THE

ONTARIO WEEKLY REPORTER.

(TO AND INCLUDING JUNE 7TH, 1902.)

VOL. I. TORONTO, JUNE 12, 1902. NO. 22.

FALCONBRIDGE, C.J. JUNE 3RD, 1902.

WEEKLY COURT.

WALKERTON BINDER TWINE CO. v. HIGGINS.

Company—Lien of —Shares.

Motion by plaintiffs to continue an injunction restraining defendant from selling or transferring certain shares of the stock of the plaintiffs, an incorporated company. The defendant was the contractor for the plaintiffs' building. He received in January, 1901, in part payment of the contract price, a cheque for $22,832, which, plaintiffs allege, should have been for $22,384. In the final settlement he received in part payment the stock in question, which is fully paid.

G. H. Kilmer, for plaintiffs. The plaintiffs claim a lien on two grounds: (1) of debt; (2) part of the price payable under the contract is represented by the shares, and in effect plaintiffs have the right to stop the shares in specie in the hands of defendant. As between the parties there is a lien in favour of plaintiffs: Lindley's Company Law, p. 456; Pinket v. Wright, 12 Cl. & F. 764; Hague v. Dandeson, 2 Ex. 741; McMurrich v. Bond Head Co., 9 U. C. R. 333.

M. H. Ludwig, for defendant. It is clear that no lien exists. The only case in which the company can refuse to register a transfer is set forth in R. S. O. ch. 191, sec. 28. See also White on Joint Stock Companies, p. 181.

FALCONBRIDGE, C.J.—The high authority of Lord Lindley is pledged to the dictum (Lindley's Law of Companies, 5th ed., p. 456) that a company should have a lien on the shares of its members for what may be due from them to the company in respect of such shares.

The defendant does not categorically deny the mistake which is said to have been made in the figures whereby plaintiffs claim to have overpaid defendant by the sum of $448, but only says in a general way that he is "not indebted to the plaintiffs in any sum whatever."

I think the *status in quo* ought to be preserved, and I shall continue the injunction to the hearing.

Costs in cause unless the trial Judge shall otherwise order.

David Robertson, Walkerton, solicitor for plaintiffs.

Ritchie, Ludwig, & Ballantyne, Toronto, solicitors for defendant.

JUNE 2ND, 1902.

DIVISIONAL COURT.

DUNN & CO. V. PRESCOTT ELEVATOR CO.

Bailment—Warehouseman—Negligence of—Stored Corn—Measure of Damages.

Appeal by liquidator of defendants from judgment of MACMAHON, J., ante p. 75.

G. F. Henderson, Ottawa, for appellants.

J. Leitch, K.C., for plaintiff.

The judgment of the Court (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.) was delivered by

STREET, J.—The duties of defendants under the circumstances are concisely and properly stated in Beal v. South Down R. W. Co., 3 H. & C. at p. 342. See also Story on Bailments, secs. 444 and 408; Brabant v. King, [1895] A. C. at p. 646; Snodgrass v. Ritchie, 17 Rettie, 712; Re Mersey Docks, 1 H. L. C. 93. . . . In my opinion the defendants were guilty of negligence in not having more carefully watched and examined the condition of the corn under the circumstances, and they are liable to the plaintiffs for the loss which has happened. The damages have been properly estimated, and the appeal should be dismissed with costs.

JUNE 2ND, 1902.

DIVISIONAL COURT.

RE GAULT v. CARPENTER.

Appeal—County Court—Interlocutory Order—Examination of Judgment Debtor—Production by Transferee of—Jurisdiction—R. S. O. ch. 55, sec. 52.

Appeal by judgment debtors and their mother, Elizabeth Carpenter, from order of a County Court Judge, made after

judgment in the action in the County Court of Stormont, Dundas, and Glengarry, directing the defendants, the judgment debtors, to attend for examination before a special examiner, and ordering the appellant Elizabeth Carpenter, their alleged transferee, to attend and produce at the same time the books of account used by the judgment debtors in their business.

