as binding as any of the others which he is bound to observe. The objection in this case was apparently not well-founded in fact, and was, upon the evidence, held not to be established; and my only reason for referring to it is that Riddell, J., seemed to be of the opinion that the matter was still in doubt upon the law.

The other objection was as to the right of the clerk to vote. This objection is, I think, well-founded by virtue of the provisions contained in sec. 179 and in sec. 365. . . . He is not entitled to vote on such a by-law . . . and the vote was properly disallowed.

Coming now to the three objections before mentioned. Upon the argument I was impressed with the contention of Mr. Douglas . . . that it is a statutory condition precedent to the right of an illiterate person to vote, that he should take the declaration required by sec. 171. Reflection, however, leads me to the conclusion that the omission is merely an irregularity in the mode of receiving the vote, and so covered by sec. 204.

[Reference to Re Port Arthur Election, 12 O.L.R. 453, distinguishing that case.]

The remaining question is as to the result of the poll and the various objections taken to the votes of persons who were allowed to vote. There had been a scrutiny by the County Court Judge, who reached certain conclusions which appear in the case, from several of which Riddell, J., dissented, although the result arrived at by both, namely, that the by-law had been carried by a sufficient majority, was the same.

I agree with Riddell, J., that, upon a motion to quash, the findings of a County Court Judge upon a scrutiny are not binding upon the High Court. . . .

One thing at least seems to be clear, namely, that the finality of the voters' list is as binding upon the the one tribunal as upon the other, for, although scrutiny only is mentioned in sec. 4 of the the Voters' Lists Act, the policy of finality is so clearly expressed that it ought also, I think, to be respected in the High Court: see Stowe v. Jolliffe, L.R. 9 C.P. 734, at p. 750.

The persons who are qualified to vote upon such a by-law as that in question are such persons, called "electors" in R.S.O. 1897 ch. 145, sec. 141, as are qualified to vote at a municipal election; and the electors of a municipality are defined by sec. 86 of the Consolidated Municipal Act, 1903. The voters' list to be used is that provided for in sec. 148.

But adopting the finality of the voters' list leaves open the question of the nature and extent of the inquiry which must be made in the case of tenants whose names were left upon the voters' list, although actually then disqualified by non-residence and whose disqualification continued down to the time of the election. Riddell, J., was of the opinion that this was a question not open to the County Court Judge upon a scrutiny—a question, it seems to me, left in considerable and unnecessary obscurity in the legislation upon the subject. But it was certainly open to Riddell, J., to consider and determine the question. The law is properly most careful to protect the bona fide voter in exercising his right, but I see no sign of favour extended to the voter who is so only by virtue of the statutory estoppel. Sub-section 2 of sec. 24 of the Voters' Lists Act speaks of "persons who subsequently to the list being certified are not or have not been resident within the municipality." This language seems amply wide enough to include the case of the persons to whom I have referred, as well as those, if any, who, after the list was certified, became disqualified by becoming non-resident. It would be an odd and wholly illogical conclusion that the person who was actually disqualified when the list was certified should be in a better position than one who, properly qualified then, subsequently became disqualified—a result which, in my opinion, could not have been intended, and which is certainly not clearly within the language used. . . .

[The learned Judge then examined the votes in dispute, and in effect agreed with the conclusions of RIDDELL, J.]

The result is, that there are 9 votes, including that of the town clerk, to be deducted, which leaves the total number of votes 592, of which three-fifths is 355. And deducting 9 votes from 368, the total number of votes in favour of the by-law, leaves 359, or a majority of 4 over the statutory requirement.

Appeal dismissed with costs.

MACLAREN, J.A., agreed.

MOSS, C.J.O., and MAGEE, J.A., agreed in the result; MAGEE, J.A., stating reasons in writing.

MEREDITH, J.A., dissented, for reasons stated in writing, holding that sec. 24 of the Voters' Lists Act did not apply to such a case as this, and that sec. 204 of the Municipal Act could not be invoked in favour of the by-law.

MARCH 8TH, 1911.

RE RYAN AND TOWN OF ALLISTON.

Appeal—Leave to Appeal to Court of Appeal from Order of Divisional Court—Motion to Quash Local Option By-law—Voting on By-law—Voters' List—Ontario Voters' Lists Act, sec. 17(4).

Application by Ryan for leave to appeal from the order of a Divisional Court, 22 O.L.R. 200, ante 161, affirming the order of MEREDITH, C.J.C.P., 21 O.L.R. 582, 1 O.W.N. 1116, dimissing the applicant's motion to quash a local option by-law passed by the council of the town of Alliston.

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

J. B. Mackenzie, for the applicant.

W. A. J. Bell, K.C., for the respondents.

The judgment of the Court was delivered by GARROW, J.A.:—There were 25 objections originally urged as reasons for the motion, all of which but one were disposed of adversely to the applicant on the motion. One was reserved, and judgment subsequently given upon it also adversely to the applicant (21 O.L.R. 582), subsequently affirmed by a Divisional Court.

The point reserved, which was somewhat fully discussed before us on the motion, was that the learned County Court Judge in the revision of the voters' list had omitted to comply with the requirements of sub-sec. 4 of sec. 17 of the Ontario Voters' Lists Act, 7 Edw. VII. ch. 4, by holding the Court for the hearing of complaints without the notice having been first given as required by that sub-section. And upon this point the learned Chief Justice was of the opinion that, notwithstanding the omission, the list of voters then settled and certified was the proper list to be used, within the meaning of sec. 24; that the clerk, in providing the proper lists to be used at an election, was only required to resort to the last certified de facto list, and was not obliged to examine into the sufficiency of the various steps by which the final result had been arrived at. In this I agree. Any other construction would lead to great confusion, and be, indeed, contrary to what I regard as the spirit of the Act. See, for instance, sec. 42, which says that "the non-performance by the clerk of any of his duties under this Act within the times ap-

pointed shall not affect the validity of any list;" also secs. 43, 44. Section 42 seems, indeed, almost, if not quite, wide enough expressly to include the omission by the clerk to give the notice required by sub-sec. 4 of sec. 17.

As to the other objections; not all of them were urged before us, the main one evidently being that which I have discussed above. Several of them are based upon facts which were disputed and found against the applicant; and as to those, if any, which depended upon questions of law, they are either covered by the recent judgment of this Court in Re Ellis and Town of Renfrew, supra, or are too trivial and unimportant to justify further discussion.

The application should be refused with costs.

MARCH 8TH, 1911.

McCARTHY & SONS CO. v. W. C. McCARTHY.

Contract—Company—Authority of Agent—Ratification—Enforced Resignation of Manager—Promise to Pay Sum of Money—Evidence.

Appeal by the defendant from the order of a Divisional Court, 1 O.W.N. 500, allowing an appeal by the plaintiffs from an order of ANGLIN, J., 12 O.W.R. 1123, varying a report of the Local Master at Ottawa by allowing to the defendant, upon taking the accounts between the parties, a disputed item of $1,000.

At the trial the action was referred to the Master, who found upon the evidence that the agreement upon which the defendant relied had been made, but that Mr. Murphy, the plaintiffs' agent, was not authorised to make it. ANGLIN, J., held that the plaintiffs had ratified the agreement which, he agreed with the learned Master, had in fact been made. The Divisional Court held that no agreement had in fact been made, and restored the Master's report as to the item in question.

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

C. A. Moss, for the defendant.

G. H. Watson, K.C., for the plaintiffs.

Garrow, J.A.:—In my opinion, no sufficient reason appears for reversing the judgment of Anglin, J.

The undisputed circumstances appear to be as follows:—

The defendant's dismissal took place in the month of March, 1900. He had at that time been the plaintiffs' manager at Ottawa for over two years, on a yearly salary. He was the son of the founder of the plaintiffs' business, and a brother of the president and general manager, Mr. D. J. McCarthy. He was cross-examined before the Master as to an alleged shortage in his account, which he denied, and there is no evidence that he was guilty of the suggested or of any other misconduct such as would have justified dismissal without notice.

