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APPELLATE DIVISION.

OCTOBER 7TH, 1913.

*BURKE v. SHAVER.

Costs—Scale of—Action Brought in County Court—Award of Division Court Costs—Action within Competency of Division Court—Solicitor—Breach of Contract.

Appeal by the plaintiff and cross-appeal by the defendant from the judgment of the Senior Judge of the County Court of the County of Wentworth.

The action was brought in the County Court against a solicitor, and judgment given for the plaintiff for $92.84, but with Division Court costs only.

The plaintiff appealed on the ground that County Court costs should have been allowed; and the defendant, from the judgment against him. The defendant's cross-appeal was abandoned at the hearing.

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

J. G. O'Donoghue and M. Malone, for the plaintiff.

W. S. McBrayne, for the defendant.

The judgment of the Court was delivered by MEREDITH, C.J.O.:—The plaintiff appeals upon the ground that the learned Judge of the County Court erred in holding that the action was one within the proper competency of the Division Court.

It was contended by counsel for the appellant that the action was one of tort and not founded on contract, and therefore not within the competency of the Division Court. In sup-

*To be reported in the Ontario Law Reports.

port of this contention Laidlaw v. O'Connor, 23 O.R. 696, was cited; but what was said by Armour, C.J., in that case, makes against it. The learned Chief Justice, p. 698, quotes from note (a) to Hill v. Finney (1865), 4 F. & F. 616, at p. 635. . . . To the same effect is what was said by the Master of the Rolls in Sachs v. Henderson, [1902] 1 K.B. 613, 616.

In Steljes v. Ingram (1903), 19 Times L.R. 534, Phillimore, J., reviewed the authorities and decided that an action against an architect to recover damages for not using due care and skill in supervising the erection of an house which the architect had undertaken to supervise, was an action founded on contract.

In the case at bar, the respondent was acting for the appellant in completing a purchase of land in another Province, and was intrusted by him with a cheque for the amount of the purchase-money, with instructions not to pay it over until the taxes on the land were paid. The respondent did not follow these instructions, and the appellant was subsequently compelled to pay them to save his land, which had been sold for the taxes.

It appears to us that the action is, therefore, for the direct breach of a positive contract to do a specific act, and not for breach of a general duty arising out of the retainer to bring sufficient care and skill to the performance of the contract, and, being so, was within the proper competency of the Division Court.

There is a cross-appeal by the defendant, and it was abandoned on the argument.

Both appeals will be dismissed, and there will be no costs of them to either party.

OCTOBER 8TH, 1913.

*REX v. RUSSILL.

Criminal Law—Offence against Inland Revenue Act, sec. 372—Selling Wood Alcohol without "Poison" Label—Act of Servant—Conviction of Master—Mens Rea—Exceptions to General Rule.

Case stated by one of the Police Magistrates for the City of Toronto, at the instance of the Crown.

*To be reported in the Ontario Law Reports.

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

N. F. Davidson, K.C., for the Crown.

T. N. Phelan, for the defendant.

The judgment of the Court was delivered by HODGINS, J.A.:—In the case submitted, the Police Magistrate states that the defendant was charged with selling wood alcohol in a vessel not having affixed thereto a label bearing the words "Wood Alcohol, Poison," in black letters not less than one-quarter of an inch in height, in violation of the provisions of sec. 372 of the Inland Revenue Act (R.S.C. 1906 ch. 51), as enacted by sec. 27 of ch. 34 of 7 & 8 Edw. VII.

In his reasons for judgment, which are part of the case, he finds that the sale is proved. This sale is, upon the evidence, contrary to the statute referred to, by which "any person who holds in possession, sells, exchanges or delivers any wood alcohol contrary to the provisions of this section (372) shall incur a penalty not less than $50 and not exceeding $200."

The question to be answered is, whether the magistrate was justified in refusing to convict the defendant.

The latter did not personally make the sale, nor was he present when it was effected, but it was made in the sense hereafter mentioned to one Johnston, by the hand of the clerk of the defendant, in the latter's hardware store in King street, in the city of Toronto, on the 10th February last. The Crown contends that the defendant is, in law, liable as the seller, although the clerk actually carried out the sale.

The principle upon which this vicarious liability is imposed is stated by Lord Russell of Killowen, in the case of Coppen v. Moore, [1898] 2 Q.B. 306—speaking for a special Court convened for the purpose, consisting of the Lord Chief Justice, Sir Francis Jeune, P., Chitty, L.J., Wright, Darling, and Channell, JJ. . . .

After stating the general principle of law applicable to a criminal charge, "nemo reus est nisi mens sit rea," Lord Russell observes: "There is no doubt that this is the general rule, but it is subject to exceptions, and the question here is whether the present case falls within the rule or within the exceptions. . . . The greater number of exceptions engrafted upon the general rule are cases in which it has been decided that by various statutes criminal responsibility has been put upon masters for the acts of their servants. . . . The question, then,

in this case, comes to be narrowed to the simple point, whether, upon the true construction of the statute here in question, the master was intended to be made criminally responsible for acts done by his servants in contravention of the Act, where such acts were done, as in this case, within the scope or in the course of their employment. In our judgment, it was clearly the intention of the Legislature to make the master criminally liable for such acts, unless he was able to rebut the prima facie presumption of guilt by one or other of the methods pointed out in the Act." . . .

