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SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. FEBRUARY 20TH, 1914.

VAUGHAN-RHYS v. CLARRY ET AL.

5 O. W. N. 929.

Contract—Purchase of Timber Limits—Action for Purchase-Price—Misrepresentations — Executed Contract—Absence of Fraud—Breach of Warranty — Evidence—Res Judicata — Estoppel—Findings of Trial Judge Confirmed.

Action to recover for purchase price of timber limits; defendants counterclaimed for damages for deceit or for breach of warranty arising on the contract.

BOYD, C., gave plaintiff judgment on his claim and dismissed defendants' counterclaim with costs.

SUP. CT. ONT. (2nd App. Div.) affirmed above judgment holding that defendants had not established the charge of fraudulent misrepresentation.

Appeal by defendants from the judgment of HON. SIR JOHN BOYD, C., in favour of plaintiffs.

The action was for a money demand: and the defendants counterclaimed for damages for deceit or for breach of warranty arising upon a contract for the sale and purchase of timber limits. The judgment appealed from was in favour of the plaintiff on his claim and dismissed the counterclaim. The appeal was confined to the counterclaim.

J. Bicknell, K.C., and Nathan Phillips, for defendants (appellants).

Shirley Denison, K.C., contra.

HON. SIR WM. MULOCK, C.J.EX.:—In this action the defendants endeavour to succeed on one of two grounds: (1) deceit; (2) breach of warranty.

The first question to determine is, what was the contract between the parties?

It appears that Clarry, who lives in the province of Ontario, was on the 1st of November, 1907, in the city of Vancouver, and observing a notice in the window of one Gallagher, a real estate agent, to the effect that he had certain timber limits in British Columbia for sale, entered Gallagher's office, and then came into touch with the plaintiff, Vaughan-Rhys, the ostensible owner of these limits. The notice which had attracted Clarry's attention was discussed. It contained a statement as to the quantity and quality of the timber on the limits, and their accessibility. At this stage it doubtless played an important part in the mind of Clarry, for he asked the plaintiff to sign it, which the plaintiff did.

On this occasion the plaintiff made a written offer to the defendant for the sale of the limits. That offer contains a number of terms, amongst others this term:

"As soon as the stock is issued, if this is satisfactory to you, a proper agreement will be drawn embodying the above conditions; or if you give me your cheque for the $500, dated ten days from now, that is the 11th November, I will accept the same."

The defendant did not accept the offer unconditionally; his acceptance, which is in writing, at the foot of the offer, being in the following words:

"I accept the above, subject to report of P. Meyers being satisfactory; and subject to title being clear."

That qualified acceptance did not constitute a contract.

Clarry left British Columbia about this time, leaving Gallagher to look after his interests, including the securing of the completed document referred to in the plaintiff's offer.

On the 9th of November the plaintiff, Vaughan-Rhys, delivered to Gallagher a document under seal, signed by the plaintiff, wherein he offered and agreed to sell the limits to Clarry on the terms therein set forth. That agreement was left with Gallagher. Clarry says he did not receive it from Gallagher, but Gallagher, being Clarry's agent to secure the document, delivery to him was delivery to Clarry.

Subsequently Clarry completed the purchase, and the limits were transferred to him; and the only contract of which we have any evidence is the one resulting from the agreement on the 9th of November, 1907, and the defendants' conduct in completing the purchase.

Thereafter, certain litigation in the Courts of British Columbia arose between the parties in respect of the dealings

between them, one of such actions being a suit by the plaintiff against the defendants for a vendor's lien on the limits in respect of the unpaid portion of the purchase money.

In that suit the plaintiff alleged the sale of the limits to the defendant under the contract of the 9th of November, 1907; and the defendants, in their statement of defence, admitted the correctness of that allegation, as to the agreement of the 9th of November, and the Court took the defendants at their word, and found that the contract was that of the 9th of November, 1907.

We are not only bound by that judgment, which is an estoppel, but we would reach that same conclusion if the question was yet at large. Thus it is judicially declared that the rights of the parties grow out of the agreement of the 9th of November, 1907. And with that agreement as a starting point, the questions of fact to be here determined are whether the plaintiff was guilty of deceit or breach of warranty.

The learned Chancellor was not able to accept Clarry's version of the occurrences. He did, however, accept apparently the version of the plaintiff's witnesses.

Clarry forgets, or does not remember, where other witnesses remembered distinctly. Where one witness testifies to a certain fact, and the opposing witness does not remember, credence can be given to the honesty of both sides by accepting the evidence of the one who does remember and which stands uncontradicted by the other.

That is the charitable view which the Chancellor has taken of the evidence, and, sitting in appeal, we do not take exception to such finding.

The evidence, if we felt at liberty to review it, would not warrant us in disturbing such finding, and, unless we were to reverse it, the appeal must fail.

The transaction, as it stands, is an executed contract, and, therefore, nothing short of actual fraud would be sufficient to render it void. Misrepresentation, not fraudulent, would not help the defendants. If it was competent to us to review the learned Chancellor's findings, we would, as a jury, looking at all the circumstances, reach the conclusion that there was no actual fraud.

As to the other question of fact, namely, whether there was a breach of warranty, it is to be observed that the representations made on the 1st of November might have been

material if the case were still executory; and if the contract had been completed on the 1st of November.

But no contract was then made, and those representations were not made part of the contract of the 9th of November, 1907.

In the contract of the 9th of November an opportunity was given the defendants to verify or falsify the allegations contained in the schedule, as it is called. He could then have gone, or have caused his agents to go, to the limits and have them examined for his own information.

When the agreement of the 9th of November, 1907, was prepared, the schedule was not made a part of it so as to become a warranty. It is referred to, but only in the sense that the defendants are given an opportunity to send their agents to examine the limits, and if the agents' report shews the quantity of timber mentioned in the schedule, then the defendants are to increase their purchase money by delivering over certain shares, otherwise not.

Thus the schedule is referred to merely by way of description, but it not being made a part of the contract, the statements contained in it do not amount to a warranty.

That being the case, the defendants cannot recover for breach of warranty, and failing on both grounds, the appeal must be dismissed with costs.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. MARCH 9TH, 1914.

SMITH v. RANEY.

6 O. W. N. 55.

Deed — Rectification of—Action for Possession — Surplusage—Possession—Agreement for Definite Quantity—Rectification Refused —Appeal.

SUP. CT. ONT. (2nd App. Div.) *held*, that in order that a deed may be reformed by the Court there must be at least two things established; namely, an agreement differing from the document, well proved by such evidence as leaves no reasonable doubt as to the existence and terms of such agreement; and a mutual mistake of the parties by reason of which such agreement was not properly expressed by the deed.

McNeill v. *Haines*, 17 O. R. 479, followed.

Judgment of VANCE, Co.C.J., reversed.

Appeal by the plaintiffs from a judgment of His Honour Judge Vance, County Court of Simcoe, dismissing an action

to recover possession of land and allowing the defendant's counterclaim for rectification of the conveyance of land made by the defendant to the plaintiff.

The appeal to the Supreme Court of Ontario (Second Appellate Division), was heard by HON. SIR JOHN BOYD, HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE MIDDLETON, and HON. MR. JUSTICE LEITCH.

A. E. H. Creswicke, K.C., for appellant.

M. B. Tudhope, for respondent.

HON. MR. JUSTICE MIDDLETON:—One Marion H. Dallas, now deceased, the plaintiff's predecessor in title, owned lots nine and ten on the north side of Brant Street, in the town of Orillia. According to the plan, these lots had a depth of 210 feet. The southerly 150 feet of lot number 9 had been sold to one Scott, while the south 150 feet of lot ten had been conveyed to the plaintiff, Charlotte B. Smith. This left, according to the paper title, the rear sixty feet still vested in the heirs of the late Marion H. Dallas. This sixty feet would have a frontage upon Matchedash street. The fence between the lots in question and the lots immediately to the north had not been erected upon the true boundary line, and a possessory title had probably been acquired to some four feet six inches immediately to the north.

Scott had been accustomed to obtain access to the rear of his lot by crossing over the land immediately to the north of the portion conveyed to Mrs. Smith, to Matchedash street, through a gate in the fence there.

Mr. Evans, a practising solicitor in Orillia, had charge of the affairs of the estate. Mrs. Smith, as already mentioned, resided in Orillia. Her brothers and co-plaintiffs resided in Victoria, B.C., and Lamont, Alberta, respectively. Mr. Evans had placed a "for sale" sign upon the rear land; and the defendant, seeing this, called at his office with a view to negotiate for its purchase. After having inspected the property and after having ascertained that the frontage between fences on Matchedash street was between 65 to 70 feet, the defendant signed an agreement to purchase the northerly sixty feet of the two lots in question. There is a good deal of difference in the accounts given as to what took place. The agreement was mislaid, and only found shortly before the trial; but the recollection of the defendant was that there

was no agreement and that he had paid ten dollars on account, taking a receipt. The receipt is not forthcoming; and, from the fact that when the transaction was closed the defendant did not claim credit for this supposed payment and that Mr. Evans is very clear that no such payment was made, it is evident that the defendant is mistaken in his recollection.

The account given by Mr. Evans is clear, and in accordance with the written evidence. He says that upon the defendant coming to his office and enquiring as to the property he told the defendant that the estate was ready to sell sixty feet off the north end of these two lots; that defendant then tendered $10 to bind the bargain, but that he said he would prefer to have a written agreement, and desired the defendant to again inspect the property before signing the document. The defendant did go and inspect the property, and came back and expressed himself as satisfied, when the contract for the sale of the sixty feet was executed.

Mrs. Smith, who had a half interest in the property, signed the document as vendor. Her brothers were communicated with, and they signed the deed prepared in pursuance of the contract, conveying sixty feet only. The defendant then took possession not only of the sixty feet of land, but of sixty-nine feet, which it is found on survey actually lay between the fences. The nine feet additional consisted of two strips of approximately equal width, the one to the north of the sixty feet being the one as to which possessory title had been acquired, and the one to the south represented an overrun in the depth of the lot. The defendant has now built upon the property, some portion of his veranda being upon the northern strip, no part of his building being upon or near the southern limit of the land. He has interrupted Scott's access to the rear of his lot.

At the trial the plaintiffs brought an action of ejectment, claiming that the conveyance operated only to convey sixty feet. They were ready to allow the defendant to take the sixty feet from the north of the lots according to the actual survey, or from the north of the lots according to the actual occupation, but they are not willing to give him title to nine feet more than his deed calls for.