C. J. McCarthy, the plaintiffs' secretary-treasurer at the time and for some years afterwards, said in his evidence that he understood the reason why the Ottawa agency was closed, was because it had been unsuccessful.

The correspondence put in before the Master shews that the defendant, after the dismissal, maintained friendly relations with his brother, the plaintiffs' president, and that he made no complaint in it concerning the dismissal, the only reference to the dismissal being that contained in the defendant's letter of the 10th July, 1900, in which the defendant says: "I would *once more* call your attention to my arrangement with Mr. Murphy respecting payment to me in lieu of salary" etc.

The correspondence also shews that the defendant, who was a married man with a family depending on him, was financially in very poor circumstances. In the letter from which I have just quoted he says: "Our rent is once more past due, and we are once more in that beautiful state of uncertainty when we do not know what will happen next," etc.

The plaintiffs carried on the business of brewers at the town of Prescott. Mr. Murphy's instructions were in writing, in the form of a resolution as follows: "It is hereby resolved that the following powers are hereby delegated to A. A. Murphy, accountant, of the city of Montreal: first to deliver to W. C. McCarthy a letter signed by the manager of the company asking for the immediate resignation of W. C. McCarthy as agent of the said company; second, for the said A. A. Murphy to, as soon as possible, take possession of the office of the agency and business of the said company in the city of Ottawa, and everything relating thereto, and to hold same on behalf of the said company and to transact all business in connection therewith, with the widest powers possible, and subject only to the further orders of the manager of the said company."

The letter which he carried and delivered to the defendant was as follows: "March 21st, 1900. W. C. McCarthy, Esq., Manager Ottawa Agency of the J. McCarthy & Sons Company of Prescott Limited. Dear Sir: I very much regret that, acting under instructions from the board of directors of our company, I have to request you to resign as manager of our Ottawa agency. Mr. Murphy will present this letter, as well as a copy of the resolution of the directors passed to-day and authorising him to take over the business. Yours truly, D. J. McCarthy, Manager the J. McCarthy & Sons Company of Prescott Limited." . . .

The last credit of wages to the defendant in the plaintiffs' books is, "salary four months $333.34," on the 31st March, 1900, a few days after the dismissal, made, it is said, in Mr. Murphy's handwriting.

Under these circumstances, then, the defendant told the story which the learned Master, and afterwards Anglin, J., believed, namely, that, when Mr. Murphy came with the letter and the resolution, it was agreed that, if the defendant would peaceably give up possession and retire from the agency, he would be paid by the plaintiffs $1,000 in settlement of all claims arising out of the dismissal. The defendant further deposed that Mr. Murphy at once, in his presence, wrote a letter to the plaintiffs informing them of the arrangements which had been made, which letter he saw copied in the office letter-book and afterwards deposited in the post-office by Mr. Murphy.

I cannot, under these circumstances, with deference, agree with the learned Chief Justice of the Common Pleas that the defendant's story is improbable. To me it seems utterly improbable that a man in his financial circumstances, and who knew his rights as a yearly employee—for he had been a practising solicitor—would have so tamely submitted, as the plaintiffs suggest, to what seems to have been an arbitrary dismissal from a business created by his father, and controlled by his brother. There would surely, in that event, have been found in the mass of correspondence which the plaintiffs produce, at least one letter of complaint by the defendant to his powerful and, so far as appears, friendly, brother, the president. And the letter of the 10th July, 1900, before referred to, would surely in that case never have been written, or at least would have been promptly answered and its utter baselessness in its reference to an arrangement with Mr. Murphy exposed.

It is unfortunate, of course, that both Mr. D. J. McCarthy and Mr. Murphy are dead. That, however, is not the fault,

nor should it be the misfortune alone, of the defendant. He is not responsible for the plaintiffs' delay in bringing the action, and is only defending himself as best he can against claims, many of them stale, which he contends are unfounded, a contention which, to judge by the largely reduced amount allowed by the Master, was not without support.

It is also unfortunate for the plaintiffs' case upon the item in question that the fact of the leaves missing from the letter-book synchronises so completely with the absence from their letter files of any letter from Mr. Murphy reporting what he had done at Ottawa. Such a letter must, as Mr. C. J. McCarthy seemed to think, have been written. And, if produced, it would have told the tale, either in support or in condemnation of what the defendant has sworn.

Anglin, J., was of the opinion that the instructions to Mr. Murphy did not authorise him to make the agreement. It is not necessary expressly to dissent upon this point, agreeing as I do with that learned Judge in his other conclusions. If, however, it had become important, I would, I think, have reached a different conclusion upon that point. I am at present unable, under all the circumstances, to read the exceedingly extensive powers, "the widest powers" they are called, conferred upon Mr. Murphy, as restricted in the way they seemed to be to Anglin, J. But it would serve no useful purpose to pursue this view further at present.

The appeal should, in my opinion, be allowed, with costs here and in the Divisional Court, and the order of Anglin, J., restored.

Moss, C.J.O. Maclaren, J.A., and Sutherland, J., concurred; Sutherland, J., giving reasons in writing.

Meredith, J.A., dissented, for reasons stated in writing. He agreed with the decision of the Divisional Court.

March 8th, 1911.

McLAUGHLAN v. TOWNSHIP OF PLYMPTON.

Municipal Corporations — Drainage — Repair of Old Drain — Agreement with Land-owner—Injury to Land—Trespass —Leave and License—By-law—Sufficiency of Outlet.

Appeal by the plaintiff from the report of the Drainage Referee.

In 1906 the plaintiff purchased lot 24 in the 13th concession of the township of Enniskillen, from one Hugh McCorkingdale, who had previously owned it for a number of years. This lot abutted upon the boundary-line between the townships of Enniskillen and Plympton. The Tait drain was in the defendants' township, and was repaired by the defendants in 1894. The plaintiff's lot, or McCorkingdale's, as it then was, was at first assessed for $100, being $80 for benefit and $20 for outlet; but an agreement was made between McCorkingdale and the defendants, and his lot was dropped from the assessment, upon his undertaking to take away the water himself. The water crossed the town-line through a culvert then in the highway, and passed into the lands of McCorkingdale at a low spot adjoining the highway.

In 1907 another complaint was made to the council that the Tait drain was out of repair, and the council was requested to have it repaired in accordance with the Drainage Act. An engineer, instructed by the council, made a report in which he recommended some changes. This report was adopted and the work done, including the carrying of the drain through the plaintiff's land.

The plaintiff objected while the work was in progress, and finally on the 20th September, 1909, filed and served upon the defendants notice of action under the Drainage Act. The allegations upon which he relied were (without reference to any by-law or other authority) that the defendants constructed the drain in question, which brought down and discharged large quantities of water upon the plaintiff's lands; that the defendants had from time to time deepened, widened, and enlarged the drain, and brought down additional water thereto, thereby greatly increasing the volume and velocity; that the waters complained of were brought out of the natural course, and but for the drainage would not have come upon the plaintiff's lands, by reason whereof the plaintiff's lands had been flooded, his crops destroyed, his use and enjoyment of the lands interfered with, and the lands injuriously affected, and the value diminished. And he claimed: (1) $1,000 compensation; (2) $500 as damages; (3) an injunction; (4) a mandamus to compel the defendants to carry their drainage works to a proper and sufficient outlet; and (5) other relief.

The defendants in general terms denied the plaintiff's allegations; set up the agreement as leave and license; that the work was done, without negligence, under by-laws which authorised what had been done; and that the plaintiff did not file and serve his notice of claim within two years.

The matter came on before the learned Drainage Referee, and witnesses were examined. He held that the agreement was binding upon the plaintiff, and that it authorised what the defendants had done, and that, in any event, the plaintiff had not sustained any damage; and dismissed the action.

