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HIGH COURT OF JUSTICE.

MIDDLETON, J. JULY 23RD, 1912.

RE WEST NISSOURI CONTINUATION SCHOOL.

Schools—Township Continuation School—Establishment of—Duty of School Board—Requisition for Funds—Mandamus.

Motion by W. B. Harding and John Macfarlane, ratepayers, for an order directing the West Nissouri Continuation Board and the several members thereof forthwith to take such proceedings as may be necessary in order that the school may be established and made available to such persons as shall desire and be entitled to attend the same, and further directing the school board (within the time limited by the statute) to make request or demand upon the council of the township of West Nissouri for such money as the school board may in its discretion deem necessary in order to open and maintain the school.

The motion was heard at the London Weekly Court on the 22nd June, 1912.

W. R. Meredith, for the applicants.

G. S. Gibbons, for Simon Blight, John Salmon, and Ernest McCutcheon, three of the trustees.

MIDDLETON, J.:—This motion is a continuation of the litigation which has been pending in the Courts for some considerable time. (See 25 O.L.R. 550.) It has already been determined that the continuation school district has been validly established; and a mandatory order has been granted, at the instance of the school board, directing the payment by the township corporation to the school board of the sum of $1,000 for maintenance pur-

poses. A motion for a mandamus to compel the payment of $7,000 (and the issue of debentures for the raising of that sum) for the purpose of erecting a school building, failed, solely upon the ground of the insufficiency of the demand made by the school board.

Since that motion was launched, there has been a change in the constitution of the board; and it is impossible to read the material, or hear the argument of counsel representing one section of the trustees, without being quite convinced that it is the intention of some members of the board to prevent the establishment of the continuation school. These gentlemen, no doubt actuated by reasons which appear to them to be good and sufficient, think the establishment of the continuation school undesirable; and, although they have accepted office upon the the school board, are actively seeking to prevent the establishment of any school.

Following the decision of the Divisional Court (25 O.L.R. 550) rendering necessary the making of a further demand to obtain the $7,000, for which a by-law has already been passed by the township council, a resolution was introduced at the meeting of the school board on the 27th March last, authorising the making of the necessary formal demand. This resolution was defeated, upon an equal division of the board: the three trustees represented by Mr. Gibbons voting against it, the other trustees voting in its favour.

A resolution was at the same meeting moved to demand from the township $2,770 for the maintenance of the school, in order that the school might be carried on at once. This was lost upon the same division.

A third resolution, directing an advertisement for teachers, was also moved, and lost upon the same division.

A fourth resolution, directing instruction to be given to the architects to draw specifications and to advertise for tenders for the construction of a school building, was also moved, and lost upon the same division.

A newspaper account of the proceedings of this meeting is put in and verified; the attitude taken by those opposed to the resolutions being that the school should not be established because the ratepayers of the township are opposed to it. No amendment was moved to any of the resolutions; and, so far as appears, the sole issue raised was, "School or no school?"

Another meeting was held on the 16th April, 1912, when a resolution was moved: "That the West Nissouri Continuation

School Board do provide adequate accommodation for all purposes according to the regulations." This resolution was defeated; one at least of the trustees opposed stating that "they would never have a school."

A resolution was moved at this meeting by those opposed to the school: "That a committee, consisting of Trustees Salmon, McCutcheon, and Fitzgerald, be a committee to look into the question of the location of the continuation school and to advise as to the desirability of renting suitable premises or building, and to report to the trustees at their next meeting." This resolution was defeated by those in favour of the school being established, as the committee named were the three members opposed.

Upon the hearing of this motion, counsel opposing the granting of the order took the position that his clients are not opposed to the establishment of the school, and that the resolution last-quoted was intended to be a step towards its establishment. These three trustees, examined as witnesses upon the motion, also took that position.

Upon the argument, I intimated that, in my view, the trustees were called upon to discharge the duties imposed upon them by the statute; that is, to take all proper steps for the establishment of the school; but that how this was to be done, whether by renting temporary premises or by building, was a matter that was entirely and absolutely in the control of the trustees, and that the Court ought not in any way to interfere with the free and untrammelled exercise of this discretion by the responsible body.