The principle thus enunciated was applied by the Court in Parker v. Alden, [1899] 1 Q.B. 20, in directing the conviction of a master for an offence against the Sale of Food and Drugs Act, 1875, where the milk he supplied was adulterated by strangers; in Brown v. Foot, 66 L.T.N.S. 649, to a case where milk supplied by the person convicted was adulterated by his servant against his express order; in Fitzpatrick v. Kelly, L.R. 8 Q.B. 337, where adulterated butter was sold without knowledge of this condition; and in a recent case, where the language of the Act is very similar, Caldwell v. Bethell, [1913] 1 K.B. 119. The Courts considered that these were cases in which the Legislature had in effect determined that mens rea was not necessary to constitute the offence, because, when the language, scope, and object of the Act was considered, it appeared that, if the master was to be relieved of responsibility, a wide door would be opened for evading the beneficial provisions of the legislation. . . . .

[Reference to Pharmaceutical Society v. London and Provincial Supply Association (1880), 5 App. Cas. 857.]

Lord Alverstone, C.J., in Emary v. Nolloth, [1903] 2 K.B. 264, gives three exceptions to the general rule that a guilty mind is necessary before a person can be convicted. These are: (1) if the offence is prohibited in itself, knowledge is immaterial; (2) where there is an absolute prohibition against selling, it is unnecessary to have knowledge; (3) though knowledge is essential, it will be imputed, where the master has delegated his authority or his own power to prevent.

Of the first exception, Brooks v. Mason, [1902] 2 K.B. 743 . . . and Rex v. Coulombe, 20 Can. Crim. Cas. 31, . . . are examples.

Channell, J., in Pearks v. Southern Counties Dairies Co., [1902] 2 K.B. 1, states the second exception at p. 11. . . .

Examples of the third exception are found in Commissioners

of Police v. Cartman, [1896] 1 Q.B. 655, and Strutt v. Clift, [1911] 1 K.B. 1. . . .

These exceptions, however, are, when analysed, covered by the principle stated in the Coppen case, which is more shortly put in the case last cited, in this way, that the mens rea is a necessity ingredient in a criminal offence unless the statute either expressly or by necessary implication from its language dispenses with it.

That this is no new principle is seen from an examination of the case of Regina v. Prince (1875), L.R. 2 C.C.R. 154. . . .

The decision in Williamson v. Norris, [1899] 1 Q.B. 7, in which it was held that a servant was not liable for selling liquor without a license under sec. 3 of the Licensing Act of 1872—which enacted that "no person shall sell . . . any intoxicating liquor . . . without being duly licensed"—is not easy to reconcile with the rule established by the other cases dealt with. The principal, however, was a Committee of the House of Commons, which could not be licensed. But even there it was held that, upon the true construction of the statute, the sale struck at was a sale by the master or principal and not that by a servant.

It cannot be doubted that the intention of the sections of the Inland Revenue Act cited was to prohibit absolutely the sale of wood alcohol, a poison, except in labelled bottles. It would fritter away the statute to hold that the sale of the article proved in this case, if made by a servant, absolved the employer, because he did not actually conduct the sale. The prohibition is explicit; the sale was in law the sale of the master; and there is no saving clause, such as is found in Coppen v. Moore, enabling the employer to free himself. It seems to fall fairly within the exceptions quoted. And, as stated by Hagarty, C.J., in Regina v. King (1869), 42 U.C.R. 246, "If it be contrary to law to sell liquor or any other article in a shop, the keeper of that shop, is, we think, responsible for any sale made by any clerk or assistant in his shop; prima facie, it would be his act."

There was a clear delegation of authority or of the master's power to prevent a sale contrary to the statute, by putting the servant in charge of the store and of the vessel of wood alcohol from which the quantity sold was taken. Moreover, the statute in question is one of a class to which the construction given in this case is most readily applied, as recognised even by Brett, J., in his dissenting judgment in Regina v. Prince (ante).

Section 111 of the Inland Revenue Act, relied on by counsel for the defendant, as indicating a contrary intention, does not, when examined, bear out the interpretation sought to be put upon it; nor does its position in the statute lead to the conclusion that it has any relation to the clause in question here. . . . It is not equivalent to a provision such as was decisive in Paul v. Hargreaves, [1908] 2 K.B. 289.

The question submitted should be answered in the negative, and the case remitted to the Police Magistrate.

HIGH COURT DIVISION.

LENNOX, J. OCTOBER 6TH, 1913.

McGREGGOR v. CURRY.

Executors—Action against—Evidence to Establish Contract between Plaintiff and Testator—Corroboration—Laches—Acquiescence — Statute of Limitations — Trust — Company-shares—Delivery of—Dividends— Appropriation — Waiver —Costs.

Action against the executors of one Curry, deceased, to compel the transfer to the plaintiff of ten shares of the capital stock of the Ford Motor Company, pursuant to an alleged contract between the plaintiff and the deceased, or for damages or other relief.

A. R. Bartlett and Urquhart, for the plaintiff.
A. C. McMaster, for the defendants.

LENNOX, J.:—There seemed to be unanimity of opinion at the trial as to the good character, good faith, and truthfulness of the plaintiff. This does not dispense with the necessity for corroboration; but, granted that this statutory requirement is complied with, the testimony to the plaintiff's unimpeachable character, and my own observation of the manner in which he gave evidence, disinclines me to accept without question the very severe comments now made upon his testimony by counsel for the defendants.