The appeal was heard before a Divisional Court, FALCONBRIDGE, C.J., STREET, J., BRITTON, J.

J. H. Moss, for appellants.

W. E. Middleton, for plaintiffs.

STREET, J.—In my opinion the order in appeal is clearly interlocutory and not final within the meaning of R. S. O. ch. 55, sec. 52, as interpreted by the Court of Appeal in Baby v. Ross, 14 P. R. at p. 443. Such an order is merely a means or step towards an end, it is not the end itself; and appeals are only given against orders which are the end of the particular matter of which they are a part.

FALCONBRIDGE, C.J.—I concur.

BRITTON, J.—In agreeing I venture to express my regret that the question whether the learned County Court Judge has power to make such an order against the appellant Elizabeth Carpenter can not now be disposed of on its merits, without putting any of the parties to the expense of a motion against an order to commit, should any such order be made and the appellant further resist.

Appeal quashed with costs.

Maclennan, Cline, & Maclennan, Cornwall, solicitors for plaintiffs.

Gogo & Stiles, Cornwall, solicitors for other parties.

JUNE 4TH, 1902.

DIVISIONAL COURT.

GOODYEAR v. GOODYEAR.

Chattel Mortgage—Renewal of—Change of Possession—Parent and Child—Execution Creditor.

Appeal by claimant, a chattel mortgagee, in an interpleader issue from judgment of County Court of York. Issue as to the ownership of certain goods and chattels seized under writ of execution. The claimant and execution creditor were brothers. On the evidence the trial Judge was not satisfied of the validity and bona fides of the mortgage, and held that there being no clear or satisfactory evidence of change of possession, and the onus being upon the claimant to satisfy the Court as to his title

to the goods, judgment should be entered for execution creditor with costs.

The appeal was argued before a Divisional Court (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.).

W. E. Middleton, for plaintiff.

James McCullough, Stouffville, for defendant.

STREET, J.—I think it is plain that Robert Goodyear, the father of the claimant Samuel Goodyear and of the execution creditor James Goodyear, was indebted to certain other persons at the time he made the chattel mortgage to his son Samuel Goodyear, and that shortly after making it he became indebted to the execution creditor James Goodyear. The mortgage appears to have been made having as one of its objects, if not its sole object, the protection of the chattels against the existing creditors. The consideration stated in the chattel mortgage is $300, and it is sworn by the claimant that his father, the mortgagor, owed him this round sum partly for money lent and partly for wages, but the father, who is living, was not called to substantiate the truth of this story, as he should have been under Merchants Bank v. Clark, 18 Gr. 594.

The chattel mortgage was made on 13th January, 1896, and was renewed in 1897, 1898, and 1899. During these years the mortgagor was living on a place of which he and the mortgagee, his son, were joint lessees, but the son was living on another place. During the year 1899, however, the son moved on to the place, and he and his father lived there together until the expiration of the lease in the year 1901. In the meantime, however, viz., in December, 1899, the son advertised the goods in question for sale under the chattel mortgage, and bought them all in himself, and they were never moved from the place. The father and son, the claimant, then continued to live together upon the place until the father left in February or March, 1901. Before he left, the execution creditor recovered judgment and seized the goods under his execution. The mortgagee claimed them under the mortgage, and the present issue was thereupon directed. The learned County Court Judge upon these facts decided in favour of the execution creditor, stating that he was not satisfied that the mortgage was made bona fide, and that there was no proof of any change of possession of the goods from the mortgagor to the mortgagee, the chattel mortgage having expired before the seizure.

The amount in dispute is only $44, and it is subject to the sheriff's costs and fees.

I am of opinion that the appeal should be dismissed. The claimant has produced no evidence but his own in support of his mortgage, although that of his father was available, and his own account of the matter under the circumstances appears to me unsatisfactory. Apart from this, however, I think it is plain that the claimant's position as a mortgagee was never changed; that his mortgage, not having been renewed in January, 1900, had expired as against creditors before the seizure by the sheriff, and that his title to the goods in question had not been completed as against creditors by any actual and continued change of possession before the seizure, for he and his father still occupied the premises upon which the goods had always remained and upon which they continued to remain until the seizure by the sheriff.