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

A. Weir, for the plaintiff.

W. J. Hanna, K.C., for the defendants.

The judgment of the Court was delivered by GARROW, J.A. (after setting out the facts) :—It was contended before us that the agreement was unauthorised and illegal, that the report of the engineer was illegally altered, and that it was contrary to the Act to leave the terminus of the drain at an insufficient outlet—all formidable objections if urged by the right person at the right time.

It may even be conceded that these objections, or some of them, would, under other circumstances, have been insuperable. But the work has now been done. No one proposes to enlarge or extend it. An injunction would, therefore, serve no useful purpose, and a mandatory order such as is asked would only enure to the plaintiff's own benefit, since the present outlet is sufficient for every one else. And if, for his own purposes, the plaintiff desires to extend it, no one can or will hinder or prevent him from doing so on his own land.

It has been truly said that such drainage schemes as this are purely local affairs. The inhabitants at large of the municipality are not interested. The corporate officials are really used merely as a convenient agency for the ratepayers within the drainage area, who expect to reap the benefit, and who ought also to bear the burden. A wise agent always follows his instructions—in this case the statute—and declines to incur personal obligations. And on this principle it is easy now to see that a mistake was made by the defendants in yielding to the suggestion, which undoubtedly came in the first place from the plaintiff's predecessor in title, that the provisions of the statute should be departed from, and the agreement substituted.

But on what principle can the plaintiff now be heard to complain? He stands exactly in the shoes of his vendor, from whom he purchased with notice. If McCorkingdale could not have complained, neither can he. The defendants are not suing. They are defending themselves against acts which, as alleged,

amount to trespasses, neither more nor less, and their defence is, substantially, leave and license under the agreement. An agreement may be such that no Court would enforce it; yet it may nevertheless afford a perfectly good defence of leave and license. Whether this agreement does or not depends upon a reasonable construction of its terms. No one can reasonably doubt, upon the whole evidence, what was really intended, namely, that, if McCorkingdale was relieved of the assessment, he would take the burden of the waters which might come to his lands and supply a sufficient outlet. The agreement otherwise would have been entirely inadequate and have had no real meaning as applied to the circumstances. And the subsequent conduct of McCorkingdale in digging a connecting drain in his own lands makes it very plain that he so understood it. It is not, however, clearly expressed how he was to dispose of the water, and that is the advantage which the plaintiff, not too honestly, seeks to take. He is, however, bound by the express terms of the agreement. And the agreement does expressly say that McCorkingdale grants to the defendant "the privileges and right at all times thereafter to connect the said outlet drain with the said gully or ravine, and to suffer and permit at all times thereafter the water which may come in and along said outlet drain to find an outlet in and along said gully at Bear Creek aforesaid without interruption or obstruction by the grantor, his heirs or assigns, with the right to the grantees to enter in and upon said gully to remove obstructions or repair if necessary." The connection thus expressly authorised could only be made by going upon the plaintiff's lands, as the defendants did, and there digging the necessary connection. The plaintiff might, and, according to what I regard as the true, although obscurely expressed, intention, should, have made the connection himself. Not having done so, he is not, in my opinion, under the circumstances, in a position to complain that the defendants did so for him. Nor is it material that the drain was somewhat straightened, and access to the plaintiff's lands made at a slightly different point. When the agreement was made, the parties knew they were dealing with a statutory drain, subject to repair and improvement from time to time under the statute. The grant of the easement does not prescribe any definite point at which the water should enter the plaintiff's lands. And there is not a particle of evidence that the new point selected is unreasonable, or that the defendants have, by the change, appreciably increased in any way the burden which McCorkingdale, for valuable consideration, agreed to assume.

The appeal should be dismissed with costs.

HIGH COURT OF JUSTICE.

CLUTE, J. MARCH 2ND, 1911.

SHARPE v. WHITE.

Damages—Breach of Contract to Take and Pay for Shares—Measure of Damages—Ascertainment of Market-price of Shares at Date of Breach or Breaches—Difference between Contract-price and Market-price.

Appeal by the defendants from the report of Neil McCrimmon, an Official Referee; and motion by the plaintiff for judgment upon the report.

The report was made pursuant to the judgment of RIDDELL, J., of the 18th June, 1908, declaring that the defendants had broken a certain agreement of the 23rd May, 1907, and that the plaintiff was entitled to recover such damages as he might have suffered thereby.

By the agreement, which was signed by William J. White and Helen S. White, the defendants, they contracted to buy from the plaintiff 1,000,000 shares of stock of a company called "Cobalt Merger Limited," for $150,000, payable as follows: $5,000 on the execution of the agreement; $25,000 on the 3rd June, 1907; $50,000 on the 25th July, 1907; and $45,000 on the 25th August, 1907. The agreement provided for 30 days' extension of the last two instalments, on the terms and conditions therein provided.

The defendants paid the first instalment of $5,000, but refused to carry out any other provisions of the agreement.

The Referee assessed the damages sustained by the plaintiff at $66,106.65, with interest at 5 per cent. from the 27th August, 1908.

The defendant William J. White notified the plaintiff on the 1st June, 1907, that he would not carry out the contract.

This action was commenced on the 26th June, 1907.

The plaintiff, as the Referee found, held, at the date of the trial, under option, 637,867 shares, and in his own right 362,133 shares.

I. F. Hellmuth, K.C., for the defendants.

C. A. Moss, for the plaintiff.

CLUTE, J.:—The plaintiff contended before the Referee that

the value of the stock for the purpose of ascertaining damages should be taken at the breach of contract; and the defendants contended that they should have the advantage of transactions which took place in the stock over two years after the breach of the contract and after the time for the performance of the contract had lapsed.

The Referee came to the conclusion that the damages must be ascertained as of the date at which the contract should have been performed by the defendants.

Assuming that he was right as to this, there was no objection as to the amount of damages assessed. The contention was, however, as before the Referee, that a subsequent transaction by the plaintiff, in which he dealt with the shares in question, should be taken into consideration, and that, the plaintiff having thereby disposed of the shares advantageously, the defendants should be credited with the amount which the shares realised, and, if necessary, there should be a reference back to ascertain that amount.

It was strenuously urged by Mr. Hellmuth that the recent judgment of the Privy Council in Erie County Natural Gas and Fuel Co. v. Carroll, [1911] A.C. 105, on appeal from the judgment of the Court of Appeal for Ontario, Carroll v. Erie County Natural Gas and Fuel Co., 13 O.W.R. 795, was conclusive in this case. I think it distinguishable. . . .

In Halsbury's Laws of England, vol. 10, p. 332, sec. 609, it is said: "In an action for the non-delivery of shares, the measure of damages is the difference between the contract-price and the market-price at the date of the breach:" citing Shaw v. Holland, 15 M. & W. 136; Powell v. Jessopp, 18 C.B. 336; and see Michael v. Hart & Co., [1902] 1 K.B. 482 (C.A.) . . .

[Reference to and quotations from Michael v. Hart & Co., supra; Frost v. Knight, L.R. 7 Ex. 111; Roper v. Johnson, L.R. 8 C.P. 167; Brown v. Miller, L.R. 7 Ex. 319; Mayne on Damages, 7th ed., p. 195; Helliwell on Stockholders, p. 352.]

Erie County Natural Gas and Fuel Co. v. Carroll . . . proceeds upon certain special circumstances differing very widely from the facts in this case. . . .

[Statement of the facts and quotation from the judgment of the Privy Council in that case, delivered by Lord Atkinson, containing citations from Hamlin v. Great Northern R.W. Co., 26 L.J. Ex. 20, 23; Le Blanche v. London and North Western R.W. Co., 1 C.P.D. 302.]

The judgment there proceeds, as I understand it, upon the application of the law to the case where a party procures an

article similar to that for which he bargained, to take its place, and in such case he is entitled only to the cost of so procuring it, and not to profits.

In the present case there was a breach of contract for the payment for certain stock at a certain price on certain days. The vendee repudiated the contract after making the first payment. The measure of damages in such a case is the difference between the purchase-price and the price of the article on the day of the breach, or, as in this case, where the breaches were upon different days, the sum of the differences of the price on the various days when the payments were to have been made, as pointed out in the authorities above quoted.