The learned County Judge has directed the deed to be reformed by adding to the land thereby conveyed the two strips, describing them as parcels two and three.

Upon the hearing of the appeal it appeared to us that the case was one which ought to be settled, and the matter stood over to allow negotiations but we are now advised that a settlement is impossible.

We do not think that the judgment in review can be sustained. The law is well stated in the case of *McNeill* v. *Haines*, 17 O. R. 479, cited by Mr. Tudhope: "In order that a deed may be reformed by the Court there must be at least two things established; namely, an agreement differing from the document, well proved by such evidence as leaves no reasonable ground for doubt as to the existence and terms of such agreement; and a mutual mistake of the parties by reason of which such agreement was not properly expressed by the deed."

In this case the defendant's difficulty is that there never was any agreement save that evidenced by the written contract of May 3rd, 1909. Whatever took place between the defendant and Mr. Evans was entirely preliminary to the document which was drawn up. Mr. Evans did not pretend to have any right to bind the parties beneficially interested in the estate. The only thing that they ever did or were asked to do was to sign the contract and the conveyance in pursuance of it. Quite apart from the Statute of Frauds, there never was any agreement by any of the plaintiffs save an agreement relating to the sixty feet.

It may be that the plaintiff thought that he was getting the sixty-nine feet, and that under the circumstances the Court would not decree specific performance against him; but the transaction is no longer executory. A deed has been given and the situation is so changed that rescission is impracticable.

The appeal must be allowed, and judgment entered for the plaintiffs. The plaintiffs should, however, be held to their offer to allow the defendant to take either sixty feet according to the literal interpretation of the conveyance or sixty feet according to the possession on the ground.

There is no reason why costs should not follow the event.

HON. SIR JOHN BOYD, C., HON. MR. JUSTICE RIDDELL and HON. MR. JUSTICE LEITCH, agreed.

HON. MR. JUSTICE BRITTON. MARCH 5TH, 1914.

McKENZIE v. TEESWATER.

6 O. W. N. 32.

Municipal Corporations — By-law Authorising Deed of Lands to Library Board for Site—Special Act—58 Vict. c. 88 (O)—Public Libraries Act, 9 Edw. VII. c. 80, secs. 8, 12—Town Authorised to Sell but not to Deed — Substantial Compliance—Motion to Quash—Dismissal of.

BRITTON, J., *held*, that where a municipality was authorised to sell certain lands and to devote the proceeds to public library purposes, it was justified in deeding the lands directly to the Library Board without any effort being made to sell such lands.

Parsons v. *London*, 25 O. L. R. 173, and *Phillips* v. *Belleville*, 11 O. L. R. 256, referred to.

Ottawa Electric Light Co. v. *Ottawa*, 12 O. L. R. 290, distinguished.

Motion to quash a by-law of the town of Teeswater.

G. H. Kilmer, K.C., for applicant.

Wm. Proudfoot, K.C., for respondent.

HON. MR. JUSTICE BRITTON,—The by-law now attacked enacts that the corporation of the Village of Teeswater do grant and convey to the Teeswater Public Library Board, part of the parcel of land known as "Edmund Square" in said village, for the "purpose of a site for a public library building." The by-law was passed on the 23rd January, 1914, and apparently on the same day, the conveyance authorised by the by-law, was executed, and registered in the registry office for the County of Bruce. The title to the land in question now stands in the name of the Public Library Board.

An authority for the by-law, and as alleged by the applicant the only pretence of authority, is 58 Vict. ch. 88 (Ont. 1895) and the provisions of that Act are correctly set out in the preamble of the by-law. Of the objections taken to the by-law, the only one necessary to be specially considered on this application is the one raised by the question: "Can the corporation of the Village of Teeswater enact such a by-law as the one attached, and pursuant to it, convey the land directly to the Teeswater Public Library Board, or will it be necessary that the village corporation make an actual sale of the land, and, so far as relates to the "purpose of a public library" deal only with "the moneys realized." The

preamble of the Act shews how the village became the owner of Edmund Square. Section 1 enacts: "The Corporation of the Village of Teeswater may pass a by-law or by-laws for leasing or selling such portions of the said land as they may not require for the purposes of a market square, or other public purpose, and may by such by-law or by-laws authorise the leasing or sale of the same, in one or more parcels, and either by public auction, tender or private contract, and on such conditions as to the said corporation may seem proper."

Section 5. "The moneys realized from such leases or sales shall be applied to payment of compensation to persons whose properties front on said square, and to the costs of, and in connection with the application for this Act, and the balance thereof shall be applied to the purchase of a park or fair ground, either jointly with any other municipality, or municipalities, or otherwise, or for the purpose of a public library, as the corporation of the village of Teeswater shall direct, but no lessee or purchaser shall be bound to see to the application of any such moneys."

Section 6. "It shall not be necessary to obtain the consent of the electors of the said town to the passing of any by-law under this Act, or to observe the formalities in relation thereto by the Consolidated Municipal Act, 1892, or any Act amending the same."

Part of this square was sold in 1896, or prior thereto. Out of the proceeds were paid all the costs of the application for, and obtaining the special Act, and all compensation to those having land fronting on the square was paid, so the way was cleared for getting a site and the erection of a building for a public library, if the corporation would assist. As the Public Library Board desired a site for the library building, and as the land was unproductive, and not wanted by the village, and was suitable for the library building, the corporation took the short cut by passing the by-law and conveying the land directly to the Public Library Board. No harm has been done. The Council acted in perfect good faith and their work should not be interfered with unless want of jurisdiction is perfectly clear.

See *Parsons* v. *London*, 25 O. L. R. 173; *Phillips* v. *Belleville*, 11 O. L. R. 256.

What is set out in the affidavit of applicant has little to do with the question for my decision, but some of applicant's

statements are denied by Farquharson, the Clerk of the corporation of Teeswater. Mr. Farquharson states that the whole of the purchase price of the land purchased under by-law No. 10, 1896, was paid from the proceeds of debentures issued and sold. That being the case, it cannot be said that any part of the proceeds of sale of the remainder of Edmund Square is held for the payment of the three remaining unpaid debentures of $60 each. No illegality or irregularity appears in the establishment of the Public Library in Teeswater. The fact of the petition being presented to the Council by many electors has no bearing upon the case, but even that is explained by Mr. Farquharson.

The intention of the members of the Council in 1896 as expressed in the By-law No. 10 cannot bind the Council of 1914. Section 12 of ch. 80 (1909, O.) is not contravened by a conveyance of this property to the Public Library Board. The levy of ½ mill or ¾ mill in each year is in no way affected by a special grant or conveyance of property owned by the village to the Public Library Board.

Section 8 of the last recited Act places no difficulty in the way of the Public Library Board accepting this land. By sub-sec. 1 of sec. 8 the Board must procure, erect, or rent the necessary buildings; sub-sec. 2 restricts the amount in any one year to $2,000 without the consent of the Council. The conveyance to the Public Library Board implies the consent of the Council if that were necessary.

By sub-sec. 5 of sec. 12, the Council may issue public library debentures for the purpose of acquiring a site, etc.

The Ottawa Electric Light Co. v. *Ottawa*, 12 O. L. R. 290, comes nearer to supporting this motion than any case I can find. But that case seems to me distinguishable from this case. The special Act authorized the production of electricity for motive power, etc.

The by-law there attacked attempted to authorize an agreement to supply. One of the main objects of that Act was the production—the manufacture in Ottawa. The production there involved large outlays for plant, wages, etc. A very different thing from purchasing electricity—produced elsewhere.

Here the only thing sought was to procure a site—that the Public Library Board was entitled to, and the corporation of the village bound in some way to furnish. The objection

is not to what was done, but to the way it was done. Under all the circumstances the by-law should not be quashed.

Application dismissed with costs.

HON. MR. JUSTICE LATCHFORD. MARCH 2ND, 1914.

BAIN v. UNIVERSITY ESTATES AND FARROW.

CONNOR v. WEST RYDALL LIMITED AND FARROW.

6 O. W. N. 22.

Process — Service Writ out of Jurisdiction — Action Properly Brought against one Defendant in Jurisdiction—Con. Rules 25, 48—Conditional Appearance—Refusal to Allow Substitution of, for Ordinary Appearance Entered through Alleged Inadvertence.

LATCHFORD, J., refused to grant defendants, they being resident out of the jurisdiction, have to substitute conditional appearances under Rule 48 for the ordinary appearances entered by them to concurrent writs served out of the jurisdiction, where he was satisfied that the Courts had jurisdiction over such defendants.

Standard Construction Co. v. *Wallberg*, 20 O. L. R. 646, followed.

Judgment of Master-in-Chambers reversed.

Appeals from orders of the Master in Chambers, permitting the defendant corporations to withdraw the ordinary appearances which they have entered to concurrent writs, served out of the jurisdiction by order of a local Judge of the Supreme Court, and allowing them to substitute therefor conditional appearances, under Rule 48.

A. B. Cunningham, for motions.

J. Grayson Smith, contra.

HON. MR. JUSTICE LATCHFORD:—The appeals were argued together, There is no substantial difference between the two cases as to the point now involved. In both statements of claim had been filed and served; and in one the statement of defence. In the other the defence was due when the motions for the orders appealed against were made.

The writ in each case states that the plaintiff's claim is to set aside an agreement for the purchase and sale of lands situate in the Province of Manitoba, and to recover from the defendants moneys paid to them by the plaintiff. Each agreement is claimed to have been made with the land

company through the fraud and misrepresentation of the defendants, i.e., the land company and Farrow, who is resident in Toronto.

Inadvertence is stated to have led to the entry of the appearances. To ascertain what that inadvertence was—the material being silent on the point—a reference to the Rule under which a conditional appearance can be entered may be illuminating.

Rule 48 provides that where a defendant desires to contend that an order for service out of Ontario could not properly be made a conditional appearance, may be entered by leave. This Rule embodies the former C. R. 173, and the form of conditional appearance. H. & L., Form 105.

The only inadvertence, therefore, was that the defendant companies did not appear in a way which would enable them to contend that the orders for service out of jurisdiction could not properly be made.

The question of jurisdiction is the only question that can be opened up if the orders of the learned Master are allowed to stand. It was squarely raised before me and can better be disposed of now than at a subsequent time.

Under Rule 25, service out of Ontario of a writ of summons . . . may be allowed whenever (*g*) a person out of Ontario is a necessary or proper party to an action properly brought against another person duly served within Ontario.

Each action was properly brought against a person other than the land company, and that person—Farrow—was duly served within Ontario.

