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APPELLATE DIVISION.

FIRST DIVISIONAL COURT. JULY 19TH, 1920.

*RE CONSOLIDATED TELEPHONE CO. AND TOWNSHIPS OF CALEDON AND ERIN.

Telephone Company—Sale of Parts of System and Plant to Township Corporations—Approval of Ontario Railway and Municipal Board—Necessity for—Application by Company Refused—Appeal by Leave—Ontario Telephone Act, 1918, 8 Geo. V. ch. 31, secs. 24, 25, 87, 106—Ontario Railway and Municipal Board Act, R.S.O. 1914 ch. 186, secs. 9, 47, 48—Inclusion of Franchise in Sale of System—Board not Acting Judicially but as Delegate of Legislature—Discretion—Review—Parties to Application Heard by Chairman only by Authority of Board—Report of Chairman to Board—Adoption by Board without Hearing Parties again.

An appeal (upon leave granted) by the Consolidated Telephone Company from the refusal of the Ontario Railway and Municipal Board to give its approval to by-law No. 17 of 1919 of the Council of the Corporation of the Township of Erin, passed on the 15th December, 1919, and by-law No. 772 of the Council of the Corporation of Caledon, passed on the 15th December, 1919.

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

F. W. Wegenast, for the appellant company.

K. B. Maclaren, for the township corporations, respondents.

MEREDITH, C.J.O., in a written judgment, said that the Erin by-law provided for the purchase by the township corporation of the telephone plant owned and operated by the company

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

and located within the limits of the townships of Erin, East Garafraxa, Eramosa, and the village of Erin, for $34,064.47.

The Caledon by-law recited that the Caledon township council on the 1st August, 1919, by by-law No. 770, provided for the establishment of a telephone system; that the council on the 14th November, 1919, by resolution, accepted the offer of the Consolidated Telephone Company for the sale of that part of its system in the townships of Caledon, Albion, and Mono for $39,355.08; and that a bill of sale thereof had been prepared. After these recitals, the by-law enacted that the terms and conditions of the bill of sale "are hereby approved and confirmed," and authorised the due execution of the bill of sale by the township authorities on behalf of the corporation and the carrying out of the terms of the bill of sale, including payment of the price. The bill of sale comprised the "plant, equipment, and system" of the company.

A bill of sale, similar in form to that made to the Caledon Corporation was made to the Erin Corporation on the 15th December, 1919.

No formal agreement was entered into in either case.

The grounds urged upon the argument of the appeal were: (1) that the appellant company should have been afforded an opportunity of being heard before the Board dealt with the report of its Chairman; (2) that the refusal of the Board to give its approval was wrong, and this was a question of law as to which there was a right to appeal to this Court.

The Ontario Telephone Act, 1918, 8 Geo. V. ch. 31, contains no express provision as to appeal, but sec. 106 makes applicable the provisions of the Ontario Railway and Municipal Board Act as to the jurisdiction, powers, and practice and procedure of the Board; and sec. 48 of the latter Act, R.S.C. 1914 ch. 186, provides that an appeal to a Divisional Court, by leave, upon a question of jurisdiction or upon any question of law, shall lie.

The section of the Telephone Act applicable is sec. 24, authorising the purchase by a municipality of an existing system; sec. 25 does not apply.

Section 87 requires the approval of the Board to the sale or transfer by a company of its system; and that approval had not been obtained. Before any agreement of sale or purchase could become operative, the approval of the Board was essential.

In exercising the power conferred by secs. 24 and 87, the Board does not act judicially, but as the delegate of the Legislature. A purchase of the company's system or part of it would have the effect of transferring the franchise, and without legis-

lative authority that could not be done. It could not have been intended, as was argued, that the Board should be powerless to do more than approve of an agreement or determine only whether the agreement was a fair one to the parties affected by it.

Regina v. Newcastle-on-Tyne Corporation (1889), 60 L.T.R. 963, distinguished.

Rex v. Inspector of Leman Street Police Station (1920), 36 Times L.R. 677, followed.

The discretion of the Board is absolute, subject only to review by the Lieutenant-Governor in Council under sec. 47 of the Ontario Railway and Municipal Board Act.

Under the provisions of sec. 9 of the Ontario Railway and Municipal Board Act, the Board authorised its Chairman to report to the Board upon the applications for approval of the by-laws. The Chairman held an inquiry, which the parties attended and at which they were heard and evidence taken, and he reported to the Board what had been done and the conclusion to which he had come. The Board, after the reading of the report and some explanations by the Chairman, came to the conclusion that approval should be withheld. It did not appear that any application to be heard before the Board was made by the appellant company, nor any application under sec. 25 of the Act to vary the decision.

Section 9 provides that the report made to the Board "may be adopted as the order of the Board or otherwise dealt with as to the Board seems proper." This language is wide enough to warrant the Board, where evidence has been taken and the parties concerned have been fully heard, in acting upon the report without bringing the parties before it again.

The appellant company's two objections should be overruled, and the appeal dismissed with costs.

MACLAREN, J.A., for reasons stated in writing, agreed that the appeal should be dismissed.

MAGEE, J.A., in a written judgment, said that he was of opinion that, in the circumstances, the discretion exercised by the Board in withholding approval of the sale should not be interfered with by this Court; but he was not without doubt as to the propriety of the Board, without hearing the parties, adopting the conclusion of the Chairman.