I find that there is sufficient corroboration of the plain-

tiff's evidence as to the alleged contract. There is quite sufficient in support of the evidence of the plaintiff to induce me to believe that the plaintiff's story is probably true, to believe that it is true; and in fact there is evidence which could hardly be forthcoming except upon the hypothesis of the truthfulness of the plaintiff's story. See Wilson v. Howe, 5 O.L.R. 323; Radford v. Macdonald, 18 A.R. 167; Green v. McLeod, 23 A.R. 676; Parker v. Parker, 32 C.P. 113.

But to justify a recovery in this action I must believe that the plaintiff's story of the making of a contract is true, as well as find that there is evidence corroborating it. Naturally enough, it is argued that the plaintiff's inaction for so many years after the time he thought he was entitled to delivery of the stock at least suggests a doubt as to the bona fides of his claim.

I have come to the conclusion, however, that the delay does not shew the non-existence of the alleged contract, and that the plaintiff's acquiescence or submission was induced by the intimate business and social relations then and for many years existing between the two families—the Currys and the McGreggors—and by the close business and personal relations between the deceased and the plaintiff, as well as the consideration of the younger for the older and the deference with which I would expect the plaintiff would probably treat his father's trusted partner and intimate friend. And why not? The money of McGreggor the elder, and of the deceased, had furnished the plaintiff with profitable employment in the past, and was still substantially the basis of his enterprises. I accept the evidence of the plaintiff as being in all essential particulars accurate and trustworthy.

It is argued that the contract was not definite, in that it might mean either shares at par or above or below par. I think it was quite definite, and was for ten shares of the nominal value of $1,000; or, to put it the other way, it was for $1,000 worth of the $2,500 worth of stock the deceased would receive in the transaction—a part of what the deceased would get. This necessarily meant at par, and, being $1,000 worth necessarily meant ten shares. And these shares are ear-marked; they were allotted as number 54.

Is the claim barred by the Statute of Limitations? I do not think the statute has any application; but, if it has, the plaintiff is not barred. Where a contract is open to more than one construction, and the parties are silent as to one of the terms of

the contract, a plaintiff seeking to enforce it must be content to accept the most unfavourable construction if that is the way in which the defendant understood it at the time. Here, when the plaintiff asked for the stock, the deceased did not dispute his right to it, but merely disputed his right to get it then. He said, "I was not to give it until the property sold was paid for in full." The plaintiff grumbled, but acquiesced. No time had been mentioned, and both parties recognised what the deceased contended for as the meaning of the contract. This seems reasonable enough, as the deceased was transferring the shares in consideration that he would be profited by what the plaintiff would bring about, but until the property was paid for his gain was not assured. The plaintiff acquiesced. In the circumstances of this case—in the face of the attitude of the parties then and afterwards—could a Court say that the time claimed by the deceased was not a reasonable time? And, more than this, could the deceased, if alive, be allowed to say that that was not a reasonable time, and that, his declaration notwithstanding, the plaintiff was barred? I think not. The property was paid for on the 5th November, 1908.

But in any case I do not see how the statute applies. The plaintiff's counsel does not contend, and the defendants' counsel denies, that this can be regarded as a trust. All the same, I am of opinion that the deceased Curry was clearly a trustee for the plaintiff of ten of the twenty-five shares first allotted to him. They were partners in a joint adventure, and each was the agent of the other for certain purposes connected with it. The plaintiff was not acting for himself only, when he entered into the contract with the American company; he was, as the agreement says, representing others as well. Before anything was done at all, the plaintiff and the deceased had come together and were acting in unison.

The deceased was an active party throughout. If the transaction was carried through, he was to be handed twenty-five shares out of the company's first payment of stock, and fifteen of these were to be his property, ten being the property of the plaintiff. I see no difficulty in holding that the deceased was a trustee of these ten shares for the plaintiff. The shares are specific and ear-marked, as I said.

The plaintiff is entitled to have the contract specifically performed by delivery of ten shares of the twenty-five shares first allotted to the deceased or by delivery of the shares of the new

company in substitution for them if new shares have been issued. He is also entitled to the dividends, if any, paid in respect of the ten original or substituted shares since Mr. Curry's death.

I have limited the payment of dividends in this way, after a good deal of doubt and hesitation. I am clearly of opinion that the plaintiff was entitled to the dividends which accrued in respect of these shares from the 5th November, 1908; but the deceased in his lifetime having, with the knowledge of the plaintiff, appropriated these dividends as his own, without any violent, or even definite or emphatic, action on the part of the plaintiff, I have come to the conclusion that the plaintiff, in an action against the estate of the deceased recipient, should be taken to have waived his rights.

I am of opinion, also, that the plaintiff's lack of firmness and his failure to state the facts as early as he should have done, invited this litigation, and that he is, therefore, not entitled to costs. The executors will be entitled to their costs as between solicitor and client, out of the estate.

MIDDLETON, J., IN CHAMBERS. OCTOBER 7TH, 1913.

OWEN SOUND LUMBER CO. v. SEAMAN KENT CO.

Particulars—Statement of Claim—Contract—Damages — Practice—Information Obtainable by Discovery—True Function of Particulars—Supplementary to Pleadings.

Appeal by the plaintiffs from the order of HOLMESTED, Senior Registrar, sitting for the Master in Chambers, ante 55, requiring the plaintiffs to furnish the defendants with particulars of certain matters alleged in the statement of claim, before delivery of the defendants' statement of defence.