Farrow acted for principals not resident or having any office or property, so far as appears, in this province. His acts, however, were for the benefit of such principals who directly or through Farrow, received the moneys which the plaintiffs now seek to recover from them and him.

They are, I think, necessary, as well as proper parties. Quite obviously upon the facts disclosed, they are either one or the other. The Court, therefore, has jurisdiction. No useful purpose can be served by the orders appealed from, while they render uncertain and embarrassing, the position of the plaintiff in each case. As my brother Middleton said in *Standard Construction Co.* v. *Wallberg* (1910), 20 O. L. R. 646, at 649, when a case is shewn within the Rule—

then 162 (*g*), identical with Rule 25 (*g*)—there is no reason why a conditional appearance should be entered.

That case is still an authority, the rule on which it was rendered remaining unchanged in the revision.

Accordingly I reverse the orders appealed from. The costs in each case to be to the plaintiff in any event of the action.

HON. MR. JUSTICE MIDDLETON. MARCH 7TH, 1914.

RE FAIRCHILD.

6 O. W. N. 35.

Will—Construction — Provision for Daughter—"To have a Home with her Mother"—Life Estate of Mother—Death of Mother—Termination of Daughter's Rights.

MIDDLETON, J., *held*, that where a testator by his will gave a life estate to his wife and provided that "my daughter Sarah shall have a home with her mother so long as she does not marry again," that any rights of the daughter lapsed with the death of the mother.

Originating notice of motion to determine the question of rights of Sarah Jane Butler, under the will of the late Peter Fairchild. Heard March 4th, 1914.

J. Harley, K.C., for executors.

M. W. McEwen, for Sarah Jane Butler.

HON. MR. JUSTICE MIDDLETON:—The late Peter Fairchild, who died about nineteen years ago, by his will made not long before his death, gave his farm to his son, Peter M. Fairchild, subject to the right of his widow, "to have a home where she now resides in the old homestead while she lives, and she is to draw her thirds while she lives, from the estate, for her support." This is followed by the provision in favour of the daughter Sarah Jane, which gives rise to the present application: "And I also direct that my daughter Sarah shall have a home with her mother so long as she does not marry again."

Sarah had been married, but her husband had deserted her. She and her infant children were, at the time of the testator's death, living as part of the household. After his death she continued to live upon the property during the lifetime of the widow. Upon the widow's death Sarah

still remained as housekeeper for her brother Peter M. Fairchild, who never married.

Peter M. Fairchild died on the 28th November, 1913. By his will he gave a farm to his sister Sarah and one of her sons, subject to payment of a legacy to the other of her sons. The rest of his estate, after payment of certain legacies, he directed to be realized and divided among his sisters, nephews and nieces, share and share alike.

Notwithstanding the provision made for Sarah under her brother's will she claims to be entitled to a home upon the old homestead under the will of her father.

This claim is, I think, untenable. What she is given by that will is a right to a home with her mother. The mother has been given practically a life estate in the homestead, and the testator then gives to his daughter the right to remain with the mother on the old homestead during the mother's life. Upon the termination of that life estate her rights came to an end. During her brother's lifetime she remained upon the property, but that was a matter of arrangement with him, and the brother seems to have very fairly provided for her by giving to her and her children the farm mentioned in his will, in addition to a share in his estate.

It should be declared that any interest given to Sarah Jane Butler under the will of the late Peter Fairchild, came to an end upon the death of his widow, and she has now no claim upon the land under his will.

Costs out of estate.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. MARCH 6TH, 1914.

HEWITT v. GRAND ORANGE LODGE OF BRITISH AMERICA.

6 O. W. N. 16.

Life Insurance—Benefit Society—Claim that Member not in Good Standing—Alteration in Rules — Non-Retroactive Effect—Construction of—Additional Fee—No Demand for—Insurance Corporations Act 1892, sec. 40 (1)—Insurance Act R. S. O. 1897, c. 203, sec. 165—Recognition as Member in Good Standing—Estoppel—Proof of Loss—Waiver.

SUP. CT. ONT. (2nd App. Div.) *held*, that the rules of a benefit society are not *prima facie* to be given a retroactive effect and that a member is not bound by such rules altering his contract of insurance with the society unless he received notice of the same.

That a benefit society having for years, and until the date of a member's death, received his dues and treated him as a member in good standing without notifying him of additional dues owing by him, were estopped from seeking to avoid the payment of the amount of his insurance policy after his death on the ground of non-payment of additional dues claimed to have been owing by him.

Judgment of KELLY, J., reversed.

Appeal by plaintiff from the judgment of HON. MR. JUSTICE KELLY at the trial, dismissing the action, which was brought by the daughter and residuary legatee under the will of James Hewitt, deceased, to recover the sum of $1,000, the amount of a policy of insurance or endowment certificate issued to the deceased by the defendants.

The appeal to the Supreme Court of Ontario (Second Appellate Division) was heard by HON. SIR WM. MULOCK, C.J.Ex., HON. MR. JUSTICE LATCHFORD, HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE LEITCH.

A. J. Russell Snow, K.C., for plaintiff, appellant.

J. A. Worrell, K.C., for defendants, respondents.

HON. MR. JUSTICE SUTHERLAND:—The plaintiff in this action is the daughter and residuary legatee under the last will of James Hewitt, deceased, and as such claims to be entitled to be paid the sum of $1,000, the amount of the policy of insurance or endowment certificate issued to him by the Grand Orange Lodge of British America.

The contention of the defendants is that as he was not at the time of his death in "good standing" he had lost

"all rights and claims upon the benefit fund" of the "Orange Mutual Benefit Society of British America" established by the said Grand Orange Lodge, and to which such policy or certificate had reference.

Hewitt had been a member of the Orange Order prior to the 24th of January, 1888, and being then in good standing therein and desiring to take advantage of the benefits of the said Mutual Benefit Society, made written application for membership. It contained an agreement on his part to be bound by the rules and regulations then in force or thereafter to be adopted, and being accepted, a certificate of membership, dated January 28th, 1888, was issued to him containing a similar agreement.

Having subsequently lost this certificate he applied, in the year 1899, for a duplicate, and one was issued as of the same date as the original, across the face of which was written: "This is a duplicate signed February 18th, 1899." While not an exact duplicate, it too, contained a provision that the contract it purported to express was subject to the "provisions of the constitution and laws of the Society or hereafter to be enacted or adopted."

Under the rules in force in the Mutual Benefit Society at the time Hewitt joined, if he withdrew from membership in the Order he ceased to be a member of the benefit fund, and, in case of death, his representatives were disentitled to any benefit therefrom; rule 4 (Ex. 14.)

Rules were subsequently passed on February 1st, 1893 (Ex. 3) permitting members of the Mutual Benefit Society to withdraw from the Orange Order and still retain membership in such Mutual Benefit Society. I quote from rule 5: "Should a member . . . withdraw from membership in the Orange Association such withdrawal shall not effect his standing in the benefit fund, and, in case of death, his representative shall be entitled to the benefits of the fund in the same manner as if the connection with the Orange Association had been maintained. And a member taking advantage of the above clause by withdrawing from the Orange Society shall pay annually, in advance, the sum of $2 in addition to his assessments."

Rule 9: "The term 'good standing' in this benefit fund signifies that the member has not withdrawn from his primary lodge (except as provided for in clause 5 of these rules), and is not suspended or expelled therefrom, and from the Orange Association, and that he has paid within

the prescribed time all his assessments for the insurance or other funds of the benefit fund, as well a dues, capitation tax, or other demands provided for in the constitution and laws of the Orange Association or this benefit fund."

Rule 10: "If a member is not in good standing he is not eligible to office, and if an officer he forfeits his office. A member not in good standing loses all his rights and claims upon the benefit fund of whatsoever kind and nature, and can only regain them when reinstated according to the rules of the benefit fund."

Rule 40: "The management funds shall be composed of the fees derived from applications for membership, the registration fee, and the annual fee of two dollars from each member, which latter fee shall be payable on or before the first day of October in each year, and shall be applied in payment of medical examiners, officers, and special agents' fees, and office expenditure of secretary and treasurer."

The last-mentioned rules were apparently in force in 1901. It was proved at the trial that, in June of that year Hewitt withdrew from the Orange Association, and the report of his withdrawal was made by the lodge of which he was a member of the District Lodge. It was also proved that at the time of such withdrawal Hewitt was a member of the Order in good standing and received a certificate to that effect. He apparently intended to continue a member of the Mutual Benefit Society, as he paid regularly the monthly assessments demanded by the society, and in addition, a fee of $2 annually, in advance, in October of each year, up to the time of his death. Undoubtedly he continued to the end to think he was a member of the Benefit Society.

The rules were amended in 1906, and I quote from rule 5 (Ex. 18) part of sub-sec. "b": "In the event of a member of the benefit fund withdrawing from membership in the Orange Association," etc., "such member may by notifying the secretary of the benefit fund in writing of such withdrawal within one month from the date thereof and paying within the same time the sum of two dollars to the benefit fund, and by paying in addition to all other assessments a similar sum of two dollars in advance on the second day of January in each year after such withdrawal,

continue to be a member of the benefit fund, and he, or in case of his death, his representatives shall be entitled to the benefit of the fund in the same manner as if connection with the Orange Association had been maintained, but the giving of said notice and the making of said payments are conditions precedent to his representatives being so entitled to said benefits. Provided, that if such withdrawal takes place after the first day of July in any year, the amount of the annual fee payable on the second day of January in the year thereafter shall be one dollar, instead of two dollars."

(c) In the event of any default being made in payment of the said annual fee in advance on the second day of January in each year, after the withdrawal of the member from the Orange Association, his certificate shall be forfeited, and neither he nor his beneficiaries or representatives shall be entitled to any benefits from the benefit fund unless and until he shall be duly and legally reinstated as hereinafter provided."

Rule 9: "The term 'good standing' in this benefit fund signifies that the member has not withdrawn from his primary lodge (except as provided for in rule 5), and is not either suspended or expelled therefrom, or from the Orange Association, and that he has paid within the prescribed time all his assessments for the benefit fund, as well as all dues, capitation tax, or other demands provided for in the constitution and laws of the Orange Association, or the rules of the benefit fund.

Rule 40: "There shall be a "management fund, which shall be composed of . . . ; (c) An annual fee of $2, to be paid on or before the first day of October by every member to whom a certificate of membership has been issued before the first day of January, 1906.