FERGUSON, J.A., read a dissenting judgment. He was of opinion that the Board, in considering and acting on evidence not disclosed and refusing to hear and consider the appellant

company's relevant evidence and argument, acted erroneously and on a mistaken assumption of jurisdiction, and by thus acting on a wrong construction of the Act had not exercised the real discretion given to the Board by the Act.

Appeal dismissed (FERGUSON, J.A., *dissenting*).

HIGH COURT DIVISION.

KELLY, J. JULY 15TH, 1920.

BUTLER v. HAMILTON LUMBER AND COAL CO. LIMITED.

Company—Action against Company and Directors to Recover Sums Paid by Shareholders for their Shares—Prospectus—Misrepresentations—Failure to Prove—Company Ordered to be Wound up—Liquidator Joined as Defendant without Authority from Court—Striking out Name of Liquidator—Dismissal of Action—Costs.

Action by 18 shareholders of the defendant company against the company, its liquidator, and Brennen and Taylor, directors of the company, to recover the amounts paid by the plaintiffs for their shares, on the ground that they were induced to purchase by misrepresentations made in the prospectus and by the defendants Brennen and Taylor or their agents.

The action was tried without a jury at Hamilton.
P. R. Morris, for the plaintiffs.
Peter White, K.C., for the defendants Brennen and Taylor.
C. V. Langs, for the liquidator of the defendant company.

KELLY, J., in a written judgment, said that the defendant company had gone into liquidation and a permanent liquidator had been appointed on the 20th December, 1919. No order had been issued authorising the continuance of the action against the liquidator, and, at the trial, his name had been struck from the record as a defendant, with costs (fixed at $20) to be paid to him by the plaintiffs.

The defendant company was incorporated on the 2nd December, 1916. On the 12th February, 1917, the company issued a prospectus, signed by Brennen and Taylor and others, all named

as proposed directors; and it was admitted that the plaintiffs received copies of this prospectus. The plaintiffs had subscribed for an aggregate of 24 shares.

The main purpose of a prospectus is to afford to intending subscribers and others such complete and reliable information as will properly inform them of the character, standing, and prospects of the concern in which they contemplate embarking. It should not be misleading either in its statement of the facts or in withholding material facts. The statute imposes liability upon directors or proposed directors who, in the promotion of a company, issue a prospectus not complying with its provisions in that respect.

The statement which appeared on the title-page of the prospectus of the defendant company that there was a branch office at 265 King street east in the city of Hamilton—where the head office also was—was not, in the circumstances, of such materiality as to afford a ground for objection by the plaintiffs. Several of the plaintiffs went to this "branch" office and there procured copies of the prospectus.

The statement that a certain lumber and coal company (part of whose assets was purchased by the defendant company) had been successful in its operation, and that its net profits for nine years averaged more than 20 per cent. per annum, was borne out by the evidence. The evidence also shewed that, while that company was owned and operated by the M. Brennen Manufacturing Company of Hamilton Limited, its operations were carried on as a separate and distinct business.

A by-law of the defendant company providing for a reduction in the price of coal sold to preferred shareholders was produced and put in as evidence at the trial.

The allegation that certain shares of the stock of the defendant company were issued for the discharge of liabilities, and not for the purchase of assets, was not correct.

The question whether the company whose assets were bought by the defendant company had any connection with the Brennen company was, in the circumstances, immaterial.

There was nothing in the prospectus suggestive of misrepresentation that the defendant company was entitled to get anything beyond what a certain agreement of the 24th January, 1917, provided for; and there was no evidence that the defendant company did not receive, free from liabilities of the selling company, the assets which that company had agreed to sell.

On the evidence, the prospectus substantially complied with the requirements of the Companies Act.

If, as appeared now to be the case, the plaintiffs should lose the amounts of their subscriptions, the loss was not attributable

to what happened prior to their purchase; and nothing which happened since was in issue in this action.

The action should be dismissed; but it was clearly not a case in which the defendants were entitled to costs: there should be no costs except those directed to be paid by the plaintiffs to the liquidator.

SUTHERLAND, J. JULY 15TH, 1920.

RE BRENNER.

Will—Construction—Absolute Gift of whole Estate to Widow—Subsequent Direction to Executors as to Division among Children—Effect—Absolute Gift not Cut down—Remainder—Trust—Right of Widow to Dispose of whole Estate by Will.

Motion by Matilda Arnold and Louisa Logel, daughters of John Brenner, deceased, for an order determining two questions as to the construction of the will of the deceased.

The motion was heard in the Weekly Court, Toronto.

D. Inglis Grant, for the applicants.

F. W. Harcourt, K.C., Official Guardian, for the infant grandchildren of the testator.

J. E. Jones, for the surviving executors.

SUTHERLAND, J., in a written judgment, said that the testator died on the 30th March, 1914, leaving him surviving his widow, the two daughters who were the applicants; another daughter, Julia Gies, who died on the 26th September, 1914, intestate and leaving her surviving her husband, Conrad Gies, and one son, Frank Gies, now 19 years of age; and the children of the testator's daughter Theresa Arnold, who predeceased the testator, leaving her surviving her husband and three infant children.

The testator devised and bequeathed "everything I possess at the time of my death to my wife . . . and I empower her to sell or dispose of all or any of the . . . real or personal estate at any time after my death, except the following provisoes: My executors shall pay, as soon as conveniently they can after my decease, the sum of $500 to John K. Brenner . . . In like manner they shall pay the sum of $200 to the parish priest . . . It is my wish that after the death of my wife or any time before my executors divide, when making any divisions among my children, such divisions shall be equal among all my

children, excepting the share to my deceased daughter Theresa—her share shall be paid to her children at the ages of 21 years. Before making the aforesaid divisions my executors shall deduct . . . $1,000 from my daughter Louisa, . . . $400 from my daughter Julia, and . . . $180 from my daughter Theresa. My executors shall invest, if possible, the share going to the children of my deceased daughter Theresa . . . and keep so invested until they reach the ages of 21 years with interest in favour of said children. All the residue of my estate not hereinbefore disposed of, I give . . . unto my said wife."