The difficulty arises from the inference which counsel for the applicants suggests as irresistible, that there is no bona fide intention to adopt either one course or the other, but simply an intention to drag the matter on until the 15th August, the time limited for making requisitions upon the township council. This fear, was, no doubt, somewhat augmented by the position taken by the respondents' counsel, that no mandatory order could be made until after the time for municipal action had expired; and it was suggested by counsel for the applicants that then the same argument would be adduced as on the former motion for a mandamus, that no order could be granted because the time had gone by.

To meet this situation, I directed the matter to stand until after the 15th July, and that in the meantime a meeting of the board might be held; and I gave leave to supplement the present material by placing before me the proceedings at that meeting, stating that this would give the trustees represented by Mr.

Gibbons an opportunity of shewing that Mr. Meredith was quite wrong in stating that there was no intention to establish a school in any way. I offered to accept the undertaking of Mr. Gibbons, on behalf of these three gentlemen, that they would act upon the intention stated in their examination, and take steps to establish a school in rented premises. Mr. Gibbons declined to give this undertaking, stating that his clients might not now be of the same mind, and that circumstances have changed—referring to the view that in December the county council may be induced to attempt to repeal the by-law establishing the school.

Since then, copies of the notices calling the meeting and of the correspondence have been put in, and these confirm the view that the three trustees in question have no intention of discharging the duties of their office in any way. This being so, the mandamus will go in the form indicated above, and Mr. Gibbons's clients will be directed to pay the costs of the motion.

I do not direct a stay, as the demand must be made by the 15th August, and Mr. Gibbons's main argument was based upon the statement that his clients would make the demand for such sum as might be necessary, in their view, to establish the school in rented premises, and their opponents have now abandoned the plan of at once erecting a suitable building.

KELLY, J., IN CHAMBERS. JULY 26TH, 1912.

REX v. MARCINKO.

Criminal Law—Keeping Disorderly House—Criminal Code, sec. 228—Magistrate's Conviction—Evidence—Weight of—Penalty—Excess—Amendment.

Application by the defendant to quash a Police Magistrate's conviction, under sec. 228 of the Criminal Code, for keeping a disorderly house.

D. D. Grierson, for the defendant.

J. R. Cartwright, K.C., for the Attorney-General.

KELLY, J.:—On the argument the chief grounds relied upon by the defendant were: (1) that there was no reasonable evidence on which the conviction could be made; and (2) that the

Police Magistrate imposed a penalty in excess of what is authorised by the Criminal Code, and that, after service upon him of the notice of motion to set aside the conviction, which called upon him to make a return of the conviction, information, etc., he amended the conviction by substituting a penalty provided by the Code.

In Regina v. St. Clair, 27 A.R. 308, 310, a case very much resembling the present one, Mr. Justice Osler, in delivering the judgment of the Court of Appeal, said: "If there was evidence upon which the magistrate might have convicted, he was the judge of the weight to be attached to it." In that case, as in this, there was no evidence of disorderly conduct except on one single occasion; but there was, as there is in the present case, evidence of the bad reputation of the house. The Court was of opinion that, in the face of such facts, it could not be said that there was no evidence to support the charge.

I think that in the present case there was evidence from which the magistrate might draw the conclusion of guilt, and on which he might have convicted. On that ground, the conviction must be sustained.

Then as to the other ground, that of excessive penalty and the magistrate's amendment of the conviction, the amendment was made so as to bring the penalty within what is authorised by the Criminal Code, namely, the payment of $100 (which includes costs), and, in default of payment, imprisonment for six months.

If the magistrate had the power to make the amendment, the defendant's objection is not well taken; but, assuming that he had not that power, the liberal powers of amendment given by the Code enable the Court to amend in cases such as this; and I, therefore (if it be necessary), now amend the conviction of the accused, Georgina Marcinko, made on the 10th April, 1912, by substituting for the words "two hundred dollars besides costs" the words "one hundred dollars." This $100 includes costs.

The conviction being so amended, I dismiss the defendant's application, but without costs.

KELLY, J., IN CHAMBERS. JULY 27TH, 1912.

REX v. RIDDELL.

Liquor License Act—Amending Act, 2 Geo. V. ch. 55, sec. 13(O.) —Intra Vires—Conviction of Person Found Drunk in Local Option Municipality—Jurisdiction of Magistrates—Evidence—Two Offences—Information and Conviction Following Language of Statute.

Motion by the defendant to quash a conviction made by two Justices of the Peace for the county of Lennox and Addington, under sec. 13 of 2 Geo. V. ch. 55(O.), amending the Liquor License Act.