I think the Referee applied the right principle to the assessment of damages; and, applying that principle, it was not complained before me that the amount assessed was too large.

The defendants' appeal is dismissed with costs.

The plaintiff is entitled to judgment for the amount found by the Referee, with costs of the reference and of this appeal and of the motion for judgment.

CLUTE, J., IN CHAMBERS. MARCH 3RD, 1911.

RE USHER AND TOWN OF NORTH TORONTO.

Municipal Corporations—Expropriation of Land—By-law—Opening of Road—Compensation for Land Taken—Award—Enforcement—Absence of By-law Adopting Award—Municipal Act, 1903, *sec.* 463*—Issue and Sale of Debentures—Registration of By-law—Municipal Act, secs.* 396, 399*—Interest on Damages for Lands Injuriously Affected—Mandamus to Corporation to Raise Money to Pay—Amount of Award.*

Motion by Usher to enforce an award of P. H. Drayton, Official Arbitrator, made on the 1st December, 1910, in the same manner as a judgment, and for an order of mandamus requiring the town corporation to proceed to raise money for the payment of the amount of the award and for the opening of a road as set out in their by-law No. 1042.

R. U. McPherson, for Usher.

T. A. Gibson, for the town corporation.

Clute, J.:—By by-law No. 1042 of the Corporation of the Town of North Toronto, passed on the 24th August, 1909, it was enacted that certain lands therein named be expropriated and taken for road purposes, including those of the claimant Usher, being parts of lots 9, 10, 21, and 22, according to plan No. 944 for North Toronto. Notice of arbitration was duly given under R.S.O. 1897 ch. 227 and the amending Acts, to fix and determine under the Act the amount of compensation to which Usher was entitled. The arbitrator by his award found that the claimant was entitled to $4,800 for the land expropriated and $3,500 for injuriously affecting the remaining lands of the claimant, and the claimant was given his costs of and incidental to the arbitration.

It is contended by Mr. Gibson, for the corporation, that, under sec. 463 of the Municipal Act, the award not having been adopted by by-law, the original by-law is to be deemed to be repealed, and the property stands as if no such by-law had been made.

The answer made by the claimant's counsel to this objection is that sec. 463 applies only to cases where the original by-law did not authorise or profess to authorise any entry or use to be made of the property before an award has been made, except for the purpose of survey, and that the by-law in question expressly authorises "that for the purposes aforesaid all things necessary in and about the premises be undertaken and done."

The by-law under the authority of which the award was made, applied to a large number of other lots, the proposed street being nearly a mile in length. All the owners of the lands over which the proposed street is to pass have been settled with, except some four or five, besides the claimant.

The money to be raised under the by-law was in fact raised by debentures duly issued and applied in expropriation of the lands as far as it would extend. It transpired, however, that the estimate was too low, and that there was not sufficient to pay for all the lands. That, I presume, is the real cause of objection to the present motion.

There is no provision in the section by which a portion of the by-law may be deemed to be repealed. It is clear, I think, that the by-law must stand, the debentures having been issued and marketed, and the money provided to be raised under the by-law having been actually raised and expended. But it is said that the by-law may be deemed to be repealed in part at the pleasure of the corporation. I do not think this argument is tenable. The by-law had to be submitted to the people; and it is hardly

conceivable that it would have been passed if it had been supposed that the money raised thereunder might be fully applied in expropriating a portion of the lands mentioned in the by-law, and the by-law treated as a nullity with reference to the balance.

I am of opinion, therefore, that this objection to enforcing the by-law fails. It may be noticed, however, that the by-law in question has been registered by the corporation. Section 396 provides that, except in certain cases, not material here, a by-law passed by any municipality for contracting any debt by the issue of debentures and for levying rates for the payment of such debts, shall, within four weeks after the final passing thereof, be registered by the clerk of the municipality.

Section 399 declares that every by-law registered under sec. 396, or registered before the sale of the debentures issued thereunder, shall be absolutely valid and binding upon the municipality according to the terms thereof, and the by-law shall not be quashed or set aside on any ground whatever, unless within three months an application is made to quash the same.

In the present case the by-law was passed on the 24th August, 1909, and no motion to quash has been made. Reading these sections together, I think it obvious that sec. 463 does not apply to a case of this kind so as to give effect to the contention of the corporation, where, as here, the by-law has been registered for more than three months without being attacked. The corporation have proceeded to issue the debentures, expropriated a large portion of the lands contemplated by the by-law, and have expended all the money so raised under the by-law.

In my opinion, the claimant is entitled to judgment for the amount as found by the award: see McVicar v. Town of Port Arthur, 26 O.R. 391.

It is contended for the corporation that interest should be allowed upon the damages assessed for the remaining lands injuriously affected only from the date of the award, and not from the date when the lands were expropriated under the by-law. This point, however, I think, is covered by In re Leak and City of Toronto, 29 O.R. 685, 26 A.R. 351, 30 S.C.R. 321. . . .

The claimant is entitled to interest from the 24th August, 1909, the date of the passing of the by-law.

The by-law provides for the raising of the funds for the payment of the lands to be expropriated for the street by a general levy. I think the claimant is also entitled to the further relief asked for, a mandamus commanding the Corporation of North Toronto to raise the money necessary for the payment of and to pay the amount of the award, with interest from the

date of the by-law, and the costs, but, as was said by Armour, C.J., in McVicar v. Town of Port Arthur, 26 O.R. at p. 402: "As, no doubt, the defendant corporation has refrained from raising the money necessary for the payment of the plaintiff's order in the belief that the plaintiff had no remedy against it for the amount of it," I think that a reasonable time ought to be afforded to it for that purpose.

I, therefore, direct that a peremptory writ of mandamus do issue, returnable on the 1st day of the June sittings of Weekly Court. If this date is not satisfactory, it may be spoken to before the order herein issues. The claimant is entitled to the costs of this motion.

[Leave to appeal refused by RIDDELL, J., on the 7th March, 1911.]

TEETZEL, J. MARCH 3RD, 1911.

McPHERSON v. TEMISKAMING LUMBER CO.

Execution—Notice of—Execution Act, sec. 9—Interpleader Issue—Timber—Further Evidence—Costs.

Motion by the plaintiff Booth for leave to introduce further evidence on his behalf, as to which his counsel had not been instructed before the trial on the 11th November last, judgment having been delivered by TEETZEL, J., on the 11th January, 1911 (ante 553), allowing the claim of the plaintiff McPherson, but dismissing the claim of the plaintiff Booth upon the interpleader issue.

W. Laidlaw K.C., for the plaintiff Booth.
G. H. Kilmer, K.C., for the defendants.

TEETZEL, J.:—I have heard evidence upon the question as to whether the defendant company had notice of the plaintiff Booth's execution, within the meaning of sec. 9 of the Execution Act, 9 Edw. VII. ch. 47.

The evidence introduced was that of the plaintiff Booth and of J. E. Murphy, president of the defendant company; and I find that on the 24th February, 1910, such facts were stated by the plaintiff Booth to Mr. Murphy. as president of the defendant company, as amounted to actual notice to him for the com-

pany that Booth at that time had an unsatisfied execution in the Sheriff's hands at North Bay for about $1,000, under a judgment against McGuire & Co.

While Mr. Murphy denied some of the facts stated by Booth, I am of opinion that his recollection was at fault, and I accept Booth's evidence as to the conversation with him.

I also find that at that time the defendant company had expended about $16,000 in connection with cutting the logs in question, and about three-quarters of the total quantity had then been cut.

Notwithstanding such notice of his execution, I am still of opinion, as expressed in my former judgment, that, so far as respects the plaintiff Booth, he is not entitled to any claim against the logs in question, on the authority of Canadian Pacific R.W. Co. v. Rat Portage Lumber Co., 10 O.L.R. 273.

The costs of the application to adduce further evidence and of the subsequent hearing must be paid by the plaintiff Booth on the final taxation.