The widow of the testator died on the 4th October, 1919, leaving a will whereby she devised and bequeathed all her real and personal estate to her executrices upon trust to convert into money and to pay two small legacies and divide the balance between her daughters Matilda Arnold and Louisa Logel.

The questions submitted were: (1) What estate did the widow take under the will of her husband? (2) Is a trust created by the will of John Brenner for his children and grandchildren?

In the learned Judge's opinion, there was an absolute gift to the widow of the real and personal estate of the testator, and nothing was found in the will to cut this down to a life-estate. The authorities require that, unless the intention to cut down the absolute estate is apparent on the face of the will, it remains. Even if the will could be construed as a gift of the residue remaining at the death of the wife to the children, that would not deprive the widow of the absolute estate: Re Miller (1914), 6 O.W.N. 665; Constable v. Bull (1849), 3 DeG. & Sm. 411; In re Walker, [1898] 1 I.R. 5.

Order declaring that the widow took an absolute estate and that no trust in favour of the children and grandchildren was created; costs of all parties out of the estate.

SUTHERLAND, J. JULY 15TH, 1920.

RE SMITH.

Will—Construction—Division of Estate among Children—Provision for Case of Child Dying without Issue—"My other Children"—Ascertainment of Class as at Death of Testator.

Motion by the National Trust Company Limited, trustees of the estate of John Smith, deceased, for an order determining two questions as to the proper construction of the will of the testator.

The motion was heard in the Weekly Court, Toronto.

G. Keogh, for the applicants.

M. H. Ludwig, K.C., for the children of Sarah Murdoch, Anne Boeckh, and Charles Smith, deceased children of the testator.

D. O. Cameron, for Neil J. Smith and others, living children of the testator.

F. W. Harcourt, K.C., for the infants.

SUTHERLAND, J., in a written judgment, said that the questions stated for the opinion of the Court were: (1) What persons, in the events that had happened, were entitled under the will to share in the capital sum of which the testator's daughter Mary Forster received the income during her lifetime? (2) Do the children of the sisters and brother of Mary Forster who predeceased her share in the said capital or the income thereof?

The testator had six daughters and four sons, all of whom survived him. Mary Forster died on the 19th June, 1919, intestate and without issue; two of her sisters and two of her brothers predeceased her, three of them leaving issue; three sisters and two brothers survived her.

There was no appointment of any child by deed or will prior to his or her decease.

The will was a long one. The provision which gave rise to the questions stated was one giving a power of appointment to each child of the testator over his or her share, and in default of appointment to the issue of any child who died without exercising the power, and if no issue then "in trust for my other children in equal shares."

The precise point was, whether the words "my other children" meant children living at the death of the testator or at the date of the death of the children of the testator thereafter, and thus, in so far as the present motion was concerned, at the death of Mary Forster.

The learned Judge was of opinion that the words "my other children" applied to all the children living at the death of the testator. He had shewn in other clauses of the will that his intention was that only children who were living at a certain time should benefit in remainder; but his intention in the clause under discussion appeared to be to include under the words "other children" any one who might die after him. The class was to be ascertained at the death of the testator, and not at the death of the life-tenant or even of any one child. If the words had been "my next of kin," instead of "my other children," the next of kin would, according to the cases, have to be ascertained as at the death of the testator, and the words "my other children" must be

construed in the same way: Theobald on Wills, Can. ed., p. 595; Re Oliver (1915), 9 O.W.N. 190, 191.

Therefore, the children of any of the testator's children who predeceased Mary Forster were entitled to a part of the estate to which their parent would have been entitled if he or she had survived.

Order declaring accordingly; costs of all parties out of the estate.

ORDE, J. JULY 15TH, 1920.

RE SECOND CHURCH OF CHRIST SCIENTIST AND DODS.

Covenant—Conveyance of Land—Building Restrictions—Grantee Confined to Building Private Dwelling House—Proposed Erection of Church-building—Breach of Covenant—Restraint by Injunction—Requirement that Building be Commenced within one Year—Neglect to Enforce—Waiver or Estoppel—Right of "Physician" to Exercise Profession in Private Dwelling House—Church-corporation Doing Work of "Healing."

Application by the church (a corporate body), under Rule 604, for an order determining questions as to the interpretation of two deeds made by Andrew Dods conveying lands now owned by the applicant.

The application was heard in the Weekly Court, Toronto.

G. H. Shaver, for the applicant.

P. E. F. Smily, for Andrew Dods and others, respondents.

ORDE, J., in a written judgment, said that, before 1910, Dods subdivided a block of land in the city of Toronto into 29 building lots, and registered plan 1267 shewing the subdivision. With the exception of certain lots, which he still retained, Dods had sold all the lots shewn upon the plan, and each conveyance contained the following provision, after the habendum, "and subject also to the conditions and restrictions contained in" a schedule attached. This schedule was in part as follows: "To the intent that the burden of the reservations and restrictions shall run with the land, the purchaser, for himself, his heirs, executors, administrators, and assigns, covenants with the vendor to observe and comply with the following, namely: (1) No building or erection shall be placed upon the land except a detached private dwelling house fronting on High Park Gardens, and costing at least $5,000,

exclusive of land occupied thereby, and excepting suitable outbuildings or stables in the rear thereof. . . . (4) No trade or calling shall be carried on upon the said property except that of physician. . . . (6) The purchaser will commence within one year from this date and complete within reasonable time thereafter a dwelling house upon the said lands conforming with the above restrictions. . . ."

