The
Ontario Weekly Notes

VOL. IX. TORONTO, JANUARY 21, 1916. No. 20

APPELLATE DIVISION.

FIRST DIVISIONAL COURT. JANUARY 10TH, 1916.

OSHAWA LANDS AND INVESTMENTS LIMITED v. NEWSOM.

Fraud and Misrepresentation—Sale of Land—Misrepresentation by Vendor-company—Evidence—Rescission — Return of Purchase-money—Restitution—Assignees of Purchaser—Findings of Trial Judge—Appeal—Third Parties—Indemnity—Agency Contract—Res Judicata—Costs.

Appeal by the plaintiff company from the judgment of MIDDLETON, J., 8 O.W.N. 260.

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

I. F. Hellmuth, K.C., and H. C. Macdonald, for the appellant company.

N. W. Rowell, K.C., and E. M. Rowan, for the defendant, respondent.

E. T. Coatsworth, for the third parties Medcalf and Poutney.

No one appeared for the third party Mackenzie.

HODGINS, J.A., delivering the judgment of the Court, said that so far as the evidence and exhibits enabled the Court to comprehend the standards recognised and the methods employed in the sales which were the subject of this action, there was no reason to differ from the learned Judge's conclusion. Necessarily, in a case involving the making and the truthfulness of representations, the view of the trial Judge was entitled to great weight; and the evidence, when analysed, did not support the position taken by counsel for the appellant company on the argument, nor that put forward in the notice of appeal.

There was no satisfactory evidence that the defendant made independent inquiries and relied solely, or even principally, upon them. The remarks of Lord Halsbury, L.C., in Aaron's Reefs Limited v. Twiss, [1896] A.C. 273, at p. 284, seemed applicable: "You may use language in such a way as, although in the form of hope and expectation, it may become a representation as to existing facts, and if so, and if it is brought to your knowledge that these facts are false, it is a fraud."

The disposition made by the trial Judge of the action, as between the appellant company, the respondent, and the third parties before the Court, although only on a third party notice, was right and proper: Strathy v. Stephens (1913), 29 O.L.R. 383. The presence of the third parties was clearly necessary to enable the Court effectually and completely to adjudicate upon the questions involved in the action; for without them the lands could not be released from all claims. They ought, however, to be formally added as defendants, and the pleadings amended, before the order on this appeal is issued.

As to Medcalf, the plea of res judicata could not be established. The former action was dismissed as against the present appellant, on the ground that Medcalf had not bought from it, but from Newsom. As against him it was dismissed because his representations were not then proved to be untrue; so that, as to both the appellant company and the respondent, there was no estoppel in the present action, and the principle of res judicata had no application.

The appeal should be dismissed with costs as to the respondent and third parties—the latter to tax one bill only.

FIRST DIVISIONAL COURT. JANUARY 10TH, 1916.

McFARLAND v. CARTER.

Limitation of Actions—Possession of Land—Acts of Ownership—Conflicting Evidence—Overhanging Eaves—Bay Window—Gas-pipe—Limitations Act.

Appeal by the plaintiffs from the judgment of the County Court of the County of Welland, in so far as it was against the appellants, in an action to recover possession of land in the village of Colborne, to which the appellants asserted title by length of possession.

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

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

E. D. Armour, K.C., for the defendant, respondent.

MEREDITH, C.J.O., delivering the judgment of the Court, said that the respondent had the paper title to the land in question, which formed part of lot 2, but the appellants claimed title by length of possession to the east 6 or 8 feet of the lot.

Up to the time lot 1 was purchased by the mother of the appellants from Mrs. Armstrong there had been no possession of the land in question by the owner of lot 1. That was clear from the evidence of Mrs. Armstrong, who lived on lot 1 from the time she purchased it in April, 1877, until she sold it to Mrs. McFarland in 1886. When Mrs. McFarland purchased, lot 2 belonged to a Dr. King, and was unoccupied. It was rented by Mrs. McFarland or her husband from King, and the tenancy continued at all events down to the time when McCoppen purchased lot 2 from Dr. King, and, according to McCoppen's testimony, for 4 months afterwards, and during this time a rental of $1 a month was paid for the use of the lot. McCoppen bought in May, 1897. It was clear that during the period of this occupation the statute did not run against the owner of lot 2; and, therefore, in order to establish their case, the appellants must have shewn such a possession of the land in question since the termination of the tenancy as would have operated to extinguish the title of the owner of it; and this had not been shewn.