FALCONBRIDGE, C.J.—I concur.

BRITTON, J.—With the greatest respect for the decision of my learned brother Street, whose opinion I have had the privilege of perusing, I regret that I am not able to agree.

I think the judgment of the learned County Court Judge is wrong and should be reversed, and that judgment should be entered for the claimant.

Appeal dismissed with costs; BRITTON, J., diss.

C. R. Fitch, Stouffville, solicitor for plaintiff.

James McCullough, Stouffville, solicitor for defendant.

JUNE 5TH, 1902.

DIVISIONAL COURT.

PATTISON V. TOWNSHIP OF WAINFLEET.

Way—Non-Repair — Municipal Corporation — Negligence — Bridge —"Traction Engine"—R. S. O. ch. 242.

Appeal by defendants from judgment of County Court of Welland, in favour of plaintiff in an action for damages for personal injuries to plaintiff and for injury to an engine attached to a grain threshing machine which plaintiff was driving over a bridge in the township of Wainfleet, when the bridge gave way and the engine was thrown down into the bed of a creek below. The trial Judge found that the bridge was out of repair and unsound, to the knowledge of defendants, for a considerable time before the damage complained of; and that the engine, not being a traction engine within the ordinary meaning of that term, R. S. O. 1897 ch. 242, pleaded by defendants, did not apply, so as to relieve them

from responsibility, and gave judgment for plaintiff for $75 damages and costs.

The appeal was heard by FALCONBRIDGE, C.J., STREET and BRITTON, JJ.

L. C. Raymond, Welland, for defendants.

E. A. Lancaster, St. Catharines, for plaintiff.

STREET, J.—I think the evidence of negligence on the part of the defendants was sufficient to justify the finding of the learned Judge below upon that point, and that the damages found by him are reasonable. The only question is, whether the engine in question was a traction engine within the meaning of R. S. O. ch. 242, in which case it would have been the duty of the plaintiff before crossing the bridge to have strengthened it, under sec. 10 of the Act. This question is one of fact, and I think it has been properly found by the learned Judge in favour of the plaintiff. It appeared from the expert evidence given at the trial, and not contradicted, that the engine was not a traction engine within the ordinary and accepted meaning of the term, although it was constructed so as to be able to move itself and draw its tender containing fuel and water for its own use. It was explained that it was built for the purpose of furnishing power to a thresher or separator, and that the gearing which gave it the power of locomotion was entirely different from and very much lighter than that used in engines built for traction purposes.

There was no evidence that the plaintiff in moving the engine in question along the highway from farm to farm was making an unusual or improper use of the highway.

In my opinion, therefore, the judgment should not be disturbed, and the appeal should be dismissed with costs.

See Toronto Gravel Road Co. v. Township of York, 12 S. C. R. 517.

FALCONBRIDGE, C.J.—I concur.

BRITTON, J.—The questions are questions of fact. I agree with the findings of the learned County Court Judge.

The duty of the municipality was to have this bridge strong enough for the ordinary traffic of the highway.

In a good agricultural township like Wainfleet, with farms well cultivated, the bridge should be sufficiently safe to permit of large loads of grain and farm produce and farm machinery being taken over it without risk. It was well known to the defendants how grain is separated and cleaned up, and it seems to me to make no difference whether by horse power or steam power, and, if by steam, whether the boiler and engine are taken upon a waggon and drawn by horses or

propelled along the road by its own steam power—the bridge in either case should be sufficient to safely carry an ordinary and reasonable load. I think the Legislature, in ch. 242, R. S. O., intended by "traction engine," something very different in weight from the one owned by plaintiff.

The traction engine in that Act is an engine entirely different in construction and for a wholly different purpose from plaintiff's.

The whole Act is to protect the public and public highways where traction engines are to be employed "for the conveyance of freight and passengers, or both, on any public highway in this Province," and it does not apply to this case.

