

The
Ontario Weekly Notes

VOL. XI. TORONTO, SEPTEMBER 22, 1916. No. 2

HIGH COURT DIVISION.

MIDDLETON, J., IN CHAMBERS.

SEPTEMBER 15TH, 1916.

ELECTRIC DEVELOPMENT CO. OF ONTARIO LIMITED
v. ATTORNEY-GENERAL FOR ONTARIO AND
HYDRO-ELECTRIC POWER COMMISSION
OF ONTARIO.

Writ of Summons—Action against Hydro-Electric Power Commission of Ontario—Necessity for Fiat of Attorney-General—Power Commission Act, R.S.O. 1914 ch. 39, sec. 16—Constitutional Validity—Judicature Act, secs. 20, 33—Motion to Set aside Writ of Summons.

Appeal by the plaintiffs from an order of the Master in Chambers setting aside the writ of summons on the ground of a statutory requirement that an action should not be brought against the Commission without a fiat from the Attorney-General, which had been refused. See sec. 16 of the Power Commission Act, R.S.O. 1914 ch. 39.

D. L. McCarthy, K.C., for the plaintiffs.

I. F. Hellmuth, K.C., for the defendant Commission.

Edward Bayly, K.C., for the Attorney-General.

MIDDLETON, J., in a short written judgment, said that the appeal failed. The statute provided that no action should be brought against the Commission without a fiat first obtained from the Attorney-General. A fiat was refused, and the writ was then issued in the face of the statute. Whatever remedy might be open to the plaintiffs, it was clear that the statute could not be ignored. The question of the validity of the statute, as being for any reason beyond the competence of the Province,

was not open upon this motion, as sec. 33 of the Judicature Act, R.S.O. 1914 ch. 56, had not been complied with. In any event, the decisions in *Smith v. City of London* (1909), 20 O.L.R. 133, and *Beardmore v. City of Toronto* (1909-10), 20 O.L.R. 165, 21 O.L.R. 505, would probably be found to conclude this question, so far as any Court of first instance was concerned.

The writ having been improperly issued, the order setting it aside should be affirmed.

It was not necessary to consider whether an action would lie against the Attorney-General for the purpose of obtaining a declaration of the invalidity of the recent statute. By sec. 20 of the Judicature Act, the Court was given power to determine the validity of a statute at the instance of the Attorney-General, but it by no means followed that the Attorney-General might, against his will, be compelled to appear as a defendant to uphold the validity of a Provincial Act. This question did not require solution upon the present motion.

The appeal should be dismissed with costs.

LAHEY V. QUEENSTON QUARRY CO. LIMITED—FALCONBRIDGE,
C.J.K.B.—SEPT. 16.

Fixtures—Sale of Land—Articles not Affixed to Freehold—Evidence—Intention—Money Paid into Court—Costs.]—Action to recover possession of certain chattels alleged to have been wrongfully removed by the defendants from a gravel-pit sold by them in April, 1914, or to recover the value of the chattels, and for damages. The action was tried without a jury at St. Catharines. The learned Chief Justice, in a written judgment, said that the chattels mentioned in para. 1 of the prayer of the statement of claim, were the only ones now in dispute. As to the other matters, they were either abandoned, or sufficient money had been paid into Court to cover them. The articles in question were chattels because they never became part of the land and did not pass under the conveyance to Kasting. As far as any evidence of intention could affect the case, the testimony of C. Lowry, W. A. Pew, and R. Lowry, as to the conversation in Mr. McBurney's office following on Perry's question, "Did you get the derrick?" should be accepted. Frank Stewart, an apparently independent and credible witness, said that Perry told him the derrick was rented from Lowry. Whether observed or recognised

by Kasting and his agents or not, the item of rental of the derrick appeared frequently in the accounts rendered by the defendants. The plaintiff failed both on the law and the facts. Action dismissed with costs. The defendants may take the money out of Court and apply it *pro tanto* on their costs. Gideon Grant and F. H. Upper, for the plaintiff. A. C. Kingstone and F. E. Hetherington, for the defendants.