Shortly after purchasing, McCoppen moved the hedge which, it was contended, marked the boundary between his land and that of the appellants, and that without any objection or protest by them. The evidence as to the acts of ownership since that time was very conflicting; and, in view of the conflict of testimony, it was impossible to hold that there had been, since the McFarlands' tenancy of lot 2 came to an end, a possession by them of the land in question sufficient to extinguish the title of the owner of it.

That the title of the owner of lot 2 to that part of the lot occupied by the areas at the cellar windows and by the bay window had been extinguished, was undoubted, and the judgment of the County Court so determined. That the appellants had acquired the right to maintain the eaves of their house where they overhang lot 2, was also undoubted, and by the judgment this was intended to be declared; but, by an over-

sight, it had not been done. A gas-pipe leading to the appellants' house was also on lot 2. The judgment should be varied by including in what were called the admitted rights of the appellants the right to maintain the eaves as they actually exist, including the eaves of the bay window, and the right to maintain the gas-pipe.

With this variation, the judgment should be affirmed and the appeal dismissed without costs.

FIRST DIVISIONAL COURT. JANUARY 10TH, 1916.

RE PORT ARTHUR WAGGON CO. LIMITED.

PRICE'S CASE.

Company—Winding-up—Contributory — Shareholder — Prospectus—Application for Shares—Allotment—Notice—Preferred Shares — Bonus of Common Shares — Conditional Subscription.

Appeal by Philip I. Price from the order of SUTHERLAND, J., 8 O.W.N. 480.

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

George Bell, K.C., for the appellant.

A. McLean Macdonell, K.C., for the liquidator, respondent.

MEREDITH, C.J.O., delivering the judgment of the Court, said that the right of the appellant to have his name removed from the list of contributories depended upon his having established that his subscription for the shares in question was a conditional one, and that the condition upon which the subscription was made was not complied with.

The finding of the Master that the appellant, at the time of his subscription for the shares, was informed by Lindsay that the common shares were subject to a pooling agreement, was fatal to the appellant's case. Having notice of the fact that the shares were subject to a pooling agreement, the appellant must be taken to have agreed that his right to the common shares was subject to the terms of that agreement.

There were other objections equally fatal to the appellant's

claim. His application was, in terms, for preferred shares only, and the application was headed "Application for Preferred Shares." The statement at the foot of the application was not, in form or in substance, an application for common shares, but was that the subscription for preferred shares "carries with it a bonus of 100 per cent. of fully paid-up and non-assessable common stock of the company"—in other words, that, on becoming a shareholder in respect of preferred shares, the subscriber was to be entitled to a bonus of an equal amount of fully paid-up and non-assessable common shares. Being fully paid-up and non-assessable, they must be shares that had already been allotted to some one, and therefore shares which the company could not allot to the appellant.

The company accepted the appellant's offer to take 10 shares of preferred stock; and they were duly allotted to him. It might be that, having accepted his application, the company was bound to see that he received the bonus of common stock; and that, if it had not done so, it might be liable to an action for breach of its agreement; but there was nothing in the nature of a conditional application. On the contrary, the foundation of the right of the appellant to the common shares was that he had become the holder of the preferred shares. Putting the case on the highest ground on which it could be put, his application meant: "I apply for 10 shares of preferred stock, and my subscription for these shares entitles me to a bonus of an equal amount of common stock, paid-up and non-assessable." His right to the bonus shares did not arise until he had become the holder of the preferred shares.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. JANUARY 10TH, 1916.

OLDRIEVE v. C. G. ANDERSON CO. LIMITED.

Sale of Goods—Lumber in Esse at Time of Contract—"National Inspection"—Acceptance — Deduction for Excess—Caveat Emptor—Cash Discount—Evidence.

Appeal by the defendant company from the judgment of the Junior Judge of the County Court of the County of Elgin in favour of the plaintiff in an action for the price of lumber sold and delivered to the defendant company.

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

S. H. Bradshaw, K.C., for the appellant company.

A. A. Ingram, for the plaintiff, respondent.

GARROW, J.A., delivering judgment, said that the plaintiff had a quantity of white ash lumber manufactured and piled at Dutton station for sale, and the defendant company entered into negotiations with the plaintiff for its purchase. One Schriner, a buyer for the defendant company, came to Dutton and saw the pile, and made some, but not a complete, examination of it. The plaintiff's price was $45 per thousand feet. Schriner informed the plaintiff that the defendant would purchase only subject to what is called "national inspection"—a term well understood in the lumbering trade. To this the plaintiff, at the time, objected, and they parted without making a bargain. Negotiations were subsequently renewed, and in the end the plaintiff agreed to accept national inspection. The lumber was inspected, loaded on cars, and shipped, apparently to Detroit.