Appeal dismissed with costs.

Lancaster & Campbell, St. Catharines, solicitors for plaintiff.

Raymond & Cohoe, Welland, solicitors for defendants.

JUNE 2ND, 1902.

DIVISIONAL COURT.

TAYLOR V. DELANEY.

Will—Testamentary Capacity—Unsustained Charges of Fraud—Costs.

Appeal by defendant from judgment of Surrogate Court of Essex, admitting to probate the will of R. Taylor, deceased, on the ground that he was of unsound mind, and incapable of making a will.

The appeal was heard before a Divisional Court, STREET, J., BRITTON, J.

F. A. Anglin, for defendant.

A. H. Clarke, Windsor, for plaintiff.

STREET, J. (after reviewing the evidence)—In my opinion, the judgment appealed from is right and should not be disturbed, and the present appeal must be dismissed with costs. I observe that the learned Judge gave no costs against Delaney at the trial. No reasons are given for this, or any other part of the judgment, and I cannot avoid calling attention to the rule which has been repeatedly laid down and followed, that in testamentary cases, where charges of fraud are made, as here, without any evidence being offered to support them, costs should be given against the person making them.

BRITTON, J.—It is the duty of an appellate Court, as was decided in Russell v. Lefrancois, 8 S. C. R. 335, "to review the conclusion arrived at by Courts whose judgments are

appealed from, upon a question of fact, when such judgments do not turn upon the credibility of any of the witnesses, but upon the proper inference to be drawn from all the evidence in the case."

The proper inference to be drawn from the whole evidence in this case is, that the testatrix, at the time she made the will in question, had capacity to comprehend the extent of her property and the nature and claims of the plaintiff whom she was excluding from this, although he had been a beneficiary under a former will. See Harwood v. Baker, 3 Moore P. C. 290.

I am satisfied that Rose Taylor had testamentary capacity, and I so conclude by a consideration of what she said and did shortly before and at the time of, and shortly after, making her will, as against what medical experts thought her condition ought to have been.

The point as to undue influence was not pressed—the argument was wholly upon the question of testamentary capacity.

Clarke, Cowan, Bartlet, & Bartlet, Windsor, solicitors for plaintiff.

Murphy, Sale, & O'Connor, Windsor, solicitors for defendant.

BRITTON, J. JUNE 5TH, 1902.

TRIAL.

SLAVEN v. SLAVEN.

Costs—Will—Action to Set aside—Separate Defence.

The plaintiff is a son of Eliza Slaven, who died on the 14th September, 1900, and this action was brought to set aside her will on the ground of undue influence and want of testamentary capacity.

G. F. Shepley, K.C., and C. H. Widdifield, Picton, for plaintiff.

G. Lynch-Staunton, K.C., R. D. Gunn, Orillia, M. R. Allison, Picton, J. R. Brown, Picton, D. L. McCarthy, and John A. Wright, Picton, for defendants.

BRITTON, J.—The parties came to an agreement, and consent minutes were filed, upon all points except as to costs of defendant Milo Slaven. He resisted plaintiff's contention, put in a separate defence by his own solicitor, and did not join in the settlement, but consented to it, claiming however to be entitled to costs.

Milo was a necessary party to the action, and plaintiff assumed the risk of liability for costs in case of failure. I think Milo is entitled to costs, and that plaintiff should pay them. As between plaintiff and defendants other than

Milo Slaven, provision for Milo's costs should have been made, and perhaps was made, and if so my decision will in no way affect any agreement made between plaintiff and defendants other than Milo.

From all that appears before me I can not say that the interests of Milo Slaven were so identical with those of the other defendants, that he should not have been separately represented. Had the case been fought to a finish and had defendants been successful, possibly one set of costs only would have been allowed. I can not say. This is, however, a case in which I should not send parties to a taxation, but should determine the amount of Milo's costs. He did not personally attend the trial, and there are no witness fees payable by him, so I fix the amount at $40.