Further rules were passed in 1907 (Ex. 19). In rule 5, sub-sec. "B there is the following slight change: "Provided, that if such withdrawal takes place after the first day of July in any year, the amount payable at the time of withdrawal shall be one dollar."

Further rules were put in at the trial, for 1909 (Ex. 15), and 1911 (Ex. 7), which latter are said to be the rules in force at the time of Hewitt's death, which occurred on the 19th March, 1912; but these rules make no changes of importance.

It is apparent from the reception by the society of his monthly dues and the annual sum of $2 payable in each year in October, down to the year in which he died, that the Mutual Benefit Society continued to regard him, up to his death, as a member thereof. This, indeed, is also admitted.

The defendants say that it was only after his death that for the first time they learned he had withdrawn years before from the Orange Association. They contend that no notice of the withdrawal was ever communicated to them by him or by the original Orange Lodge of which he was a member, or by the District Lodge to which, as already stated, the notice of his withdrawal had been communicated.

They also claim that under secs. 5 and 40 of the rules in existence in 1901, the annual sums of $2 required to be paid are different sums, and that, as Hewitt only paid one of these, namely, that required to be paid in October, and made default in payment of the other, he forfeited, from the time of the first default, his right to continue as a member, and the right of his representatives on his death to any advantage under his certificate.

They contend further that, in 1906, he did not give the notice of withdrawal then required by rule 5 as amended, and did not pay the withdrawal fee of $2. They also claim that under rule 5, it became then clear, if there was doubt before, that a second annual fee of $2 was payable in January of each year, and that Hewitt, failing to pay the same, was in default for years before his death, and thereby under rules 9 and 10 forfeited his right to continue a member, and the right of his representatives to assert any claim under his certificate.

The action came on for trial before Kelly, J., on the th October, 1913, and at the conclusion thereof he delivered judgment for the defendants, and it is from this judgment the plaintiff now appeals. He finds as a fact that Hewitt was in good standing at the time he withdrew from the Orange Association. I quote from his judgment:—

"Then coming down to the time of the withdrawal in June, 1901, when certain rules relating to the rights of those withdrawing were in force, those rules did not expressly require that notice should be given; that is afterwards required by the revised rules of 1906, in which it is

expressly required that a person wanting to take the benefit of the fund shall give notice of his withdrawal. Coupled with that is the evidence that the Association proper was not required to give notice to the benefit fund of those who had withdrawn. And, so far as the evidence goes, I can only find that the officers of the benefit fund—those who had the administration of it—did not know of this man's withdrawal, because notice was not given. I think he was required to comply with that part of the rule in 1906, when a new rule was sent to him. The only evidence we have of the sending out of these rules I must accept. While Mr. Crowley cannot say this man was expressly sent a copy of the rules, he did say that every member was notified by the forwarding of the new rule, and he gives the reason, because the rates were increased. So that it comes down to this, that I do not think Hewitt complied with the requirements of the Association, giving himself or his beneficiaries the right to claim the amount of this benefit certificate. He did not give the notice; he did not make the payment; and cannot find it was the duty of the Association to do more than they did towards notifying this particular person, as well as others, about the change in rules. I do think, so far as their duty devolves upon them, they did give notice to Hewitt."

I am unable to agree with the learned Judge in his view of the applicability of rule 5 as thus amended in 1906. It is plain, I think, that Hewitt could not comply with portions of the rule. He had withdrawn in 1901. He could not, therefore, in 1906, give to the secretary of the benefit fund a notice "in writing of such withdrawal within one month from the date thereof." Neither could he "within the same time" pay the sum of $2 to the benefit fund as a withdrawal fee, as mentioned in the rule. Clearly the rule as to these features could only apply to those who withdrew after it had been thus amended.

A further matter to be considered, however, is that involved in the question whether the $2 to be paid annually in advance by Hewitt in addition to his assessments under rule 5 (Ex. 3) is the same annual fee of $2 required from each member, to be payable on or before the 1st October in each year under rule 40, or a different and additional sum, and whether if the rule as amended in 1906 makes it there clear that it is an additional one, Hewitt was

bound by it, or whether it had application only to those who should withdraw after it came into force.

The contention on the part of the plaintiff is that it is the same $2 in each case, but in any event that if it is clear after 1906 that it is a different fee, it had no application to Hewitt, and he was not obliged to pay it.

The only place in the rules in force in 1901 where a fee to be paid annually is mentioned, apart from rule 40, is in rule 5, and the sum mentioned is in each rule $2. In rule 40 it is spoken of as "the annual fee of $2 from each member." The annual fee, therefore, referred to in rule 40, is the same apparently, as that referred to in rule 5. This is what the plaintiff contends, that only the one annual fee was to be charged to each member of the Benefit Society, whether he continued to be a member both of the Order and the Society or withdrew from the former and continued only to be a member of the latter. She contends that the latter part of rule 5, namely, "And a member taking advantage of the above clause by withdrawing from the Orange Society shall pay annually in advance the sum of $2 in addition to his assessments" made provision for the entire liability of a member withdrawing. This clearly was also the view of the deceased up to the time of his death. I am of opinion that it is the correct view under the rules.

If one looks to what followed after Hewitt's withdrawal in 1901, it would appear that both he and they considered thereafter that all he was required to pay was his assessments and one annual sum of $2. The secretary of the Grand Orange Lodge of British America gave evidence at the trial, and I quote therefrom, p. 4:—

"Q. Can you tell me whether all assessments were paid by the late James Hewitt, the insured in this policy? A. All the monthly assessments up to the time of his death.

"Q. Was there any other sum required to be paid by him annually; was not there an annual fee of $2? A. An annual fee of $2 in October.

"Q. Of each year? A. Yes.

"Q. That was paid as well, I understand? A. Yes.

"Q. Was there any other fee? Did you ever give notice to him of any other fee that he should pay? A. No.

"Q. There is nothing in your books to shew that he ever had notice of any other call on that policy? A. No.

"Q. Or assessment of any kind? A. No."

There did not appear to be, until the rules of 1906, any provision requiring a member withdrawing to notify the Grand Lodge or the secretary of the benefit fund of such withdrawal. Hewitt had apparently regularly withdrawn and had received a certificate to that effect and no doubt thought he had done everything necessary on his part to give all the notice required when he had notified the Local Orange Lodge of which he was a member. There certainly seems to have been a loose system of doing the business of the organisation when after he had withdrawn in this way and a notice of such withdrawal had been sent from the local to the District Lodge, it stopped there and never reached the Grand Lodge. It seems to me that if any fault should be imputed as to this, it should be placed not at the door of the plaintiff, but at that of the organisation.

If the society intended that there should be two annual fees of $2 to be payable they should have made it clear beyond question by the language used. I do not think they did so. Looking to the fact that only one of the fees was paid by Hewitt during the years subsequent to 1901 and that no notice was ever given to him that any other was required, one would think that the conduct of both parties clearly indicates that only one was payable.

When we come to the rules of 1906 (Ex. 18) for the first time in rule 5, sub-sec. "B" there appears a statement that in addition to all other assessments a sum of $2 shall be payable in advance on a definite date in each year after withdrawal, namely, on the 2nd day of January. It may be that this rule when read with rule 40 makes it then for the first time definitely to appear that the sum of $2 in each rule is a different sum and that a member thereafter withdrawing must not only annually pay that amount on or before the 1st day of October in each year under rule 40, but also a further sum of $2 in each year in advance on the 2nd day of January, under rule 5.

Under rule 40 (Ex. 3) each member of the society was required to pay the annual fee of $2 therein referred to. Under this rule as amended in 1906 such annual fee was to be paid only by members to whom a certificate of membership had been issued before the 1st day of January, 1906. Hewitt was one of those who had previously to that date received such a certificate and he continued to pay the annual fee. But I am of the opinion that the very language of rule 5 in the rules of 1906 shews it to be applic-

able only to members who should withdraw after it came into force. I am of opinion, therefore, that the society having by its rules in force in 1901 permitted a member in the Orange Order to withdraw therefrom in an apparently regular and accepted way and not having made it clear by sec. 5 of the rules then in force that two annual sums of $2 were required to be paid, cannot now be heard to say that in consequence of Hewitt having failed to pay one of them he was not at the time of his death in good standing and his representatives can make no claim on the benefit fund. The society treated him as in good standing down to the time of his death and he no doubt considered he was.

On the defendants' own shewing and admission the situation is that he in ignorance of the fact, even if it were the fact, that he was required to pay two annual sums of $2 continued to make all other required assessments and one annual payment for years after he had withdrawn, when it is plain, as it seems to me, from that very fact, that if he had known that another was required he would have paid it also, and they continued to receive from him such assessments and such annual payment of $2, when it was improper for them to receive them except upon tthe assumption that he was still in good standing. All this is quite inconsistent with the view that the defendants now put forward, namely, that he made default years before his death, and in consequence was at that time no longer in good standing, and his representatives disentitled to make any claim upon the benefit fund. His certificate had not been forfeited and was apparently a valid and subsisting one at his death.

It is said that before action the defendants were willing to refund the assessments and annual sum of $2 received from Hewitt from 1901 to the time of his death. He had, of course, been paying into the fund for years before that time. Where each party to a contract has gone on recognizing it as valid and subsisting up to the death of one of the parties the one in ignorance that he should pay more and the other that it should receive none of the moneys or else more, it is rather late for the latter to repudiate the contract in toto. Instead of offering to return the moneys paid since 1901, one would have thought a fairer proposition under the circumstances would have been to request payment of the additional annual sum of $2 claimed to have been payable, with or without interest, or with the right to deduct the same from the $1,000.

The plaintiff also contends that by the Statute Law it was, under the conditions disclosed in the evidence and by-laws, impossible to forfeit the deceased's certificate. The Insurance Corporation Act (1892), 55 Vict. ch. 39, sec. 40, sub-sec. (1) provides as follows: "No forfeiture or suspension shall be incurred by any member of a friendly society or person insured therein by reason of any default in paying any contribution or assessment, except such as are payable at fixed dates until after notice to the member stating the amount due by him and apprising him that in case of default of payment by him within a reasonable time, not being less than thirty days, and at a place to be specified in such notice, his interest or benefit will be forfeited or suspended and until after default has been made by him in paying hi contribution or assessment in accordance with such notice."

By the Insurance Act of 1897, 60 Vict. ch. 36, sec. 165 (R. S. O., 1897), ch. 203, sec. 165), sec. 40 of the Act of 1892, was amended from the point where the words "thirty days" appear therein so as to read as follows: "to the proper officer to be specified in such notice his interest or benefit will be forfeited or suspended, and until after default has been made by him in paying his contribution or assessment in accordance with such notice."