The defendant company contended that some 9,920 feet more of No. 1 lumber was in the quantity inspected and shipped than, under the terms of the agreement, the defendant company was obliged to take, for which the defendant company claimed a reduction at the rate of $20 per thousand. The defendant company also contended that a cash allowance of 2 per cent. was customary, and should have been made. The learned Junior Judge held in favour of the plaintiff on both contentions.

The first contention was concluded by the inspection and delivery at Dutton. The goods were in esse from the beginning of the negotiations—they were not goods to be manufactured. The rule caveat emptor, therefore, applied to exclude implied warranties. See Jones v. Just (1868), L.R. 3 Q.B. 197, at p. 202. And the inspection, followed by the acceptance and shipment, settled all other questions, both of quantity and quality. See Towers v. Dominion Iron and Metal Co. (1885), 11 A.R. 315.

There was no evidence in the case sufficient to justify a holding that the defendant company was entitled to the 2 per cent. trade discount claimed.

The appeal should be dismissed with costs.

MEREDITH, C.J.O., concurred, for reasons briefly stated in writing.

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

HODGINS, J.A., was of opinion, for reasons stated in writing, that the proper conclusion of fact was, that the defendant company, voluntarily or knowingly, by reason of compulsion caused by having resold, accepted the lumber with an excess of No. 1 common, though without realising the amount of that excess; and the legal result was the same as if the company was unaware of it: Poulton v. Lattimore (1829), 9 B. & C. 259; Wallis Son & Wells v. Pratt & Haynes, [1910] 2 K.B. 1003, [1911] A.C. 394. The appellant company "voluntarily" precluded itself from the remedy of rejection—"elected" to treat the breach of condition as a breach of warranty; and, having done so, could not reject, and is entitled to sue for damages as for a breach of warranty. The respondent knew, but did not disclose, the true state of affairs, and cannot complain if the law requires him to fulfil his contract. The respondent was bound to submit to "national inspection." The lumber was originally to contain 80 per cent. of first and seconds and 20 per cent. of No. 1 common, and the only modification was that the appellant company was to have those quantities reduced by $7\frac{1}{2}$ per cent. of No. 2 common.

Appeal dismissed; HODGINS, J.A., *dissenting.*

FIRST DIVISIONAL COURT. JANUARY 10TH, 1916.

*TRAVATO v. DOMINION CANNERS LIMITED.

Writ of Summons—Failure to Serve—Negligence of Solicitor—Renewal after Expiry of Year—Workmen's Compensation for Injuries Act, sec. 9—Revival of Action after Statutory Bar—Claim at Common Law—Right to Bring New Action for.

Appeal by the plaintiff from the order of CLUTE, J., ante 15.

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

*This case and all others so marked to be reported in the Ontario Law Reports.

A. W. Langmuir, for the appellant.
W. Morison, for the defendant company, respondent.

MEREDITH, C.J.O., delivering the judgment of the Court, said that no case was made for allowing the writ of summons to be renewed, even if, had a case been made, it was in accordance with the practice of the Court to permit a renewal so as to revive a cause of action which had become barred. There was no explanation of the failure to serve the writ while it was yet in force, and no reason why it was not served before it had expired, or why an order was not obtained, while it was yet alive, for its renewal; and there was no satisfactory explanation of the delay of upwards of 4 months between the 3rd March, 1915, when the plaintiff's present solicitors were instructed, and the making of the application, in August, 1915, upon which an Official Referee, acting for the Master in Chambers, made the order for the renewal of the writ after its expiry—i.e., the order set aside by Clute, J.

Where, owing to the expiry of the writ of summons, a cause of action has become barred, leave to renew the writ nunc pro tunc ought not to be granted. Even where the writ is yet alive, the plaintiff may not, as he formerly might have done, take it to the proper office and have it renewed, but he must obtain leave to renew it; and apparently the only ground upon which such an application is based is, that, for a sufficient reason, any defendant has not been served (Rule 9). The practice in England is well settled, and it is, that leave to renew will not be granted if the cause of action has been barred by a statute of limitations.