LOUNT, J. JUNE 6TH, 1902.

TRIAL.

SKILLINGS v. ROYAL INSURANCE CO.

Fire Insurance—Notice to Company Terminating Policy— Given by Registered Letter Wrongly Addressed, Received Day After Fire—Ontario Insurance Act, Statutory Conditions 19a, 23.

Action by a firm of lumber merchants in Ogdensburg, New York, to recover amount of loss by fire under a policy issued by defendants and covering certain lumber at Parry Sound, Ontario. By agreement between the parties the following question, among others, was submitted for the opinion of the Court: "Was the policy in question cancelled or surrendered ?"

W. R. Riddell, K.C., and A. Fasken, for plaintiffs.

C. Robinson, K.C., and C. S. MacInnes, for defendants.

LOUNT, J.—On the 30th May, 1901, the plaintiffs wrote from Ogdensburg to Mr. Lett, the defendants' agent at Barrie, as follows:

"Enclosed please find Royal policy 7535269 lumber located at Conger Lumber Company's yard at Parry Sound, Ont., expiring January 21st, 1902, which we wish to cancel as of June 5th. We make return premium as $74.25. If correct kindly send us check for same and oblige." The policy was enclosed with this letter in an envelope, which, by mistake of the plaintiffs' stenographer, was not correctly addressed, the address being "Mr. F. A. Lett, Agent, Parry Sound, Ont.," when it should have been "Barrie," instead of Parry Sound. The policy had indorsed on it at the time, partly printed and partly written, the following: "Surrender. Received from the Royal Insurance Company the sum of $74.25, being the consideration for the within policy,

which is hereby cancelled and surrendered." This was signed by the plaintiffs.

The post stamp on the envelope shews that it was received at the post office "Ogdensburg" on the 30th May, 1901, at the post office "Parry Sound" on the 31st May, 1901, and at the post office "Barrie" on the 6th June. It is admitted by the defendants that the envelope, with its contents, the letter and policy, were not received at Barrie by Mr. Lett until half-past eleven on the forenoon of the 6th June, and that it had been forwarded by the post master at Parry Sound by post to Mr. Lett at Barrie. The fire had taken place before the arrival of the letter at Barrie; it began about 11 p.m. on the night of the 5th June, and terminated by 5 a.m. on the 6th June. On the morning of the 6th June, and before the letter had been received by Mr. Lett, Mr. Bartlett, the agent at Orillia for the plaintiffs, telephoned Mr. Lett, informing him of the fire, and Mr. Lett, immediately after, and before the receipt of the letter, replied by letter, asking for information; and about the same time he telegraphed to the defendants at their head office, Montreal, informing them of the fire.

* * * * * * * * * *

Condition 19a of the Ontario statutory conditions provides: "The insurance, if for cash, may be terminated by the assured by giving written notice to that effect to the company or its authorized agent, in which case the company may retain the customary short rate for the time the insurance has been in force, and shall repay to the assured the balance of the premium paid."

Condition 23: "Any written notice to a company for any purpose of the statutory conditions, when the mode thereof is not expressly provided, may be by letter delivered at the head office of the company in Ontario, or by registered post letter addressed to the company, its manager or agent at such head office, or by such written notice given in any other manner to an authorized agent of the company."

May, on Insurance, 4th ed., vol. 1, sec. 67, says: "The right of cancellation on notice reserved by the terms of the policy to either party should be exercised with care that the notice be explicit and the conditions strictly complied with." And to the same effect, Joyce on Insurance, vol. 2, sec. 1,660: "The right to rescind or cancel can only be exercised by either party acting strictly in compliance with the exact stipulations of the policy relating thereto," citing with approval many American authorities, where the law in this respect is in the different States, and especially in the

State of New York, similar to condition 19a. See also judgment of MacMahon, J., in Bank of Commerce v. British America Assurance Co., 19 O. R. 241, approving of Runkle v. Citizens' Ins. Co., 6 Fed. Rep. 148: "The right, however, to terminate a contract of insurance which has been partly entered into and has taken effect by this method is a right which can only be exercised by either party by a strict compliance with the terms of the policy relating to cancellation." The learned Judge also refers to May on Insurance, Chase v. Phoenix Mutual Life Ins. Co., 67 Me. 85, and Hathorn v. Germania Ins. Co., 55 Barb. (N.Y.) 28, as to the strictness required in complying with the conditions cancelling a policy of insurance.