The Act of 1897 continued in force down to the time of Hewitt's death. In rule 5 of the Society's rules of 1893, in force at the time that Hewitt withdrew from the order in 1901, it is, I think, clear, that "no fixed date" is provided for the annual payment of the $2 therein mentioned. The defendants' argument is that it may be or must be inferred that the expression "shall pay annually in advance the sum of $2 in addition to his assessments," meant pay annually in advance either from the date of withdrawal or from the first January next following. But neither is fixed as the date; no date is fixed.

From 1901 until 1906, therefore, it is clear that even if the sum of $2 was additional to that provided to be paid under rule 40, and Hewitt failed to pay it, no forfeiture or suspension would incur without notice. It is, of course, not pretended that he received any such notice.

But when the society amended its rules in 1906, and made the date for payment of the $2 a fixed one, was the result, in case Hewitt failed to pay as he did, that such failure brought about a forfeiture of his certificate?

It is clear he did not know that such annual payment was to be made at all. He had not been asked to pay it before, although the defendants now contend it had been payable before. He was not asked in or after 1906 to pay it. No intimation was given to him that in consequence of such rule, and this non-payment thereunder, his certificate had been or would be forfeited. Even though he had agreed to be bound by rules which might be subsequently adopted, his contractual rights could not be so seriously affected without it being incumbent upon the Society to shew that he had received from its notice of the coming into force of rules bringing about such a result. There is no absolute evidence that he ever did receive even a copy of the rules. The evidence as to sending copies thereof to all members in 1906, is of a general character. If we can infer anything from Hewitt's course of conduct after 1906, it is clear that he either did not receive the rules, which is most probable, or did not appreciate their alleged applicability to his case.

"It is chiefly where the enactment would prejudicially affect vested rights or the legal character of past transactions, or impair contracts, that the rule in question prevails. Every statute, it has been said, which takes away or impairs vested rights, acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions or considerations already past, must be presumed, out of respect to the Legislature to be intended not to have a retrospective operation," Maxwell on Statutes (1905), 4th ed., p. 323.

If by analogy we make use of a similar rule of construction with reference to these by-laws, I am of opinion that rule No. 5, as amended in 1906, cannot be said to have applied to Hewitt or to have a retroactive effect on his contract with the society. But in any event, I think that before the society could contend that he was bound thereby to such an extent as to enable it to forfeit his certificate, it must be incumbent upon them to shew clearly that the section in question does apply to him, and that he had received notice of its coming into force.

I am of opinion that the judgment should be set aside. The trial Judge has indicated in his judgment what may well be done in case the defendants still put forward the contention that proofs have not been supplied in the terms of the

contract, or that the proper parties, namely, the executors of the testator, are not before the Court to receive the moneys claimed. The defendants have been repudiating liability altogether, and in that view would appear to have waived the necessity on the part of the plaintiff to furnish proofs in strict accordance with the contract when if furnished the defendants would still resist payment on the other grounds indicated.

It is, I understand, contended on behalf of the plaintiff that strict compliance with the necessary proofs could not be made owing to the defendants refusing to give a certificate to the effect that the deceased was in good standing at the time of his death. Any necessary amendments may be made, and the time extended for putting in further proofs, if required.

There will be judgment for the plaintiff, or the executors, if they consent to be added as plaintiffs, for the amount claimed, with suitable interest and costs, or if the executors decline, they may be added as defendants and payment made to them.

HON SIR WM. MULOCK, C.J.Ex., HON. MR. JUSTICE LATCHFORD and HON. MR. JUSTICE LEITCH, agreed.

HON. MR. JUSTICE BRITTON. MARCH 2ND, 1914.

FORT WILLIAM COMMERCIAL CHAMBERS LTD. v. BRADEN.

6 O. W. N. 24.

Company—Shares—Action for Unpaid Calls—Subscription—Alleged Conditions—Misrepresentation—Evidence—Estoppel of Defendant—Acting as Director—Payment of Call—Acceptance of Allotment—Prospectus—Waiver—Companies Act 7 Edw. VII. c. 34 s. 95—2 Geo. V. c. 31, s. 112—Counterclaim.

BRITTON, J., *held*, that defendant was liable to plaintiff company for calls as a shareholder, as he had not proved his contention that his subscription had been obtained by misrepresentation and in any case was estopped by reason of his having actively acted as shareholder and director of the company.

That suing for calls upon unpaid stock is not commencing business within the meaning of Companies Act 2 Geo. V. c. 31, s. 1112.

Purse v. *Gowganda Queen Mines*, 15 O. W. R. 287; 16 O. W. R. 596, referred to.

Plaintiff company incorporated under the Ontario Companies Act, brought action against defendant, a broker re-

siding at Fort William, to recover for calls upon one hundred shares of stock, which it alleged were subscribed for by and allotted to the defendant. The defendant paid 2½ per cent., being the first call, but refused to pay the second, third and fourth calls of 10 per cent. each.

Defendant made a general denial of liability. He denied that any such company was ever incorporated; he denied that it was ever organized or authorized to do business; he denied that any shares were allotted to him and did not admit the validity of the calls made upon shares which plaintiff claimed were allotted.

Tried at Port Arthur without a jury.

C. A. Moss and J. E. Swinburne, for plaintiff.

W. F. Langworthy, K.C., for defendant.

HON. MR. JUSTICE BRITTON: — The defendant specially defends this action because of alleged misrepresentation made to him, and he contends that any subscription made by him for stock, or any promise or agreement to take stock, was upon the express condition, first, that if the company was unable to obtain subscriptions for stock to any amount sufficient to pay for lots to be purchased from the McKellar Bros., there was to be no liability. Other special conditions are set out in the statement of defence, and a special reply to all these is made by the plaintiff company.

The defendant was a person greatly interested in the prosperity of Fort William, and it was deemed essential, by many of the citizens, that a company, such as the present, should be formed for the purpose of making Fort William a great centre for the distribution of grain, and the building to be erected by the plaintiff, which is now completed or in the course of completion at an early date, was necessary for the purpose of retaining the head office of the grain inspection and sample market, at Fort William.

Those of the citizens of Fort William who were desirous of having this company formed—the promoters, of whom the defendant was one—on or about the 4th of June, 1912, entered into an agreement in writing, and under seal, to take stock in the company then to be formed; and by this agreement the defendant was bound to take 100 shares. The agreement is as follows:—

"We, the undersigned, hereby covenant and agree each with the other to subscribe for and take shares of the Capital Stock of a Company, to be incorporated and known as 'The Fort William Grain Exchange, Limited,' or otherwise, as may be agreed upon, for the purpose of erecting a Grain Exchange, Sample Market, and Office building in the City of Fort William, and acquiring the site thereof at a cost of not more than five hundred thousand dollars ($500,000) to the par value of the amount set opposite our respective names, and to pay for the same in five equal instalments as follows:—

One-fifth cash and the balance in four equal instalments payable within three, six, nine and twelve months, respectively, from the 1st day of July, 1912.

This is upon condition that the Dominion Grain Commission agrees to rent two floors of the said building.

In witness whereof our hands and seals this 4th day of June, 1912."

This was signed by defendant and a number of others.

Pursuant to what was agreed upon, application for incorporation was made, and the plaintiff company was incorporated under the Companies Act, 1907, by letters patent, dated 29th July, 1912.

The promoters, of whom the defendant was one, apparently upon being advised of the issue of these letters patent, at once met together—or if all did not meet, some did—and many of the promoters signed a formal application for shares and their acknowledgment of allotment of these shares. The defendant signed the following:—

"To the Fort William Commercial Chambers, Limited,
and the Provisional Directors thereof.

I hereby apply for and agree to take 100 shares in the Fort William Commercial Chambers, Limited, or such smaller number as may be allotted to me.

Dated at Fort William this 29th day of July, 1912.

(Sgd.) M. H. Braden."

"I hereby acknowledge having received notice from the Fort William Commercial Chambers, Limited, that 100 shares in the said company have been allotted to me, in accordance with my application.

(Sgd.) M. H. Braden."

Then a document was drawn up and signed, so far as appears, by all the then stockholders.

The defendant signed:—

"Fort William Commercial Chambers, Limited.

We, the undersigned, the Provisional Directors, Incorporators and all the subscribers to the stock of the Fort William Commercial Chambers, Limited, organized under the laws of the Province of Ontario, having its principal office at the City of Fort William in the district of Thunder Bay, do hereby waive notice of the time, place and purpose of the first meeting of the stockholders of the said company, and do fix Friday the 2nd day of August, 1912, at 8 o'clock in the afternoon, as the time, and the City Hall, Fort William, Ontario, as the place of the first meeting of the incorporators, provisional directors and subscribers to the stock of the said company.

And we do hereby waive all the requirements of the statutes as to the notice of this meeting, and the publication thereof; and we do consent to the transacion of such business as may come before said meeting.

Dated this 29th day of July, 1912."

It was signed by the defendant, by Perry and Dean and about thirty others.

Pursuant to that agreement, the provisional directors met on the 2nd August, 1912, at the time and place appointed, and proceeded to allotment. The defendant had agreed to take 100 shares of stock which were allotted to him. All the stock subscribed for, was allotted.

After the meeting of the provisional directors was over, a meeting of shareholders was held. That was the first meeting of shareholders, and was to be considered as the statutory meeting. All the requirements of the statute in regard to that meeting were expressly waived.

The defendant was present at that meeting of shareholders, and he allowed his name to be put in nomination for director, and upon a ballot being taken he was elected as director.

Immediately after the adjournment of the shareholders' meeting, a directors' meeting was held. The defendant took part—an active part in the proceedings, moving and seconding resolutions. He seconded the passing of a by-law authorizing an agreement with the McKellars, and he was present and assented to other important business being transacted.

A formal notice to the defendant of allotment was sent to him on 2nd August, 1912.

On the 30th July, 1912, the defendant signed as director, two important agreements, one between McKellars and the company, and the other between Murphy and others and the company.

The defendant attended a meeting of the directors on the 3rd August, and seconded the resolution, making the call of 2½ per cent upon the stock. Notice of this call was sent out, and defendant subsequently paid the 2½ per cent. on the $10,000.

On the 8th August, 1912, another meeting of directors was held at which defendant was present, taking part, when many shares were allotted to divers applicants.

On the 15th August another meeting of directors took place, stock was allotted—defendant being present taking part.