Reference to Doyle v. Kaufman (1877), 3 Q.B.D. 7, 340; Hewett v. Barr, [1891] 1 Q.B. 98; Smalpage v. Tonge (1886), 17 Q.B.D. 644.

The same practice has been followed in this Province: Williams v. Harrison (1903), 6 O.L.R. 685; Mair v. Cameron (1899), 18 P.R. 484.

This case differs from Doyle v. Kaufman in that the common law cause of action is not barred; but that affords no reason for allowing that to be done which will revive the cause of action that is barred.

There is nothing to prevent the appellant from bringing a new action based upon his common law claim, and that he should be left to do.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. JANUARY 10TH, 1916.

BENSON v. MAHER.

Master and Servant—Injury to Servant—Defective Scaffolding—Building Trades Protection Act, R.S.O. 1914 *ch.* 228, *sec.* 6—*Breach of Statutory Duty—Findings of Jury—Evidence—Avoidance of New Trial—Determination of Liability by Appellate Court.*

Appeal by the plaintiff from the judgment of the County Court of the County of York in favour of the defendant, in an action for damages for injury sustained by the plaintiff by reason of the collapse of a defective scaffold erected in a building of the defendant, upon which the plaintiff was working at the time of the collapse. The action was tried with a jury, and the judgment for the defendant was entered by the County Court Judge upon the jury's findings.

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

V. H. Hattin, for the appellant.

W. N. Ferguson, K.C., for the defendant, respondent.

HODGINS, J.A., delivering the judgment of the Court, said that the appellant was working upon a scaffold erected for the purpose of enabling joists to be replaced in a building of the respondent which had been damaged by fire. The scaffold was in fact erected by one Buckley, who was a foreman carpenter, but it was not clearly established that he occupied that position in regard to this particular work. The appellant and one Gordon were sent to the work by Cross, who had been told by Tucker, the respondent's manager or superintendent, to engage men for the work to be done, and Buckley was one of these men. The scaffold was erected before the appellant got to the work. The jury found, on sufficient evidence, that the appellant's injuries were caused by a defect in the manner of the construction of the scaffold, but they also found that the defect did not arise from any negligence on the respondent's part, and that the respondent furnished proper materials for the scaffold. They absolved the appellant from contributory negligence. The case went to the jury on a charge by the learned County Court Judge that the respondent was not liable if the

injuries were caused by the negligence of a co-employee or fellow-servant of equal rank.

The attention of the learned Judge was not called to the provisions of the Buildings Trades Protection Act, 1 Geo. V. ch. 71, sec. 6, now R.S.O. 1914 ch. 228, sec. 6, nor to the decision in Hunt v. Webb (1913), 28 O.L.R. 589, which is decisive against the respondent. The finding of the jury that the defect in the scaffold did not arise from any negligence of the respondent must be set aside, as their attention was not directed to the liability arising out of the breach of statutory duty.

The appellate Court having before it all the materials necessary for the determination of the matters in controversy relating to the question of liability, it was not necessary to send the case back for a new trial. The statutory duty having been neglected, the Court was enabled to give the proper judgment. The finding of the jury should be set aside and the judgment vacated, and in place thereof there should be a finding that the respondent was liable on account of the breach of the duty created by the Act referred to, and directing judgment for the appellant for $300, with costs of the action and appeal.

FIRST DIVISIONAL COURT. JANUARY 10TH, 1916.

*RÉAUME v. COTÉ.

Declaratory Judgment—Limitation of Actions—Possession of Land—Limitations Act, R.S.O. 1914 ch. 75, sec. 12—Declaration of Title—Judicature Act, sec. 16 (b)—Discretion.

Appeal by the defendants Aggie Coté and Jennie Réaume from the judgment of SUTHERLAND, J., ante 17.

The appeal was heard by GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

J. H. Rodd, for the appellants.

J. Sale, for the plaintiff, respondent.

GARROW, J.A., delivering the judgment of the Court, said that the plaintiff was in possession of the land in question, and the action was brought to obtain a declaration that she was entitled in fee simple as against the defendants. The plaintiff's alleged title, as against them, was solely derived by length of

possession for a period exceeding the 10 years prescribed by the Limitations Act; and the relief which had been granted was simply a declaration that she was so entitled.

The question raised before this Court—apparently for the first time—as to the propriety of granting a declaratory judgment in the circumstances, besides being of general importance, was, in view of the numerous authorities, one of some nicety.