LATCHFORD, J. MARCH 3RD, 1911.

HUNTER v. RICHARDS.

Water and Watercourses—Mill-owners—Pollution of Stream—Prescription — Payments — Acknowledgment — Nuisance—R.S.O. 1897 *ch.* 133, *sec.* 35—*Easement—Damages—Injunction—Suspension for Limited Time.*

The plaintiff was the owner of a lumber mill on Constant creek, in the township of Grattan, and the defendants were the owners of a mill, above the plaintiff's mill, upon the same creek.

This action was brought to recover damages for injury done to the plaintiff by the defendants in fouling the stream and obstructing the flow of water to the plaintiff's mill by throwing refuse in the creek and otherwise injuring the plaintiff.

P. White, K.C., for the plaintiff.

T. W. McGarry, K.C., for the defendants.

LATCHFORD, J.:—The defence in this case is, that the defendants have a right by prescription, existing for upwards of forty years prior to 1896, to damage the property of the plaintiff. Other issues are, it is true, raised, but I regard them as of no importance.

The mill built in 1885 contained but one saw, according to the evidence taken at Ottawa. As the mill is now, it is equipped with many—with shingle and lath mills, an edger, and other similar appliances. It is not clearly shewn when the property of the plaintiff was first prejudicially affected (see judgment of Sir G. J. Turner, L.J., in Goldsmith v. Tunbridge Wells, L.R. 1 Ch. at p. 352), when the primitive state of the mill was altered, or when the various improvements that now exist were made. But it is, I think, fair to assume that the evolution from the one saw of 1855 to the present complex condition has been gradual, and that the property of the plaintiff was not materially affected to his prejudice until 1895 or 1896. The payment of $100 to the plaintiff in 1896, more than forty years after the original saw began cutting, is some evidence that the refuse then discharged over his lands was in excess of what the defendants had any possible right by prescription to send down upon him. It is disputed that any right to pollute such a stream as flowed between the two mills can be established by lapse of time. This contention would be tenable if the fouling amounted to a public nuisance: see Blackburn v. Somers, 5 L.R. Ir. 1. Although an undoubted nuisance to the plaintiff, the pollution of the stream has not been shewn to be a nuisance to the public. In the latter event no prescription could, of course, arise. If prescription as of right existed in favour of the defendants in 1896, it existed only to the extent of the primitive and limited fouling of the stream in 1856, and the years immediately following, which did not materially injure the plaintiff. The payments made by the defendants to the plaintiff for some years after 1896, in addition to what was paid in that year, were, in my opinion, an acknowledgment that the fouling of the stream during those years was greater than the defendants enjoyed as of right, and enjoyment as of right was necessary before the defendants could claim the benefit of the statute R.S.O. 1897 ch. 133, sec. 35. Any easement respecting the sawdust or refuse from the mill of 1855 or 1856, which the defendants were entitled to, could not be materially altered or increased to the further detriment of the plaintiff. It was held in Bealey v. Shaw, 6 East 208, that a mill-owner, who had by twenty years' user acquired a right to divert part of a stream, was liable to an action at the suit of the owner of a mill lower on the stream for a subsequent diversion to the lower mill-owner's injury.

Baxendale v. McMurray, L.R. 2 Ch. 790, cited by counsel for the defendants, is not an authority in their favour. It simply decides that a change in the quality of the pollution, where

a right to pollute exists, does not destroy the easement, and that the onus of proving an increase (which lay upon the plaintiff) had not been satisfied.

In the present case it had been established that there was an increase in the pollution of the stream, especially in 1896, and the three or four subsequent years. In McIntyre v. McGavin, [1893] A.C. 268, Lord Watson says, at p. 277: "A proprietor who has a prescriptive right to pollute cannot, in my opinion, use even his common law rights in such a way as to add to the pollution." By the compensation made to the plaintiff during this period, any right of the defendants, even their limited right of 1855, was interrupted, and a period of twenty years has not since elapsed. If the refuse of the mill reaches the burner and is there consumed, all damage to the plaintiff will be prevented. It is, however, no part of the duty of the Court to inquire how the defendants may best prevent the nuisance to the plaintiff.

I direct that judgment be entered after thirty days in favour of the plaintiff for $200 and costs. An injunction is also granted restraining the defendants from discharging refuse into Constant creek to the injury of the plaintiff, but the operation of the order is to be suspended for four months to enable the defendants so to alter their mill that no additional damage shall be done.

TEETZEL, J. MARCH 4TH, 1911.

ADAMS v. CRAIG AND ONTARIO BANK.

Bank and Banking—Cheque Drawn by Customer—Promise of Bank Manager to Pay—Consideration for—Acceptance by Drawee—Statute of Frauds—Ratification of Transaction—Fraud.

Appeal by the defendants the Ontario Bank from the report of George Kappele, an Official Referee; and motion by the plaintiff for judgment on the report.

The action was upon a cheque for $2,223.43, the amount of a cheque drawn by the defendant Craig upon the Ontario Bank, in favour of the plaintiff.

The Referee found in favour of the plaintiff against the Ontario Bank for the amount of the cheque.

J. W. Bain, K.C., and M. Lockhart Gordon, for the defendants the Ontario Bank.

I. F. Hellmuth, K.C., and H. S. White, for the plaintiff.

TEETZEL, J.:—I fully agree with the learned Referee both in his findings of fact and conclusions of law set forth in his very carefully prepared judgment, and have only to add that, besides the judgment being supported by Simpson v. Dolan, 16 O.L.R. 459, the facts bring the case within the rule that a promise to pay merely out of the moneys of the debtor which shall come to the hands of the promisor is not within the Statute of Frauds: Rowlatt's Law of Principal and Surety, p. 44; Andrews v. Smith, 2 C. M. & R. 627, 631.

It is further to be observed that the promise given by the bank manager and its acceptance by the plaintiff resulted in the plaintiff ratifying the sale to Craig, which, upon the other facts in the case, may well have been rescinded by the plaintiff as having been brought about by misrepresentation or fraud, and his goods recovered in an action; for I consider it quite probable that a jury would find that when Craig entered into the agreement of purchase with the plaintiff, intending to pay him by a cheque on a bank in which he knew he had no funds, and in which he was in fact $34,000 overdrawn, and give his cheque for the purchase-money, he committed a fraud upon the plaintiff.

The plaintiff's ratification of the sale and forbearance to sue either to set the sale aside or to recover the purchase-money would afford ample consideration for the manager's promise to the plaintiff, within Callisher v. Bischoffsheim, L.R. 5 Q.B. 449, and Drewry v. Percival, 19 O.L.R. 463.

The appeal will, therefore, be dismissed; and, the plaintiff having moved for judgment pursuant to the report, I direct that judgment be entered for the above amount and interest from the 13th October, 1906, together with costs of the action, reference, and this appeal.

MEREDITH, C.J.C.P. MARCH 6TH, 1911.

RE SALTER.

Will—Construction—Disposition of Estate—Alternative Scheme —Inconsistent Provisions—Deferred Period of Distribution —Executors—Payment into Court—Representation of Parties—Costs.

Originating motion for the determination of questions arising upon the will of Peter Salter, dated the 8th November, 1897.

G. H. Kilmer, K.C., for the executors and for Adeline Gregg, Joseph Albert Salter, Margaret Ann Anderson, Elizabeth Mary Anderson, Wesley Arthur Salter, and John Gordon Salter.

E. C. Cattanach, for the infants.

A. R. Clute, for Peter David Salter.

MEREDITH, C.J.:—The testator died on the 3rd August, 1898, leaving a widow, Mary Jane, and eleven children surviving him.

He had been married twice, and three of the children were the issue of the second marriage.

He owned two farms, lots 27 and 28 in concession A in the township of Brant, and lot 28 was heavily incumbered at the time of his death, and $500 was to come to his estate from the Oddfellows Federal Insurance Company and $200 from the Oddfellows. Beyond these assets, he does not appear to have been possessed of any property except his household furniture and his farm stock and implements, the extent or value of which is not shewn.