There was no covenant by Dods, as grantor, that he would be bound by any similar restrictions, or would exact similar restrictions or covenants from later purchasers of any of the remaining lots; and, although the *burden* of the restrictions and covenants was in each case to run with the particular lot conveyed, there was nothing in any of the deeds to shew that the *benefit* of the restrictions and covenants was to run with any land whatever.

On the 22nd January, 1910, Dods conveyed lot 13 on plan 1267 to Frances A. Rudd, and on the 1st August, 1912, lot 12 to George A. Rudd, each conveyance containing the words and the schedule above mentioned. These two lots had since been conveyed to the applicant corporation, which thereupon set about the erection of a church-building thereon. To this Dods and several other owners of lots on plan 1267 took objection, alleging a breach of the restrictions and covenants contained in the conveyances of lots 12 and 13—and contending that a church-building is not a private dwelling house (restriction 1).

Whether or not the method adopted by Dods made this a building scheme with reciprocal covenants and restrictions applicable, both as to benefit and burden, to every lot, and running with the land, it was not necessary to decide on this application. The absence of a reciprocal covenant on the part of the grantor may be a serious obstacle in the way of other purchasers: Page v. Campbell (1920), ante 333.

But Dods, the original grantor, was a party to this application, and, as the owner of some of the lots shewn upon the plan, was entitled to enforce the restrictions and covenants contained in the Rudd deeds.

It was not suggested that a church-building could be considered a private dwelling house within the meaning of restriction 1; but it was contended, for the applicant-corporation, that the grantor had waived that restriction by his failure to enforce the covenant contained in restriction 6. The failure to commence to build a dwelling house within one year was undoubtedly a breach of restriction 6; but no principle of law entitles a covenantor to escape from one covenant by breaking another. Standing by and allowing a purchaser to erect a building which did not comply with restriction 1 might constitute a waiver or estoppel; but the grantor might, if he wished, expressly waive No. 6 without waiving

No. 1. A tacit waiver could hardly go farther than an express one—and the grantor may yet take steps to enforce No. 6.

The work of the applicant-corporation having to do with healing, it was argued that in the building to be erected it would be carrying on the trade or calling of a physician within the meaning of restriction 4. If that were so, however, the church-building would not be a private dwelling house; and it was obvious that by "physician" was meant a duly qualified physician under the laws of the Province.

The restrictive covenants in the two Rudd deeds were enforceable by Dods against the applicant-corporation, and the erection of a church-building by the corporation would be a breach of those covenants which Dods could enforce by injunction.

Order declaring accordingly; the respondents' costs of the application to be paid by the applicant.

KELLY, J. JULY 17TH, 1920.

RUDD v. TOWN OF ARNPRIOR.

Municipal Corporations—Negligence—Sewage and Drainage System—Throwing Water on Lands of Plaintiff—Street-crossings Preventing Surface-water Flowing into River—Catch-basins Allowed to Become Choked—Right of Action—Remedy by Arbitration to Fix Compensation—Time-limit for Bringing Action—Municipal Act, secs. 331, 460—Limitations Act—Damages—Evidence—Quantum—Reference—Costs.

Action against the town corporation for damages and an injunction in respect of injury to the plaintiff's land and buildings in the town by water caused to flow thereon by reason of the negligence of the defendants, as the plaintiff alleged.

The action was tried without a jury at Ottawa.

J. A. Hutcheson, K.C., and R. J. Slattery, for the plaintiff.

A. E. Fripp, K.C., and J. E. Thompson, for the defendants.

KELLY, J., in a written judgment, said that the plaintiff's land and buildings were on the east side of John street; that street in early days was crossed by a gully extending through the plaintiff's property to the Madawaska river. In its natural state, considerable water flowed through the gully and discharged into the river. Then this flow was interfered with by the gradual filling-in of the gully with earth and refuse. A pavement and

sidewalks were put down on John street and a sewage-system was installed. The grade of the street in front of the plaintiff's property was raised many feet, and the pavement and sidewalks were placed upon the new level. Ever since these improvements, there had been a pronounced down-grade from north to south on this street, ending at the line of the gully. For many years the process of filling-in the gully immediately to the west of John street had gone on, partly by the defendants and partly by the inhabitants of the town. A wooden box-drain had been carried, in the line of the gully, across and beneath the surface of John street and under the plaintiff's buildings, discharging on the plaintiff's premises some distance to the east of his buildings. The grade of the streets intersecting John street north of the plaintiff's property was from John street towards the river. In constructing a concrete sidewalk on the east side of John street, the defendants made crossings at the street intersections, the surface of both the crossings and the sidewalks being higher than the surface of the middle pavement. When installing the system of sewage, the defendants constructed, on the east side of John street pavement and beside the sidewalk, catch-basins, connected by pipes with the sewer beneath the street, for the purpose of intercepting and carrying off surface-water. For several years much surface-water had flowed southerly on John street to the front of the plaintiff's premises, and thence over the sidewalk on to a planking between the sidewalk and the plaintiff's buildings and into his premises. The plaintiff alleged that this water had carried away a large quantity of soil from his land and had so undermined the foundations of his buildings as to make them unfit for the purposes of his business and too dangerous to inhabit, and that for practical purposes the buildings were destroyed; and he alleged that this condition was due to the negligence of the defendants in the construction of the roadway, kerbs and sidewalks, and in intercepting the natural flow of the water and bringing it down in large volumes and discharging it in front of his property, without making proper provision for its discharge otherwise than through his property, and in changing the natural course of the water, and in the faulty construction of the catch-basins, permitting them to become obstructed and choked up with refuse.