Reference to Chancery Order 538; also to sec. 16 (*b*) of the Judicature Act, R.S.O. 1914 ch. 56, first introduced by 48 Vict. ch. 13, sec. 5, and identical in language with the English Order XXV., Rule 5; Bunnell v. Gordon (1890), 20 O.R. 281; Austen v. Collins (1886), 54 L.T.R. 903, 905; Stewart v. Guibord (1903), 6 O.L.R. 262; Ottawa Young Men's Christian Association v. City of Ottawa (1913), 29 O.L.R. 574, 581.

But Miller v. Robertson (1904), 35 S.C.R. 80—the headnote of which says, "A Court of Equity will not grant a decree confirming the title to land claimed by possession under the Statute of Limitations nor restrain by injunction a person from selling land of another"—seems to be almost precisely in point, and is binding on this Court.

There can be no doubt, upon all the authorities, that now in all cases a discretion exists in the Court to grant or to withhold a mere declaration of right. That being so, a very proper case for the exercise of the discretion adversely to the plaintiff seems to be such a case as this.

Foisy v. Lord (1911), 2 O.W.N. 1217, 3 O.W.N. 373, considered and distinguished.

Appeal allowed and action dismissed without costs.

FIRST DIVISIONAL COURT. JANUARY 10TH, 1916.

*RE SCARTH.

Infant—Custody—Separation of Parents—Right of Father to Custody of Girl of Ten—Welfare of Infant—Conduct of Parents—Infants Act, R.S.O. 1914 ch. 153, sec. 2—Costs.

Appeal by Amy H. R. Scarth from the order of LENNOX, J., ante 143, requiring the delivery by her to her husband, James Frederick Scarth, of their infant daughter, Mary Howitt Scarth, born in August, 1906.

The appeal was heard by GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

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

R. C. H. Cassels, for the respondent.

GARROW, J.A., delivering judgment, said that he agreed with the views and conclusions of Lennox, J., both as to the facts and the law. He quoted with approval the words of Street, J., in Re Mathieu (1898), 29 O.R. 546: "Where a husband has done no wrong and is able and willing to support his wife and child, the Court will not take away from him the custody of his child merely because the wife prefers to live away from him and because it thinks that living with the father apart from the mother would be less beneficial to the infant than living with the mother apart from the father. . . . It must be the aim of the Court not to lay down a rule which will encourage the separation of parents, who ought to live together and jointly take care of their children."

The Infants Act, now R.S.O. 1914 ch. 153, originally 50 Vict. ch. 21, is not, in so far as it expresses concern for the welfare of the infant, intended to exalt the interest of the infant into one of paramount importance, nor was it even the introduction of a new principle, but rather the adoption by the Legislature of a rule which had been long acted upon by the old Court of Chancery. See Andrews v. Salt (1873), L.R. 8 Ch. 622, 640. The exact language is (sec. 2), "having regard to the welfare of the infant, *and* to the conduct of the parents, *and* to the wishes as well of the mother as of the father." Other things, such as the conduct of the parents, being equal, when it happens that the wishes of the parents conflict, the Court must determine, having regard, however, to the father's practically immemorial right to control unless he has forfeited that right by misconduct.

Here no misconduct has been established against the father. There is no sufficient reason for this husband and wife continuing to reside apart.

The appeal must be dismissed, but without costs, and the order should not issue until the father has satisfied the Court that he has made due provision to receive and properly care for the infant.

MAGEE and HODGINS, JJ.A., concurred.

MACLAREN, J.A., dissenting, was of opinion that it was not in the interest of the child that she should be at present removed from the custody of the mother; the statute having placed the welfare of the infant in the foreground as being of prime importance.

Appeal dismissed; MACLAREN, J.A., *dissenting.*

FIRST DIVISIONAL COURT. JANUARY 10TH, 1916.

*MILK FARM PRODUCTS AND SUPPLY CO. LIMITED v. BUIST.

Contract—Sale of Land and Business—Mistake—Rescission—Executed or Executory Contract—Failure of Consideration—Municipal By-law—Validity.

Appeal by the plaintiffs from the judgment of MIDDLETON, J., 8 O.W.N. 491.