H. S. White, for the plaintiffs.
Coyne, for the defendants.

MIDDLETON, J.:—The plaintiffs by the statement of claim allege an agreement by the defendants to purchase lumber, to be manufactured by the plaintiffs at certain prices. The plaintiffs, it is said, manufactured the lumber and had the same ready

for delivery, but the defendants failed and refused to take delivery or carry out the contract. The plaintiffs sue for the price of the lumber sold, or, in the alternative, for damages for breach of the contract. Upon what the defendants rely, or what the defence is to the action, is not suggested by the material filed, nor indicated by counsel upon the argument.

The defendants sought for particulars as to the time and place of the contract and whether it was in writing or not; and no objection to this is taken.

What is complained of is an order requiring the plaintiffs to state the time when the lumber was manufactured, the dates and times and quantities when piled, and the place where piled; to give in detail what is relied upon as constituting the failure and refusal to accept, and saying when the lumber in question was sold, the particulars of the sales, giving the price, date of sale, etc. It is said that this was intended to be supplemented by a direction to state whether the lumber has been sold, and, if so, to give these last particulars.

Under our practice, I do not think that the order, in so far as it is complained of, can be sustained. No doubt, before the trial, the defendants are entitled to obtain the fullest possible information touching the plaintiffs' case; but this information is ordinarily to be obtained by discovery; in the first place, by the production of documents; and, in the second place, by oral examination. Rule 138, which authorises the making of an order for particulars, is supplementary to the provisions dealing with pleadings which are embarrassing or tend to prevent a fair trial; and is intended to enable the Court to compel a party pleading to supplement his pleading where it is so bald or vague as to fall short of what is required by the general provision directing the pleading to contain a concise statement of the material facts upon which the party pleading relies.

In England, the practice as to particulars has gone beyond what is either necessary or desirable here; because there there is not the same facility in obtaining discovery, and it makes little difference whether the information sought is given as particulars or given in answer to interrogatories. Yet even in England the distinction is recognised: see, for example, the decision of the Court of Appeal in Young v. Scottish National Union and National Insurance Co. (1907), 24 Times L.R. 73.

The true function of particulars is well stated in Millbank v. Millbank, [1909] 1 Ch. 376. It is, first, to prevent a surprise at the trial—a function that can seldom be relied upon here,

with our ample provisions for discovery—and, secondly, so to define and limit the claim as to bring about a limitation of the evidence at the hearing—again a function that can seldom be relied upon here—and, thirdly, as supplementary to the pleadings, in fact, as an amendment to pleadings embarrassing by reason of lack of particularity.

Some particulars are properly required under this pleading, as the alternative claim for damages is too vague. The order should be modified so as to require the plaintiffs to deliver the particulars ordered with reference to the making of the contract, and to require delivery of particulars of the damages claimed. Such damages are probably the only remedy the plaintiffs are entitled to, as they do not shew that the property in the lumber in question has passed, and the defendants are entitled to know what damages are sought. If the lumber is not yet sold, this will be the difference between the contract-price and the market-price. If the lumber has been sold, this may be the difference between the contract-price and the sale-price. Whatever the claim is, the plaintiffs ought to put it forward in some definite and tangible form, so that the defendants, if so advised, may pay some sum into Court in satisfaction.

Under the circumstances, the costs here and below ought to be in the cause.

MIDDLETON, J. OCTOBER 8TH, 1913.

RE AMES.

Will—Construction—Legacies Charged on Land—Devise—Life Estate—Remainder to Children or Issue—Tenants in Common per Stirpes—Rule in Shelley's Case—Settled Estates Act—Gift over—Costs.

Motion by Margaret Ames, a beneficiary under the will of Myron B. Ames, deceased, for an order determining a question arising upon the administration of the estate as to the construction of the will.

J. Harley, K.C., for the applicant.

W. S. Brewster, K.C., for Thomas Ames.

Grayson Smith, for Myron Ames.

J. R. Layton, for John Ames and others.

J. R. Meredith, for the Official Guardian, representing infants and unborn issue.

MIDDLETON, J.:—The question arises under the will of the late Myron B. Ames, who died on the 21st July, 1881, having made his will dated the 19th April, 1881. This will has not been proved, but has been registered.

The testator gives the north half of lot 30 in the 2nd concession to his wife for life, so long as she remains his widow; she to provide for the education of certain of the testator's children so long as they remain at home and assist in farming the lands in question. Upon the death of the widow (which occurred on the 21st July, 1910), this parcel goes to Thomas "during the term of his natural life without impeachment of waste he the said Thomas Ames paying thereout the several legacies or sums following" (then follow certain legacies, amounting in all to $2,100) "all which said four several legacies or sums I charge and make chargeable on the said north half of said lot number 30 . . . and from and after the decease of the said Thomas Ames I give and devise said north half of said lot number 30 in the 2nd concession . . . unto such of the children of the said Thomas Ames as shall be living at his decease and to the children or remoter issue then living of any child of the said Thomas Ames as shall be then dead leaving any such issue the same children to take and divide per stirpes and the said children and issue of the said Thomas Ames to take among themselves as tenants in common; and, subject to the said several devises and charges as aforesaid, I give and devise the said north half of the said lot number 30 in the said 2nd concession . . . unto the said Myron Ames, Margaret H. Walker, Emily Thomas, Ursula Jane Barger, Amelia Ames, and John Ames, their heirs and assigns forever as tenants in common."