After reviewing the evidence, the learned Judge found against the defendants the facts as to the cause of the water flowing down John street to and upon the plaintiff's property, and that this condition was due to negligence and breach of duty by the defendants in not properly caring for and maintaining the catch-basins, in consequence of which the surface-water reached and flowed into the plaintiff's premises, and also in so constructing and maintaining the crossings at the intersecting streets as to prevent

the flow of water accumulating on John street on to and along these streets towards the river. The learned Judge also found that the plaintiff had suffered substantial damages as the result of the defendants' negligence—damage which would have been much reduced had they responded promptly and reasonably to the plaintiff's earlier complaints.

A proprietor higher up cannot collect and concentrate surface-waters and pour them in unusual quantities upon the lands of an adjacent proprietor: Ostrom v. Sills (1897-8), 24 A.R. 526, 539, 28 Can. S.C.R. 485.

Increasing the velocity or quantity of surface-water makes a municipal corporation liable: Malott v. Township of Mersea (1885), 9 O.R. 611.

While a municipality may improve and must repair the highways, it may not in any manner collect vagrant waters and discharge them on the lands of others: Simm v. City of Hamilton (1919), 16 O.W.N. 1.

Having wrongfully collected the water, the defendants were under obligation to keep it in control and not allow it to flow upon the plaintiff's lands.

This was not a case where what happened was done without negligence or lawfully under the authority of a statute, and the plaintiff was entitled to proceed by action and was not confined to compensation under the arbitration clauses of the Municipal Act: Meredith and Wilkinson's Canadian Municipal Manual, pp. 22, 23; Malott v. Township of Mersea, supra.

Sections 331 and 460 of the Municipal Act, pleaded by the defendants, had no application to limit the time for commencing the action; nor was the plaintiff's claim barred by the Limitations Act.

It was not possible, upon the evidence given at the trial, to determine the quantum of damages.

There should be a judgment for the plaintiff for an injunction and damages, to be ascertained by the Local Master at Ottawa; the plaintiff's costs to and including the trial to be paid by the defendants; further directions and costs of the reference reserved until after the Master's report.

LENNOX, J., IN CHAMBERS. JULY 20TH, 1920.

RE TORONTO HUMANE SOCIETY.

Sale of Land—Mortmain and Charitable Uses Act, R.S.O. 1914 ch. 103, secs. 2 (2) (d), 7, 10—Land Conveyed to Humane Society by Deed of Gift—Time for Selling Fixed by Act—Extension of Time—Sale with "all Reasonable Speed"—Land Vested in Accountant of Supreme Court of Ontario—Notice to Accountant—Order for Immediate Sale—Execution of Conveyance.

Motion by the society, under sec. 7 of the Mortmain and Charitable Uses Act, R.S.O. 1914 ch. 103, for an order extending the time for selling lot 327 Albany avenue, in the city of Toronto.

Fletcher Kerr, for the society.

LENNOX, J., in a written judgment, said that the property was conveyed to the society, by a quit-claim deed of gift, on the 2nd March, 1917, and had not been sold within the two years limited by sec. 7 (1) of the Act. Why it was not sold within two years was not made to appear, and, in the circumstances, it was not necessary to inquire. The object or purpose of the grant was not therein stated, but the society was incorporated for purposes "beneficial to the community," as defined by clause (*d*) of sub-sec. (2) of sec. 2 of the Act, and the object of the grantor and the purpose for which the property was held, namely, charitable uses, were therefore to be inferred.

The learned Judge was asked to extend the time for selling or disposing of the property, under sec. 7, until the 1st November next. The proceedings were not technically correct; but, by the combined effect of secs. 7 and 10 of the Act, the learned Judge had power, and it was his duty, upon a proper application, to "cause the land to be sold . . . with all reasonable speed." Sub-section (2) of sec. 7 enacts that: "If the land is not sold within the two years, or within such extended period" (that, is by an order of extension *made within the two years*), "it shall vest forthwith in the Accountant of the Supreme Court, and sub-section 2 of section 10 shall apply thereto." The provisions of this latter sub-section have not for their object an extension of time, but an order or direction to expedite the sale and disposal of the trust property "by the administering trustees thereof for the time being," if acting properly and willing to act; with directions as to the persons to whom the purchase-money is to be paid.

The time asked for carrying out the sale is reasonable. The property is, however, now vested in the Accountant; and, as a consequence, when the sale is made, he will, in his official capacity, have to be a party to and execute the deed. No reference to the subject is to be found in Mr. Holmested's Judicature Act. It would seem proper, although it may not be imperative, that notice of the application should be given to the Accountant or the Chief Justice of Ontario, where the property has vested by lapse of time as here.

There should be an order that the Toronto Humane Society or its adminstering trustees proceed to sell and dispose of the property "with all reasonable speed," and, if possible, complete such sale and disposal on or before the 1st November, 1920, and that the purchase-money be paid to the society.

KELLY, J. JULY 22ND, 1920.

REED v. MICHIGAN CENTRAL R.R. CO.