The conviction was, for that the defendant was found upon a street or in a public place, in a municipality in which a by-law passed under sec. 141 of the Liquor License Act was in force, in an intoxicated condition owing to the drinking of liquor.

J. B. Mackenzie, for the defendant.

J. R. Cartwright, K.C., for the Attorney-General.

KELLY, J.:—It was argued for the defendant that the Ontario legislature had no power to enact sec. 13 of the Act 2 Geo. V. ch. 55, and "that the offence could not be made to exist in local option territory or there alone."

These objections are answered by Hodge v. The Queen, 9 App. Cas. 117.

On the further objection that it was not proven that the defendant's condition was owing to the drinking of liquor, and that there was no valid and sufficient evidence to prove the offence, the defendant must fail. There was evidence on which the convicting magistrate might have convicted; and, as said in Regina v. St. Clair, 27 A.R. 308, 310, "they were the judges of the weight to be attached to it."

Though in the notice of motion exception was taken that no by-law under sec. 141 was in force in the municipality, counsel for the defendant on the argument stated that he did not then raise any objection to the by-law. It is, therefore, not necessary to consider that objection.

One other exception was taken to the conviction, namely, that the information and the conviction charge two offences, and the evidence was not confined to one offence.

Both the information and the conviction follow the language of the section under which the conviction was made; and that is all that is required: Rex v. Leconte, 11 O.L.R. 408.

As all the objections fail, I dismiss the defendant's application with costs.

KELLY, J. JULY 29TH, 1912.

MAPLE CITY OIL AND GAS CO. v. CHARLTON.

Husband and Wife—"Oil Lease" of Wife's Lands Made by Husband—Confirmation by Wife—Alteration of Lease—Payments Received by Husband for Wife—Estoppel.

Action by the assignees of an oil lease for possession of the lands leased and to restrain the defendants from entering upon or prospecting for oil or gas thereon during the currency of the lease.

W. N. Tilley, for the plaintiffs.

O. L. Lewis, K.C., and W. G. Richards, for the defendants the Ridgetown Fuel Supply Company Limited.

R. L. Gosnell, for the defendants John Charlton and Agnes Charlton.

KELLY, J.:—The defendant Agnes Charlton, wife of her co-defendant John Charlton, is the owner of part of lot 177 on the north side of Talbot road (on the town line) in the township of Tilbury, containing 90 acres more or less.

On the 12th October, 1905, W. E. Keve, accompanied by George A. Jackson, a farmer residing in the township of Romney, went to the residence of the defendants the Charltons, and negotiated with the defendant John Charlton for what is known as an "oil lease" of the property. The negotiations were carried on in the presence of the defendant Agnes Charlton, and resulted in a lease being made by John Charlton to Keve of all the oil and gas in and under the premises, with the exclusive right to enter thereon for the purpose of drilling and operating for oil, gas, or water . . . for the term of ten years, "and as much longer as oil or gas are produced therefrom," etc.

The lease was made on certain conditions, one of which was that, if operations for drilling a well for oil or gas were not

commenced within four months from the date of the lease, and in case a well were not so commenced, the lease should become null and void, unless the lessee should pay to the lessor 25 cents per acre annually thereafter until a well should be commenced, and that such payments might be made "in hand by cheque or post office order mailed to the first party's (lessor's) credit in the Bank of Commerce of Blenheim, Ontario." Jackson, who completed the drawing of the lease, says he assumed that John Charlton was the owner of the property.

On the 20th July, 1906, Keve assigned this lease to H. E. Graham, and both the lease and the assignment were registered in the registry office on the 9th August, 1906.

Drilling for oil or gas did not commence within the four months; and on the 6th February, 1907, $22.50 (being 25 cents per acre for the 90 acres) was paid to John Charlton, who gave to the New York and Western Consolidated Oil Company (a company apparently owned by Graham, or with which he was associated) a written receipt therefor, which was expressed to be "in full for one year's rent from February 12th, 1906, to February 12th, 1907, on lease made by me to W. E. Keve, of Lima, Ohio, on the 12th day of October, 1905, for oil and gas purposes, on my land . . . and this payment is received by me in full satisfaction of all present claim or claims due me on said lease, which is hereby confirmed."

