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COURT OF APPEAL.

JUNE 30TH, 1911.

*RE ONTARIO SUGAR CO.

McKINNON'S CASE.

Estoppel—Res Judicata—Company—Winding-up—Contributory—Action for Calls — Dismissal — Consent Judgment — Grounds for—Ascertainment—Evidence outside of Pleadings and Judgment.

Appeal by the liquidator from the decision of MEREDITH, C.J.C.P., ante 496, 22 O.L.R. 621, dismissing an appeal from an order made by an Official Referee upon a reference for the winding-up of the company, striking the name of S. F. McKinnon off the list of contributories.

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

Strachan Johnston, for the appellant.

J. Shilton, for S. F. McKinnon, the respondent.

The judgment of the Court was delivered by MOSS, C.J.O.:—

. . . McKinnon was one of the original subscribers for shares in the company. He signed the memorandum of agreement and stock-book upon which the petition for the issue of letters of incorporation was based, and thereby agreed to take 50 shares of the par value of $100 each. He was named in the letters of incorporation as one of the incorporators. Calls were made upon him in respect of these shares to the extent of $5,000. He denied that he was a shareholder and refused to pay the calls. Thereupon the company commenced an action against him on the 10th December, 1902. The statement of claim alleged, amongst

*To be reported in the Ontario Law Reports.

other things, that the defendant was one of the applicants for the letters of incorporation, and had ever since the incorporation been the holder of 50 shares of the capital stock of the company of the par value of $100 each, and that five calls of 20 per cent. each had been duly made and notice thereof duly given to the defendant; and the plaintiffs claimed payment of $5,000 for principal and $164.14 for interest. In his statement of defence the defendant set up various grounds upon which he asserted that he never became or was a shareholder in the plaintiff company, and he also specifically denied that he ever became or was the holder of the said 50 shares or any shares of the capital stock of the company. He further alleged that the calls were not made in pursuance of the letters patent and the Ontario Companies Act and the by-laws of the company. He also caused third party proceedings to be instituted against one Richard Harcourt, claiming that the latter was bound to relieve him from the said shares and all liability in respect thereof. Mr. Harcourt having filed a defence to this claim, an order was made providing, amongst other things, for the trial of the issues between McKinnon and him by the Judge before whom the action was tried, immediately after the trial or otherwise as the trial Judge might direct.

The action and issue came on for trial before Magee, J., on the 5th October, 1904, in the presence of counsel for all parties, and, counsel aforesaid consenting thereto, it was ordered and adjudged that the action of the plaintiffs against the defendant be dismissed without costs, and that the claim of the defendant against the third party be withdrawn. With reference to this disposition of the matter, an entry appears on p. 137 of the minute-book of the company as follows: "Directors' meeting, 15th October, 1904. 3. S. F. McKinnon suit: The president reported that the case had been dismissed, which settles the matter as far as the company is concerned, but Mr. McKinnon would, in his (the president's) opinion, still be held liable to creditors of the company. . . ." . . .

No further action was taken by the directors or the company. McKinnon's name continued on the books as a shareholder, but he was not aware of it. No further demand for payment was made; he was not notified of and did not attend or vote at shareholders' meetings or otherwise act as a shareholder.

The company continued business until the latter part of 1908, when, upon proceedings instituted under the Winding-up Act (Dom.), an order was made on the 15th December, 1908, declaring the company insolvent and directing it to be wound up

under the provisions of the Act, and shortly thereafter the liquidator was appointed.

The proceeding to place McKinnon on the list of contributories was commenced on the 8th March, 1910, and was disposed of on the 31st March, 1910, by the Official Referee, who virtually gave effect to the answer or defence of res judicata set up by McKinnon, and struck his name from the list of contributories. Upon appeal this order was affirmed by Meredith, C.J. . . .

It is not now questioned that a judgment by consent may raise an estoppel inter partes. That it is as binding and conclusive between the parties and their privies as any other judgment (subject, perhaps, to certain exceptions in cases of fraud or mistake), is well established by the authorities referred to by the learned Chief Justice, to which may be added the case of Hardy Lumber Co. v. Pickerel River Improvement Co., 29 S.C.R. 211. . . .

[Reference to and quotations from In re South American and Mexican Co., [1895] 1 Ch. 37, 45, 50.]

The only difficulty in that case, as in this, was to ascertain what was and what was not in issue and what was actually determined or settled by the judgment. The rule of estoppel by judgment is simple and plain, viz., the facts actually decided by an issue in one suit and in a competent Court cannot be again litigated between the same parties or their privies, and are conclusive between them. But the appellant's contention in this case is, that, inasmuch as there were at least two issues in the former suit, viz., whether McKinnon was a shareholder and whether the calls were duly made, success upon either one of which entitled McKinnon to judgment of dismissal of the action, and inasmuch as judgment on the first issue was the only one which would be conclusive, and it was not apparent upon the record and proceedings upon which of the issues he did succeed, he failed to prove the res judicata.

It is said further that the inquiry is to be made by reference only to the pleadings and judgment in the former action. This appears to be stating the rule in too restricted a sense. For, while it is true that, in cases where a judgment or decree is couched in general terms, the extent to which it ought to be regarded as res judicata can only be determined by ascertaining what were the real matters of controversy in the cause, the inquiry is not limited strictly to what is to be found upon the record and in the judgment. As the learned Chief Justice says, the Court, for the purpose of ascertaining what was actually determined in the

former action, may look outside the judgment and the pleadings. And in this case it is not necessary to go beyond what is clearly admissible in order to come to the conclusion that the ground of dismissal was not confined to the issue as to the making of the calls. . . . Looking, as we are entitled to do, at the whole of the proceedings, including the third party proceedings, and reading, as we must, the judgment as a whole, it is apparent that it proceeded upon the basis of McKinnon's being not liable as a shareholder and of the plaintiffs assenting to that and giving up their claim against him as a holder of shares in the company. . . . The only fair inference from the way in which the third party claim was dealt with is, that, the basis of dismissal of the action being such as to put an end to all further claim on the part of the plaintiffs, no good reason existed for further prosecuting the claim against the third party. Coupled with this is the contemporaneous minute in the company's books of the president's statement that the case had been dismissed, which settled the matter as far as the company was concerned, the abstention from any subsequent demand for payment and from in any way treating him as a shareholder. . . .

Appeal dismissed.

JUNE 30TH, 1911.

RE LENZ.

Will—Construction—Avoidance of Intestacy—Indication of Intention to Dispose of whole Estate—Residuary Estate—Division into Shares—Deduction of Insurance Moneys from Shares—Testacy or Intestacy as to Insurance Moneys.

Appeal by the Official Guardian, on behalf of the infant son of the testator, from the judgment of MIDDLETON, J., ante 721, declaring the construction of the will of Charles Frederick Lenz, deceased.

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

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

E. D. Armour, K.C., for Catherine Bowstead and Emma Lenz, sisters of the testator.

J. Bicknell, K.C., and W. M. McClemont, for Mary B. Lenz, the widow.

H. J. Martin, for the executors.

The judgment of the Court was delivered by Moss, C.J.O.:— . . . The testator died on the 28th October, 1907, leaving him surviving his wife, Mary Biggar Lenz, and his son, Charles Lenz, an infant under the age of twenty-one years, on whose behalf this appeal is being prosecuted. Two sisters, Emma Lenz and Catherine Bowstead, who are beneficiaries under the will, also survived him. John Bowstead, Joseph Dingle, and S. F. Washington, the persons appointed executors, obtained probate of the will. All these persons are represented in this proceedings, but those substantially interested are Charles Lenz, on the one side, and Emma Lenz and Catherine Bowstead, on the other. . .

At the date of the execution of the will there were in existence two policies of insurance upon the testator's life in favour of his wife for the sum of $10,000; there were also in existence two policies of insurance upon his life in favour of his two sisters for the sum of $8,000. These policies had been effected by the testator—the $10,000 being payable to his wife, and the $8,000 being payable to his sisters in equal shares.

After revoking all former wills and making provision for payment of all his debts and funeral and testamentary expenses, the testator, by the will in question, devised and bequeathed his interest in his house and premises in the city of Hamilton and its contents to his wife, and his cottage and lot on Hamilton Beach to his two sisters in equal shares.

The will then proceeded as follows (clause 5): "I will and direct that all the rest residue and remainder of my estate real and personal . . . be divided into three equal portions (subject to the provisions hereinafter contained as to insurance moneys) and that one portion thereof less the sum of $10,000 represented by a policy or policies of insurance on my life payable to my said wife if such insurance moneys are paid to her or less such portions of such insurance moneys as shall be paid to her be transferred or paid over to my said wife absolutely; and that one portion thereof less the sum of $8,000 represented by a policy or policies of insurance on my life payable to my said sisters if such insurance moneys are paid to them or less such portions of such insurance moneys as shall be paid to them be transferred and paid over to them (my said sisters) absolutely in equal shares; and that the remaining one-third portion be transferred or paid over to my son Charles Lenz when he attains the age of twenty-four years."

By clause 9, the executors and trustees were authorised to allow "my said son's portion of my estate" to remain invested as at the date of the testator's death; and, by clause 10, the

executors and trustees were directed to pay over the interest and revenue arising from my said son's portion, until he arrived at the age of twenty-four years, to his mother, for his support, maintenance, and education, with a provision enabling them to apply the interest and income for the same purposes in case of the death of the mother.

After the testator's death, his wife received the $10,000 payable under the policies in her favour, and his sisters received the $8,000 payable under the policies in their favour.

The questions to be answered are, whether, upon the true construction of the will and in the events which have happened, part of the residuary estate to the extent of $18,000 is undisposed of, and, if so, in what manner is it now to be dealt with.

. . .

Looking at all the dispositions of the will, there is little reason for thinking that the testator had any intention or desire to leave any portion of his estate undisposed of; but the question is, whether he has so expressed himself as to prevent that state of matters with reference to the $18,000 in question. If he has failed to express himself in language which, reasonably construed, is found to involve its disposition, then it must be left to the disposition which the law, in that case, makes of it. . . .

But, in seeking to ascertain the meaning of the language a testator has used, the Court is to have regard to the circumstances of which he was aware and to endeavour to give effect, as far as possible, to the general intent to be gathered from a perusal of the will.