The time for payment of these legacies has now passed, and Margaret, who is entitled to her legacy of $500, makes this application.

There is no doubt that these legacies are charged upon and payable out of the land.

Thomas Ames asks to have it declared that he is entitled to an estate in fee or in tail. If he is, he will have no difficulty in raising and paying the legacies in question. If he is not, and if he is entitled to the life estate only, he asks that an order may now be made under the Settled Estates Act authorising the mortgaging of the land.

I think that Thomas himself takes a life estate only, and that the rule in Shelley's case does not apply so as to give him

any greater estate. The testator has not used the word "heirs," nor has he used any other words as equivalent to "heirs." If Thomas himself leaves him surviving children or remoter issue, then such children or issue will take as tenants in common per stirpes. If he leaves him surviving no children or issue of children, then the brothers and sisters named will take. I read this gift over as relating to the death of Thomas. This should be so declared, and the order sought should go for the raising of the money under the Settled Estates Act.

The costs of all parties should be paid out of the money so raised. I direct this in preference to directing the costs to be paid out of the estate, because the application is really one in ease of the owners of this particular parcel, and does not affect the testator's general estate. Myron Ames was properly notified as one of those interested in the gift over. The application does not concern in any way the parcel devised to him.

MIDDLETON, J. OCTOBER 8TH, 1913.

RE BOYLE AND CITY OF TORONTO.

Municipal Corporations—Expropriation by City By-law of outside Land for Addition to Industrial Farm—"Acquire"—Municipal Act, 1913, *sec.* 6—*Special Act,* 1 *Geo. V. ch.* 119, *sec.* 5—*Bona Fides—Statutory Powers—Exhausting by Original Purchase—Interpretation Act,* 7 *Edw. VII. ch.* 2, *sec.* 7 (33).

Motion by Boyle, the owner of certain lands sought to be taken by the Corporation of the City of Toronto, by by-law No. 6353, intituled, "A By-law to Acquire Additional Lands for the Industrial Farm," to quash this by-law.

H. H. Dewart, K.C., for the applicant.
Irving S. Fairty, for the corporation.

MIDDLETON, J.:—By sec. 576 (3) the council of any city or town may pass a by-law "for acquiring any estate in landed property, within or without the city or town, for an industrial farm." At the time of the passing of this statute the word "acquire" had not the wide significance now given to it by the Municipal Act of 1913, sec. 6—which provides that the power to acquire shall include the power to acquire by purchase or

expropriation—it only enabled the municipality to acquire by purchase.

The city authorities, contemplating the establishment of an industrial farm, and realising the impracticability of securing a site without power to expropriate, applied for a special Act; and, by 1 Geo. V. 119, sec. 5, power was given to expropriate lands within a radius of twenty-five miles from the city and to establish an industrial farm thereon.

Subsequently the city acquired lands for the purpose of an industrial farm, by purchase from several owners. No by-law was passed relating to these purchases, but the purchases were sanctioned by resolution of the city council.

Thereafter, buildings were erected upon this farm, and it has been used now for some time for the purpose contemplated. The proceedings of the city council and its commissioners indicate that, throughout, there was no intention to confine the ultimate limit of the farm to the parcel first acquired. It was realised that, if the undertaking succeeded and met the hopes of its promoters, the farm would have to be from time to time enlarged.

On the 10th February, 1913, the by-law in question was passed, reciting the special Act, but making no mention of the general Act, and that lands had been acquired and an industrial farm had been established thereon, "and that, in the opinion of the council, it has become necessary to acquire additional lands for the purpose of the farm;" the lands in question are therefore "expropriated and taken for the purpose of an addition to the said farm."

The bona fides of the application of the city council in taking this land is somewhat faintly and quite unsuccessfully attacked by the applicant. I am satisfied that there is no reason to suppose that the by-law is not an absolutely bona fide exercise by the municipality of powers which it thinks it possesses.

The necessity and the desirability of the purchase are questions entirely for the municipal council, and cannot, in the absence of mala fides, be in any way reviewed by the Court.

The question more seriously discussed upon the argument is this: it is said that the powers conferred by the statute were fully exercised once and for all upon the purchase of the original site, and that the corporation thereupon became functus as to the matter, and had no right to acquire, either by purchase or expropriation, any other parcel for the enlargement of the original site. Reliance is placed for this upon the case of Re

Inglis and City of Toronto, 8 O.L.R. 570, where MacMahon, J., said, with reference to a street-closing by-law which was void as being passed without the consent of the Dominion Government, that—consent being a necessary condition precedent to the exercise of municipal jurisdiction—"it was a void by-law by reason of the consent of the Dominion not having been obtained; and that void by-law, in the passing of which the council had exhausted its powers, could not be given life and rendered valid by the subsequent consent of the Dominion Government and the passing of the amending by-law."

I am inclined to think that the expression "in the passing of which the council had exhausted its powers" was a mere dictum, and that the decision was really based upon the ground that the subsequent consent and amendment of the by-law could not give validity to that which was void in its inception.

But, quite apart from this, there are many other cases in which the question as to whether a power can be exercised from time to time, or only once for all, is discussed. These cases are now of no real value, because, by the Interpretation Act, 7 Edw. VII. ch. 2, sec. 7 (33), "if a power is conferred . . . the power may be exercised . . . from time to time as occasion requires." This provision is similar to the provision of the English Interpretation Act, 52 & 53 Vict. ch. 63, sec. 32; concerning which Craies states (p. 243): "The substantial effect of the provision is to rebut the presumption that the power is exhausted by a single exercise."