It having come to the knowledge of Graham that these lands stood in the name of the defendant Agnes Charlton, and not in that of John Charlton, early in September, 1907, Graham and A. D. Chaplin, who was the secretary-treasurer of the plaintiff company, went to Charlton's house, with the evident intention of having Mrs. Charlton confirm the lease made by her husband, or of having her sign a new lease to take the place of the former one. There was then produced to her what purported to be a copy of the original lease signed by her husband and Keve, and after the names "John Charlton" and "W. E. Keve" had been struck out, and the names "Agnes Charlton" and "H. C. Graham" substituted therefor, the document was signed and sealed by Agnes Charlton and by Graham.

Later on, the lease was assigned by Graham to A. D. Chaplin, who in turn assigned it to the plaintiff company.

The lessee, or those who subsequently became entitled to the benefit of the document, not having commenced to drill, they continued to make the annual payments of $22.50 to John Charlton. . . .

On the 6th January, 1911, the defendants Agnes Charlton and John Charlton made an "oil lease" of these same premises to John W. Smith, who, on the 9th January of that same year, assigned it to the defendants the Ridgetown Fuel Supply Company Limited. . . .

The defendant company proceeded to drill a well on the premises, and have incurred considerable expense thereby. . . .

In answer to the plaintiffs' claim to be entitled under the documents executed in favour of Keve and Graham, the defendants have set up that the plaintiffs are not, under these documents, entitled to the property or the use thereof or to the gas or oil which may be taken therefrom, on the ground that John Charlton had not the right to make the lease; that the document signed by Agnes Charlton was not a confirmation of the lease; and, if the latter document should be taken to be a lease from her to Graham, that the lessees have forfeited their rights by reason of payment of the 25 cents per acre annually having been made to John Charlton and not to her. They also contend that there have been such material alterations in the documents as render them inoperative.

The further defence is put forward that the lands are not described with such accuracy as to satisfy the Statute of Frauds. The defendants, however, are not entitled to succeed on this last ground; in my opinion, the documents sufficiently describe the property.

As to any alterations made, they were immaterial and not such as to affect the validity of the documents or to vary their legal effect; they merely expressed more fully the intention of the parties, already apparent on the face of the documents, and do not prejudice any of the parties thereunder: Norton on Deeds, 2nd ed., p. 39.

Moreover, the evidence of Chaplin is, that no alterations or additions were made to the document signed by Mrs. Charlton, after she had signed it, except this addition at the end, "22nd October, 1907;" but there is no evidence to shew by whom this addition was made.

The defendants laid stress upon two letters from Graham to Mrs. Charlton, in December, 1907, in which she was told that the plaintiffs would not drill on the property until they had got a lease properly signed. This was not in repudiation of what had been already signed, but it shews a desire on the lessees' part to have a more formal document from the owner before they commenced to drill.

A ground of defence urged in the argument was as to the manner of making the annual payments of $22,50, and the consequence of their having been made to the credit of John Charlton, instead of to Agnes Charlton. On this ground, I think they must fail.

From the depositions of the Charltons, on their examination for discovery, it is quite apparent that both fully understood the nature, objects, and meaning of the original lease and the document later on signed by Agnes Charlton; that the husband had been in the habit of conducting business for his wife; that she, when the original document was drawn, knew of its contents, read it over, and expressed her approval of it; and that, when she signed the document in September, 1907, she intended it to be a confirmation of the lease signed by her husband on the 12th October, 1905.

I cannot treat the dealings of the husband and wife in this transaction as separate; and, taking into consideration all the circumstances, I think it would be most unfair and inequitable to allow them to evade the consequences of what may be taken to have been their joint act, and thus relieve them from the obligation to carry out the bargain which they made with the plaintiffs' predecessors in title. The propriety of this conclusion is to be seen from their evidence. . . .

The evidence of John Charlton shews that the lease was recognised as existing and in force, when, in April, 1908, he drew from the bank the $22.50 paid in by the lessees; this money was not returned to the plaintiffs or their predecessors in title.

On the argument the question was not raised as to the effect of the payment for the year ending the 12th February, 1908, being made after that date. There is some doubt about the date the bank received it. But, assuming that it was made after the end of that year, I think the Charltons waived any forfeiture that might have resulted from failure to make payment within the proper time, when the husband drew that payment from the bank in April, 1908. The acceptance of this payment, and what took place in November or December, 1909, when John Charlton spoke to the plaintiffs' secretary about giving up the lease, and to which I refer later on, is evidence that the Charltons treated the lease as being in effect at that time.