On that day the shareholders met. Considerable business was done. At that meeting a resolution was adopted appointing a committee to canvass for the sale of stock. The defendant regarding himself and being regarded by others as a prominent promoter and shareholder. At the last mentioned meeting of shareholders all the directors resigned. The defendant was re-nominated — he not objecting — but was not re-elected as director.

Then the defendant having ceased to be a director, but not objecting to the allotment of shares to him, and long after such allotment, tendered for the construction of plaintiff's proposed building. Tenders were opened by the directors at their meeting on the 3rd February, 1913, and defendant's tender at the sum of $272,000 was accepted.

Afterwards the defendant withdrew his tender and accepted a return of his deposit, but not objecting to his being a shareholder and apparently consenting to the contract for the necessary building being given to another.

The negotiations between the defendant and the directors appear in their report to the shareholders of the 19th April, 1913.

The letter of defendant of May, 1913, is the letter of a business man having an interest in the company, and recognizing that the business of any company must be managed by the directors or managers of that company. The defendant did not attempt to withdraw until the 10th April, 1913.

In defendant's letter he does not allege any misrepresentation of any existing facts, but his complaint was that the directors had gone beyond what was their intention or beyond their statement of intention.

In any such undertaking the directors must necessarily be at liberty from time to time to change their plans, for all of which they are responsible to the shareholders; but this is no ground for any shareholder to repudiate and refuse to pay for his shares.

The defendant represented himself to others as a shareholder, and so far as appears, a fair inference would be that by his so representing and so acting, others who perhaps would not have become shareholders, did so in this.

The defendant, as it seems to me, has waived any formalities in reference to this stock. The calls were properly made; the defendant had notice of these calls; he not only signed the agreement that he would take the shares, but he signed in the books of the company an undertaking to accept the shares if they were allotted to him, and they were so allotted.

As to misrepresentation, that is a question of fact. I find there was no misrepresentation. It was not proved that any representation by the company or by any one authorized by the company, was untrue. This case is entirely free from the slightest suspicion of fraud. The company and all the directors in their plans and negotiations for securing property and erecting a building thereon truly stated what these plans and negotiations were. I find, as was argued, that "there was no misrepresentation of an existing fact or an existing intention." It seems to me quite impossible that the defendant wholly or in any material respect relied upon the representation of any one. He had as full and complete knowledge of what had been done, and what was intended, as one of those who promised to subscribe or did subscribe for shares. If it be alleged that there was any representation that the buildings would cost only $250,000, it must be noticed that it was thought by the promoters that the cost of land and building, might reach $500,000, and provision was made for that amount.

Then the defendant was willing to take the contract for erecting the building at the price of $272,000, without in any way considering that an excessive price. The contract was not given to defendant because he exacted other terms with which the company could not comply.

All was right at first, but the defendant, and the defendants in the other two cases tried with this case, as early as 24th May, 1913, began to look for a way out. On that day they wrote to the president and directors, formally demanding that proper guarantees be furnished to them that the proposed building would carry an additional five stories, ten in all, etc. They stated that they would refuse to pay calls, etc., until furnished with evidence, see Ex. 21. The defendants were not entitled to any such information unless shareholders. They recognized this and put their refusal to pay wholly upon the ground of "misrepresentation on the part of the directors and failure to carry out the representations made to the subscribers for stock, and upon their failure to make any adequate provision for the protection of shareholders or their rights, and in the absence of authority." See Exhibits 23 and 24.

The correspondence in reference to the proposed building and contracts for same, will shew that the defendant thought himself a shareholder and was acting as such. See Exhibit 13.

The Act in force when this company was incorporated was 7 Edw. VII. ch. 34 (1907, O.), sec. 95 definies "prospectus." It is practically an invitation or offering to the public, for subscription or purchase shares or debentures or other securities of the company. There was not in this case, when the defendant became a shareholder or subscriber for shares, if he ever became such, any invitation to the public to subscribe for shares, or any offering of shares within the meaning of the Act. The object of the Act was to protect the public, not to protect a promoter, or an original subscriber for stock. I am of opinion that the objection of want of prospectus is not open to the defendant. If prospectus in this case was necessary, the defendant is one of those to blame for not having one issued and filed. To allow it as a defence in this action, would be allowing the defendant to take advantage of his own wrong.

Then by 2 Geo. V. ch. 31 (1912), part VI. is made to apply to every company whether formed before or after the passing of that Act. The defendant contends that the Act applies; if so, the objection of want of prospectus cannot be taken unless taken within ten days after notice of allotment, sec. 99, sub-sec. 4. The notice of allotment to defendant was 2nd August, 1912. Objections were not formally taken until

in this action. The allotment was on the 29th July, 1912, and the defendant waived all objections to this. The defendant's attempted withdrawal was not until 1913.

Allotment. I am of opinion that the allotment was in the view of defendant's waiver and consent must be considered legal and binding upon him. The meeting of 2nd August, 1912 was a statutory meeting. Even if the defendant had the right to treat his subscription for stock as voidable that right expired in one month after the statutory meeting.

The notice to defendant of allotment to him was sent on 2nd August, 1912. A call was made upon all shares of two and one-half per cent., and on the 23rd August, 1912, the defendant paid the two and one-half per cent. for which he counterclaims in this action. An irregular allotment renders contract for shares only voidable, some steps should have been taken by defendant to rescind, but instead of that defendant validated the allotment by his writing, and by general acquiescence and by payment of first call.

At the time of the formation of this company, and after, during all the time when defendant was acting, and when business of the company was being done, the company as between it and the non-paying original shareholders must be treated as a private company.

Counsel for the parties put their arguments in writing—cited may cases—and made instructive comments upon all the sections in the Acts of 1907 and 1912.

I have looked at the cases. No useful purpose will be served by any further reference to them.

The case of *Purse* v. *Gowganda,* 16 O. W. R. 596, is in point in plaintiff's favour. The case for plaintiff has not been met by defendant. If the section of the Act of 1912, in reference to commencement of business (sec. 112) is applicable to this case, I am of opinion that suing for calls upon unpaid stock is not commencing business within the meaning of the Act.

The company has been organized.

The plaintiff is entitled to judgment for $3,140.69 being for second, third and fourth calls of $1,000 each upon 100 shares of stock and interest upon second call, $1,000 from 17th February, 1913, interest on third call from 26th March,

1913, and interest on fourth call from 26th April, 1913, interest at 5 per cent. per annum and down to this date.

There will be a declaration that defendant is a shareholder in plaintiff company to the amount of 100 shares, and that he is liable for the unpaid calls made since the commencement of this action and interest thereon, and that he is liable too for the unpaid balance of said stock as the same has been or may be called.

The judgment will be with costs.

The counterclaim will be dismissed with costs.

Thirty days' stay.

HON. MR. JUSTICE BRITTON. MARCH 2ND, 1914.

FORT WILLIAM COMMERCIAL CHAMBERS LTD. v. PERRY.

6 O. W. N. 41.

Company—Shares—Action for Calls—Misrepresentation—Estoppel—Defendant Acting as Director—Counterclaim.

BRITTON, J., *held* defendant liable to plaintiff company for unpaid calls, holding that he had not established his defence of misrepresentation in respect of his subscription.

Action by plaintiff company for unpaid calls. A similar action to that by same plaintiff against M. H. Braden, *ante* p. 910.

Tried at Port Arthur without a jury.

C. A. Moss and J. E. Swinburne, for plaintiff.

W. F. Langworthy, K.C., for defendant.

HON. MR. JUSTICE BRITTON:—It was agreed that the evidence taken in the *Braden Case* should be used in this case—so far as applicable. The defendant subscribed for 50 shares, and as the holder of these was elected director, and also president of the company.

In addition to the evidence in the *Braden Case*—the certificate of defendant being the holder of shares—the allotment—the calls, and non-payment was put in.

There should be judgment for the plaintiff for $1,570.35, being for second, third and fourth calls of $500 each on 50 shares of stock and interest on second call from 17th Feb-

ruary, 1913, and on third call from 25th March, 1913, and on fourth call from 26th April, 1913, all at 5 per cent. per annum, and down to this date. Declaration that defendant is a shareholder in plaintiff company to the extent of 50 shares, and that he is liable to pay the unpaid calls since the commencement of this action and interest thereon, and that he is liable for the unpaid balance of said stock as the same has been or may be called.

Judgment will be with costs.

Counterclaim dismissed with costs.

Thirty days' stay.

HON. MR. JUSTICE BRITTON. MARCH 2ND, 1914.

FORT WILLIAM COMMERCIAL CHAMBERS LTD. v. THOMAS EDGAR DEAN.

6 O. W. N. 40.

Company—Shares—Action for Calls—Misrepresentation—Estoppel—Counterclaim.

BRITTON, J., *held* defendant liable to plaintiff company for unpaid calls, holding that he had not established his defence of misrepresentation in respect of his subscription.

Action by plaintiff company for unpaid calls. A similar action to that of the same plaintiff against M. H. Braden, *ante* p. 910.

Tried at Port Arthur without a jury.

C. A. Moss and J. E. Swinburne, for plaintiff.

W. F. Langworthy, K.C., for defendant.

HON. MR. JUSTICE BRITTON:—It was agreed that the evidence taken in the *Braden Case* should be used in this case so far as applicable and relevant. The only difference is that the defendant Dean did not act as director. He did, however, attend meetings of shareholders and signed as did Braden.

In short, Dean, in this undertaking, seems to have cast his lot in with Braden—in my opinion only objecting to payment of calls—because Braden objected.

There should be judgment for the plaintiff for $3,140.69, being for second, third and fourth calls of $1,000 each on

100 shares of stock, with interest on second call from 17th February 1913, and on third call from 26th March, 1913, and on fourth call from 26th April, 1913. Interest at 5 per cent. per annum down to this date.

Declaration that the defendant is the holder of 100 shares in the stock of the plaintiff company, and that he is liable to pay the unpaid calls made since the commencement of this action and interest thereon, and he is liable for the unpaid balance of said stock, as the same has been or may be called.

Judgment will be with costs.

Counterclaim will be dismissed with costs.

Thirty days' stay.

SUPREME COURT OF ONTARIO.

FIRST APPELLATE DIVISION. MARCH 9TH, 1914.

NEOSTYLE ENVELOPE CO. v. BARBER-ELLIS LTD.

6 O. W. N. 43.

Patent—Action for Royalties—Patented Envelope—Non-Compliance with Postal Regulations—Substitution of Different Envelope—Refusal of Defendants to Accept—Compliance with Contract—Repudiation of, by Defendants—Right of Plaintiffs to Treat as Ended—Relicensing of Others by—Damages—Reference—Appeal.