Even under the old law, I should have come to the conclusion, having regard to the subject-matter of the legislation, that it was not intended that the power should be exhausted by a single exercise.

The application, in my view, fails, and must be dismissed with costs.

MIDDLETON, J., IN CHAMBERS. OCTOBER 8TH, 1913.

*RE ATHENS HIGH SCHOOL BOARD AND TOWNSHIP OF REAR OF YONGE AND ESCOTT.

Schools—High School Board—Sums Required for Maintenance—Requisition on Municipal Council—Deficit from Previous School-year—High Schools Act, 9 Edw. VII. ch. 9, sec. 24—Bona Fides—Unforeseen Expenditure—Duty of Municipal Council.

Motion by the High School Board for a mandamus to compel the township corporation to levy and collect their proportion of the amount required by the Board for the maintenance of the High School, in pursuance of a requisition made by the Board.

G. H. Kilmer, K.C., and H. A. Stewart, K.C., for the applicants.

J. A. Hutcheson, K.C., for the respondents.

MIDDLETON, J.:—The municipality have served notice consenting to an order directing them to levy and collect the amount mentioned in the requisition, save as to one item, namely, "Deficit from last school-year, $916.20." The argument was confined to the right of the High School Board to compel payment of this item.

The duty of the Board is defined by the High Schools Act, 9 Edw. VII. ch. 91, sec. 24. To it is intrusted the obligation of providing adequate education for the pupils and appointing necessary teachers and officers; and, by sub-sec. (h), it is authorised to apply to the municipal council before the 1st August in each year "for such sums as the Board may require for the maintenance of the school for the twelve months next following the date of such application."

The whole duty of administering school affairs is placed upon the Board. Its sole source of income, apart from fees and legislative and county grants, is the sum to be contributed by the ratepayers, through the municipal council; the scheme, put shortly, being to have all the rates levied and collected at the one time by the municipal council, although the administration of school affairs is left with the school board. In the case

*To be reported in the Ontario Law Reports.

of this particular school, the amount required last year turned out to be insufficient to meet the actual expenses of the school. This arose from the fact that the number of pupils was greater than had been foreseen, and it became necessary, in the opinion of the board, to appoint an additional teacher. The municipality now take the position that, the Board's expenditure having exceeded the estimate, there is no provision in the Municipal Act by which the Board can compel a levy for the excess. There is no room on the material to suggest mala fides; in fact, counsel expressly repudiated any such idea. The fault of the Board, if any, is that it did not make an adequate allowance for unforeseen contingencies.

It would be a most serious reflection upon the legislation if, by any such reasoning, the ratepayers could be relieved from paying for services incurred on their behalf by their duly elected representatives; and it would be equally unfortunate if the failure of the Board to demand a sum sufficient to cover the necessary outgoings is to impose personal liability upon the members of the Board.

It is said, and truly said, that the policy of the Act is to require the expenditure of each year to be borne by the taxation of that year. This is true not only of school sections but in respect to the whole municipal government; but it would scarcely be thought that the failure to levy adequate rates would constitute a defence to a municipality if sued by its creditors. . . .

[Reference Re Toronto Public School Board and City of Toronto, 2 O.L.R. 727, 4 O.L.R. 468.]

A series of cases which appear to me to throw much light upon this problem were not cited in the Toronto case. While it is true that these cases, by reason of the difference of legislation, may not be, strictly speaking, conclusive, yet the principles indicated seem to govern. . . .

[Reference to Attorney-General v. Lichfield (1848), 17 L.J. Ch. 472; Jones v. Johnson (1850), 5 Ex. 862; Haynes v. Copeland, 18 C.P. 150.]

I realise the difficulty in applying this law in view of the wording of the statute in question here; yet I think it is applicable. Where there is no deliberate intention on the part of the Board to postpone the payment of debts incurred one year to the next, but the obligation arises by reason of the insufficient estimate, and money has had to be borrowed to pay the necessary expenses for maintaining the school, that

money may, I think, be regarded during the next year as a sum required for the maintenance of the school for the ensuing twelve months; as, if it is not obtained on requisition to the municipal council, it cannot be obtained at all, and the creditor could sue and take in execution the school property, without which the school cannot be maintained or continued. Totally different considerations would arise if there was any room for supposing that there had been any deliberate attempt on the part of the board to shift the burden of taxation from one year to another, or if the contract had been a contract void upon its face as being a contract to incur liability in one year payable in another.

Had it not been for the decision in the Toronto case, I would have thought that the Legislature had intended the Board alone to determine the amount to be levied, and that, in the absence of bad faith, the municipal council had no right to criticise the demands made; but I am precluded from acting upon that view by the decision in question.

The mandamus will, therefore, go, with costs.

REX v. GRAY—MIDDLETON, J.—OCT. 3.