John Charlton admits, too, that he had notice from the bank in each year, except the present year, that the annual payment had been paid into the bank.

Neither of the Charltons did anything to repudiate the lease, until about November or December, 1909, when an opportunity

presented itself of leasing the property on terms more favourable to them than those contained in the documents under which the plaintiffs claim; and, desiring to be freed from their dealings with the plaintiffs and their predecessors, the defendant John Charlton approached the secretary of the plaintiff company, and asked, as the secretary says, for a surrender of the lease held by the plaintiffs. John Charlton himself admits that he did go to the secretary, "to see what he was going to do about the lease, whether he was going to go on and drill, or give it up," and he admits that he told the secretary that he was going to lease it to other parties; in reply to which the secretary said that, if he did so, he would get into trouble. On his return home, he told his wife of this interview.

In the face of this warning, the Charltons did lease to Smith; and the more favourable terms they were able to make with him may have helped to induce them to disregard whatever obligations they may have been under towards the plaintiffs.

In answer to an objection by the defendants, it is contended on behalf of the plaintiffs that Agnes Charlton is estopped from denying the rights of her husband to bind her to the transaction of the 12th October, 1905. . . .

[Reference to Cairncross v. Lorimer (1860), 3 Macq. H.L. 827.]

Counsel for the Charltons contended that the registered deed to Agnes Charlton was notice to the plaintiffs of her title, and should be presumed against them; and, therefore, her "standing by" had not the effect of estopping her or giving the plaintiffs any right by estoppel.

It must not be overlooked that there was more than a mere "standing by" on her part, when she read over and expressly approved of the making of the original document. In Gregg v. Wells, 10 A. & E. 90, it is laid down that "a party who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving."

As to the defendant company, they cannot claim to have been ignorant of the true condition of affairs. The original lease to Keve and the assignment thereof by Keve to Graham had both been registered before they negotiated with the Charltons. Charlton swears that Smith was told of the existence of the lease set up by the plaintiffs and of the documents under which they claimed; and, as he puts it, "I told him all about it" . . .

The defendant company, though put upon inquiry, both by the registered documents and by the knowledge which they obtained from the Charltons, took no steps to clear off the title or to put themselves in a position where they could safely deal with or obtain a lease of the property; they took the risk of entering upon the property and expending a very considerable sum of money in drilling operations.

On the whole evidence, and without expressly referring to many objections taken by counsel for the defendants in their lengthy and able arguments, I cannot do otherwise than hold that the effect of the lease of the 12th October, 1905, and of the document subsequently signed by Agnes Charlton in favour of Graham, taken together, as I think they should be, is to constitute a lease by the husband and wife. It is beyond doubt that both intended that the lease should be given, and they thought they were making such a lease; they acted upon it to the extent of accepting payment of the first year's rental, as well as the rent for the year ending the 12th February, 1908, which was drawn from the bank by John Charlton (for I must hold that the receipt of these moneys by the husband was for the wife), and they had notice that the other payments were being made from time to time to the bank as rental for the subsequent years.

If any part of the evidence adduced by the plaintiffs was capable of being contradicted or explained by the defendants, they did not avail themselves of the opportunity of doing so, as they refrained from going into the witness-box at the trial.

I declare, therefore, that the document of the 12th October, 1905, taken with that signed by Agnes Charlton in December, 1907, constitutes a lease for the purpose therein set forth of the part of lot 177 on the Talbot road, township of Tilbury East, owned by Agnes Charlton, and that the plaintiffs are entitled to possession for the purposes set forth in these documents.

The defendant company are restrained from entering upon or prospecting for oil or gas on these lands during the time that the plaintiffs are so entitled.

Following what was directed by his Lordship the Chancellor in McIntosh v. Leckie, 13 O.L.R. 54—a case in many respects not unlike the present one—if the plaintiffs take the benefit of the work done and improvements made by the defendant company on the lands, it must be on terms of compensating that company therefor; and there will be a reference to the Master at

Chatham to ascertain the amount of such compensation, if the parties fail to agree.

The plaintiffs are entitled to their costs of the action.

DIVISIONAL COURT. JULY 29TH, 1912.

QUEBEC BANK v. CRAIG.