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

S. F. Washington, K.C., and A. M. Lewis, for the appellants.

D. Inglis Grant, for the defendant, respondent.

GARROW, J.A., delivering judgment, said that the action was brought for the rescission of an agreement of the 24th April, 1914, made between the plaintiffs and the defendant, for, among other things, the sale by the defendant to the plaintiffs of premises in the city of Hamilton, upon which the defendant was then carrying on a dairying business, and for the return of $8,500 which had been paid on account of the purchase-money, upon the grounds: (1) that the agreement had become impossible of performance; (2) that the object and purpose were frustrated, and the consideration had failed; (3) that the agreement was illegal; and (4) that the parties to the agreement were mutually mistaken as to the existence of a certain by-law of the city which rendered their contemplated enterprise, under the agreement, illegal.

The by-law referred to was passed on the 27th October, 1913; it included the defendant's land in a residential area, and prohibited the erection within it of any "factory."

The defendant did not ask that the agreement should be performed, but was content to accept a cancellation if the plaintiffs' claim for a refund were disallowed.

Both parties acquiesced in the conclusion that the by-law was valid, and that it presented an insuperable obstacle to carrying out the original intention.

The plaintiffs' real difficulty was, that while disappointed in the enlarged use to which it was proposed to put the defendant's land, by extending and increasing the buildings and plant, they did get, or could have got, under the agreement, this very land with the business and goodwill agreed for. It was out of the question to say that there was a total or even a partial failure of consideration—there being no evidence that the price agreed upon was made in any way to depend upon the proposed additions and enlargements.

The defendant was not responsible for the plaintiffs' disappointment; he practised no deceit and made no false or erroneous representations.

There was no mistake, mutual or otherwise, in regard to the parties, the subject-matter, or the consideration—the usual grounds for relief upon the plea of mistake. In no case has relief been granted to a purchaser because he was disappointed in the use to which he might be able to put the purchased property, unless some other ground intervened.

Reference to Smith v. Hughes (1871), L.R. 6 Q.B. 597; Cooper v. Phibbs (1867), L.R. 2 H.L. 149; Scott v. Coulson, [1903] 1 Ch. 453, [1903] 2 Ch. 249; Tamplin v. James (1880), 15 Ch.D. 215; Appleby v. Myers (1867), L.R. 2 C.P. 651; Herne Bay Steam Boat Co. v. Hutton, [1903] 2 K.B. 683; Krell v. Henry, ib. 740; Civil Service Co-operative Society v. General Steam Navigation Co., ib. 756.

The appeal should be dismissed with costs.

MACLAREN, J.A., concurred.

MAGEE, J.A., agreed in the result.

HODGINS, J.A., said that the prohibition in the by-law existed at the date of the contract; and, if it rendered the purpose an impossible one at that date, the contract would be void ab initio, subject to whatever qualifications in the consequent rights of the parties might be found to subsist owing to its having been executed partly or in whole: Clark v. Lindsay

(1903), 88 L.T.R. 198; Blakeley v. Muller & Co., [1903] 2 K.B. 760 (note); Civil Service Co-operative Society v. General Steam Navigation Co., [1903] 2 K.B. 756, 764; Chandler v. Webster, [1904] 1 K.B. 493; Elliott v. Crutchley, [1904] 1 K.B. 565, [1906] A.C. 7.

In view, however, of the decision in Re Nash and McCracken (1873), 33 U.C.R. 181, the by-law was always bad on its face. The underlying purpose of the contract, therefore, had never been rendered legally impossible. Mistake in appreciating the effect of the by-law made no difference in the result. The appellants founded their case upon the contract having been always impossible of performance. If that position could not be maintained, then mistake in imagining that it could be was not relevant.

The appeal should be dismissed.

MEREDITH, C.J.O., concurred.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. JANUARY 10TH, '16.

RE CORDINGLEY v. WILLIAMSON.

Division Courts — Jurisdiction — Jury Trial — Irregularity — Waiver — Claim for Damages for Conversion of Goods — Amount in Excess of Jurisdiction in Action for Tort — Claim Actually Based on Contract—Amendment—Prohibition.

Appeal by the defendant from the order of LENNOX, J., 8 O.W.N. 536, refusing prohibition.

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

The appellant, in person.

W. H. McFadden, K.C., for the plaintiff, respondent.

THE COURT dismissed the appeal with costs.

FIRST DIVISIONAL COURT. JANUARY 11TH, 1916.

*McINDOO v. MUSSON BOOK CO.