It appears tolerably certain that the testator expected and believed that upon his death his wife and sisters would receive from the respective insurance companies the amounts of the various policies payable to them. And it is equally certain that he did not intend that in such case they were to receive exactly the same share of his residuary estate as his son. As to the division of the residuary estate, there is no ambiguity. It is to be divided into three equal portions. The doubts are as to what the testator intended should be regarded as equal parts of his residuary estate when it became necessary to distribute the portions. If his wife and sisters received no part of the insurance moneys from the insurance companies, there would be no difficulty and no further question. One portion of the residuary estate would go to his wife, one to his two sisters in equal shares, and the remaining one would be held and dealt with for the benefit of his son. In that case there would be complete equality. Is there anything to shew that the testator intended that the receipt of insurance moneys

by any of the beneficiaries under the policies should alter the principle of equality of distribution among the recipients of the residuary estate? If it was to be distributed in equal portions without regarding or taking into account moneys received by the testator's wife or sisters under the policies, there would not be equality. To provide against this, the division into equal portions is to be "subject"—that is, with reference—"to the provisions hereinafter contained as to insurance moneys." The division into portions is to be so made as that, having regard to the moneys that may be received by his wife or sisters, there shall be a distribution that will place all upon an equal footing. The expression "subject to" has no arbitrary signification. It is capable of many different meanings according to the subject-matter in connection with which it may be used. See Stroud's Judicial Dictionary, vol. 3, p. 1956, and cases referred to. Here, in furtherance of the general intent, it may, without any violence to its meaning, be read as a direction to work out equality of distribution of the residuary estate by reference to the insurance moneys that may be received. In that way the whole of the testator's estate is disposed of, and there is no intestacy as to any part.

For these reasons, as well as for those given by Middleton, J., the appeal fails and should be dismissed; but, as the difficulty has been created by the testator, the costs of all parties should be borne by the estate, those of the executors and trustees as between solicitor and client.

JUNE 30TH, 1911.

LATIMER v. PARK.

Contract—Formation—Letters and Telegrams — Sufficiency—Statute of Frauds—Vendor and Purchaser—Letter "without Prejudice"—Effect of—Specific Performance—Form of Judgment.

Appeal by the defendant from the judgment of MEREDITH, C.J.C.P., ante. 354, in favour of the plaintiff in an action to compel specific performance of an agreement for the sale to the plaintiff of land in the township of Georgina for $4,010 in cash.

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

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

F. Arnoldi, K.C., for the plaintiff.

The judgment of the Court was delivered by Moss, C.J.O.:—

. . . The plaintiff's claim is that the agreement was concluded between the plaintiff and defendants and is evidenced by correspondence produced and put in evidence at the trial.

The defendant sets up that there was no contract or agreement in writing signed by him, and, by leave obtained at the trial, pleads the Statute of Frauds; further, that there was no concluded agreement, no mutuality, and that the defendant was induced by misrepresentations or concealment on the part of his agent, one Crozier, as to the value of the premises and as to offers therefor, to enter into the agreement upon which the plaintiff relies. . . .

Upon consideration of the evidence and of the arguments advanced, there does not appear to be any good reason for coming to a conclusion differing from that of the learned Chief Justice.

Upon the questions of fact involved, he had the advantage of seeing and hearing the testimony of all parties to the transaction, in addition to the somewhat voluminous correspondence which passed between the defendant and Crozier and others. Any circumstances tending to arouse suspicion were cleared up and explained; and upon the whole evidence there is no reason for supposing want of good faith on the part of the plaintiff or Crozier. It is true that the latter acted up to a certain period in the transaction in the two-fold capacity of agent for the defendant and for the plaintiff. But he did so to the knowledge of the defendant, who was fully aware of the fact that the plaintiff was Crozier's brother-in-law, and that the latter was desirous of obtaining the property for and assisting him to purchase it, and the defendant was willing that the plaintiff should become the purchaser, provided he paid as high a price as any other person desiring to purchase.

Under instructions from the defendant, sealed tenders were advertised for, apparently with a view to ascertaining what others were willing to give. In response three tenders were received, the highest being $4,010. These were forwarded to the defendant by Crozier, in a letter in which, acting on behalf of the plaintiff, he informed the defendant that the plaintiff would "go the highest bid," and saying that, if the defendant accepted the highest bid, he (Crozier) would pay the cash, and asking him to wire. In answer, the defendant wired, "I accept John Latimer's bid for the farm." He thus had presented to him the option of accepting or rejecting the plaintiff as a purchaser, knowing, as he did, the circumstances under which the offer was made and on whose behalf it was made; and he adopted the former course.

Subsequent correspondence took place, and he executed and procured to be executed by his wife, his son and his wife, a conveyance in duplicate of the property to Crozier, which he sent to the manager of the Metropolitan Bank at Sutton, with instructions to deliver them to Crozier on receiving from him a marked cheque for $3,809.50, payable to the defendant's order; and he notified Crozier of what had been done. Then, in consequence of the receipt by him of a letter from one Cronsbury, who had sent in the tender for $4,010, containing statements which turned out to be unfounded and were afterwards retracted by Cronsbury, the defendant wired the bank manager to return the deeds, which was done. The whole difficulty seems to have arisen from Cronsbury's letter and the apparent suspicions which it created. The testimony at the trial shewed that, so far as value was concerned, the price offered was a fair and reasonable one, and that Crozier had not received or heard of any better or higher offer than Cronsbury's. And there was really no ground for the defendant not being held to a specific performance of the agreement if he had entered into one sufficient to bind him, within the terms of the Statute of Frauds.

In argument the plaintiff relied upon possession having been taken of the premises by him after the receipt by Crozier of the defendant's telegram accepting the plaintiff's offer, and also upon the conveyance to Crozier. But these facts do not appear to assist the plaintiff so far as the question of the Statute of Frauds is concerned, and the learned Chief Justice does not appear to have attached weight to them. But, without reference to them, the plaintiff has shewn upon the correspondence a distinct agreement evidenced by writing. The learned Chief Justice has made this so apparent, by reference to the various letters and telegrams, that it is unnecessary to traverse the same ground.

It was objected, however, that the Chief Justice should not have received in evidence or acted upon the defendant's letters of the 22nd December, 1909, and the 4th January, 1910, because they are expressed to be "without prejudice." But, as the Chief Justice points out . . . , Crozier's letter of the 27th December to the defendant was an acceptance of the proposal contained in the latter's letter of the 22nd December, which removed the conditional privilege attached by the words "without prejudice." The rule seems to be correctly stated in Omnium Securities Co. v. Richardson, 7 O.R. 182. . . .

[Reference, also, to Walker v. Wilsher, 23 Q.B.D. 335, per Lindley, L.J., at p. 337.]

In face of the correspondence in this case, it is not possible

to contend with success that there was not a concluded agreement.

It follows that the appeal fails; but there is one matter in connection with the form of the judgment as issued, to which Mr. Clark drew attention, in respect of which there should be a slight change, so as to provide that the purchase-money represented by the marked cheque be paid over to the defendant or his agent upon execution and delivery of the deeds, instead of the present declaration that he is entitled to the cheque. The form of the certificate may be discussed in Chambers in the event of any difficulty arising.

Subject to this variation, the appeal is dismissed with costs.

JUNE 30TH, 1911.

STUART v. HAMILTON JOCKEY CLUB.

Company—Shares—Transfer by Unauthorised Person—Liability of Company to True Owner—Indemnity against Person Purporting to Transfer and against Transferee—Dividends Received—Subsequent Transfer—Evidence—New Trial.

Appeals by the defendants as against the plaintiff and the third parties from the judgment of MIDDLETON, J., ante 673; and cross-appeals by the third parties from the same judgment so far as in favour of the defendants as against the third parties respectively.

The appeals were heard by MOSS, C.J.O., GARROW, MACLAREN, and MAGEE, JJ.A.

C. A. Moss, for the defendants.

W. J. Elliott, for the plaintiff.

A. W. Anglin, K.C., and R. C. H. Cassels, for the third party Counsell.

I. F. Hellmuth, K.C., and J. R. Meredith, for the third party Stuart.

The judgment of the Court was delivered by GARROW, J.A.:—

. . . The plaintiff sues as administratrix with the will annexed of her late husband, John Jacques Stuart, for a declaration that a transfer of three shares in the capital stock of the defendants held by her husband at the time of his death, made by his father, the third party John Stuart, to the third party John L.

Counsell, was and is invalid and of no effect, for an order that the defendants register the plaintiff in the proper transfer-book as the owner of such shares, and for payment of all dividends and moneys which should have been received on such shares from the 30th October, 1905, with interest.

The transfer executed by John Stuart is in the words following: "In consideration of the sum of one dollar to me paid by J. L. Counsell, of Hamilton, I hereby sell, assign, and transfer to him three shares of the capital stock of the Hamilton Jockey Club Limited, standing in the name of John J. Stuart on the books of the said club; and I hereby appoint the secretary of the said the Hamilton Jockey Club Limited my attorney to make the transfer of the said shares in the said books. As witness my hand and seal this 6th day of April, A.D. 1906. John Stuart." (Seal.)

This transfer was afterwards assented to by the defendants at a directors' meeting held on the 25th June, 1906, and an entry thereof made in the proper transfer-book by the defendants' secretary.

John Stuart had no authority to make the transfer. His son was dead, and he was neither his executor nor administrator. A faint attempt was made to set up a defence of estoppel by acquiescence, but the attempt utterly failed.

I entirely agree with Middleton, J., that as to the plaintiff's claim there is no defence shewn, and the appeal should as to it be dismissed with costs.

There is, I think, more difficulty in dealing with the defendants' claim over against the third parties. The legal basis of such a claim is, of course, that the defendants were misled by the transfer. The only evidence as to it is, in addition to the documents, that of Mr. Loudon, the defendants' secretary, who only knows what occurred after the transfer reached him. Neither Mr. Stuart nor Mr. Counsell was called as a witness, and we, therefore, know nothing of the origin of the transaction, or the course of the negotiations, nor why, although the transfer is dated the 6th April, it apparently did not reach the defendants for approval until the 25th June following.