Banks and Banking—Advances by Bank on Security of Raw Material—Bank Act, secs. 74, 88, 89—Substitution of Goods —Promissory Notes—Payment—Receipt of Proceeds of Manufactured Goods when Sold—Estoppel.

Appeal by the defendant from the judgment of RIDDELL, J., in favour of the plaintiffs, in an action upon two promissory notes, dated the 23rd December, 1904, and the 31st January, 1905, for $4,500 and $5,000 each, upon which had been paid on account of principal $3,000, and interest to the 15th November, 1906, secured under the Bank Act, sec. 74, (now sec. 88), by 312 tons of sulphite pulp.

The appeal was heard by CLUTE, SUTHERLAND, and LENNOX, JJ.

J. Bicknell, K.C., and H. W. Mickle, for the defendant.

F. E. Hodgins, K.C., for the plaintiffs.

CLUTE, J.:—The defendant was, at the time of the advances, the manager of the Imperial Paper Mills of Canada Limited, who were largely indebted to the plaintiffs for advances for which the plaintiffs held security on pulpwood of that company. The company were in straitened circumstances. Owing to the action of the bondholders, who were pressing for payment, the plaintiffs refused to make further advances to the company for the purchase of sulphite, which was necessary to enable the company to continue the manufacture of paper of a certain kind, of which sulphite formed an ingredient, it is said, of 18 to 50 per cent. of the value of the product.

The company required sulphite to enable them to work up the wood on hand into pulp and paper. The plaintiffs were interested in having the wood upon which they held their lien turned into paper for sale. It was arranged that advances should be made direct to Craig, who should purchase sulphite and give

security to the plaintiffs upon the sulphite so purchased for the advances so made. It was in these circumstances that the advances were made on the notes sued on. The money was directly used for the purchase of sulphite. Craig, as manager of the company and as owner of the sulphite, allowed the same to be used in the manufacture of paper, upon the understanding that the amount so used should be replaced from time to time by the company. This was done. Paper was manufactured and sold and the sulphite replaced down to May, 1906. The company continued to use the sulphite without replacing it, and by July it had been all used up. The defendant contends that it went into paper, which was sold, and of which the plaintiffs got the benefit; in short, that they were paid in full for the advances made upon the notes by receiving the whole of the proceeds of the paper when manufactured and sold; and that the plaintiffs were bound to account to the defendant, to the extent of the value of the sulphite, on a sale of the paper; which, he contends, realised sufficient to pay the notes in full.

It is, I think, rather a question of fact than of law.

It is clear that the plaintiffs did not lose their security for the advances made to the defendant by the substitution of other sulphite in place of that first given in pledge, as this was the intention of all parties under the arrangement.

Sub-section 2 of sec. 88 expressly provides that the bank may allow the goods covered by such security to be removed, and other goods of substantially the same character and value substituted therefor, and such substituted goods shall be covered by the security as if originally covered thereby. Under sec. 89 it is provided that the bank may continue to hold security during the process and after completion of its manufacture with the same right and title by which it held the original goods. Sub-section 2 gives the bank priority over an unpaid vendor, unless the vendor also has a lien known to the bank. . . .

In dealing with questions of fact, the trial Judge states that he had no reason to doubt the veracity of any of the witnesses; but that the recollection of other witnesses was to be preferred to that of the defendant in regard to matters on which they disagreed. After a careful perusal of the evidence, I have formed the same opinion.

The case turns largely upon what took place in carrying on the business between the 1st May and the end of June or the 1st July, when the crash came. Watson was assistant-treasurer, acting under the direction of the defendant. He did the financ-

ing; and full credit is given to his evidence by my brother Riddell. If the facts are as he states—and I see no reason to doubt them—they are conclusive, in my opinion, against the defendant's contention.

It appears from Watson's evidence that the sulphite purchased by advances made upon the notes was used up within a month or two thereafter, and was replaced by purchases from time to time; that, by the direction of the defendant, about the beginning of May, 1906, the sulphite on hand began to be depleted by not being replaced as it was used. The plaintiffs were not aware of this until some time towards the end of June, when the local manager ascertained that it was all used up.