Copyright—"Literary Composition"—Title or Name of Book—Infringement by Use of Similar Name—Copyright Act, R.S.C. 1906 ch. 70, sec. 4—Passing off—Reputation—Evidence.

Appeal by the plaintiff from the judgment of MASTEN, J., ante 239.

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

L. F. Heyd, K.C., and E. C. Ironside, for the appellant.

George Wilkie, for the defendants, respondents.

THE COURT dismissed the appeal without costs.

FIRST DIVISIONAL COURT. JANUARY 13TH, 1916.

*SHEWFELT v. TOWNSHIP OF KINCARDINE.

Bond—Cancellation—Liability of Sureties—Right of Action.

Appeal by the plaintiffs from the judgment of MEREDITH, C.J.C.P., ante 237.

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

G. H. Kilmer, K.C., for the appellants.

S. H. Bradford, K.C., and P. A. Malcolmson, for the defendants, respondents.

THE COURT dismissed the appeal with costs.

HODGINS, J.A., IN CHAMBERS. JANUARY 14TH, 1916.

*RE CLARKSON AND CAMPBELLFORD LAKE ONTARIO AND WESTERN R.W. CO.

Evidence—Appeal from Award under Railway Act of Canada—Right of Appellant to Examine one Member of Arbitration Board as Witness to Make Evidence for Use on Appeal—Attempt to Ascertain Reasons for Arriving at Amount Awarded—Necessity for Leave of Appellate Court.

Motion by the railway company, the respondents in a pending appeal from an award under the Railway Act of Canada, to set aside an appointment issued by a special examiner, at the instance of the land-owner, the appellant, for the examination of His Honour Judge Morgan, one of the arbitrators, to ascertain the reasons actuating the arbitrators in awarding the amount of compensation fixed by them, and how they arrived at their figures.

Angus MacMurchy, K.C., for the railway company.
W. R. Smyth, K.C., for the land-owner.

HODGINS, J.A., said that the desirability of having the reasons for an award given by the arbitrators, and their duty in that regard in cases of appeals from awards under the Railway Act, was pointed out by Lord Macnaghten in James Bay R.W. Co. v. Armstrong, [1909] A.C. 624, at p. 631, and in a case of municipal arbitration by Britton, J., in Re City of Peterborough and Peterborough Electric Light Co. (1915), 8 O.W.N. 564. In both those cases wide powers existed for increasing or decreasing the amount awarded and for reviewing the evidence. That information, however, must be got in a proper way—either by the statement of a case by the arbitrators, or, more usually, by the delivery of written reasons, for the information of the Court. These must not be obtained ex parte; nor can the views of one of the arbitrators be used, unless, at least, all have had the opportunity of stating theirs.

The examination of one arbitrator, pending an appeal, is not the proper way of obtaining the needed information. The arbitrator is, no doubt, a competent witness in an action on an award; and he may be as competent on an appeal if it involves similar questions; but just what is here wanted cannot

be obtained from an arbitrator as a witness: O'Rourke v. Commissioner for Railways (1890), 15 App. Cas. 371, at p. 377.

As the proceeding taken by the appellant here is for the examination of an arbitrator as a witness with a view to eliciting his evidence as such, for use on a pending appeal, it falls within Crowley v. Boving and Co. of Canada (1915), 33 O.L.R. 491—the principle of that decision and of the cases which it follows is not avoided by saying that it is not really evidence that is wanted, but merely information which it would be proper to bring before the Court if obtained in another way.

Order made setting aside the appointment, with costs to the respondents (the railway company) in the pending appeal.

HIGH COURT DIVISION.

MIDDLETON, J., IN CHAMBERS. JANUARY 10TH, 1916.

REX v. GOURLAY.

Criminal Law—Offence against Post Office Act—Summary Conviction—Prosecution not Instituted within 6 Months—Conviction Quashed—Costs.

Motion to quash a conviction of the defendant by a magistrate for using postage stamps that had been previously cancelled.

T. C. Robinette, K.C., for the defendant.
Edward Bayly, K.C., for the Crown.

MIDDLETON, J., said that the offence was one against the Post Office Act, R.S.C. 1906 ch. 66, sec. 135, and was punishable upon summary conviction. The offence was committed on the 24th February, 1915; prosecution was not instituted until the 13th October, 1915. Under the Criminal Code, which applies to prosecutions under any special statute where there is no repugnant provision, the prosecution ought to have been within 6 months after the offence.