There is nothing on the face of the transfer to suggest to any one that John Stuart had or claimed to have any legal authority to deal with the property of his deceased son. Even in the conspiracy of silence of which, it seems to me, the defendants and the third parties might fairly be accused, enough appears to justfy the conclusion that all parties, Counsell included, knew at least that John Jacques Stuart was dead. . . . The resolu-

tion which the directors passed contains the words "estate of J. J. Stuart," shewing that they knew perfectly well that they were dealing with the estate of a deceased shareholder. And this is even more clearly shewn by the next document, prepared and executed next day by the secretary, doubtless under instructions, and subsequently executed by Mr. Counsell, which is in these words: "The Hamilton Jockey Club Limited. I, John J. Stuart (estate), of Hamilton, in consideration of the sum of dollars paid to me by J. L. Counsell, of Hamilton, do hereby bargain, sell, and transfer to the said J. L. Counsell three shares of $100 each of the capital stock of the Hamilton Jockey Club Limited, now standing in my name on the books of the said company, upon which $120 has been paid, to hold to the said J. L. Counsell, heirs, executors, curators, administrators ,or assigns, subject to the same conditions that I hold the same; and I, the said J. L. Counsell, do hereby agree to accept and receive of the said John J. Stuart estate the above-named three shares, subject to the same rules, liabilities, and conditions upon which the said John J. Stuart held said shares. Witness our hands and seals this 26th day of June, 1906. John J. Stuart estate, John Stuart, executor J. J. Stuart estate, by his attorney, A. R. Loudon. J. L. Counsell." (Seals.) . . .

So far as appears, John Stuart did not authorise and indeed knew nothing of this second document. The only authority which Mr. Loudon claims for executing it is contained in the power of attorney in the earlier document, which certainly did not authorise him to use the wholly false addition to John Stuart's name, "Executor J. J. Stuart estate."

In these circumstances, with such meagre evidence as this is, I am, with deference, unable to concur with Middleton, J., in thinking that the third party John Stuart made or was a party to any representation to the defendants of which they can complain. It is not like the case of a forged transfer or a forged power of attorney under which a transfer is executed. In such a case the document appears to be genuine. The falseness is not apparent. And, accordingly, the parties propounding it are, quite properly, held liable as for a false representation—in other words, are assumed to warrant its genuineness. But in this case the transfer carried on its face its utter uselessness and condemnation, and ought not to have been accepted or acted upon by the defendants.

As to the third party Counsell, the case stands somewhat differently. Middleton, J., regarded him as an innocent purchaser. I do not say that he is not; but, in my opinion, there is

no oral evidence, one way or the other, as to his innocence. Upon the documents, and especially his execution of the second transfer, with the false addition before pointed out, I should be inclined to infer that he knew the essential facts, that is, that John Jacques Stuart was dead, and that John Stuart could, therefore, lawfully intermeddle with his estate only as an executor or administrator, and either knew that John Stuart was neither the one nor the other, or very carelessly neglected to find out; neither position being entirely consistent with my idea of what is innocence in such circumstances.

Then Counsell, and not Stuart, did actually propound the transfer—and Counsell and his transferees have since received the dividends for which he has been held accountable by Middleton, J. A perusal of the evidence, however, also shews an important matter, . . . namely, that Counsell's transferees appear to hold in trust for Counsell himself. That circumstance, indicating that the defendants may probably have even larger rights than those claimed or allowed in the present proceedings, coupled with the very meagre and unsatisfactory state of the evidence, leads me to the conclusion that the proper order, in all the circumstances, to make, is to set aside the judgment against the third parties entirely and dismiss the third party proceedings, without prejudice to the defendants proceeding as they may be advised against Stuart or Counsell or both, or Counsell's transferees, in a fresh action. If, however, the defendants prefer to proceed upon the present imperfect record, they may, instead, have a new trial of the issue as to the third parties, upon payment of the costs of the last trial in so far as that issue was concerned, and of this appeal; election to be made within thirty days. If the first-named proposition is accepted, the dismissal will be without costs to either party of the trial or of this appeal.

JUNE 30TH, 1911.

*CASWELL v. TORONTO R.W. CO.

New Trial—Misstatement of Counsel as to Witness not Called—Bona Fides—Remarks of Judge—Inference—Evidence—Effect on Jury—Discovery of New Evidence—Inconclusiveness—Conflict.

Appeal by the defendants from the order of a Divisional Court, ante 655, directing a new trial.

*To be reported in the Ontario Law Reports.

The appeal was heard by Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A.

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

John W. McCullough and S. J. Arnott, for the plaintiff.

The judgment of the Court was delivered by Meredith, J.A.:—A new trial is a hardship in any circumstances; and when granted upon insufficient grounds is a very grave injustice: to take away from any one that which has been fairly won, and to subject him to the delay and cost and the mental and physical strain of another trial, as well as to the uncertainty of its outcome, is something which fairly may be thought intolerable. New trials are, of course, occasionally necessary in order that justice may be done between the parties, but they are contrary to the public interests, and may fairly be described as necessary evils, when necessary. . . .

A strong case must, therefore, be presented before a new trial can properly be directed; so strong that even in some cases where an injustice has been done to one of the parties at the trial, a new trial is not granted unless the error was pointedly objected to at the time; and, all through the practice upon applications for new trials, the like reluctance in granting new trials is everywhere evident.

It is, however, sometimes the right of a party to have a new trial; and sometimes the Court, exercising a discretion of its own, grants a new trial; but seldom, and only when the interests of justice plainly require it.

In this case I am quite unable to perceive anything like a right to a new trial; if it is to be had, it must be entirely a new trial in the discretion of the Court.

The defendants' counsel was quite within his right in asking for an adjournment of the trial until the absent witness could be brought in to give her evidence; the fact that he was mistaken in thinking, and saying, that she had been subpoenaed, in no sense cancelled that right. He would have been quite justified in stating, in good faith, the character of the evidence which he expected that she would give, but he did not do so; and indeed it seems that that which he did say was not even heard by the jury.

It was not necessary that the learned trial Judge should have said anything to the jury upon the subject, but there was nothing objectionable in his doing so; and, if there had been, the proper time to have objected to it was when it was said. It was quite within the right of counsel for the defendants to have

moved for an adjournment of the Court in a formal manner upon affidavit in such a manner that the jury might have heard a great deal more than they did, from the defendants' point of view; but that was not done; a less formal application was made, and it was at once refused.

What the jury were told was, that the witness had been subpœnæd and had not attended; they were not even told on which side she had been subpœnæd, nor was a word said about the nature of the evidence it was thought she would give if present. . . . The jurors were sworn to give a true verdict according to the evidence adduced at the trial; and I find it quite impossible to believe that they disregarded that obligation because they were told that another witness of the accident had been subpœnæd but failed to attend the trial.

The whole case, then, comes to this. The plaintiff has, since the trial, found the absent witness, and, upon her evidence, since obtained upon affidavit and cross-examination upon that affidavit, seeks a new trial: that is, the motion is really one for a new trial on the ground of newly discovered evidence; and the rule, in such a case, is that a new trial will not be granted unless the applicant shews (1) that such evidence could not, with due diligence, have been adduced at the trial, and (2) that it is of such a character as to satisfy the Court that the plaintiff ought to recover in the action. It is often put much stronger than this —that it is conclusive. Certainly a new trial should not be granted when the new evidence directly disproves the plaintiff's case, and shews no other cause of action: see Young v. Kershaw, 81 L.T.R. 531; Germ Milling Co. v. Robinson, 3 Times L.R. 71. . . .

[Reference also to and quotations from Anderson v. Titmas, 36 L.T.R. 711, per Cleasby and Huddlestone, BB.]

But in the present case there is nothing conclusive. There would be two witnesses on each side, and, therefore, no preponderance of testimony.

In this case there is no evidence that any attempt was made on the plaintiff's part to procure for the trial any evidence other than that of herself: it does not appear even that the defendants were asked for any information as to the persons who saw the accident.

Nor does it appear that the newly discovered evidence would aid the plaintiff: it is directly opposed to her story of the occurrence; and, in my opinion, if accepted, though in direct conflict with the testimony of the plaintiff and of the three other witnesses at the trial, it would displace the plaintiff's claim and de-

feat her action. The story of this witness, twice repeated, is that the plaintiff arose before the car had stopped and was thrown down by the sudden jolt of the car in stopping. This evidence alone does not go far enough to prove a right of action, and, if true, the case presented by the plaintiff is untrue.

Without considering the other point in the case, I would allow the appeal and dismiss the application for a new trial.

HIGH COURT OF JUSTICE.

RIDDELL, J., IN CHAMBERS. JUNE 12TH, 1911.

*REX v. MITCHELL.

Criminal Law—Arrest without Warrant—Habeas Corpus—Rightfulness of Detention at Time of Return—Valid Warrant—Voluntary Surrender before Issue of Warrant—Expiry of Term—Time for—New Habeas Corpus—Costs of Conveying to Gaol—Amendment of Warrant—Conviction for Offence against Liquor License Act—Objections to—Evidence not Taken before Summons Issued—9 Edw. VII. ch. 9 (D.)—Information—Sufficiency—Date of Offence—Previous Conviction—"Autrefois Convict."

Motion by the defendant, upon the return of a habeas corpus, for an order for his discharge, and also for an order quashing his conviction.

J. B. Mackenzie, for the defendant.
J. R. Cartwright, K.C., for the Crown.

RIDDELL, J.:—The prisoner is in Cobourg gaol, and he obtained a writ of habeas corpus, upon the return of which a motion is made for his discharge. It appears from the return and affidavits filed, etc., that the prisoner was, on the 10th May, convicted by the Police Magistrate at Campbellford of a second offence against the Liquor License Act and sentenced to pay a $200 fine and costs, and in default to three months' imprisonment in the Cobourg gaol at hard labour.

Not liking to be seen in the custody of a constable, and not being able, or if able, not willing, to pay his fine, he took the

*To be reported in the Ontario Law Reports.

train for Cobourg from Hastings, a village a few miles from Campbellford, with the intention of delivering himself to the keeper of the counties' gaol. He presented himself to the keeper as a prisoner, telling him the story, but the keeper refused to receive him. He thereupon telephoned the Police Magistrate at Campbellford. At about 6 p.m. the Chief of Police at Cobourg saw the prisoner at the gaol door trying to get in, and thought he was drunk. Whether he was drunk or not I do not determine—the affidavits are conflicting, and the matter is one rather of opinion and of definition than of fact—and it is not material in any view of the case. The Cobourg Chief telephoned to the constable at Campbellford to see if there was anything against Mitchell, and was informed that there was a warrant of commitment out for him, asked to arrest him, and told that the Campbellford constable would be up with the warrant next day. The request was acted upon, the Cobourg Chief went with the prisoner to two hotels to find his valise and finally found it. The Cobourg lock-up was not considered by the Chief a suitable place to keep the prisoner, who was a pretty respectable-looking man, and the Chief obtained permission from the keeper to place him in the gaol as furnishing better quarters for him. He there remained without demand or desire for release, so far as appears, until the next day, when the Campbellford constable appeared with the warrant and delivered the same to the keeper of the common gaol.