FALCONBRIDGE, C.J.K.B., 24 O. W. R. 885, dismissed an action for royalties for the use by licensees of a patented envelope, holding that as the form of the envelope contracted for had been materially changed to comply with the postal regulations, the altered form was not the article contracted for and there was consequently a failure of consideration.

SUP. CT. ONT. (1st App. Div.) *held*, that the amended envelope was within the scope of the patent and a compliance with the contract and defendants were liable in damages for their refusal to observe its terms.

Judgment of FALCONBRIDGE, C.J.K.B., reversed.

Appeal by the plaintiff from a judgment of HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., dated 8th July, 1913, directed to be entered after the trial without a jury at Toronto, on the 5th May, 1913; 24 O. W. R. 885.

The appeal to the Supreme Court of Ontario (First Appellate Division), was heard by HON. SIR WM. MEREDITH,

C.J.O., HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE and HON. MR. JUSTICE HODGINS.

C. S. McInnes, K.C., and C. C. Robinson, for appellant.

G. H. Kilmer, K.C., for respondent.

HON. SIR WM. MEREDITH, C.J.O.:—The appellant is the exclusive licensee for the Dominion of Canada of George John Hartke, to whom letters patent of the Dominion of Canada were issued on the 21st or 22nd day of June, 1910, for an invention in envelopes, and on the 26th September, 1913, the following agreement was entered into between the appellant and the respondent.

Toronto, Sept. 26th, 1910.

The Neostyle Envelope Co.,
New York City, N.Y.

Gentlemen,—We hereby accept for the entire life of the patent an exclusive license for the manufacture and sale in the Dominion of Canada for a certain invention in envelopes covered by letters patent number 126,393, issued by the Canadian Government, June 22nd, 1910. In consideration of your granting said license we hereby agree to pay semi-annually a royalty on said envelopes at the rate of eight cents per thousand on a minimum quantity of three millions the first year, four and a half millions the second year, six millions the third year, seven and a half millions the fourth year, nine millions the fifth year, ten and a half millions the sixth year, and ten and a half millions each and every year thereafter until the expiration of said patent. On all of said envolopes we sell in excess of the above stipulated minimum quantities per year we shall pay you a royalty at the rate of six cents per thousand.

It is understood and agreed that if called upon to do so, either by you or the Rolland Paper Company of Montreal, Canada, we shall grant to the Rolland Paper Company a non-exclusive license to manufacture and sell said patent envelope in that portion of the Dominion of Canada lying east of Kingston, Canada, provided Rolland Paper Co. guarantees to pay royalty at the rate of eight cents per thousand on a minimum of one million the first year, one and a half million the second year, two millions the third year, two and a half millions the fourth year, three millions the fifth year, three and a half millions the sixth year, and three and a half

millions each and every year thereafter, and a royalty of six cents per thousand on all envelopes which said Rolland Paper Company sell in excess of the above stipulated quantities per year.

Faithfully yours,
Barber-Ellis Limited,
Per Jno. F. Ellis.

The year begins on Nov. 1st, 1910.
Agreed to J. F. E.
H. A. Swigert, Vice-President,
Neostyle Env. Co.

The action is brought to recover damages for the breach by the respondent of this agreement, which, as the appellant alleges, and the fact is, was repudiated by the respondent shortly after it was entered into.

The respondent by its statement of defence alleges that on the negotiation for the agreement the appellant represented to the respondent that:

"The patented envelope was such that circulars and other printed sheets within the classification of third class postal matter enclosed therein was secured from falling out of the envelope and was secret but that the end of the envelope being open the rate of postage would be that payable in respect of third class matter, which is about half of the usual letter rate"; that

"The only benefit or advantage of the patented envelope is the lower rate of postage when used for the purpose of mailing third class matter. For the purpose of carrying ordinary letters the patented envelope serves no useful purpose whatever nor has it any advantage over the letter envelope now in common use"; that

"The patented envelope when in use and in transit through the mails cannot be opened so as to allow the contents to be examined and replaced without destroying the envelope, although one end of the same is open"; that

"The defendants' business is that of manufacturing and selling envelopes and before acting under the said agreement in any way and for the purpose of obtaining assurance that the patented envelope could be used for the purpose aforesaid the defendants submitted a sample of the patented envelope to the postal authorities of the Dominion of Canada and was informed by them that the proposed use of

the patented envelope at the rate of postage for third-class matter infringed the postal regulations made by the Postmaster-General in pursuance of sec. 9 of the Post Office Act, being ch. 66 of the Revised Statutes of Canada and particularly sec. 82 of the said regulation, which is as follows:

"Every packet of printed or miscellaneous matter must be put in such a way as to admit of the contents being easily examined. For the greater secnrity of the contents, however, it may be tied with a string. Postmasters are authorised to cut the string in such cases if necessary to enable them to examine the contents. Whenever they do so they will again tie up the packet.' And the defendant was further informed that the full letter rate of postage must be paid in respect of matters enclosed and mailed within the patented envelope;" that

"The saving of postage in the manner aforesaid was the sole object of both parties to the said agreement at the time of the making of the same, and the defendant making the said agreement relied upon the representations of the plaintiff as to the object and utility of the said patented envelope; and that

"The use of the patented envelope as intended by both parties to the said agreement is contrary to and will infringe the provisions of the said section of the Post Office Act and the said regulations made thereunder;" and the respondent submits that the object or purpose of the parties to the agreement being in fact unlawful and illegal the agreement is void.

The learned Chief Justice found as a fact that envelopes marked as exhibits 7, a, b, c, and d, which were the same that were shewn by the appellant's vice-president to the respondent during the negotiations which resulted in the making of the agreement, or similar to them, infringed the regulations of the Post Office Department; that this envelope "when in use and transit through the mails cannot be opened so as to allow the contents to be examined and replaced without destroying the envelope;" that another envelope, exhibit 9, which satisfied the Post Office authorities and which the appellant contends is covered by the patent "is not what" the respondent "bought;" that "the consideration of the contract has wholly failed;" that "apart from any question of representation or misrepresentation by the plaintiff's agent the parties were contracting with reference to an article which would answer the requirements

of the Canadian Post Office so as to send the matter enclosed therein at the lower rate of postage and this article failed to answer them."

It may be assumed in favour of the respondent that what the parties were negotiating about was the right to manufacture and sell envelopes that, to use the language of the Chief Justice, "would answer the requirements of the Canadian Post Office Department so as to send the matter enclosed therein at the lower rate of postage," and it may be that if the only envelope that was covered by the patent and which the respondent had acquired the right to manufacture and sell was the envelope exhibit 7, a, b, e, and d, it would have been proper to conclude that inasmuch as that form of envelope could not be used for sending matter at the lower rate of postage, the consideration for the agreement would have wholly failed; but that was not the only form of envelope covered by the patent which the respondents acquired the right to manufacture and sell. An envelope of the form of exhibit 9 is, I think, covered by the patent and there is no question that it could be used for sending third-class matter by post. There are, as it appears to me, as wide differences in the form of the hook between exhibits 7, a and b, and exhibit 7, c and d, as there are between exhibit 9 and any of these exhibits. The learned Chief Justice speaks of the hook of exhibit 9 as "a very emasculated hook," and says that it "does not engage with anything." That it is a book, I agree, but why it is dismissed with the contemptuous reference to it as "a very emasculated hook" I do not understand. It appears to be a very respectable hook and to engage with the flap provided for it though perhaps not to the same extent as the hooks on exhibits 7, c and d, and indeed the learned Chief Justice goes further than Mr. Ellis for, when asked by his counsel the difference between the hook on exhibit 7, c, and that on exhibit 9, the answer of Mr. Ellis was, "The hook is made more distinctly, I should say. Exhibit 7, c. It is not a hook as complete. This is far more complete to hang any matter on than that is. (Exhibit 7, c, more of a hook than exhibit 9.)"

There is also uncontradicted evidence that millions of envelopes of the same form as exhibit 9 have been and are in use in Great Britain and the United States, and according to the testimony of Mr. Dawson, his firm has made a sale of 150,000 of these envelopes and no complaints have

been made by purchasers that there was any difficulty with the post office, and his firm has also sent a few of them through the post office and there has been no difficulty with them.

There is, therefore, in addition to the testimony of the appellant's vice-president that the envelopes are safe, secret and secure the corroboration of it by the evidence to which I have just referred, which is, in my opinion, more to be relied on than the theories propounded by Mr. Maybee, the respondent's expert witness, and I cannot think it possible that such large numbers of the envelopes would be used in Great Britain and the United States or such large numbers of them would have been sold by Mr. Dawson's firm if they were open to the objection made by the respondent that they were not safe, secret and secure.

My conclusion is that the respondent has wholly failed to prove that envelopes made in accordance with the specifications and claim of the letters patent cannot be used without contravening the postal regulations of Canada, and that the respondent also failed to prove that envelopes of the form of that marked exhibit 9 are not "safe, secret and secure," and that the contrary is the proper conclusion on the evidence.

It is, I think, open to grave question whether, if the respondent had fairly presented the case to the post office authorities, it would not have obtained a favourable ruling as to the envelopes marked 7, a, b, c and d.

The postal regulations of the United States as to third class matter do not substantially differ from the Canadian regulations, and I cannot think that millions of these envelopes would have passed through the post offices of the United States if the objections to them which the respondent practically invited the Canadian post office officials to raise had really existed. It is plain, I think, from the testimony of Mr. Ellis, that he, after sleeping over the matter, rued the bargain he had made, and at once set about to find means by which the respondent could escape from the obligation it had entered into.

In addition to the reasons which, as I have stated, lead me to the conclusion that the defence of the respondent fails, I am inclined to think that the respondent relied upon Mr. Ellis' judgment as to the envelopes shewn to him answering the representations that are said to have been made to him. They were large manufacturers of envelopes,

and presumably understood the postal regulations of Canada as well, if not better than, the appellant's vice-president, who was a resident of the United States, and Mr. Ellis examined the envelopes 7, a, b, c and d, and was competent to judge whether, when the envelope was saled, the flap could be withdrawn without tearing or destroying the envelope. Even the learned Chief Justice, who is not an expert, was able to form an opinion, an erroneous one I, with great respect, think, upon the matter, by the ocular demonstrations which were made during the progress of the trial.

For these reasons I am of opinion that this defence fails.