Railway—"Trackage Agreement" between Railway Companies—Running Rights—Trainman on Rear of Lessee-company's Train Killed by Engine of Lessor-company Backing into Train—Action under Fatal Accidents Act against Lessor-company—Negligence Found by Jury—Judgment against Lessor-company—Claim for Indemnity against Lessee-company—Breaches of Trackage Agreement and Negligence—Finding of Trial Judge.

Action (under the Fatal Accidents Act) by the mother and administratrix of the estate of Frank Reed, a brakesman in the employment of the Pere Marquette Railway Company, who was killed by a locomotive of the defendants, to recover damages for his death; and claim over by the defendants against the Pere Marquette Railway Company, brought in as third parties.

The two issues came on for trial together at St. Thomas; and it was agreed that, should the jury's findings be in favour of the plaintiff, the question of the liability of the third parties to the defendants should be determined by the trial Judge without a jury.

The verdict of the jury was in the plaintiff's favour for substantial damages; and judgment was given in her favour.

J. B. Davidson, for the plaintiff.

D. W. Saunders, K.C., and S. S. Mills, for the defendants.

R. L. Brackin, for the third parties.

KELLY, J., in a written judgment, dealt with the claim of the defendants for relief over. He said that Frank Reed was, on the evening of the 12th January, 1917, in the course of his duty as a brakesman on the railway of the third parties, upon a freight train of the third parties, when a locomotive of the defendants backed into the rear of that train, then standing in the railway yard at St. Thomas station. Reed was stationed on the end of the train and was struck and killed. By an agreement of the 29th December, 1903, called the "trackage agreement," the third parties had running rights over parts of the lines and tracks of the defendants, such parts being called the "joint section," and including the tracks on which the third parties' train was then standing.

The defendants' claim for indemnity was based on the allegation that the accident was caused by the negligence of the third parties in employing Reed as a brakesman, he being ignorant of his duties and not qualified to perform them, and the negligence of the third parties in not protecting the standing train by stationing some one on the ground to signal approaching trains.

The jury exonerated Reed from negligence, and found that his death was due to the defendants' negligence, in that their engine was moving too fast while backing.

The defendants appealed to the terms of the trackage agreement which required that men in the position of Reed should, before entering upon the performance of their duties, be examined by the proper officers of the defendants. Reed had not been examined; but the jury did not find—and the learned Judge had been unable to see from the evidence—any necessary connection between the fact that he had not been so examined and his death.

After a careful examination of the provisions of the trackage agreement, the various rules and instructions applicable to the movements and protection of trains, and the testimony at the trial, the learned Judge concluded that the third parties were not guilty of negligence or breach of agreement making them liable in this instance. The jury found, and on sufficient evidence, that the defendants were negligent. Under art. III., sec. 5, of the trackage agreement, the liability must be borne by the defendants, and not by the third parties.

The claim of the defendants against the third parties must, therefore, be dismissed with costs.

ROSE, J. JULY 23RD, 1920.

CANADIAN STEWART CO. LIMITED v. HODGE.

Contract—Sub-contractor for Government Works—Work not Conforming to Specifications and not Satisfactory to Government Engineer—Damages for Refusal to Supply Material and Do Work over again—Measure of—Return of Money Paid—Counterclaim—Drawback—Failure to Do Portions of Work—Measure of Damages—Failure of Principal Contractors to Supply Material—Loss thereby to Sub-contractor not Shewn—Payment for Use of Defendant's Plant in Doing Work he should have Done—Declaration—Reference to Ascertain Damages—Costs.

Action by the contractors with the Dominion Government for the construction of a part of the Toronto harbour improvements against a sub-contractor for the work of constructing a certain portion of the ship-channel, for the return of the moneys paid by the plaintiffs to the defendant, less the contract-price of such of his work as did not have to be done over again; for the value of the materials supplied by them to the defendant, less the value of so much as remained as placed by the defendant in the work, and of such as they were able to utilise in the work which they did; for the cost of the rectification; and for damages for the defendant's failure to go on with the work of the other portions of his sub-contract.

Counterclaim by the defendant for 10 per cent. of the contract-price of the work done by him up to the end of May, 1915; for the whole of the contract-price of the work done in June and July, 1915; for damages for an alleged refusal on the part of the plaintiffs to allow him to complete his work; and for rent for the use of his plant by the plaintiffs.

The action and counterclaim were tried without a jury at a Toronto sittings.

D. L. McCarthy, K.C., and A. W. Langmuir, for the plaintiffs.

McGregor Young, K.C., for the defendant.

ROSE, J., in a written judgment, stated the facts and reviewed the evidence. He said that the defendant's obligation under his sub-contract was to do the work therein described, in conformity with the plans and specifications forming part of the main contract and to the satisfaction of the chief engineer of the Department of Public Works. Beyond controversy, the

work did not conform to the plans and specifications and did not satisfy the chief engineer. The question in the case was, whether the fault lay with the defendant, or, as he alleged, with the plaintiffs.

The learned Judge found, for reasons fully stated, that the defendant must pay damages for refusal to supply the material and do his work over again, or to execute the work shewn on the alternative plan; the measure of damages being what it cost the plaintiff to do the work and supply the materials which he ought to have done and supplied.