I am now asked to discharge him because, by reason of the manner of his coming to and into the gaol, for a term of some 20-24 hours, the keeper had no warrant.

I do not think that the inquiry upon a writ of habeas corpus goes further than the determination of the rightfulness of the detention at the time of the return upon which the Court delivers judgment. There have been many instances in which a Court has enlarged the time for its decision until the detainor has had an opportunity to make a return of a warrant which will make his detention lawful, which otherwise would not be lawful. Rex v. Graf, 19 O.L.R. 238, is one of them, and others are cited in that case, especially Rex v. Morgan, 3 O.L.R. 356.

And the circumstances (if it exists) that the original capture was illegal does not entitle the prisoner to his discharge if at the time judgment is given there be a valid warrant justifying his detention. "A detention which was illegal in its inception may afterwards become legal and thus bar the prisoner's right to a discharge on habeas corpus:" 15 Am. & Eng. Encyc. of Law, p. 158. . . .

[Reference to Regina v. Richards, 5 Q.B. 926; Elizabeth Warman's Case, 2 W. Bl. 1204; Rex v. Winton, 5 T.R. 89; In re Robert Fell, 15 L.J.M.C. 25; Ex p. Cross, 2 H. & N. 354; In re Charles Smith, 11 Q.B. 227; In re Elmy and Sawyer, 1 A. & E. 843.]

There can be no distinction between a void warrant, a piece of waste paper, and no warrant at all. It follows that whether the original taking were wrongful or not is immaterial; and the present validity of the present imprisonment (by "present" meaning the "time of the return" upon which judgment is given for or against discharge) is all that can be inquired into.

Whether an action lies for false imprisonment for the time during which the prisoner was in gaol without a warrant, we need not inquire any more than was done in Regina v. Richards. In view of the fact that the prisoner was clamouring to be admitted to gaol, it may perhaps be considered that, unless and until he made a demand for release, he could not be said to be imprisoned at all: Commonwealth v. Green, 185 Pa. St. 641. Neither are we concerned with the question as to when the imprisonment will come to an end—in any view the term of imprisonment is still current—and the refusal to discharge on this writ will not prevent the prisoner obtaining another whenever he conceives that his term has expired: Rex v. Robinson, 14 O.L.R. 519; In re Bartels, 15 O.L.R. 205. And there is nothing in Rex v. Miller, 19 O.L.R. 288, opposed to this view.

The warrant is valid upon its face—but an objection is made that no sum, or at least a much smaller sum, should have been awarded for costs of conveying to gaol. Under the circumstances, no sum should have been charged at all—the prisoner being at the gaol door and anxious to deliver himself up before the warrant was made out. But it has been decided by my brother Teetzel that the warrant may be amended: Rex v. Degan, 17 O.L.R. 366. In that case, it is true, the amount of costs was not set out upon the face of the warrant (I have the papers before me). The warrant read: "Costs . . . of conveying the said W. M. D. to the said common gaol amounting to the further sum of $....., as indorsed hereon . . .;" and the costs (itemised) were set out in a paper attached to the warrant. But my learned brother did not proceed upon that ground—it is plain that he looked upon the case as though the amount had been set out specifically, instead of by reference, in the warrant. I follow this case, the facts being the same and wholly different from those in Rex v. Payne, 4 D. & R. 72. . . .

I have had an opportunity of consulting my learned brother, and am authorised by him to say that a wrong construction was placed by counsel for the prisoner upon his remarks—my brother agrees with me that no general or public interest calls for the Attorney-General asking the opinion of a higher Court upon this matter. The multiplication of appeals and proceedings upon mere technical grounds is to be deprecated and not encouraged. The many pitfalls still existing in the criminal and quasi-criminal law are not to be made more dangerous in favour of one who has plainly violated the law and has no merits to be considered by the Court.

This decision agrees with Rex v. Smith, 16 Can. Crim. Cas. 425, and is not opposed to such cases as Regina v. Corbett, 2 Can. Crim. Cas. 499, Rex v. Gow, 11 Can. Crim. Cas. 81, etc., which decide that the expenses of conveying the defendant to gaol must be included in the warrant. That only applies where there are such expenses. Nor do I decide that, without the authority given by the Ontario statute, the Court could amend by striking out costs improperly inserted: Rex v. Townsend (No. 3), 11 Can. Crim. Cas. 133, and similar cases.

A motion is also made to quash the conviction, upon several grounds:—

(1) It is said that the magistrate did not take any evidence before issue of a summons. This objection is based upon the provisions of the Dominion Act of 1909, 9 Edw. VII. ch. 9, amending sec. 655 of the Criminal Code: "Upon receiving any such complaint or information, the Justice shall hear and consider the allegations of the complainant and the evidence of his witnesses, if any, and if of opinion that a case for so doing is made out, he shall issue a summons . . ." The argument is that the magistrate has no power to issue a summons at all unless and until he hears some witnesses. Much reliance was placed upon a decision of my own, Re Rex v. Graham, ante 463; but I am unable to see that anything said in that case has any bearing upon this. There the magistrate made up his mind adversely to the application for a summons without hearing witnesses. I thought and think he should not have done so without hearing any witnesses whom the complainant adduced or bonâ fide offered to adduce. But that does not at all conclude the magistrate from issuing a summons, when he is of opinion that a case for doing so has been made out. . . .

[Reference to Rex v. Smith, 16 Can. Crim. Cas. 425; Geller v. Loughrin, ante 1159; Ex p. Archambault, 16 Can. Crim. Cas. 433.]

I am of opinion that the magistrate is quite justified, when the allegations of the complainant are such as to convince him

of the propriety of issuing a summons, in issuing such a summons—if it be necessary that such allegations be upon oath, an "information" on oath is sufficient. It is only when the allegations of the complainant do not convince the magistrate that a summons should issue, that there is any need of witnesses, and until that time there are no persons who are "his witnesses." A magistrate would be ill-advised who would refuse a summons without hearing all witnesses when the complainant produced or bonâ fide offered to produce—he would leave himself open to be moved against as in Rex v. Graham, ante 326.

It is not without interest—although this cannot be made a ground of judgment—that the Minister of Justice, when introducing the bill, appended the following note to the proposed amendment: "This is a desirable amendment in ordinary cases, inasmuch as the Justice may sometimes not feel justified in granting a summons or warrant without some further evidence than that of the applicant; but it is specially designed to give express authority, which is apparently now lacking, for compelling the attendance of witnesses and for the taking of their evidence upon oath upon application for warrant in extradition cases."

Then it is said that, the defendant having on the 10th May been convicted of selling liquor without a license "on or about the 23rd day of April, 1911," he was, within three hours thereafter, served with the summons for selling liquor "on or about the 24th day of April, 1911," that it was upon this he was convicted on the 13th May; and this was the conviction for which he is suffering imprisonment. The argument is, that he might have been convicted of the latter offence upon the former information—and consequently he might have pleaded "autrefois convict." Perhaps so; but he did not—he attended and pleaded "not guilty." Even if he could now be allowed to withdraw this plea and plead "autrefois convict," he must needs prove that the offence for which he was on trial is the same as that upon which he had been convicted. That he would be wholly unable to do—the offence of which he was convicted in the first proceeding was committed, the evidence shews, on the 23rd April, while the defence in respect of which he was subsequently convicted was on the 24th April.

There are a number of trivial objections, some covered by authority, which I do not give effect to.

The prisoner should be remanded, the warrant being amended as intimated above. Upon this part of the proceedings there will be no costs. The motion to quash the conviction will be refused with costs.

BRITTON, J. JUNE 26TH, 1911.

RE MACK AND BOARD OF AUDIT OF THE UNITED COUNTIES OF STORMONT DUNDAS AND GLENGARRY.

Sheriff — Criminal Justice Returns — Fees — Liability of County Corporation—Reimbursement out of Consolidated Revenue Fund of Province—10 Edw. VII. ch. 41 (O.)—Board of Audit—Mandamus—Costs.

Motion on behalf of William Robert Mack, Sheriff of the united counties, for a mandamus requiring the Board of Audit of the said united counties to pass an account of the Sheriff for services rendered by him, and to authorise payment thereof by the Counties Treasurer.

R. A. Pringle, K.C., for the Sheriff.
W. B. Lawson, for the Board of Audit.

BRITTON, J.:—The items in dispute in the account are the following:—

(1) Monthly returns to the Inspector of Prisons of insane in gaol, each return $4.

(2) Monthly returns to Inspector of Prisons of foreigners in gaol, each return $4.

(3) Annual return of foreigners committed to gaol for each preceding year, each return $4.

(4) Quarterly return to Inspector of Prisons of supplies in gaol, each return $4.

(5) Quarterly return to Counties Treasurer of prisoners in gaol, each return $4.

In the notice of motion there is a further item for certifying and returning to the Counties Treasurer list of petit jurors, but this was abandoned on the argument.

It was admitted that the Sheriff performed the services charged for.

The objections are, that these fees are not properly connected with the administration of justice, and that the counties paying these fees can not be reimbursed out of the consolidated revenue fund, under ch. 102 and ch. 104, R.S.O. 1897.

The question is wholly one of returns. In dealing with it, I shall refer to 10 Edw. VII. ch. 41, which is a consolidation of chs. 101, 102, 103, and 104 of the R.S.O. 1897. The law, as now found in the consolidated Act of 1910, is, for all the points raised on this motion, the same as in the repealed Acts of R.S.O. 1897.

The Sheriff is an officer of the Court—specially mentioned as one of the officers "engaged in the administration of justice." He is an officer of the united counties and for the united counties, although appointed by the province of Ontario. As such he is entitled to be paid for the services, if rendered, mentioned in 10 Edw. VII. ch. 41.

By sec. 2 the Judges authorised to make Rules under the Judicature Act "may make Rules fixing fees to be allowed . . . in respect of . . . matters and proceedings . . . relating to the King's revenue." No Rules have been made, so by sec. 3 the fees in schedule A to the Act shall be the fees in any such "prosecution, matter, or proceeding."

Item 12 of schedule A is: "Every annual or general return required by law or by the Government respecting the gaol or the prisoners therein, $5." That is not in question.

Item 13: "Every other return made to the Government, $4."

The charges of the Sheriff Nos. 1, 2, 3, and 4 were made to the Inspector of Prisons and upon the Inspector's command.

The evidence before me in reference to these returns was, that from the office of the Inspector of Prisons and Public Charities for the Province of Ontario forms were sent to the Sheriff, and he was required to make and did make the returns charged for. I think these were returns made to the Government, within the meaning of the Act.