Criminal Law—Indeterminate Sentence—Industrial Farm—Municipal Act, 1903, *sec. 549a—Prisoner Confined in Central Prison—Habeas Corpus—Discharge.*]—Upon the return of a habeas corpus addressed to the Warden and Keeper of the Central Prison, the defendant moved for his discharge. MIDDLETON, J., said that the only authority for the detention of the prisoner produced upon the return of the habeas corpus was the warrant issued by Mr. Ellis, acting Police Magistrate at Toronto, committing the defendant to an industrial farm for two years' indeterminate sentence, under 2 Geo. V. ch. 17, sec. 34 (adding sec. 549*a* to the Municipal Act, 1903); and this did not authorise incarceration in the Central Prison. Nothing was produced shewing how the prisoner came to be in the custody of the Warden. Order made for the prisoner's discharge. H. C. Macdonald, for the prisoner. No one contra.

DUNN v. DOMINION BANK—HOLMESTED, SENIOR REGISTRAR, IN CHAMBERS—OCT. 7.

Writ of Summons — Special Endorsement — Statement of Claim Delivered as well—Irregularity—Setting aside—Form 5—Rules 56, 111, 112, 127—Amendment—Affidavit Filed with Appearance—Statement of Defence—Practice.]—The plaintiff issued a writ of summons endorsed with a claim for several sums of money which, he alleged, the defendants "held and received" to his use, but which they had wrongfully withdrawn from and improperly charged to his account, purporting to be the amounts of cheques which, as he alleged, were forgeries. There was a specific statement in the endorsement as to each amount. The writ purported on its face to be "specially endorsed." The claim endorsed was, notwithstanding the allegations regarding the alleged forgeries, in substance a claim for "money had and received"—a claim which may properly be specially endorsed (see Form 5). The defendants accepted the writ as a specially endorsed writ, and filed an affidavit with their appearance, as required by Rule 56. Rule 111 provides that "where the writ is specially endorsed such endorsement shall be treated as a statement of claim and no other statement of claim shall be necessary." Notwithstanding this Rule, the plaintiff filed a new statement of claim. This second statement of claim the defendants move to strike out. The motion was heard before the Senior Registrar, sitting for the Master in Chambers. The learned Registrar said that what the plaintiff had done was in effect to file two statements of claim; and that was a practice which was not warranted by the Rules. Where a plaintiff specially endorses his writ, that constitutes his statement of claim, and he is not at liberty to deliver any other statement of claim without leave. After a defence has been filed, he may amend the endorsement, and, if need be, file an amended statement of claim under Rule 127; but he cannot, before defence, deliver a new statement of claim or amend the endorsement on the writ without the leave of the Court. In the present case the new statement of claim appeared to be a mere reiteration of the special endorsement, and no reason was suggested why it should be allowed, even as an amendment. Therefore, the order should go as asked striking it out, and the defendants should have the costs of the motion in any event of the action. The defendants asked for an extension of time for filing a defence, or that the affidavit filed might be ordered to constitute the defence. There was nothing in the

Rules authorising a declaration that the affidavit constituted a defence. Rule 56, in a certain event, constitutes it a defence; but that event had not arisen; and Rule 112 appeared to require that, when that event had not arisen, a defence should be delivered as in the ordinary course of an action. In the circumstances, the defendants should have an extension of time to file a defence, say for a week from the 7th October. W. B. Milliken, for the defendants. G. Grant, for the plaintiff.

AUBURN NURSERIES LIMITED v. MCGREDY—HOLMESTED, SENIOR REGISTRAR, IN CHAMBERS—OCT. 9.

Writ of Summons—Service out of the Jurisdiction—Contract—Breaches—Assets in Jurisdiction—Con. Rule 25 (1) (*e*), (*h*).]—Motion by the defendant to set aside an order allowing service of the writ of summons in Ireland and to set aside the writ and the copy and service thereof. The motion was heard by the Senior Registrar, sitting for the Master in Chambers. The plaintiffs made a contract with the defendant in Ireland for the purchase of a certain quantity of roses. They were informed by the defendant that the freight must be paid through to destination, and he demanded from the plaintiffs money to enable him to pay this freight. The plaintiffs complied with this demand, and sent the defendant, as they alleged, $977.23 on account. The roses were consigned to the plaintiffs at, it is alleged, the wrong place, viz., Queenston, instead of Oakville. The learned Registrar said that two breaches of the contract were practically admitted: (1) non-payment of freight, as to which he referred to Orient Co. Limited v. Brekke & Howlid, [1913] 1 K.B. 531; (2) excessive amount of goods, viz., 1,000 trees more than ordered, as to which he cited Shipton Anderson & Co. v. Weil Brothers, [1912] 1 K.B. 574. In these circumstances, the plaintiffs refused to accept the goods, and claimed to recover: (1) the amount advanced as above-mentioned; (2) freight and duty paid by them in respect of the roses; and (3) for cartage, labour, and fertilizer expended by them on the roses, by arrangement with the defendant. The plaintiffs were not, therefore, suing on the contract or for breach of the contract. They said in effect: "True it is, there was a contract between us and the defendant, but he failed to carry it out, and we are suing to recover money which we have paid, and for

which in fact no consideration has been received." This liability arose on an implied contract to refund the money advanced, and on an express contract to pay for the cartage, etc. The debtor, according to the ordinary rule, was bound to seek his creditor, and the money claimed by the plaintiffs was payable in Ontario, and the case, therefore, within Rule 25 (1) (e). But the plaintiffs also relied on the fact that the defendant had property within the jurisdiction of the value of $200 and more. The property in question consisted of the roses which were sent out pursuant to the contract; and the defendant's counsel contended that it was begging the very question in issue in the action to say that they were the defendant's property—the contention of the defendant being that they were now the property of the plaintiffs; and that argument would certainly be entitled to great weight were it not for the fact that the defendant, according to the correspondence produced, admitted that he did not carry out the contract in the particulars above-mentioned. In these circumstances, the goods were, as the plaintiffs contended, the goods of the defendant, and on that ground also the allowance of service of the writ out of the jurisdiction was justified. Motion refused. Time for appearance extended for a week to enable the defendant to appeal from this order, if so advised. Costs to the plaintiffs in the action. H. W. Mickle, for the defendant. A. C. McMaster, for the plaintiffs.