The plaintiffs' claim for the return of the money paid to the defendant and the defendant's counterclaim for the amount of the 10 per cent. drawback and for payment for the work done in June and July, 1915, should be dealt with together. The plaintiffs were entitled to be put in the same position as if the defendant had done all that he ought to have done in respect of the section of the work which he had done but done defectively; that is to say, it must be ascertained, first, what it cost the plaintiffs to construct that section to the satisfaction of the Minister of Public Works, and, secondly, what the plaintiffs would have had to pay to the defendant if he had really done what his contract required him to do; and the defendant must pay to the plaintiffs the amount by which the cost to the plaintiffs exceeded what he would have earned if he had performed his contract. In ascertaining the cost to the plaintiffs, there should be taken into account: the expense of supplying the things which the defendant's sub-contract obligated him to supply, including new piles and other materials which were required to replace those spoiled by the defendant, as well as the payments made by the plaintiffs to the defendant and their payments to their own employees engaged in doing what the defendant ought to have done; but not the cost of building a coffer-dam and unwatering the work.

For the failure of the defendant to do the other sections of his work there seemed to be no valid excuse: the defendant did not complete his sub-contract, and the plaintiffs did not release him from his obligation; and, if it cost the plaintiffs more to do the work than they would have had to pay him if he had done it, they were entitled to the difference by way of damages.

As to the counterclaim in respect of alleged breaches of contract on the part of the plaintiffs, if there was any failure to furnish such material as was required to enable the defendant to comply literally with the specifications, that failure was not shewn to have caused loss to the defendant.

As to the counterclaim for payment for the use of the defendant's plant, it appeared that, at the suggestion of the defendant,

the Government took possession of that plant after the work was stopped—as, under the contract, it had the right to do—and subsequently released it, with the defendant's concurrence, whereupon it was used by the plaintiffs. If the plaintiffs were to pay the defendant for the use of it, the payment would be an additional item which they would be entitled to bring into their account against the defendant. There was, therefore, no reason why the amount of an allowance of the nature claimed should be ascertained.

There should be judgment declaring that the rights of the parties, respectively, are as above stated; and, as agreed at the trial, there should be a reference to determine the amounts. The costs down to and including the judgment should be paid by the defendant; and questions as to subsequent costs should be reserved until after the report.

LENNOX, J. JULY 24TH, 1920.

THOMPSON v. CHEESEWORTH.

Injunction—Interim Order—Application for—Municipal Corporations—Residential By-laws—Permit for Installation of Gasoline Tank upon Premises—Injury to Owner of Neighbouring Premises—Danger of Irreparable Damage not Shewn—Inconvenience and Loss—Dismissal of Application—Questions Arising on Motion Left for Trial.

Motion by the plaintiff for an order restraining the defendants the Municipal Corporation of the City of Toronto from issuing a permit to the defendant Cheeseworth to install gasoline tanks on premises lying immediately south of the plaintiff's residence in the city of Toronto for the purpose of carrying on, upon the said premises, a dry-cleaning establishment, contrary to a residential by-law (7145), and restraining the defendant Cheeseworth from locating and operating a dry-cleaning establishment on the said premises, in breach of an amending residential by-law (8363).

The motion was heard in the Weekly Court, Toronto.

F. J. Hughes, for the plaintiff.

W. D. McPherson, K.C., for the defendant Cheeseworth.

Irving S. Fairty, for the defendants the Corporation of the City of Toronto and Price, the city architect.

M. W. Wilson, for the defendants Venn and Evans.

LENNOX, J., in a written judgment, said that, in broad outline, the facts upon which the plaintiff relied were not directly controverted, but more specific allegations were necessary. It might be found, when all relevant evidence, including opinion evidence, was put in at the trial, that the plaintiff was entitled to the relief or remedy he was asking now, or some remedy or relief; but, assuming that it might be so, it did not follow that the defendants should be restrained in the meantime. Injunction is a drastic remedy, and vested in the Courts as a discretionary jurisdiction to be cautiously exercised. It should not be exercised where damages will afford an adequate remedy, and the financial position of the defendants is a guarantee that damages if awarded will be recovered, or that the conditions created pending the trial can be reversed should the Court find that the defendants are in the wrong; and the Court applied to for an interim injunction can also very properly look to the countervailing proposition: Is it not more likely that serious inconvenience and loss will result if an injunction is granted pending the trial than if it is refused?

There is no suggestion that the defendants were not acting in good faith. The matter had been very fully gone into by the city council and its officers, acting as they thought in accordance with the provisions of the Municipal Act, particularly sec. 409 (2); and the plaintiff's counsel had been fully heard. There was no satisfactory evidence that any of the defendants had done, or contemplated doing, anything wrongful or illegal: the matters in question were matters to be carefully sifted in the ordinary way.

The following cases were referred to: Paterson v. Bowes (1853), 4 Gr. 170; Bowes v. City of Toronto (1858), 11 Moore P.C. 463; Mayor etc. of Devenport v. Plymouth Devonshire and District Tramways Co. (1884), 52 L.T.R. 161 (C.A.); Dawson & Co. v. Bingley Urban District Council, [1911] 2 K.B. 149; and other English cases; also Re Hobbs and City of Toronto (1912), 4 O.W.N. 31, and City of Toronto v. Foss (1913), 27 O.L.R. 612.

No irreparable damage, and no injury for which he cannot be compensated, will accrue to the plaintiff, if he is right, by the delay till the trial; and this is not a case in which an interim injunction should be granted. The disposal of the motion is without prejudice to the ultimate liability or rights of any of the parties.

The motion should be dismissed, with costs reserved for disposal by the Judge at the trial. If the action does not go to trial, the defendants should have costs of opposing the motions, properly allocated.

STOYANOFF v. DIMITROFF—KELLY, J.—JULY 14.