In the maintenance of prisons and of public charities the revenues are directly concerned. As to the charge No. 5, it was admitted by the Inspector in his letter of the 27th May, 1909, that, while the information required came from the gaoler and gaol surgeon, yet, "to make it official, it is transmitted through the Sheriff." That, in my opinion, makes it a return made to the Government.

It may be that, because this item 13 in the schedule in ch. 104, R.S.O., differs from the item in ch. 101, R.S.O., payment for it cannot be made out of the consolidated revenue fund of the province. Item 13 in ch. 101 is: "Every other return made to the Government." In ch. 104 it is: "Every other return made to the Government or the Legislature or the Sessions required by statute or order of the Court." If the Sheriff did the work, he should be paid for it. Section 14 of ch. 41, 10 Edw. VII., makes that plain: "All fees payable under part 1 to the officers therein mentioned for services in the nature of a civil remedy, for persons at whose instances, and for whose private benefit, the same are performed, shall be paid by such

persons, and all other fees payable to such officers for services connected with the administration of justice or county purposes shall be paid in the first instance by the county." I need not further discuss the question of the county being reimbursed.

If the charges are not connected with the administration of justice, they are for county purposes. If the Sheriff is entitled to pay at all, it is to be by the county in the first instance—subject to the county being reimbursed if the service is connected with the administration of justice, or, if not, to be payable only by the county, as the case may be.

Then sec. 18 provides that, "subject to the provisions of part 3 of the Act, all accounts and demands preferred against a county in respect of the administration of criminal justice shall be audited and approved by the Board of Audit hereinafter mentioned."

The word "criminal" is in sec. 18 and not in sec. 14. That, in my opinion, makes no difference. The administration of criminal justice is not merely the apprehension and punishment of criminals, but it has reference to the custody and safe-keeping and maintenance of those charged or convicted and undergoing sentence.

Part 3 of the Act (to which sec. 18 is subject), by sec. 29, provides for the appointment of an auditor of the accounts relating to the administration of justice in the county, for which the province is liable. No such appointment has been made in the united counties of Stormont, Dundas, and Glengarry, but, if such an appointment had been made, it would only, as to a Sheriff's accounts, relieve the Board of Audit from considering the items of the account belonging to the following classes:—

(*a*) Offences for which the persons charged were committed or held to bail for trial in the High Court or General Sessions of the Peace; or

(*b*) Offences for which the persons charged were convicted before a Police Magistrate under part 15 of the Criminal Code.

By sec. 31: "All other accounts in connection with the administration of civil or criminal justice, which, under parts 1 and 2 or otherwise, are payable by the county, shall be audited by the Board of Audit."

Section 41 provides that such of the expenses of the administration of criminal justice as are mentioned in schedule C shall be paid out of the consolidated revenue fund, and as to that the Government may have an independent Government audit, but the Sheriff is in no way at the present stage a party to any such audit.

If the Sheriff ought to be paid for the items about which the contest has arisen, then a mandamus should issue. There is no other "clear, adequate, effective, and speedy remedy" for him. The Sheriff cannot go to the Provincial Government. See County of Lambton v. Poussette, 21 U.C.R. 472. And it is a prerequisite to entitle the Sheriff to sue the county: Reynolds v. County of Ontario, 30 C.P. 14. The account is not payable until audited, but, once audited, it is payable without waiting until the province pays, when the province is liable to pay the county: Sheriff of Lincoln v. County of Lincoln, 31 U.C.R. 1.

It being essential that the account should be audited before payment, the case is distinguishable from In re Davidson and Miller, 24 U.C.R. 66.

In the case of Hamilton v. Harris, 1 U.C.R. 513, the application was, after audit, for a mandamus to compel the treasurer to pay. It was held that the Sheriff had other "adequate" remedy.

It may be assumed that the liability of the Crown in the payment of expenses in connection with the administration of criminal justice in the province out of consolidated revenue fund is restricted under R.S.O. 1897 ch. 104, now ch. 41, 10 Edw. VII., to such as are mentioned in the schedule, and, if so, the county is required to pay all proper expenses connected therewith. See Fenton v. Board of Audit of the County of York, 31 C.P. 31. In that case a mandamus was granted to compel the Board to rescind their order for deduction from the account of the County Crown Attorney.

The order for a mandamus will go, that upon the Sheriff of the said united counties of Stormont, Dundas, and Glengarry, presenting his account in due form as prescribed by law to the Board of Audit for the said united counties, said Board of Audit do audit and certify the items therein mentioned above as Nos. 1, 2, 3, 4, and 5, it being admitted that the services so charged were in fact performed.

There will be no costs. In withholding costs from the Sheriff, his remedy obtained by this motion will not be complete, as the amount involved is comparatively small, but the members of the Board of Audit are, for small remuneration, performing a duty to the public, and are acting in good faith, and so should not pay costs. The Counties were not made parties to the motion. Whatever may be the final decision of the Provincial Treasurer as to reimbursing the Counties, the yearly amount is so very small, that the Counties might well refrain from further litigation about fees for returns apparently necessary, and certainly made by the Sheriff, as in duty bound.

MEREDITH, C.J.C.P. JUNE 27TH, 1911.

RUDD PAPER BOX CO. v. RICE.

Principal and Agent—Fire Insurance—Negligence of Agent—Breach of Warranty—Failure to Read Letters and Policies—Application—Second Statutory Condition—Reasonable Compromise.

Action for damages sustained by reason of the alleged negligence of the defendant in effecting an insurance, tried before MEREDITH, C.J., without a jury, at Toronto, on the 14th June, 1911.

W. C. Chisholm, K.C., for the plaintiffs.
G. H. Kilmer, K.C., and W. H. Irving, for the defendant.

MEREDITH, C.J.:—The plaintiffs employed the defendant, who is an insurance broker, to procure an insurance against fire on their (1) machinery, (2) office furniture, and (3) stock-in-trade, for the respective sums of $2,300, $200, and $2,500, which had before then been covered by insurance in the Northern Assurance Company.

The Northern had withdrawn from the risk on the office furniture and stock-in-trade, and, at the time the defendant was employed, the only insurance in that company was the $2,500 on the machinery.

All this was known to the defendant.

The defendant succeeded in effecting the desired insurance in Lloyds, through another insurance broker, named Hardman.

According to the testimony of the defendant, the application to Hardman was a verbal one, and he informed Hardman that the only insurance on the property upon which the proposed insurance was to be effected was $2,500 on the machinery, in the Northern.

On the 30th December, 1907, Hardman wrote to the defendant's firm informing them that he had by their order effected "the undermentioned insurance," and that he would hand them the policy in due course.

The "undermentioned insurance" is described in a partly written and partly typewritten memorandum at the foot of the letter, which reads as follows:—

"5,000 on machines, machinery, etc., as per wording submitted, of the Rudd Paper Box Co., Toronto.

"12 months at 30th Dec. 1907.

"Warranted same gross rate, terms, and conditions as and to follow the 'Northern' Company, and that said company has, during the currency of this policy, at least $2,500 on the identical subject-matter and risk, and in identically the same proportion on each separate part thereof, and also $5,000 on the insured building."

The warranty contained in the policy differs from that described in Hardman's letter, the words "the identical subject-matter and risk and in identically the same proportion on each separate part thereof" being struck out and the word "stock" substituted for them.

The policy was issued some time after, and was delivered or sent by Hardman to the defendant, who testified that he did not read it, but sent it to the plaintiffs within a few minutes after receiving it; and the terms of the warranty as to the insurance in the Northern appears not to have been noticed by the defendant or by the plaintiffs.

At the end of the year for which this insurance was effected, the plaintiffs employed the defendant to procure the renewal of it, and a similar course was adopted as in the case of the original insurance, the letter of Hardman being identical in terms, except its date, to the letter of the 30th December, 1907, and the policy which reached the defendant some time in 1909, contains a warranty in exactly the same words as that in the first policy.

I assume that the defendant's testimony that he did not read the policy, but sent it on to the plaintiffs within a few minutes after receiving it, was intended to apply to both policies, and apparently the terms of the warranty in the second policy were not noticed by the defendant or by the plaintiffs.

A fire having occurred, the plaintiffs made their claim against Lloyds for the amount of the loss they had sustained, which was resisted on the ground that there was a breach of warranty, in that the insurance in the Northern was not on the stock but on the machinery.

The fire totally destroyed the office furniture, almost totally destroyed the stock, and partly destroyed the machinery.

The amount of loss sustained by the plaintiffs was $3,373.81, and they ultimately compromised by accepting $2,149.14; and bring this action to recover the difference between these sums as damages sustained by them owing to the negligence of the defendant in effecting the insurance he was employed to procure.

The plaintiffs are, in my opinion, entitled to recover. It was at the least the duty of the defendant, having undertaken to effect

the desired insurance, to see that the contract which he made on behalf of his employers was not one that the underwriter might avoid on account of such a warranty as the contract contains, when to his knowledge there was no insurance on the stock in the Northern. He was also negligent in not reading the letters from Hardman informing him of the contract which Hardman had effected, and also negligent, I think, in not reading the policies when they came to hand.

It was urged by Mr. Kilmer that under the provisions of the Insurance Act Lloyds were not entitled to rely on the warranty which the policies contain, that the application to Hardman was an application to Lloyds for insurance within the meaning of the second statutory condition; that the application was verbal, and a correct statement as to the insurance in the Northern was made to Hardman; and that not having notified the assured when sending the policy that it differed from the application, and in what particulars, Lloyds were not entitled to the benefit of the warranty.

Assuming that the second condition is applicable to the state of things that existed in this case. Mr. Kilmer's contention fails because the application to Hardman was not, in my opinion, an application for insurance within the meaning of the condition. Hardman was a broker, and the proper inference from what took place, especially in the light of Hardman's letters to the defendant's firm, is that Hardman was acting as broker for the defendant, and did not assume to act as agent for Lloyds; and, in addition to this, there is not a tittle of evidence that Hardman was in fact an agent of Lloyds or had any authority to accept risks on their behalf.

When the difficulty with Lloyds as to payment of the plaintiffs' claim for the loss arose, the defendant was informed of it and notified that he would be held responsible for any loss the plaintiffs might sustain owing to the term on which Lloyds relied being contained in the policy; he was invited to take part in the efforts that were made to effect a settlement of the claim, and, when informed that the plaintiffs proposed to compromise, made no objection to their doing so, and I must find that the compromise was a reasonable one, and one which they had a right to enter into without affecting their rights against the defendant.