The company required advances from time to time for the running of the mill. These were obtained by selling the paper and assigning the accounts. The plaintiffs, however, did not collect these accounts. They were collected by the company; and, as soon as they were collected, the accounts so assigned to the plaintiffs were redeemed by the company. Assuming that the value of the sulphite went into this paper sold, and that the plaintiffs had the right to follow it and hold the proceeds of the paper as security for the original advances upon the notes, and that the defendant had the correlative right of insisting that the proceeds of the sale of the paper should be so paid, the question remains—and it seems to me the only question—what in fact took place upon the sale of the paper, and whether the action of the company, with the knowledge and sanction of the defendant, precludes the defendant now from claiming such right.

Watson says that, when the advances were being obtained, the sulphite hypothecations never came into discussion. He says that in May he pointed out to the defendant that they were using up the sulphite; that, as the paper was manufactured and shipped out, they would hypothecate the accounts to the bank and draw the money from it, and then repay them as the cheques came in from the different parties; that the plaintiffs thus advanced about $28,000 in June—from 90 to 94 per cent. of the face value; that this question of advances was discussed constantly with the defendant, and they were doing the best they could to try and keep the thing afloat pending some arrangements to be made in the old country. . . .

In my opinion, the defendant, having authorised the assignment of the accounts arising from the proceeds of the paper manufactured from the sulphite forming the security for the notes, and having received the advances thereon to their full value, over and above the value of the wood, and having made

no claim, at the time, that the proceeds should in part be applied upon the notes, cannot be heard now to charge the plaintiffs with the loss of the sulphite or with its proceeds. He himself authorised the arrangement by which the company obtained the advances to the full extent of its value. . . .

It was urged upon the argument that Mr. Jones, who subsequently became the local manager of the plaintiffs' bank at Sturgeon Falls, by his affidavit of the 14th February, 1907, in another action, made claim to this sulphite on the part of the plaintiffs. The clause referred to is as follows: "4. That at the date of the said agreement, that is, the agreement last referred to, there was in the said mill and in and about the premises a large stock of paper, ground wood, and sulphite, the product of wood, upon which the above-named Quebec Bank hold securities under sec. 74 of the Bank Act." . . . I do not think, however, that this statement by Mr. Jones affects the plaintiffs' position. Having regard to the facts of the case, as now known, I think the fair reading of the clause is, that the paper, which was made up of ground wood and sulphite, was the product of wood upon which the plaintiffs held securities under sec. 74 of the Bank Act. This was perfectly true, but it was made long after the defendant, in the view I take of the case, had lost any right to claim the proceeds of such paper by authorising the assignment of the accounts to obtain advances.

There is a further view, arising out of the facts of the case, that also, in my opinion, precludes the defendant's success. The plaintiffs in fact did not sell the paper or receive the money on such sale. The various transactions were carried through by the company. Payments were made to the company, and then the amount of the accounts which had been assigned by the company to the plaintiffs was paid out of the money so received. In other words, the plaintiffs have never received any part of the proceeds of the paper on account of or by means of the warehouse receipts.

In my opinion, the defendant is estopped from making claim now to the proceeds of the sulphite which he himself directed in another channel, by which it was lost to the plaintiffs.

I agree in the conclusion arrived at by the trial Judge, and think the appeal should be dismissed with costs.

SUTHERLAND and LENNOX, JJ., concurred—the latter giving reasons in writing.

Appeal dismissed.

DIVISIONAL COURT. JULY 31ST, 1912.

*McNAIR v. COLLINS.

Animal—Dog Killed when Trespassing—Justification—Apprehended Danger to Sheep—R.S.O. 1897 *ch.* 271—*Municipal By-law—Municipal Act,* 1903, *sec.* 540(1), (2)—*Findings of Trial Judge—Appeal—Damages.*

Appeal by the defendants from the judgment of the County Court of the County of Prince Edward, in favour of the plaintiff, in an action for damages for the loss of a dog killed by the defendants.

The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

J. H. Moss, K.C., for the defendants.

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

BRITTON, J.:—The action is for damages for wilfully and unlawfully killing the plaintiff's dog. There is no dispute about the ownership of the dog. The dog was wilfully killed by the younger defendant; and the other defendant, the father, frankly admits liability (if any) for the act of his son. The learned County Court Judge, who tried the action without a jury, found for the plaintiff, and assessed the damages at $125. The appeal is not only upon the question of liability, but also for a new trial or reduction of damages.

The dog was a valuable one, even if not thoroughbred. He was well trained to herd and attend to cattle, was a kind and affectionate animal, a good watch-dog, to which the plaintiff and his wife were much attached. A good deal of evidence was given as to the value of the dog—or the value of such a dog—and as a result it is quite clear that, if there is liability, the damages cannot be considered excessive.