The ages of all the children are not shewn, but most of them must have been under the age of twenty-one years at the time of his death, and John Gordon was at the date of the will between eight and nine years old.

The will is an ill-drawn one.

The testator evidently hoped that his executors would be able to pay off the incumbrances on, or, as the will terms it "redeem," the incumbered farm, and he contemplated that his farms would be worked by three of his sons, William Henry. Joseph Albert, and Peter David, and intended that these sons should have the farms when John Gordon, his youngest son by his first marriage, who was also the youngest child of that marriage, attained his majority, subject to a legacy of $200 to his daughter Adeline, which she was to receive in three years after his decease, to a legacy of $150 to his daughter Margaret Ann, payable when she attained her majority, and to legacies of $100 each to Elizabeth May, Wesley Arthur, and John Gordon, payable when they respectively attained twenty-one.

The provision made for the second wife and her children is as follows. The wife was to have (in lieu of dower) during her widowhood the interest on the $700 coming from the Oddfellows Federal Insurance Company and the Oddfellows, the dwelling house on lot 27, and nine acres south and east of it, and the pasture, keep, and stabling of a cow and a pig and ten hens, and she was also to receive $75 worth of provisions in each year.

The children of the second marriage were to have the $700 after the death or marrying again of their mother, and it was to be divided between them when the youngest of them attained seventeen, and the income of it in the meantime was to be used for their support.

The farms were to be given to be worked by the three sons and to provide a home for the other children of the first marriage and to give them proper schooling.

I omit any reference to the disposition made of the household furniture, as nothing turns upon it.

The testator, having in mind that it might not be possible to carry out this scheme, which I may call the primary scheme of the will, provided an alternative one. In the event of the three sons for whom the farms were intended not working "the place" or his farms properly and living and working agreeably together, the executors were empowered to sell or rent the farms and chattels, and, if they sold, each of the three sons was to receive $200 as he attained twenty-one, and the widow was to receive the interest on $2,000 during her widowhood, in addition to the interest on the $700. At the expiration of nineteen years, which was probably the time when the youngest child would attain his majority, if his wife still remained his widow, she was to receive the $700, but was to give up all claims on the farms, and the $2,000 was to be equally divided among all the surviving children, as was the residue of the estate.

It turned out that it was not possible to carry out the primary scheme of the will.

It was not practicable to pay off the incumbrances on lot 28, and it was sold by the executors in the year following the testator's death. The three sons left the other farm in the same year, and never returned to it, and did not work it, and it has been kept rented by the executors ever since, until it was sold by them in the early part of the present year. In consequence of this, the alternative scheme of the will came into operation.

The apparent conflict between the earlier and the later disposition of the $700 is unimportant because of the widow's death; and the three children of the second marriage are therefore entitled to it in equal shares.

I see no escape from the conclusion that the residue of the estate is tied up until the nineteen years have expired.

The direction is that the division of the $2,000 is to take place at the expiration of nineteen years, and is then to be between all the testator's surviving children, and "all other moneys left" are to be similarly divided among his then surviving children.

The provision as to any one or more of the three sons for whom the farms were intended dying "without an heir," and the gift in that event of the shares of those dying to Wesley Arthur, John Gordon, and Harvey Nelson, as well as the provisions made in the event of any of them dying, are quite inconsistent with the provision that the survivors are to take, and I think were intended to apply only to the devise of the farms.

There will be a declaration of the rights of the parties in accordance with the opinion I have expressed.

The executors must forthwith pass their accounts and pay into Court the moneys in their hands subject to further order.

The costs of all parties of and incidental to the motion and the payment into Court will be paid out of the fund, and may be paid to the parties entitled before the fund is brought into Court.

William Henry Salter did not appear on the motion, and I made an order that Peter David Salter should represent him for the purposes of the motion. The making of that order must be recited in the order on the motion. The evidence that Wesley Arthur died intestate is not sufficient, and the order for representation may provide that Peter David shall represent those entitled to claim under him.

Since writing the foregoing, affidavits have been filed shewing the ages of all the children, from which it appears that, as I surmised, John Gordon was the youngest child of the first marriage.

FALCONBRIDGE, C.J.K.B. MARCH 6TH, 1911.

ROSS v. McLAREN.

Way—Private Way—Right to Fence in Sides of "Lane"—Reservation in Deed—Possession—Evidence.

Action for a declaration of right.

D. B. Maclennan, K.C., and C. H. Cline, for the plaintiff.
G. I. Gogo and J. G. Harkness, for the defendant.

FALCONBRIDGE, C.J.:—The plaintiff is a carpenter, and the defendant a physician. Both reside at the village of Lancaster, in the county of Glengarry. They both have houses built on lots on the west side of the Military road, and are adjoining

proprietors—Ross being north of McLaren. Their title is derived through a common grantor, one Isabella Fraser. The defendant's deed and the registration thereof are a few days prior to that of the plaintiff. The defendant's deed grants right of way to him as follows: "Together with the right of way over a lane 11 feet and 6 inches in width, extending for 71 feet from the Military road westward over the portion of lot 25 immediately adjoining the north boundary of the parcel hereby conveyed."

The plaintiff's deed contains a reservation as follows: "Subject to a right of way" (for the defendant), "his executors, administrators, or assigns, over the southerly 11 feet 6 inches, of the property hereby conveyed, extending westward 71 feet from the Military road."

In September last the plaintiff began to construct a line fence between his own and the defendant's property, and had planted posts in the ground to form part of the said fence, when an agent of the defendant tore the posts out of the ground and stopped the construction of the fence. The defendant served the plaintiff with a notice intimating that the erection of a fence along the south side of the right of way was an infringement of the defendant's right of access to his premises over the strip of land in question; and forbidding the plaintiff to erect a fence or other obstruction there.

The plaintiff served a cross-notice on the defendant, that he, the plaintiff, intended to build a line fence between the properties and to erect a gate at the highway and another gate at the rear of the right of way in question; and insisting that the defendant should, in passing in and out through these gates, keep them closed after passing in and out; and further notifying the defendant that, if he desired one or more additional gates, for any reason, in the line fence, he could have them, but that they must be erected at his own expense, and that the additional gates would be subject to the said restrictions as to their being kept closed except when actually being used.

The plaintiff now brings this action, claiming: (1) a declaration of the Court that he is entitled to inclose his property as aforesaid, including the lane over which the defendant is entitled to a right of way, by proper fences, gates, etc.; (2) an injunction; (3) damages.

A good deal of evidence was given at the trial, the plaintiff endeavouring to shew the inconvenience and loss sustained by him and his wife by reason of the "lane" being uninclosed. The principal trouble appears to be the incursion of two vagrant

cows within the last two years. Lancaster is an incorporated village, and there is a by-law to prevent cattle roaming at large. The reeve of the village has the greatest frontage in the place, and it is all open to the street. He finds no necessity for a fence.

The inconvenience to the defendant arising from the "lane" being fenced at the sides would be enormous. His house is built to suit the right of way. He has three openings on his northern boundary: one for a coal-window; another for his back verandah; and a third for his wood-shed. The plaintiff proposes to allow him to put in three gates, the one at the west being eighteen feet long. These gates, especially the largest one, would be extremely inconvenient. The defendant's practice is principally in the country. He keeps two horses. In winter large quantities of snow would have to be removed in order to get these gates open, which would be a source of great trouble and expense. Mr. Stewart thinks the plaintiff and his wife have become "morbid."

I make these remarks upon the evidence, the result being that the plaintiff ought not to have the declaration which he asks for, unless he can shew a clear right at law to the same.