It was apparently argued at the trial, as it was before us, although it is not set up in the statement of defence, that by having on the 10th August, 1911, given to M. V. Dawson & Co. of Montreal an exclusive license for the manufacturing and sale of the patented envelope for part of the territory covered by the license to the respondent the appellant had acquiesced in the position taken by the respondent, and was, therefore, not entitled to claim damages for the breach of the agreement of the respondent to pay the royalties.

That contention is clearly not well founded. Before the dealing with Dawson & Co. the respondent had repudiated the agreement, and it was the right of the appellant, as it did, to treat the repudiation as a wrongful putting an end to the contract, and at once to bring an action as on a breach of it, and to cover such damages as would have arisen from the non-performance of the contract at the appointed time, subject to abatement in respect of any circumstances which might have afforded the appellant the means of mitigating its loss, and the agreement with Dawson & Co. was but the availing itself of that means of mitigating its loss which it was not only the appellant's right, but its duty to do.

I would reverse the judgment of the learned Chief Justice, and substitute for it a judgment for the appellant for the damages sustained by reason of the respondent's breach of the agreement with a reference to the Master-in-Ordinary to ascertain the amount of the damage, and the respondent should pay the costs of the action and of the appeal.

HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE, and HON. MR. JUSTICE HODGINS, agreed.

SUPREME COURT OF ONTARIO.

FIRST APPELLATE DIVISION. FEBRUARY 23RD, 1914.

DEMENTITCH v. NORTH DOME.

5 O. W. N. 932.

Negligence—Master and Servant—Miner Injured by Unexploded Blast —Mining Act 1908, s. 164, Rules 10, 31—Duty of Mine Captain to Inspect—Employment of Inexperienced Man in Hazardous Duty—Findings of Jury—Evidence to Warrant—Further Finding by Appellate Court—Estimated Earnings — Computation— Workmen's Compensation for Injuries Act.

SUP. CT. ONT. (1st App. Div.) *held*, that it was the duty of a mine captain to whom it had been reported that certain blast holes had blasted badly to examine them before sending an inexperienced man to reblast other holes in the immediate vicinity.

Judgment of LATCHFORD, J., at trial, affirmed.

Appeal by the defendant from a judgment of HON. MR. JUSTICE LATCHFORD, dated 30th October, 1913, which was directed to be entered on the findings of the jury after the trial of the action at Haileybury on the previous day.

The appeal to the Supreme Court of Ontario (First Appellate Division), was heard by HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE, and HON. MR. JUSTICE HODGINS.

H. E. Rose, K.C., for appellant.

F. Denton, K.C., for respondent.

HON. SIR WM. MEREDITH, C.J.O.:—The respondent is a miner and was employed by the appellant to operate a drilling machine in the appellant's mine, and while engaged in that work on the morning of the 21st March, 1913, the respondent was seriously injured owing to an explosion which took place, and his action is brought to recover damages for his injuries and is based on the allegation that they were due to the negligence of the appellant.

According to the evidence, the operation which was going on in the mine at the time of the accident was for the purpose of blasting in a new drift at the 250 foot level. The respondent was in charge of a drilling machine, which was used for perforating holes in the face of the rock, and was assisted by a helper named Mecca, who was

killed by the explosion, and a man named Cassidy was in charge of a similar machine in another drift about 50 feet away from that in which the respondent was working, and Cassidy was assisted by a helper named Orak. Cassidy and his helper had assisted the respondent in drilling 13 holes in the latter's drift, and after the holes had been "blown out" they were loaded with powder and the respondent cut the fuse and lit it; the party then ascended to the surface and waited for the reports of the explosions and counted them as they occurred. There were 13 explosions counted which indicated that there had been an explosion in every one of the holes. This occurred between 3 and 4 o'clock in the morning, and the men then went to bed. They returned to work about noon of the same day when they were requested by the captain of the mine (Grierson) to do some "timbering" in the mine which had become necessary owing to the timbers having been displaced by the explosions. When they got down to the mine the respondent and Cassidy examined the holes and found that in some cases the rock had not been broken away to the full depth of the holes which was about 5 feet, but only to the depth of about 2 feet; they then ascended to the surface and informed Grierson that some of the holes had broken badly; there is a conflict of testimony as to what next occurred and as to the instructions that were given to the respondent. According to the testimony of Cassidy, Grierson said to "fire" the holes over again, and asked how many there were to "fire out," to which the respondent replied that he thought there were eleven.

Grierson testified that they reported that "it did not break good," that he asked the respondent "How many will you have to shoot over again?" that his reply was "eleven holes," and that he then told the respondent "to shoot them or as many as he thought ought to be shot before they started drilling again," that he went down into the mine and assisted in the timbering until about five o'clock, when they went "off shift" and did not come back until seven o'clock, that he then met them at the collar of the shaft as they were going down into the mine and said: "Be sure to shoot those eleven holes, or as many as you think should be shot again." Although this report had been made to him, no steps were taken by Grierson to find out which of the holes ought to be shot again, or the condition in which the holes had been left by the explosions,

and though he was in the mine and but a few feet away from where the holes were, he does not appear to have even taken the trouble to look at them.

Orak, who was present on all the occasions spoken of by Grierson, did not throw much light on the case, the only important statement made by him being that some one said on the occasion of the report being made to Grierson: "Those last rounds did not break down, you will have to shoot again," but by whom it was said, I find it impossible to gather from his testimony.

According to the testimony of the respondent, he told Grierson that he wanted the holes shot again, and was told by Grierson to drill again, and that Grierson told him not to shoot again holes two or three feet, that is, as I understand, when the rock had broken away to that depth, that, having examined the holes and taken out the loose rock from them, and finding no trace of powder in any of them, he proceeded to drill other holes, keeping six inches away from any of the existing holes; that he had drilled one to the full depth and had partly drilled another when the explosion occurred in an old hole next to it. Different theories are suggested as to the cause of the explosion; one of them that the hole the respondent was drilling was not being truly bored, with the result that the drill went in at an angle and came in contact with the powder that remained in the adjoining hole, and another, that the jarring caused by the drilling had caused the powder to explode.

The jury, in answer to questions put to them by the learned trial Judge, found that the accident was caused by the negligence of the appellant, and that the negligence consisted "in the captain failing to inspect after report made to him of incomplete shots before resuming operations," acquitted the respondent of contributory negligence, and assessed the damages at $3,250, and judgment was thereupon entered for the respondent for that sum, with costs.

There was, in my opinion, evidence to warrant the finding of the jury.

Among the rules which by the provisions of sec. 164 of the Mines Act are required, "so far as may be reasonably practicable," to be observed in every mine, are the following:—

10. A charge which has missed fire shall not be withdrawn, but shall be blasted, and in case the missed hole has been blasted at the end of a shift, that fact shall be reported by the foreman or shift boss to the mine captain or shift boss in charge of the next relay of miners before work is commenced in them.

31. The manager or captain or other competent officer of every mine shall examine at least once every day, all working shafts, levels, stopes, tunnels, drifts, crosscuts, raises, signal apparatus, pulleys and timbering in order to ascertain that they are in a safe and efficient working condition . . .

There was no shift boss employed on the mine at the time of the accident, and no foreman in charge of or having oversight over the workmen, and no inspection for the purpose mentioned in rule 31 was made by any one after the report to Grierson that the holes had broken badly, although he was, as I have said, in the mine and near the place in which the holes had been drilled.

The jury were, I think, warranted in coming to the conclusion that Grierson was negligent in not having made an examination of the mine after it had been reported to him that the holes had broken badly and that it would again be necessary to "shoot" some of them, and in leaving the respondent to be guided by his own judgment as to which of them he should "shoot," and which of them he need not "shoot," instead of himself directing on the ground what was to be done.

Grierson is, I think, condemned by his own testimony from which I make the following extracts:—

Q. Don't you think that a careful boss with an inexperienced man would probably go down and see the result of the first shot? A. Yes, if he was not busy with something else?

Q. Wouldn't it be his duty to see to such matters? A. To a certain extent.

Q. And you told him to go down and shoot the eleven holes or as many as you have to? A. Yes.

Q. They were to use their judgment? A. Yes.

Q. And if they did not find any of these should be shot, then it was not your (*sic*) duty to shoot under your instructions. You left it to their judgment? A. Yes.

Q. You left him to use his judgment as to what should be done about the shooting? A. Yes.

* * * * *

Q. So that if a man started six inches from the former hole he would he justified in so doing? A. Yes, I made it six or somewhere close to six.

There would perhaps have been more difficulty in the respondent retaining his verdict if it had been established that he was directed to blast out any of the holes in which the rock had not broken away to the bottom of the hole, before drilling any new holes, but, as has been seen, no such direction was given to him, and he was left to use his own discretion as to what holes should be blasted out and what holes he need not blast out. The former direction would have been one that might have been safely carried out by a miner having as little experience as the respondent is shewn to have had, but the direction that was given involved the casting upon a comparatively inexperienced man the delicate duty of deciding what holes should be and what holes should not be blasted out, and running the risk that might result from an error of judgment in carrying out his instructions. The jury no doubt thought that had Grierson inspected the mine after it was reported to him that the holes had broken badly he should and would himself have determined, and pointed out which of the holes should be blasted out, instead of leaving that to be determined by the respondent.

It may be that as it stands the answer to the second question does not cover this view of the case, but it is certainly not inconsistent with it, and having before us all the materials necessary for finally determining the matter in question, the Court should exercise the power conferred upon it by the Judicature Act and make this supplementary finding, which there is ample evidence to support, and having made it, to affirm the judgment of my brother Latchford.

It was argued by Mr. Rose that there was not sufficient evidence to warrant the jury assessing the damages at $3,250; that if the respondent is entitled to recover at all he can recover only under the Workmen's Compensation for Injuries Act, and that there was no evidence as to what was the equivalent of "the estimated earnings during the three years preceding the injury of a person in the same

grade employed during those years in the like employment within this province;" and that the damages should, therefore, have been assessed at $1,500.

I am unable to agree with this contention. According to the testimony of the respondent, he was earning $3.50 a day at the time he was injured, and that appears to have been treated by everybody at the trial as a sufficient basis for determining the alternative amount to which the compensation is limited by the Act, and rightly so, I think. because, in the absence of evidence pointing to a different conclusion, the jury might properly draw the inference from the fact that the respondent was being paid that wage that the estimated earnings during the three years of a person in the same grade employed during those years in the like employment within this province would be a sum represented by $3.50 multiplied by the number of working days in the three years.

I would dismiss the appeal with costs.

HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE and HON. MR. JUSTICE HODGINS, agreed.