DOMINION BANK v. ARMSTRONG—HOLMESTED, SENIOR REGISTRAR, IN CHAMBERS—OCT. 10.

Parties—Third Parties—Service of Third Party Notice—Extension of Time for—Irregularity—Rules 165, 176—*Proper Subject of Third Party Notice—Claim for Contribution.*]—Action on a bond of indemnity or guaranty given by the defendant to the plaintiffs to secure advances made by the plaintiffs to the J. B. Armstrong Manufacturing Company Limited. The statement of defence was filed on the 22nd May last. On the 29th September last, an order was made ex parte allowing the defendant to file a third party notice against R. L. Torrance. This notice was filed and served before the order issued. The order was made nunc pro tunc so as to antedate the filing of the notice, which was subsequently re-served after the issue of the notice. The third party moved to set aside the notice for irregularity

and because the order allowing its service was an improper exercise of the discretion of the Court. The motion was heard by the Senior Registrar, sitting for the Master in Chambers. Several grounds of irregularity were mentioned: (1) that the order was made after the time allowed for defence; (2) that the order was not made till after the notice was served; (3) that it was made to take effect nunc pro tunc; but all irregularities except the first were abandoned at the argument. Counsel for the third party also contended that the claim was not properly the subject of a third party notice. In support of the first objection Parent v. Cook, 2 O.L.R. 709, affirmed 3 O.L.R. 350, was relied on as establishing that the time for delivering a third party notice cannot be extended under what is now Rule 176. Rule 165 requires a third party notice to be delivered "within the time limited for the delivery of the defence." The learned Registrar referred to the later case of Swale v. Canadian Pacific R.W. Co., 25 O.L.R. 492, which was also before a Divisional Court, and which decided affirmatively, notwithstanding what was said in Parent v. Cook, that the time for delivering a third party notice might be, and it actually was, extended in that case; and said that, in this state of the authorities, he did not think that Parent v. Cook could be said to be an authority for the proposition that there was no power to extend the time for filing a third party notice beyond that limited by Rule 165 (2); and, therefore, it was not irregular to make the order complained of. —Upon the question whether the notice disclosed a claim which was properly the subject of a third party notice, for the purpose of the motion it should be assumed that the allegations in the third party notice were true in fact. The notice stated the nature of the plaintiffs' action, and it then proceeded: "The defendant Robert T. Armstrong claims to be entitled to contribution from you to the extent of one-half of the sum which the plaintiffs may recover against him, on the ground that you are also surety for the said J. B. Armstrong Manufacturing Company Limited, in respect of the said matter, under another bond made by you in favour of the said plaintiffs on or about the said date." The mere statement of the claim seemed sufficient to shew that it was clearly a case in which a third party notice should be allowed. The third party denied that he signed the bond which was referred to in the second paragraph of the statement of claim on which the defendant's liability was based; but, even if the merits of the third party notice could be gone into on this motion, the defendant did not pretend or assert that the third party did sign the bond; his claim was based on

the fact that the third party was surety for the same debt under another bond. Motion refused, with costs to the defendant as against the third party in any event. Featherston Aylesworth, for the third party. R. D. Moorhead, for the defendant.

STEINBERG v. ABRAMOVITZ—FALCONBRIDGE, C.J.K.B., IN CHAMBERS—OCT. 11.

Pleading—Statement of Defence—Amendment—Judgment.]—Appeal by the plaintiff from the order of the Senior Registrar, sitting for the Master in Chambers, refusing to grant judgment for the plaintiff for a claim of $1,500 or to direct the delivery of particulars of the defence to that claim. The Chief Justice said that paragraph 2 of the statement of defence was ill pleaded if it was intended as a defence to the claim for the $1,500 deposit, as well as for the costs and expenses. Order made giving the defendant leave to amend within one week so as to include the $1,500—otherwise judgment for the plaintiff for $1,500. Costs of this appeal to be costs to the plaintiff in any event of the action. G. T. Walsh, for the plaintiff. E. Sugarman, for the defendant.

BERLIN LION BREWERY CO. v. MACKIE—FALCONBRIDGE, C.J.K.B., IN CHAMBERS—OCT. 11.

Venue—Change—Motion for—Convenience—Undertaking of Plaintiffs to Pay Additional Costs of Trial at Place Chosen by them.]—Appeal by the plaintiffs from the order of the Senior Registrar, sitting for the Master in Chambers, changing the place of trial from Berlin to Belleville. The learned Chief Justice said that, in the present state of the practice, there was no sufficient preponderance of convenience or expense or other valid reason for changing the place of trial from Berlin to Belleville. The plaintiffs undertaking to pay the additional costs, if any, incurred by the defendant by reason of trial at Berlin, the Registrar's order should be reversed and the place of trial changed back to Berlin. Costs to be costs in the cause. W. D. Gregory, for the plaintiffs. Eric N. Armour, for the defendant.