An effort was made to shew that the plaintiffs' managing director knew or ought to have known of the vice that existed in the policies, and it was urged that the loss the plaintiffs sustained in having to accept part of the claim was due as much to the negligence of the managing director as to that of the defendant.

I am unable to adopt that view. The plaintiffs had a right to rely on the defendant's having effected a valid insurance with Lloyds, and it does not lie in his mouth to say that, if they had not relied upon him, but had read the policies, the vice in them would have been discovered in time to have them corrected before the fire occurred.

The plaintiffs are entitled to judgment for $1,223.67 with costs.

I say $1,223.67 on the assumption that there is no dispute as to the amount of the damages if the plaintiffs are entitled to recover; but, if there is a dispute as to the damages, there will be a reference to the Master in Ordinary to ascertain the amount of them, and further directions and costs subsequent to judgment will be reserved until after his report; but the costs up to and including judgment must be paid by the defendant forthwith after taxation. The defendant will have ten days in which to elect whether or not he will take the reference.

MIDDLETON, J. JUNE 28TH, 1911.

CAMPEAU v. MAY.

Limitation of Actions—Possession of Land—Trespass—Fencing.

Action to recover possession of land.

J. E. L. Vincent, for the plaintiff.
Gordon Henderson, for the defendant.

MIDDLETON, J.:—Upon the evidence, the land was enclosed by a sufficient fence for a period more than sufficient to give a possessory title, even if twenty years is necessary, if mere enclosure is enough.

I do not think this land was in a state of nature within the meaning of the statute, so that, in my view, ten years is the statutory period.

The defendant has no colour of right to the land in question, unless she has acquired a title by virtue of the statute.

I do not think the Whites intended to steal this land. They enclosed it along with their own under some arrangement with Lapointe, and intended untimately to purchase it from him or his estate, and I accept without reserve the evidence of the son, Mr. M. Lapointe, in which he stated that the Whites from time to time saw him with the view of purchasing the land.

The present plaintiff acquired the land under a deed of gift from the last survivor of the White family as part of the block then conveyed to her by him. He was then ill, and may or may not have intended to convey the lot in question. The deed undoubtedly covers it.

Unless the fencing-in makes a difference, the acts relied on are not sufficient. They are a series of trespasses, and are not the "actual, constant, and visible occupation," to the exclusion of the true owner, for the required period necessary, under McConaghy v. Denmark, 4 S.C.R. 632, and Coffin v. North American Land Co., 21 O.R. 80. See also Kynoch v. Rowlands, 131 L.T. 148.

Stovel v. Gregory, 21 A.R. 137, deals with the question of the effect of fencing. Maclennan, J.A., says: "I do not think that merely fencing in the lot without putting it to some actual continuous use, is sufficient to make the statute run." This is in accordance with the view of Burton, J.A.; and Hagarty, C.J.O., while regarding the point as doubtful, is inclined to the same view: Osler, J.A., expresses no opinion.

The use made of this land was not continuous but occasional.

It may be said that this makes it very hard to acquire a possessory title. I think the rule would be quite different if the statute was being invoked in aid of a defective title, but I can see nothing in the policy of the law which demands that it should be made easy to steal land, or any hardship which requires an exception to the general rule that the way of the transgressor is hard.

Judgment for the plaintiff with costs.

BRITTON, J. JUNE 29TH, 1911.

RE SOLICITORS.

Solicitors—Taxation of Costs against Clients—Quantum of Fees and Charges—Discretion of Taxing Officer—Appeal—Bills of Costs—Particulars—New Bills—Services of Solicitors in Selling Company's Stock and Bonds—Services as Directors and Officers—Remuneration—Commission.

Appeals by the clients and cross-appeals by the solicitors from the taxation by the Senior Taxing Officer of the solicitors' bills of costs and charges for services rendered to the clients.

R. A. Pringle, K.C., for the clients.

F. E. Hodgins, K.C., for the solicitors.

BRITTON, J.:—The history of the proceedings for which the bills of costs in question were rendered is fully given in the statements and papers filed. . . .

The bills were rendered as separate bills against Beach et al. and against the Cobalt Power Company Limited. The proceedings necessarily ran into each other or overlapped; much of the time of the solicitors was occupied for both Beach et al. and the company. The work was important and difficult, and required a great deal of care and attention and professional skill of a high order, but the bills must necessarily be considered as a whole and as growing out of work done practically in the same matter. The solicitors were employed as such—they were not employed as brokers or promoters. They were employed generally by Beach et al., and the interests of Beach et al. and the Cobalt Power Company were not conflicting but identical; and whatever charges were necessary in the capitalisation or organisation of the company were those required by the solicitors, who were the solicitors for Beach et al.

Mr. McA. (one of the solicitors) mentions the date of the first work of the firm in this matter as about the 18th February, 1909. Mr. Pringle states that the entire time taken in the work, other than of a trifling character, was about 150 days. That would not necessarily prevent the solicitors from getting a larger amount than that allowed; but time occupied is one of the factors necessary to know in determining the proper amount to allow. The work was confined to comparatively narrow limits as to time, and the clients had the benefit of the work being done expeditiously.

In looking at the matter as a whole—as a matter in which Beach et al. and the company were as one client of the solicitors, the amount of pay as taxed seems large, and would be so considered by the majority of clients, even of the wealthy class, and in these days of large transactions.

The bill against Beach et al. as individuals was rendered at $15,907.07, and there was disallowed $9,234.12, leaving it taxed at $6,672.95. The bill against the Cobalt Power Company was rendered at $9,193.67; there was disallowed $3,126.70; leaving the amount allowed $6,066.97; so that the entire amount of the solicitors' costs as allowed is $12,739.92. This amount the clients think unreasonably large. The solicitors say the amount is unreasonably small, and that certain items struck off by the Taxing Officer should not have been disallowed. Hence these appeals.

These bills are not "solicitors' bills," within the ordinary

meaning of these words, nor are they "solicitors' bills," within the meaning of the Solicitors Act. The clients appreciated that; and so, on this appeal, argued that the solicitors should be compelled to furnish further particulars, details and items, shewing the work for which large sums were charged. It is not in accordance with the practice, if in my power, at this stage and as to this kind of bills, to order further particulars or to order new bills to be delivered.

The order for taxation was made on the 17th November, 1910 . . . upon the application of the individual clients, and the clients submitted to pay what, if anything, should be found due to the solicitors upon the taxation of these bills. These bills, which had then been delivered, were referred to the Taxing Officer; and the bills which the solicitors had delivered to the Cobalt Power Company should also be taxed by the Taxing Officer, but the latter without prejudice to any rights which the solicitors may have against the Cobalt Power Company. The Taxing Officer, however, refers to a præcipe order dater the 21st September, 1910, as his authority for taxing against the Cobalt Power Company the bill rendered to that company. Both bills were in fact taxed, and all parties were represented. It is not now a case of new bills—it is simply taxation of present bills rendered.

I have looked at every item in these bills, and have considered the evidence and arguments in support of and in objection to the items under review. There has been no error in principle on the part of the Taxing Officer. It is in every case only a question of amount.

Re Solicitor, 12 O.W.R. 1074, is binding upon me. In that case the authorities are cited and the conclusion reached that "where the Taxing Officer has not made any mistake in principal, and where the amount is not so grossly large or small (as the case may be) as to be beyond all question improper, the Court ought not to interfere with the discretion of the Taxing Officer." . . .

[Reference also to Murphy v. Corry, 7 O.W.R. 336.]

For the above reason and without referring to any other of the many cases cited, I must dismiss the clients' appeals. I do not interfere with the discretion of the Taxing Officer in dealing with costs of taxation; and I do not allow any costs of these appeals; they will be dismissed without costs.

The appeal by the solicitors is: (1) against the disallowance by the Taxing Officer of a commission by way of remuneration for services in negotiating and completing a sale of stock and

bonds of the Cobalt Power Company for $180,000; and (2) in not allowing to the solicitors, as against Beach et al., remuneration for the services of the solicitors as directors and officers of the company.

What I have said in regard to the whole matter seems to be a sufficient answer to both grounds of this appeal. The Taxing Officer acted upon a proper principle in dealing with the solicitors and the costs as upon quantum meruit.

If the solicitors intended to make a charge of 5 per cent. or any other large sum by way of commission, the clients were entitled to know of it, so that they could at least have endeavoured to separate what may be called the financial part of the business from that which is generally understood to be the work of solicitor and counsel—the difficult work of organisation and steering corporations away from the troubles into which so many fall. It may be accepted, as the solicitors allege, that solicitors are entitled to receive the same remuneration as could be recovered by any person not a solicitor for the same services. It is not the case, however, that a solicitor, employed as such, and doing special work in connection with a company or undertaking and charging for that work, can, at the end, when the undertaking is to be sold, or when bonds are issued and sold as the result of all the work of solicitor and client, and for which the client has paid the solicitor, charge a commission, adding it as "rounding out" the bill of costs. The evidence, taken as a whole, does not establish that in this case 5 per cent. was only reasonable.

The claim for remuneration for the services of members of the firm of solicitors as directors and officers of the company should not be allowed. If such services should be paid for at all, payment should be by the company and only with the consent of the shareholders. When these services as directors and officers were rendered, they were rendered as part of the whole work being carried on by Beach et al. and the solicitors; and it was not in contemplation of Beach et al. that any special and separate charge for these services by solicitors, qua directors and officers, should be made over and above the day-by-day work being charged, as shewn by the bills.

The entries in the solicitors' dockets do not estop the solicitors from claiming larger amounts than those mentioned; but they confirm my opinion that the bills should not be increased beyond what the Taxing Officer has allowed.

The appeal of the solicitors should be dismissed, but, as in the other cases, without costs.

MEREDITH, C.J.C.P. JUNE 30TH, 1911.

ROSEVEAR v. HALLIDAY.

Contract—Construction—Party Wall—Openings in—Limitation of Rights—Counterclaim—Damages by Reason of Interim Injunction.

The plaintiff, claiming to be the owner in fee of part of park lot No. 18 in the city of Toronto (as described in the statement of claim), brought this action to restrain the defendant from using the westerly wall of a brick building erected by the plaintiff, to a greater extent than provided for by an agreement between them, dated the 18th April, 1902, which was entered into at the time of the erection of the plaintiff's building.

W. C. Hall, for the plaintiff.

E. D. Armour, K.C., and W. A. Proudfoot, for the defendant.

MEREDITH, C.J.:—The agreement recites that the plaintiff is the registered owner of the land, according to the description, and that the defendant has since contracted to purchase the premises immediately adjoining it on the west.