In his reasons for judgment the trial Judge states: "The defendants' counsel explicitly conceded, at the trial, that, upon the evidence given thereat, no justification had been established under the statute. . . . The only question then is, whether the killing of the dog was justified under sec. 2 of the by-law."

My brother Riddell, in his reasons, which I have had the pleasure of perusing, says that he thinks that there was justification under the state for the killing, as it took place after

*To be reported in the Ontario Law Reports.

sunset on the 1st July—on the farm where sheep were kept. With great respect, I am not able to agree. The evidence seems to me quite clear that the dog was shot before sunset.

After the position taken by the defendants' counsel at the trial, when and where the evidence was in the minds of Judge and witnesses, I do not think it open to the defendants to fall back upon R.S.O. 1897 ch. 271. All that is open to the defendants is the defence, if any, under the by-law mentioned. The Municipal Council of the Township of Hillier had power, under the Consolidated Municipal Act, 1903, sec. 540, sub-secs. 1 and 2, to pass this by-law, which may be considered as a by-law restraining and regulating the running at large of dogs, and for killing dogs running at large contrary to the by-law. The defendants must justify, by strict proof, the act of killing.

I do not agree with the proposition of law laid down by the learned trial Judge that a by-law passed under the authority of the Municipal Act can justify the killing of such dogs only as are found running at large in a street or other public place. When a dog is found in a street or other place, not accompanied by the owner or some member of the owner's family, at a greater distance than half a mile from the premises of the owner; that dog shall be deemed to be running at large, and the onus of proof to the contrary is put upon the owner of the dog; but, when not in a street or public place, etc., the onus of proof to justify is entirely upon the person killing. The defendants, to succeed, must prove that the plaintiff's dog was found, unaccompanied, etc., on the defendants' premises at a greater distance than half a mile from the premises of the plaintiff, and that the defendant killing the dog was a resident ratepayer of the municipality.

The questions are questions of fact; and the trial Judge has not found in the defendants' favour upon all of these questions; and, in my opinion, this Court ought not to interfere with the findings of fact.

Then, as a matter of law, it seems to me an entire misapplication of the by-law to justify by it the killing of the plaintiff's dog, under the circumstances given in the evidence.

The dog was not at first found on the defendants' premises. He was seen upon the road—apparently having taken to the road from his master's home, although the defendants did not know that; but the defendants did know that the farm was occupied. The dog was walking from the west toward the east, quietly, on the road; he stopped once and turned back—perhaps, as suggested, because he heard the opening or closing of a door.

He then turned east, for the younger defendant saw him go upon the defendants' premises and continue easterly along the east and west fence, not acting like a stray dog, not "giving tongue," apparently perfectly harmless; and, when turning to the south, but continuing easterly, he was wantonly shot. The dog was apparently sent from home to meet his master.

A strict application of the by-law would permit the shooting by a resident ratepayer of a dog who, having followed his master for a distance of over half a mile, was left outside the door upon a neighbour's premises. That was not the intention of the law; and, if a strict application of the words of the by-law is insisted upon by the defendants, then there should be a strict application as to where the dog was "found." He was found, in the sense of being seen, walking or running on the highway, as he was on the defendants' premises; and, when on the highway, he was within the distance of half a mile from his master's home.

In my opinion, the appeal should be dismissed with costs.

FALCONBRIDGE, C.J.:—I agree in dismissing the appeal with costs.

RIDDELL, J., dissented, being of opinion that the defendants were protected both by the statute and by-law.

Appeal dismissed; RIDDELL, J., *dissenting.*

CURRY v. WETTLAUFER—KELLY, J.—JULY 23.

Injunction—Mining Rights—Terms—Mandamus.]—Motion by the plaintiff for an injunction restraining the defendants from mining, working, or extracting ores or minerals from a mining claim; and for a mandamus. The learned Judge made an order as follows: "The defendants by their counsel undertaking not to mine, work, or extract ores or minerals from the lands in question until the sale now pending or until further order, the injunction is refused: this without prejudice to the defendants, if so advised, applying to restrain the plaintiff from working the property pending sale. Motion for mandamus enlarged till first court-day after vacation." Britton Osler, for the plaintiff. W. M. Douglas, K.C., for the defendants.