Contract—Money Placed in Hands of Defendant to Remit to Bank in Foreign Country to be Placed at Credit of Plaintiff—Conflict of Evidence as to Method of Remitting—Corroboration—United States Currency—Rate of Exchange—Finding in Favour of Plaintiff.]—The plaintiff commenced this action on the 27th December, 1919, by the issue of a writ of summons endorsed with a claim for $1,152.50, "being the amount of moneys entrusted by the plaintiff to the defendant to remit to Bulgaria, which the defendant has failed to do." The amount was made up of "cash advanced to be remitted, $1,100," and "exchange paid on the same, $52.50." Apparently, when the writ was issued the plaintiff had not received advice that any moneys had reached Bulgaria; but, some time after the issue of the writ, he was advised by the defendant that the bank-book shewing his deposit in the Bulgarian National Bank had arrived. The plaintiff refused to accept the bank-book, alleging that the amount credited therein did not represent the amount procurable by the money which he had given to the defendant on the 6th October, 1919, to forward to the bank in Bulgaria. The action was tried without a jury at a Toronto sittings. KELLY, J., in a written judgment, said that the plaintiff's evidence, standing alone, against the defendant's evidence, could not safely be taken as establishing his claim; but there were several incontrovertible circumstances which corroborated the plaintiff's testimony and substantially supported his contention. The point of difference between the parties was, that the plaintiff said that he gave the defendant $1,100 on the 6th October, 1919, to be sent, in United States currency, to the bank in Bulgaria, to be placed to the plaintiff's credit there, and also paid exchange thereon at the rate then current for United States currency; while the defendant said that the money was given to him to purchase in Toronto a definite number of Levs for transmission to the bank in Bulgaria. Owing to the rapid fluctations in the rate of exchange at the time, the latter method of transmission was to the disadvantage of the plaintiff to the extent of several thousand Levs. The defendant did not remit the money in United States currency, but, without the knowledge of the plaintiff, purchased, on the 7th October, a draft in drachmas, payable at Salonika, part of which went to purchase 27,500 Levs for the plaintiff, and of the balance part was retained by the defendant for his benefit and placed to his credit in Bulgaria and part went to the defendant's agent there. The plaintiff was entitled to succeed to the extent of the difference between the amount required to purchase 27,500 Levs in Bulgaria at the time of the arrival of the money there,

and the sum of $1,100, which he gave to the defendant, plus exchange on the amount of that difference in United States currency on the 6th October. For the purposes of this action, counsel at the trial agreed that the value of Levs in Bulgaria at the time was at the rate of 33½ cents to the dollar in United States currency. On this basis of calculation, the plaintiff was entitled to $279.10 and exchange thereon at 4¾—the rate current on the 6th October. There should be judgment for the plaintiff for $292.35 and interest from the 6th October, 1919, with costs of the action on the lower scale. W. A. Henderson, for the plaintiff. R. R. Waddell, for the defendant.

WALKER v. GALLIPAU—KELLY, J.—JULY 17.

Boundaries—Dispute between Neighbours—Recognised Line between Lots—Acceptance by Parties—Conduct—Trespass—Nominal Damages—Costs.]—An action for trespass to land, tried without a jury at North Bay. KELLY, J., in a written judgment, said that the dispute was over the location of the boundary-line between lot 2 in concession A. of the township of Caldwell, owned by the plaintiff, and lot 1, to the east of lot 2, purchased by the defendant in October, 1915. After reviewing the evidence, the learned Judge said that his conclusion was that what the defendant intended to purchase and expected to acquire by his conveyance was the land bounded on the west by the line running northerly from the oak-post, long and universally recognised as at the boundary between the two lots. The manner of the defendant's dealing with the property after the purchase was in harmony with an honest belief, that both he and the plaintiff entertained, in the accuracy of that line. Any deductions from a mere examination of the notes of the original survey, without regard to other existing conditions, could not prevail against the circumstances in which the defendant purchased and the established fact that the line of the oak-post had been universally until 1919 recognised as the true boundary. The value of the disputed land was relatively small; the defendant had made a not ungenerous proposal for settlement; but the plaintiff was exacting, and did not accept the proposal. There should be judgment for the plaintiff, with damages assessed at $1, but without costs. G. A. McGaughey, for the plaintiff. J. H. McCurry and J. A. Philion, for the defendant.

RE MATTHEWS—LENNOX, J.—JULY 19.

Vendor and Purchaser—Agreement for Sale of Land—Title—Objections of Purchaser—Inconclusive Evidence of Title—Application under Vendors and Purchasers Act—Trial of Issue or Renewal of Motion on Additional Evidence.]—Application by a vendor of land in the township of Houghton for an order, under the Vendors and Purchasers Act, declaring that the vendor has shewn a good title. The application was heard in the Weekly Court, London. LENNOX, J., in a written judgment, said that he thought it probable that the vendor had a good title; but did not think that the facts shewn by the affidavits were sufficiently unequivocal or conclusive to justify him in declaring that the vendor had shewn a good title. What was deposed to was quite consistent with the possession of a good title, but it was not necessarily conclusive, and was not inconsistent with any other hypothesis. If the parties desired, they might have an order directing the trial of an issue, upon which the evidence of other witnesses could probably be adduced and more specific and conclusive evidence perhaps obtained from the persons who had made affidavits. If an issue should not be desired, the motion should be dismissed without costs, and with liberty to renew the motion on the present material and such additional material as counsel might advise. It should not, of course, be renewed without some additional material. W. C. Brown, for the vendor. F. H. Greenlees, for the purchaser.