Then follow two recitals in these words:—

"And whereas the said party of the second part has requested said party of the first part to enter into this memorandum for the purpose of enabling them the said parties of the first and second parts in case they or either of them should hereafter erect a new building on the said premises to the west to use the brick wall erected by said party of the first part for the purpose hereinafter mentioned and no other.

"And whereas each of the said parties hereto of the second and third parts do hereby respectively admit that they and neither of them has or ever had any manner of actions, causes of action, claims or demands of any nature or kind whatsoever against said party of the first part or in respect of the premises hereinbefore particularly described."

And the agreement is that the plaintiff consents, in case the defendant or his wife should erect a new building on the land to the west of the plaintiff's land, to permit him or her "to make such openings on the west side of the wall erected by said party of the first part (the plaintiff) as may be required to support joists for flooring and roof of such new building, no one of

said openings, however, to be of greater dimensions than ten inches high, two inches in width, and four inches deep, and each of said openings to be made where provision therefor has been made in said wall by the insertion of upright bricks and done in a proper and workmanlike manner and no closer than one foot six inches at centre;" and the defendant and his wife agree with the plaintiff "not to make any openings in said wall not necessary for the purposes aforesaid or of greater dimensions than as above set forth and not to put or place or at any time permit to be put or placed on said premises to the west, anything which might be injurious to the said wall" of the plaintiff.

The agreement also provides that nothing in it shall imply or create any obligation on the plaintiff to maintain the westerly wall of his building.

Early in the present year, the defendant determined to erect a brick building on his land, and, in preparing the plans and specifications for it, a draughtsman in his architect's office by mistake provided for the insertion into the westerly wall of the plaintiff's building of floor joists closer than one foot six inches at centres, and, according to the testimony of the plaintiff, the contractor who was constructing the defendants' building had, when the action was launched, made three holes in the wall for floor joists where no holes had been left when the plaintiff's building was erected, and closer to one another than the agreement provided for.

The defendant's architect was examined as a witness and testified to the mistake to which I have referred having been made in preparing the plans and specifications, and that it was intended to comply with the agreement as to the distance from one another at which the joists were to be placed.

No provision was made by the plaintiff for any openings in his west wall to receive the joists of the defendant's building, except some to receive the joists for the floor over the basement, but, as I understand the evidence, none for any floor above that floor, and even for it the openings did not extend all the way to the northern end of the wall.

The plaintiff's contention is that the west wall of his building rests entirely on his own land, and that the defendant has no right to use it for any purpose but the limited one mentioned in the agreement.

The defendant contends that the west wall is a party wall, and that the dividing line between his land and the plaintiff's is the centre line of it, and he also contends that the effect of the agreement is to constitute the west wall a party wall and to

create an implied obligation on the part of the plaintiff so to construct it that it could be safely used by the defendant for the support of his building; that the plaintiff has violated that obligation by building a wall that is insufficient and cannot be used by the defendant for that purpose, and he claims damages that he alleges he has sustained by reason of that breach.

It is, in my opinion, not open to the defendant to challenge the plaintiff's ownership of the west wall. Whatever might have been his rights had the agreement of the 18th April, 1902, not been entered into, he has by the agreement admitted the plaintiff's ownership of all the land upon which his building stands, for it was proved that the whole of it was within the boundaries of the land of which the plaintiff is recited to be the owner, and by another recital the defendant has admitted that he has not "any manner of actions, causes of actions, claims or demands of any nature or kind whatsoever against" the plaintiff or in respect of the premises of which the plaintiff is recited to be the owner; and I agree with the plaintiff's contention that the rights of the defendant in respect of the west wall of the plaintiff's building are limited to those which the agreement confers.

I am unable, however, to agree with the contention of the plaintiff as to the extent of the rights which the agreement confers on the defendant. It is obvious that the intention of the parties was that the west wall might be used by the defendant as a party wall for the purpose of a new building, which he or his wife might afterwards erect on the defendant's land. The arrangement which the agreement evidences was made and the agreement itself was executed before the west wall was raised above the ground floor, and it is obvious also that, reading the agreement literally, it would not accomplish what it was intended to do, for the openings were to be made "where provision has been made in said wall by the insertion of upright bricks," and no provision had been made at that time except for some of the joists for the first floor—and no other openings were made subsequently—so that, if the agreement is to be read literally, the wall would be practically useless to the defendant for the purpose for which it was intended that he should have the right to use it.

An agreement on the part of the plaintiff to provide and leave openings in the wall suitable for the building the defendant or his wife might erect is, I think, to be implied, as well as the right to the defendant, if that should not be done, to make the necessary openings, making them otherwise in accordance with the agreement. The three openings which were made by the de-

fendant at the south end of the wall, and which are complained of as being too close together, were necessitated by the plaintiff having inserted in his wall at that point a stone about four feet long, in which no openings were made, and to obviate the difficulty which the stone presented, it being in line with the openings in the wall beyond it, and of the defendant having done this, the plaintiff cannot, I think, justly complain.

Complaint is also made that the defendant enlarged some of the openings that the plaintiff had left, in order that they might receive the joists of the defendant's building. This was rendered necessary owing to the openings not having been made in line, and, unless it had been done, the floor of the defendant's building could not have been laid, and the defendant did no more in this respect than was necessary to correct the error made by the plaintiff; and his act was therefore, in my opinion, not wrongful.

Another complaint of the plaintiff is that the openings made by the defendant were more than ten inches high and more than two inches in width. Planks 2x10 had to be used, and it was shewn by the testimony of the plaintiff's builder that it was necessary to make the openings slightly larger than this in order to admit the joists into them, and that it was the usual and a proper practice to make the openings slightly larger than the joists and to fill in around the ends of the joists with concrete; and that was the course the defendant intended to adopt. This complaint is, therefore, in my opinion, untenable.

Still another complaint was made by the plaintiff, that the defendant intended to use joists 2x12, which was, as I understood the evidence, the fact. Seeing this, the plaintiff apparently jumped to the conclusion that the defendant intended to make openings large enough to admit joists that size, but that was not the case, for, as the defendant's architect testified, it was intended to bevel the ends of the joists so as to reduce their height to ten inches. This complaint also is, therefore, untenable.

The agreement properly construed conferred upon the defendant the right to do not only that which was expressly authorised to be done, but whatever was reasonably necessary in order to do what was so authorised, and my conclusion is based upon so construing the agreement.

The plaintiff's case fails, and his action must be dismissed. The claim of the defendant for damages owing to the erection of his building having been stopped by the injunction order, which is set up as a counterclaim, fails, because, within a very short time after the order was made, further work on the build-

ing was prevented by the action of the civic authorities, who intervened and refused to allow the defendant to proceed with its erection because it was not being built in conformity with the building by-laws of the city, and the defendant was not justified in using the plaintiff's wall as a party wall, because of its being unsafe, owing to the mode of its construction so to use it.

The counterclaim is, therefore, dismissed.

The dismissal of the action and of the counterclaim will be without costs.

TEETZEL, J. JULY 4TH, 1911.

KELLY v. TOWNSHIP OF CARRICK.

Highway—Nonrepair—Injury to and Death of Traveller—Negligence—Absence of Guard-rail at Embankment—Weather Conditions—Absence of Contributory Negligence—Damages for Death of Husband and Father.

Action by the widow and administratrix of the estate of Patrick Kelly, on behalf of herself and children, to recover damages for his death on the 25th December, 1910, by reason, as she alleged, of a highway in the township of Carrick, upon which he was travelling, being out of repair and in a dangerous condition.

G. Lynch-Staunton, K.C., for the plaintiff.

G. H. Watson, K.C., and D. Robertson, K.C., for the defendants.

TEETZEL, J.:—The highway in question is an original road allowance running in front of lot 16, concession D. The southerly limit of the travelled part of the road, which is about 12 feet wide, is located 40 feet northerly from the southerly limit of the highway; and along the northerly side of the travelled part, for at least 100 feet, there is an embankment of an average height of about 8 feet, its face having a grade of about 1 foot in 1, forming the high water bank of a creek. The edge of this embankment is 2 to 3 feet from the northerly limit of the travelled roadway, and the intervening strip is level ground. While the travelled roadway, which is well gravelled, is only 12 feet wide, it is possible for teams to drive upon a strip 30 feet wide from the edge of the embankment, though it slopes upward from the southerly side of the regularly travelled part about 1 foot in 8, and is not generally used.

There is no barrier or railing of any kind along the edge of this embankment.

The approach from the house on lot 16 to the travelled part of the road has a branch, after it strikes the road allowance, leading easterly, and another westerly. The deceased and the plaintiff and their daughter had been spending the evening at this house, and started for home shortly after midnight, in a cutter. There was considerable snow on the ground, and, when they started, it was, the plaintiff says, "stormy and pretty dark," and fresh snow had fallen during the evening. The westerly branch of the approach led in the direction of the plaintiff's home, but, for some unexplained cause, the horse proceeded down the approach in the direction of the easterly branch. The plaintiff remarked to the deceased, who was driving, "Pa, aren't you driving a little too straight?" and thereupon he turned the horse westerly, and in a few seconds the plaintiff felt the cutter leaning to the right, and she remarked, "Pa, we will surely upset," and almost instantly the cutter and horse toppled over the embankment, and the deceased was instantly killed, his neck having been broken by the fall.

The plaintiff alleges that the road was in a dangerous condition and out of repair, and that the defendants were guilty of negligence which caused the death of her husband.

The defendants, desides denying negligence, plead that the accident was due to the negligence of the deceased.

Besides the above recited facts, the evidence establishes that the road has been opened for over forty years; that the travelled part has been during that time in its present location; that the embankment has never been guarded; that no similar accident has ever happened; that no complaints have ever been made about its being dangerous; that the road has considerable travel upon it, being the way the residents from a substantial part of the township, and those living to the south of it, go to the county town; that the township is one of the best and wealthiest in the county; that $20 would be enough to put up a sufficient railing; that the deceased was well acquainted with the road; that he was sixty-two years of age; that he had complained about not being able to see as well at night as he formerly could; that the horse was a quiet one, and was being driven on a walk at the time of the accident; and that the deceased was not under the influence of liquor.

While it is difficult to define by any general proposition the exact extent of the obligation of municipal corporations to erect railings along their highways, a practical test is, whether there

is a dangerous object or place so near to the line of travel as to make the use of the highway itself unsafe in the absence of a railing. If there is such an object or place so located, the municipality is bound to maintain sufficient guards to protect travellers from the dangers incident to it: see Williams on Municipal Liability, pp. 190-194. In other words, a corporation is bound to erect barriers or railings where a dangerous place is in such close proximity to the travelled part of the highway as to make travelling upon it unsafe, whether by day or by night, in sunshine or storm.