It was only after considerable conflict of judicial opinion that in Siple v. Blow, 8 O.L.R. 547, the plaintiff there was held entitled to a declaration of his right to place gates at the termini of the right of way. No case has been cited which declares a person in the position of the present plaintiff to be entitled to fence in the sides. To do so would be so to burden the defendant's right as not only to make it less convenient and more burdensome to him but to render the situation intolerable: as to this see per Osler, J.A., in Siple v. Blow, 8 O.L.R. at p. 555; and per Garrow, J.A., at p. 562, citing Clendenan v. Blatchford, 15 O.R. 285, at p. 287; and on the general law see Clifford v. Hoare, L.R. 9 C.P. 362; White v. Keegan, 1 O.W.N. 394; Heward v. Jackson, 21 Gr. 263; Kastner v. Beadle, 29 Gr. 266; Watts v. Kelson, L.R. 6 Ch. 166.

It was contended for the plaintiff that the use of the word "lane" in the grant of a right of way to the defendant imported a passage between two fences. I do not think that this contention is well-founded. I do not find any legal definition of the word "lane." Mr. Justice Brayton says in Hunter v. Mayor and Aldermen of Newport, 5 R.I. at p. 330: "The term 'lane' is not a legal term. It signifies simply a narrow way, which may be either public or private and is oftener private than public." The Century Dictionary gives the following definition: "(1) A narrow way or passage; a path or

passageway between enclosing lines as of buildings, bridges, fences, trees, or persons; an extended alley. (2) A narrow and well defined track; a fixed or defined line of passage, as a navigable opening between fields of ice, a fixed course at sea, etc.—*i.e.,* Ocean lane, a fixed route or course of navigation pursued by a vessel or a line of vessels in crossing the ocean." (In the North Atlantic there is a northerly track for west-bound steamships and a southerly track for east-bound steamships from about Nantucket Shoals to the entrance of the English Channel.)

For thirty-five years, to the knowledge of the plaintiff (and for at least forty years on the evidence), there has been no fence or gate between the two properties. There was unity of possession during all this time (except for a brief period when an estate was being wound up) up to the date of the deeds to the plaintiff and defendant.

The defendant also points out that, as the plaintiff cannot plant his posts on the defendant's land, the inclosed lane proposed by the plaintiff would not be "immediately adjoining the north boundary" of the defendant's parcel.

I am of the opinion that the plaintiff has failed to establish the right which he contends for, and that his action must be dismissed with costs.

DIVISIONAL COURT. MARCH 6TH, 1911.

SIM v. CITY OF PORT ARTHUR.

Negligence—Street Railway—Injury to Person Driving Waggon on Track—Findings of Jury—Contributory Negligence—Primary Negligence—Ultimate Negligence—Proper Result of Findings.

Appeal by the defendants from the judgment of BRITTON, J., upon the findings of a jury, in favour of the plaintiff, in an action for damages for injuries to the plaintiff by reason of a collision between a laden waggon driven by the plaintiff and a car of the defendants. The plaintiff alleged negligence in the operation of the car, and the defendants alleged negligence on the part of the plaintiff. The judgment for the plaintiff was for $350 damages and costs on the County Court scale without right of set-off.

The appeal was heard by FALCONBRIDGE, C.J.K.B., LATCHFORD and MIDDLETON, JJ.

Featherston Aylesworth, for the defendants.

M. J. Kenney, for the plaintiff.

MIDDLETON, J.:—The findings of the jury cannot be interfered with.

Then, upon these findings, there is clearly a case in which the plaintiff has the right to recover.

The real view of the jury is best ascertained from the answer to question 5: "If you think both the motorman and the plaintiff were guilty of negligence, could the motorman by the exercise of reasonable care, after he became aware of the plaintiff's negligence, have stopped the car in time to avoid the accident?" A. "All unanimous that both were guilty of negligence, but that the motorman had ample time to stop the car."

The answers to question (1), "Was the driver or motorman of the defendants' car guilty of negligence which caused the accident to the plaintiff?" "Yes," and question (2) "If so, what was that negligence?" "Not stopping in time," are said to preclude recovery because they shew that the primary and ultimate negligence are the same.

I do not think this is so. The question may have been intended to relate to primary negligence, but in form it is directed to the cause of the accident, and the jury have in effect said that the accident was caused, not by the contributory negligence, but by the defendants' negligence, consisting of the motorman's breach of duty to avoid injuring the man in a position of peril, no matter how that position of peril came about.

In cases of this kind it is, I venture to think, a mistake to seek for what is called primary negligence. There may be negligence in the first instance on the part of the defendant. If there is, the plaintiff has a duty to avoid, if possible, by the exercise of reasonable care and diligence, the consequence of that negligence, and, if he fails to discharge that duty, he cannot recover unless the defendant, after he becomes aware of the plaintiff's position of peril arising from his own negligence, is guilty of a breach of the duty which then arises, to avoid, by the exercise of reasonable care and diligence, the consequence of the plaintiff's negligence. This duty is one which arises quite apart from the existence of any primary negligence. Where there is primary negligence, and contributory negligence is set up, the plaintiff may seek to avoid the consequences of such contributory negligence by shewing ultimate negligence;

but his position, if there is contributory negligence, would be quite as strong, as a matter of law, if he did not allege any primary negligence at all, and began his case by stating that, being in a position of peril as the result of his own negligence, the defendant, knowing of his peril, inflicted the injury by his failure to endeavour to avoid the accident. In other words, the obligation of the defendant to avoid injuring a negligent plaintiff is no greater and no less because there has been some earlier negligence.

If a motorman runs over a man sleeping upon the tracks, whom he has seen in ample time to enable him to stop the car, any inquiry as to the speed of the car before the discovery is irrelevant.

The point of difficulty which sometimes arises, and which has occasioned difference of opinion, is this. Could such a plaintiff say, "Before you discovered my peril, you were negligent in running your car at too high a speed, and, though you discharged every duty devolving upon you, and made every endeavour to avoid the accident after the discovery of my peril, so that there was no ultimate negligence, these endeavours were rendered fruitless by your earlier negligence in running at excessive speed," and so justify a recovery? The answer is, no; there has been no breach of the new duty which arose on the discovery of the danger, and the original negligence was not the sole cause of the accident. It was the result of the negligence of both parties. This is what is meant by saying that the same act cannot be both primary and ultimate negligence.

In this case the result of the answers of the jury is to find no primary negligence, but a breach of the new duty arising upon discovery of the plaintiff's negligence and consequent peril. This would have been ultimate negligence if there had been primary negligence; but it is also sufficient to found an action quite apart from primary negligence.

In the second place, it is urged that the plaintiff cannot recover because the contributory negligence found was continuing, and so must be assumed to be one of the causes of the accident. The jury has found as contributory negligence, "Being or driving on the tracks."

I should have been inclined to think that this did not amount to negligence at all. The tracks form part of the highway, and the plaintiff had an undoubted right to drive upon the tracks; but, assuming in the defendants' favour that this means "being and remaining upon the tracks in view of the near approach of the car," this might or might not afford an answer to the claim.

If the plaintiff became aware that the car was approaching, and was able to avoid the danger—quite obviously his duty was to avoid it, and, failing to do so, he was the author of his own damage; but this was a question for the jury, and upon them devolved the duty of ascertaining the real cause of the accident. This they have found to be the defendants' negligence, not only by the answer to the 5th but also by the answer to the 1st question.

The appeal should be dismissed with costs.

LATCHFORD, J.:—I agree.

FALCONBRIDGE, C.J.:—I agree in the result.

McCALL MANUFACTURING CO. OF NEW YORK v. HICKSON—LATCHFORD, J.—MARCH 3.

