O'SULLIVAN *v.* LAKE *et al.*

Valuator—Liability of—Misdirection.

The defendant L., who was a professional valuator, was employed by plaintiff to personally investigate the security offered for a loan on real estate, and to check the valuation of a local valuator. The said defendant visited the property and reported, in effect agreeing with the local valuator, that the property was worth considerably more than the amount proposed to be lent, and that the loan could be safely made for the sum proposed, for which report he charged, and was paid, a fee.

The loan was effected, and default having occurred in its repayment, the property was offered for sale, when it was found impossible to sell for anything like the mortgage money. In an action for negligence in valuing the property the jury found for the plaintiff. The judge at the trial directed the jury that the fact that the defendant did not obtain the opinion of other persons as to the value of land in the neighbourhood, was evidence of negligence.

Held (GALT, C.J., dissenting), this was misdirection.

It appeared from the evidence that the mortgagor had endeavoured to procure a loan for a similar amount on the same property from a company in which the defendant L. was a director, and that the loan was not effected, having been abandoned by the mortgagor. The judge at the trial, although he directed the jury that there was no evidence that the defendant had acted with intentional dishonesty, pressed upon their notice, with other observations, the enquiry: "Why was not the original transaction carried out?"

Held (per ROSE and MACMAHON, JJ.), that these observations tended to create a prejudice in the minds of the jury which was not warranted by the facts.

K., a respectable man living in the neighbourhood of the property, in his evidence valued the land at from $200 to $300 per acre, but the judge told the jury that K. was not in the land business, and had no knowledge of the value of the property.

Per ROSE, J.—The observations as to K. were a practical withdrawal of his evidence from the jury.

Per GALT, C.J.—There was evidence of negligence to go to the jury, particularly in defendant L. not making enquiries of others in the neighbourhood as to the value of the land.

A new trial was therefore directed.

Chancery Division.

Boyd, C.] [April 26.

IN THE MATTER OF THE WINDING-UP ACT R. S. C. c. 129, AND THE CENTRAL BANK OF CANADA AND YORKE.

Winding-up Act, R. S. C. c. 129—Deposit receipt—Promissory note—Contributory—Set-off.

Y., in making a deposit on a government contract, gave a marked cheque on the Central Bank, which cheque was subsequently cancelled and a deposit receipt substituted therefor. The bank obtained Y.'s note for the amount as a voucher for, or to cover, the amount of the deposit receipt. The bank went into liquidation on December 3, 1887; and on January 20, 1888, Y., having been compelled by the Government to take up the deposit receipt and replace it with other security, took an assignment of it, and notified the bank.

On being threatened with a suit on the note, Y. filed a petition asking for leave to set up the deposit receipt against the note as a set-off.

Held, following *Ings* v. *Bank of Prince Edward Island*, 11 S. C. R. 265, that the maker of a note to the bank was a mere debtor and not a contributory, and that a debtor who is also a shareholder, and so a contributory, is not a contributory *quoad* the debt which arises out of an independent transaction, and for that reason, s. 73 of R. S. C. c. 129 does not apply to this case.

Held also, that the prohibition against acquiring debts for the purpose of set-off is limited to the case of contributories; as to debtors the law of set-off as administered by the courts is applicable as if the bank was a going concern, and following *Re the Moseley, etc., Coke Co., Barrett's Case*, 4 D. G. J. & S. 756, that the right of set-off virtually arose, not by rea-