It is not possible to define at what distance in feet or inches a dangerous place must be from the travelled part in order that it should be held to be in such close proximity that it must be guarded. It is in every case a practical question, to be determined by the good sense of the trial Court, in the light of the evidence and of the principles of law applicable, whether the highway is or is not reasonably safe for public travel.

Not only what the safety of travellers requires, but what, having regard to the situation, the amount of travel, the cost of the proposed improvement, and the ability of the corporation to meet it, would be reasonable to require of the municipality, has to be considered.

With a quiet horse and in daylight, a traveller using ordinary care would not be in any peril from the unguarded embankment in question; but at night-time, with a storm raging, the ground covered with snow, and the tracks obliterated, as they were on this occasion, I think a traveller would be in serious danger of driving over the embankment.

If the highway is dangerous under the above conditions, which are to be expected in this country—and I think it is, although it may be free from danger in broad daylight, the corporation has failed in its duty.

The question of the necessity for guard-rails at dangerous places along township roads has been the subject of many decisions, both in the United States and in this country. The leading authorities are collected by Mr. Denton in his valuable book on Municipal Negligence, pp. 113-120.

I am of opinion that the evidence in this case establishes that the defendants were negligent in allowing the embankment to remain unguarded, and that such negligence was the cause of the plaintiff's loss.

I am unable to find, in view of the darkness, the weather, and other conditions stated above, that the deceased was guilty of any contributory negligence.

Then as to the damages. While the plaintiff, who was sixty-one years old, realised a share out of her husband's estate sooner by his sudden death than would have otherwise been the case, there is nothing to suggest that, had he lived out the allotted span, she would not have received as much or more, had she survived him. She has now to depend for her living on that share, while, if he had lived, she would have been entitled to be maintained by him during his lifetime. It is difficult to fix a sum to represent her actual pecuniary loss; but, I think, having regard to all the probabilities, $800 would not be an unreasonable amount to allow her.

The only child who can, I think, be considered to have suffered pecuniary loss through the death of her father, is the youngest daughter, Charlotte Kelly, who lived at home; and I think $300 a reasonable sum to allow her.

The judgment, therefore, will be for $1,100, apportioned as above, and costs.

NEVILLE v. EATON—MASTER IN CHAMBERS—JUNE 26.

Trial—Postponement—Costs.]—Motion by the defendants to postpone the trial, on the ground of the absence of a necessary and material witness. The Master was of opinion that the circumstances justified a postponement; the plaintiff to have the costs of the application in any event. R. C. H. Cassels, for the defendants. J. A. Paterson, K.C., for the plaintiff.

BANK OF HAMILTON v. KRAMER IRWIN CO.—MASTER IN CHAMBERS—JUNE 27.

Practice—Leave to Continue Action—Parties—Judgment Recovered against some Defendants—Assignment by Plaintiffs to one Defendant after Payment—Action Continued in Name of Original Plaintiffs—Delay in Prosecution of Action—Waiver—Mercantile Law Amendment Act, sec. 3.]—Motion by the defendant Dickenson, who desired to continue the action in the plaintiffs' name against his co-defendants Holme and Barker, for leave to deliver a statement of claim. The action was begun on the 30th December, 1904, and was brought to recover a debt due to the plaintiffs by the defendant company and against the other defendants as sureties for the defendant company. On the 19th Janu-

ary, 1905, judgment for nearly $11,000 was signed against all the defendants except Holme and Barker; a motion for judgment against those defendants was dismissed in February, 1905, and in April of that year, on their application to dismiss the action for want of prosecution, an order was made giving the plaintiffs leave to deliver their statement of claim on or before the 17th June, 1905. Nothing further had been done in the action. The defendant Dickenson paid the plaintiffs the amount of the judgment, and the plaintiffs assigned the judgment and the guaranties to Dickenson, pursuant to the Mercantile Law Amendment Act, sec. 3. The defendant Dickenson then made this motion. The Master said that, as the guaranties were under seal, no question could arise as to the Statute of Limitations, even if the present action were dismissed, and the applicant obliged to bring a new action. The order made in April, 1905, did not contain any term as to the dismissal of the action for non-compliance therewith; and, in any case, it was waived by the parties. Whether the present action should be allowed to proceed, or Dickenson be left to a new action, did not seem to be of importance to the respondents. In either case their defences would be available against Dickenson as well as against the bank. The language of sec. 3 of the Act was wide enough to cover the motion. If the present action were allowed to proceed, the respondents could have ample discovery from the bank and be able to inspect the bank's books: see Wilson v. Raffalovich, 7 Q.B.D. 553. Order made as asked; costs to the respondents in any event. H. E. Rose, K.C., for the applicant. H. H. Davis, for the respondents.

TOWN OF STURGEON FALLS v. IMPERIAL LAND CO.—MASTER IN CHAMBERS—JUNE 29.

Particulars—Statement of Claim—Lien for Taxes—Sale of Lands—Description.]—Motion by the defendants the Trusts and Guarantee Company for an order for particulars of the statement of claim. The action was for a declaration of the plaintiffs' right to a lien for taxes on certain lands in priority to all other claimants except the Crown and for enforcement of the lien. The defendants were the Imperial Land Company, the owners of the lands, the liquidator of the land company, and the Trusts and Guarantee Company, trustees to secure the bonds issued by the land company. The object of the motion was to obtain more definite particulars of some of the parcels described

in the statement of claim. The Master said that, in view of the plaintiffs' prayer for a sale of the lands in respect of which they alleged that taxes were due, some of the descriptions were too indefinite; and, therefore, the motion should be granted. He pointed out some of the indefinite descriptions; and said that particulars as asked for in a letter of the applicants' solicitors should be given. Costs in the cause. H. W. Mickle, for the applicants. S. H. Bradford, K.C., for the other defendants. H. H. Davis, for the plaintiffs.

SNIDER v. SNIDER—BRITTON, J.—JUNE 30.

Vendor and Purchaser—Contract for Sale of Land—Right to Conveyance and Possession on Payment of Purchase-price—Time—Extension—Agreement under Seal—Absence of Tender—Refusal to Enforce Performance—Costs.]—Action by the purchaser for specific performance of an agreement for the sale and purchase of farm land, or for damages for breach of the agreement. The agreement was made on the 6th September, 1910; the purchase-price was $4,000, payable on the 1st April, 1911. In consideration of the plaintiff's agreement to purchase, and on payment of the $4,000, the defendant agreed to convey the land to the plaintiff; it being expressly provided that time should be of the essence of the agreement. There was nothing in the agreement about possession. On the 1st April, 1911, the parties met; the plaintiff would not pay any money unless the defendant was prepared to give up possession; and the defendant was not willing to leave the premises unless the money was paid. After some discussion, an agreement was prepared and executed by the parties, extending until the 8th April the time for the completion of the sale and purchase, to enable the defendant "to dispose of hay and grain and any chattels so as to give complete possession." This agreement was not stated to be under seal, but seals were attached to it opposite the signatures of the parties. Possession was not given, nor was the purchase-money paid, on the 8th April or afterwards, and this action was brought. BRITTON, J., held that the extension agreement was under seal and imported a consideration, though there was in fact no valuable consideration for the extension; and the result of the two agreements was, that, on payment of the $4,000 to the defendant on or before the 8th April, 1911, the defendant was bound to convey, and with the conveyance the plaintiff would have been en-

titled to "complete possession." The plaintiff did not tender the money to the defendant or her solicitor at any time, and he did not have the money in his possession either on the 1st April or the 8th April. The defendant was to convey on payment of the money, and until she received it she was not bound to convey, much less to give up possession. The defendant did not waive her right to have the money first paid. Action dismissed without costs. W. S. Herrington, K.C., for the plaintiff. H. E. Rose, K.C., and U. M. Wilson, for the defendant.

STROTHERS v. TAYLOR—SUTHERLAND, J.—JULY 4.

Contract—Sale of Land and Business—Dispute as to Price and Mode of Payment—Parol Evidence—Rectification of Written Agreement—Costs.]—Action to recover the balance alleged to be due by the defendant to the plaintiff of the purchase-price of the plaintiff's land, buildings, stock, fixtures, and business as a baker and confectioner in the village of Blythe, in the county of Huron, pursuant to an agreement entered into on the 20th October, 1910, reduced to writing by a local conveyancer, and executed by the parties. The price was $4,000, and, in addition, certain articles were to be purchased by the defendant "at a fair valuation." A valuation was made by two appraisers, but a certain dynamo, according to the evidence at the trial, was omitted from the valuation. The parties were at variance as to this and certain other matters up to the time of the trial of the action, but an agreement was reached as to some of the items, and at the trial only the price of the dynamo and the manner of payment of the purchase-price were in dispute. The plaintiff was willing to accept $40 for the dynamo, but the defendant would give no more than $25. Parol evidence was admitted to shew the situation of the parties at the time the agreement was made and the circumstances under which it was made: Christie v. Burnett, 10 O.R. 609. SUTHERLAND, J., said that the evidence satisfied him that the document executed by the parties did not contain the whole of the agreement between them. It was undoubtedly an agreed term that the plaintiff was to accept from the defendant security by way of chattel mortgage for the balance of the purchase-money after giving credit for the cash paid and a mortgage upon the land. The agreement should have contained terms to the effect that the plaintiff was to accept as part payment a mortgage on the real

estate for $2,800, with interest at 5 per cent., and a chattel mortgage payable at $25 a month, with interest at 5 per cent., for the balance of the purchase-money. It contained neither of these. The plaintiff brought this action for payment of the balance of the purchase-money as though the same were payable to him, under the terms of the agreement, in cash. Such was not the true agreement between the parties; and, on a strict view of the case, the action failed. The defendant resisted payment, but said in effect that, if the plaintiff was willing to accept the rectification of the document so as to conform to the true agreement, he (the defendant) was willing to carry out the purchase. If the plaintiff declined to do this, the action would be dismissed with costs. If he consented to this, the agreement would be rectified, and the parties should carry it out as rectified. The value of the dynamo should be fixed at $25; and the sum due to the plaintiff, to be secured by chattel mortgage, fixed at $1,561.96. The plaintiff's claim to a penalty of $500, under the terms of the agreement, for the defendant's failure to carry out the agreement, should be dismissed. No costs to either party if the rectification is accepted by the plaintiff. J. L. Killoran, for the plaintiff. L. E. Dancey and Dudley Holmes, for the defendant.