Contract—Procurement by Fraud—Misrepresentation of Agent—Sale of Patterns—Notice of Cancellation of Contract—Return of Patterns.]—Action to recover $348.02 for goods sold and delivered and $150 as liquidated damages for breach of contract. Both claims were made under a written agreement dated the 4th November, 1907. At that time the defendant was carrying on business as a milliner and dealer in fancy goods at the town of Arnprior, and was agent for the sale of paper patterns made by Butterick & Co., business rivals of the plaintiffs. During the currency of her contract with Butterick & Co., the defendant was bound not to sell any but Butterick patterns. The plaintiffs' agent, one Moss, represented to the defendant, and she at the time believed, that the Butterick contract expired in August, 1908, and that thereafter she would be free to sell the plaintiffs' patterns, and she, therefore, signed the agreement with the plaintiffs. As a fact the Butterick agreement was in force until August, 1908, and thereafter until terminated by three months' notice in writing. The learned Judge finds that Moss made the representation with a form of the Butterick contract before him and with knowledge that his representation was false, and that the defendant relied upon Moss's representation and was thereby induced to sign the agreement with the plaintiffs; and upon this and other grounds (set out in a written opinion) the action failed: Ontario Ladies College v. Kendry, 10 O.L.R. 324; Long v. Smith, ante 631. The learned Judge held,

also, that, even if the contract had not been induced by the fraud of the plaintiffs' agent, for which they must be held accountable, there had been no breach by the defendant. A voluntary sale of her business took place within a time which was reasonable in the light of the correspondence; due notice of cancellation was given, and the patterns within thirty days thereafter returned unopened and in good order, just as received from the plaintiffs; and the defendant was not indebted to the plaintiffs except for the goods which she was entitled to return and did return. Action dismissed with costs. R. J. Slattery, for the plaintiffs. G. F. Henderson, K.C., for the defendant.

METROPOLITAN BANK OF CANADA V. AUSTIN & GRAHAM—FALCONBRIDGE, C.J.K.B.—MARCH 3.

Promissory Note—Partnership—Debt to Bank—Note Made after Incorporation of Company—Identity of Names—Knowledge by Bank of Incorporation—Liability of Partners—Estoppel—Novation.]—Action on a promissory note dated the 30th September, 1910, whereby the defendants promised to pay to the plaintiffs or their order $2,750 six weeks after date. This note represented a balance due to the plaintiffs on an advance of $3,000 made on the 13th November, 1909. No further advance was made by the plaintiffs. but the amount of the indebtedness had been reduced to the sum now sued for. The defendants had filed their declaration of co-partnership on the 30th December, 1905. No declaration was ever filed shewing any change in the partnership. By letters patent under the Ontario Companies Act, dated the 10th January, 1910, the defendants and three other persons were incorporated under the corporate name of Austin & Graham Limited. The defence was that the note sued on was not a note of the defendants at all, but a note of the company; and that, the company having in November, 1910, made an assignment for the benefit of creditors, the plaintiffs must rank on the company's estate and have no recourse against these defendants. The evidence for the defence was chiefly aimed at endeavouring to bring home notice of the formation of the company to the plaintiffs; and the defendants contended that this note, although signed "Austin & Graham," ought to be treated as if signed "Austin & Graham Limited." The learned Chief Justice said that he was unable to recognise the validity of such a defence. The plaintiffs, it might be assumed, were satisfied with their promisors, to whom they had made the ad-

vance before the company was ever thought of. If the defendants had come offering in renewal a note of the company, the plaintiffs would have been at liberty to accept or refuse it. There was no evidence that the company took over or agreed to take over the liabilities of the firm—nor could such an arrangement be made as to this debt without the plaintiffs' consent. Neither the doctrine of estoppel nor that of novatio could, in the circumstances, be invoked. The Court was not concerned with the effect of the incorporation nor with the assignment of the debts or other securities held by the plaintiffs. Judgment for the plaintiffs for the amount of the note and interest. W. N. Tilley, for the plaintiffs. Alexander MacGregor, for the defendants.

CHALMERS V. IRION—DIVISIONAL COURT—MARCH 3.

Husband and Wife—Mortgage Made by Wife—Influence of Husband—Lack of Independent Advice.]—Appeal by the defendant Irion from the judgment of MULOCK, C.J.Ex.D., in favour of the plaintiff. The action was brought by a married woman for cancellation of a certain mortgage and certain promissory notes made by her to the defendant Irion, upon the ground that they were made under the influence of her husband and without independent advice, etc. The judgment of the Court (MEREDITH, C.J.C.P., TEETZEL and MIDDLETON, JJ.) was given by MIDDLETON, J., who said that at the argument the Court determined all the matters in issue against the plaintiff except the contention based upon Stuart v. Bank of Montreal, 41 S.C.R. 516; and, in view of the decision of the Privy Council in that case, Bank of Montreal v. Stuart, 103 L.T.R. 641, the plaintiff's position was hopeless. Appeal allowed with costs and action dismissed with costs. O. E. Fleming, K.C., for the defendant Irion. J. M. Pike, K.C., for the plaintiff.

MCINTOSH V. ROBERTSON—MASTER IN CHAMBERS—MARCH 6.

Discovery—Examination of Party—Adjournment sine Die —Notice from Solicitor to Attend on Subsequent Day—Default.]—Motion by the plaintiff to strike out the statement of defence for the defendant's default to attend for further examination for discovery. The action was against the publisher

of the Toronto "Evening Telegram," for libel. The defendant was examined for discovery on the 25th February, 1911. The examination was adjourned sine die for the purpose of the defendant getting the information asked for, which he was not able to give. On the 27th February the plaintiff's solicitors wrote to the defendant's solicitors that the defendant's examination was adjourned until the day following at 4.30 p.m. To this the answer was that the defendant had left for California, and that the city editor of the newspaper would give the necessary information after he had informed himself of what was required. To this the plaintiff's solicitors replied that the examination had been adjourned until the 1st March at 3.30 p.m. The defendant did not attend; and the plaintiff then made this motion. Held, that, where an examination has been adjourned sine die, there can be no default of the party under examination unless there has been a new appointment given by the Examiner and served in the regular way, or unless there has been a new day and time fixed and agreed to by the party's solicitor in writing. Motion dismissed with costs to the defendant in any event. E. E. Wallace, for the plaintiff. W. N. Ferguson, K.C., for the defendant.

SMITH V. LENNOX—RIDDELL, J., IN CHAMBERS—MARCH 7.

Trial—Postponement—Illness of Witness.]—Appeal by the plaintiff from the order of the Master in Chambers, ante 831. The appeal was allowed and the order set aside. Costs in the cause. T. N. Phelan, for the plaintiff. H. E. Rose, K.C., for the defendant.

WILLIAMSON V. BAWDEN MACHINE AND TOOL CO.—MACLAREN, J.A., IN CHAMBERS—MARCH 7.

Appeal—Leave to Appeal Directly to Court of Appeal from Judgment at Trial—Amount in Controversy.]—Motion by the defendants for leave to appeal directly to the Court of Appeal from the judgment of FALCONBRIDGE, C.J.K.B., ante 725, in favour of the plaintiff. The action was for $2,500 damages for breach of a contract for the construction of a printing press, for the return of moneys advanced on account of the contract, for the delivery up of an acceptance for $500, and for the delivery of certain chattels. The trial Judge awarded no damages, but ordered the defendants to return $600 advanced by the

plaintiff, to pay $20 on account of the chattels, and to deliver up to the plaintiff his acceptance for $500. The plaintiff resisted the motion, upon the ground, among others, that the case was not one appealable to the Supreme Court of Canada, and that consequently the Court of Appeal had no jurisdiction. MACLAREN, J.A., was of opinion that the amount of the draft should properly be included in the amount in controversy in this appeal, which brought it up to more than $1,000, and that, consequently, it was appealable to the Supreme Court, and was a proper case for a direct appeal. Motion granted; costs to be in the appeal. F. Arnoldi, K.C., for the defendants. W. B. Raymond, for the plaintiff.

INNIS V. VILLAGE OF HAVELOCK—DIVISIONAL COURT—MARCH 8.

Highway—Nonrepair of Sidewalk—Injury to Pedestrian—Negligence—Notice.]—Appeal by the plaintiff from the judgment of BOYD, C., ante 205. The appeal was heard (by consent) by a Court composed of RIDDELL and SUTHERLAND, JJ. The Court dismissed the appeal with costs. F. D. Kerr, for the plaintiff. G. H. Watson, K.C., and L. M. Hayes, K.C., for the defendants.