The conviction was therefore bad, and must be quashed; but, as there appeared to be ground to suppose that the offence was actually committed, the order should be without costs, and with the usual provision for protection.

LENNOX, J., IN CHAMBERS. JANUARY 12TH, 1916.

RE HILLAM.

Lunatic—Confinement in Hospital for Insane—Statutory Committee—Hospitals for the Insane Act, R.S.O. 1914 *ch.* 295, *secs.* 40, 45—*Inspector of Prisons and Public Charities — Estate of Patient—Discharge from Trust—Direction as to Account and Costs—Appointment of Inspector as Committee of Estate.*

Application by the Inspector of Prisons and Public Charities for an order relieving him from his trust in respect of the estate of Annie Hillam, alleged to be an incompetent, and appointing him trustee or committee.

K. W. Wright, for the applicant.

LENNOX, J., said that Annie Hillam was an inmate of the Hospital for the Insane at Toronto from the 15th August, 1912, until the 16th December, 1914, when she was discharged upon probation. It was not shewn that she had ever been declared a lunatic; but, upon the evidence, it was probable that she was, as alleged, a person who "through mental infirmity" was "incapable of managing her affairs," and that upon a proper application there should be a committee appointed. She had a good deal of means—land, mortgages, money. She had relatives in Toronto, and was living with one of them. The applicant was Inspector of Prisons and Public Charities for Ontario; and he —Annie Hillam not having any other committee—became and continued to be her statutory committee while she was detained in the Hospital for the Insane: Hospitals for the Insane Act, R.S.O. 1914 ch. 295, sec. 40. When a person discharged from a hospital is not, in the opinion of the Inspector, competent to manage his affairs, and the Inspector has property in his hands, the Court may relieve him of his trust, and give directions as what is to be done with it. The Inspector applied to be relieved, and produced his accounts, shewing a balance of $503.41 in his hands. This was provided for by sec. 45. But he also asked to be appointed trustee or committee so as to continue to manage the estate of Annie Hillam. She had notice of the application, and, it was alleged, approved, but there had been no notice to her relatives.

Assuming that, aside from his official position, the Inspector was a proper person to be a committee, it was not advisable to appoint him to a position which might, later on, conflict with the discharge of his official duties. Putting it more broadly, it is important to keep the officers of the Court distinct from the officials of the Government, and that these officials should as far as possible be restricted to the exercise of the duties imposed by the Legislature. This part of the application should be refused.

Upon bringing in and passing his accounts, the Inspector would be entitled to tax and be allowed his costs of this application; and, upon payment of the amount found to be in his hands, less his taxed costs, into Court to the credit of Annie Hillam, an order should issue discharging him from his trust.

MIDDLETON, J., IN CHAMBERS. JANUARY 14TH, 1916.

*RE HARTY v. GRATTAN.

Division Courts—Jurisdiction—Ascertainment of Amount over $100—Cheque—Loan—Division Courts Act, R.S.O. 1914 ch. 63, sec. 62(d).

Motion by the defendant for prohibition to a Division Court.

Harcourt Ferguson, for the defendant.
C. M. Garvey, for the plaintiff.

MIDDLETON, J., said that the claim exceeded $100, and the Court had no jurisdiction unless the claim was ascertained as a debt by a document signed by the defendant, and the plaintiff's case was proved without other evidence than the proof of the signature: Division Courts Act, R.S.O. 1914 ch. 63, sec. 62(*d*); Slater v. Laberee (1905), 9 O.L.R. 545; Renaud v. Thibert (1912), 27 O.L.R. 57.

The plaintiff's claim was upon a cheque for $150, drawn by him, payable to the defendant. The cheque was endorsed, and, if the stamps on it might be regarded, as to which the learned Judge had much doubt, the cheque was cashed by the defendant. This, is was said, proved the loan, and called upon the defen-

dant to shew that the money he received was not lent to him; but with this the learned Judge did not agree.

When the parties to an action were not competent witnesses this question frequently arose, and the cases (see Grant's Banking Law, 6th ed., p. 94) uniformly determined that the cheque was only evidence of the payment of money and not proof of a loan, for the payment might equally well have been on account of a pre-existing debt or a gift. See Foster v. Fraser (1841), R. & J. Dig. 652; Allaire v. King (1908), Q.R. 33 S.C. 343.

It was, therefore, clear that there was no jurisdiction in the Division Court to entertain the action, and the motion must succeed.

Prohibition granted, with costs, fixed at $25.