Condition 19a does not provide how the notice shall or may be given. Condition 23, however, says "any written notice to a company for any purpose of the statutory conditions, when the mode thereof is not expressly provided, may be by letter delivered at the head office of the company in Ontario, or by registered post letter, addressed to the company, its manager or agent, at such head office, or by such written notice given in any other manner to an authorized agent of the company."

No written notice was delivered at the defendants' head office in Ontario; in fact, it was not shewn that the defendants had a head office in Ontario; the only head office spoken of was at Montreal, and no written notice was delivered there. Nor was any registered post letter, or letter or notice of any kind, addressed or sent by the plaintiffs to the defendants, their manager or agent, at any head office.

Then, was a written notice given in any other manner to an authorized agent of the defendants? Was the letter of the 30th May with the policy, having the surrender thereof indorsed thereon, a sufficient notice to satisfy condition 19a, and was the receipt thereof by Mr. Lett, the authorized agent of the defendants, on the 6th June, after the fire had occurred and the property had been destroyed, a notice to the defendants in compliance with condition 23?

In my opinion, it was not. Upon the authorities, I must hold that a letter sent by post giving such notice is not notice by depositing the letter in the post office; it can only become so when received from the post office by the party to whom it is addressed.

The post office had not been made the agent of the defendants to receive such notice. The law is well settled that if an offer made by mail is accepted by mail the contract is complete from the moment the letter of acceptance is mailed, even if it is never received; but this does not apply here, because no negotiation was pending, no contract had been proposed in writing; the plaintiffs had not made

any offer in writing to the defendants that might or might not have been accepted. The plaintiffs sought to do an act that would be binding on the defendants, whether they were willing or not. The policy and letter might have been sent by a messenger, who would have been the agent of the plaintiffs for the purpose. Having been sent by mail, it was none the less the agency of the plaintiffs than if a messenger had been sent. But it was necessary for the plaintiffs, in order to terminate the policy, to have the notice actually reach the defendants or their authorized agent, and the instrument selected for that purpose was the agent of the plaintiffs, not of the defendants; nor can the fact that the plaintiffs signed the form of surrender on the policy make any difference. It was not intended to operate and could not operate until received, and the defendants had complied with the terms of condition 19a, that is, paid to the plaintiffs the balance of the premium which the plaintiffs had paid to the defendants. Nor could it operate against the plaintiffs until delivery had taken place. The policy all the time until actually received by the defendants or their authorized agent being in the possession of the plaintiffs, during which time the property had been destroyed, the policy was, therefore, in force when the loss occurred; the character of the contract was changed from a contingent to a certain liability, and a cause of action based on an absolute debt forthwith accrued to the plaintiffs: C. P. L. Co. v. Aetna Ins. Co., 27 N. Y. 608; May on Insurance, 4th ed., vol. 1, sec. 67, as to cancellation of policy: "Notice of cancellation, if given by mail, must be received before loss by the party entitled thereto, or by his agent authorized to receive the same, otherwise there is no cancellation;" Joyce on Insurance, vol. 2, sec. 1,669.

I have not lost sight of the fact that it was by the mistake of the plaintiffs in not addressing the letter of the 30th May to Mr. Lett at Barrie, that it was not received by him before the fire, but I do not see how this can in any way affect the question.

Having regard, therefore, to the agreement between the parties, I give judgment in favour of the plaintiffs for the amount claimed by them with interest from the 5th June, 1901, and with costs.

Beatty, Blackstock, & Co., Toronto, solicitors for plaintiffs.

McCarthy, Osler, Hoskin, & Creelman, Toronto, solicitors for defendants.