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APPELLATE DIVISION.

MARCH 23RD, 1915.

*DICARLLO v. McLEAN.

Solicitor—Lien for Costs—Collusive Settlement to Defeat Lien—Liability of Defendant for Costs of Plaintiff's Solicitor—Evidence.

Appeal by the defendant from the order of MIDDLETON, J., ante 27.

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

J. M. Ferguson, for the appellant.

H. H. Dewart, K.C., for the plaintiff's solicitors, respondents.

THE COURT dismissed the appeal with costs.

HIGH COURT DIVISION.

CLUTE, J. APRIL 12TH, 1915.

J. C. PENNOYER CO. v. WILLIAMS MACHINERY CO. LIMITED.

Promissory Note—Negotiation by Payee in Fraud of Maker—Facts Shewing Notice to Endorsee—Holder in Due Course—Onus of Proof—Company—Knowledge of Person Controlling.

Action on a promissory note dated the 8th December, 1913, made by the defendant, payable 4 months after date, to the

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

order of Bates Machine Company, at the Imperial Bank of Canada, Toronto, for $840. The following endorsements appeared on the note, in the order given:—

"Bates Machine Co. N. O. Bates, treasurer.

"Pay J. C. Pennoyer Company or order. Joseph Winterbotham.

"Pay to the order of Continental and Commercial National Bank 2171 Chicago, Ill., 2171. All previous—J. C. Pennoyer Company, George I. Nervig, treasurer.

"Pay to the order of the Royal Bank of Canada. Continental and Commercial National Bank of Chicago, Nathaniel R. Ross." Across this endorsement was the word "cancelled."

The note was a renewal and arose out of an agreement entered into between the defendant company and the Bates Machine Company (third parties) in 1907. This agreement was found exclusively in the correspondence between the defendants and the third parties.

The defendants carried on business in Toronto as sellers of machinery; the third parties were manufacturers in Joliet, Illinois.

The defence was that the third parties in negotiating the note to the plaintiffs had committed a fraud upon the defendants; that the plaintiffs were mere trustees of the note for the third parties; that the plaintiffs were not holders in due course; and that they had full notice and knowledge of the facts when they received the note.

The action was tried without a jury at Toronto.

Gideon Grant, for the plaintiffs.

G. F. Shepley, K.C., and G. W. Mason, for the defendants.

The third parties were not represented.

CLUTE, J. (after setting out the facts and the correspondence):—I do not think that the plaintiffs are holders of the note in due course, or that their title is better than that of the Bates Machine Company. The course of the transaction clearly indicates to my mind, aside from the actual notice which, I think, is brought home to the plaintiffs through Joseph Winterbotham, that the note was not dealt with in the ordinary way. It was not protested; notice was not given to the previous endorsers; the defendants were not notified by either Winterbotham or the plaintiffs when the note passed into their hands; and the fact that the note was a foreign note, made in a foreign country

and payable in a foreign city, makes it appear to me incredible that, if the transaction was an ordinary one, and the plaintiffs were holders in due course, they would not have taken the usual course of giving notice to the defendants and of protesting the note when it was not paid, and of making a demand upon the endorsers for payment. It appears to have been the intention from the first to look only to the makers for payment. . . . Having regard to the facts and circumstances disclosed in the case, I do not think that the plaintiffs stand in a better position than the Bates Machine Company. A holder of a note in due course is one who has become the holder before it was overdue or without notice that it has been previously dishonoured and who has taken the note in good faith and for value and has no notice of any defect in the title of the person who negotiated it. The title is defective when the note is obtained by fraud or other unlawful means, or when it is negotiated in breach of faith or in such circumstances as amount to fraud: Bills of Exchange Act, sec. 56. Here there can be no doubt that the Bates Machine Company committed a fraud; and, if the plaintiffs had no actual notice, as I think they had through Winterbotham, of this defect, there was sufficient suspicion cast upon the transaction to put upon the plaintiffs the duty of removing such suspicion and satisfying the Court that they were holders in good faith, which they have failed to do. . . .

[Reference to Union Investment Co. v. Wells (1908), 39 S.C.R. 625, 642, 643; London Joint Stock Bank v. Simmons, [1892] A.C. 201, 221; Jameson v. Union Bank of Scotland (1913), 109 L.T.R. 850; Earl of Sheffield v. London Joint Stock Bank (1888), 13 App. Cas. 333; Swaisland v. Davidson (1882), 3 O.R. 320, 325; Oakeley v. Ooddeen (1861), 2 F. & F. 656; Sheldon v. Cox (1764), 2 Eden 224; Commercial Bank of Windsor v. Morrison (1902), 32 S.C.R. 98, 105; Pym v. Campbell (1856), 6 E. & B. 370; Union Bank of Halifax v. Indian and General Investment Trust (1908), 40 S.C.R. 510, 520; In re Nisbet and Potts' Contract, [1905] 1 Ch. 391, 402, [1906] 1 Ch. 386, 404, 409, 410; sec. 58 of the Bills of Exchange Act; Falconbridge on Banks and Banking, 2nd ed., pp. 581, 584; Dickson v. Winch, [1900] 1 Ch. 736; Tweedale v. Tweedale (1857), 23 Beav. 341, 345.]

The note in question was given for a particular purpose, in pursuance of the arrangement commenced in 1907 and continued down to the making of the present note. The defendants had fully discharged their part of the agreement, and at the time

the note was made did not owe the Bates Machine Company anything. In putting off the note there was a fraud committed by the Bates Machine Company upon the defendants. The original agreement making the putting off a fraud was known to Joseph Winterbotham, who had the controlling interest in each of the three companies—the Bates Machine Company, the J. C. Pennoyer Company (plaintiffs), and the Winterbotham & Son Company. The fraud having been established, the onus was upon the plaintiffs to prove that they were bona fide holders for value without notice. Of this they have failed to satisfy the Court, the strong inference being the other way. The plaintiffs are not holders in due course, and are in no better position than the Bates Machine Company, and are not entitled to recover upon the note sued on. Joseph Winterbotham was in fact the active mind controlling the plaintiff company—was in constant and close touch with its management; the fraud was participated in by him with knowledge of the original agreement; he being the directing mind in this transaction, his action was the action of the plaintiffs, and they are bound by the knowledge which he possessed: Lennard's Carrying Co. Limited v. Asiatic Petroleum Co. Limited, [1915] W.N. 119.

The action is dismissed with costs.

MIDDLETON, J. APRIL 15TH, 1915.

*RE ROURKE.

Lunatic—Order Declaring Lunacy—Reference—Jurisdiction of Master—Duty of Committee—Payment into Court—Lunacy Act, 9 Edw. VII. ch. 37, sec. 11(d)—Passing Accounts by Executor of Committee after Death of Committee and of Lunatic—Payments Made out of Lunatic's Estate—Gifts—Approval of Lunatic—Alleged Recovery of Sanity—Evidence—Lunacy Order not Superseded—Lunacy Act, R.S.O. 1914 ch. 68, sec. 10—Issues between Donees and Beneficiaries of Estate.

Motion by Christine Holford, executrix of the will of Dennis Rourke, who was committee of the person and estate of James Rourke, declared a lunatic by order of the 16th June, 1908, by way of appeal from the ruling of the Local Master at Windsor that he had no jurisdiction to inquire whether the lunatic had in

fact become of sound mind and capable of managing his own affairs before his death, which occurred on the 11th November, 1913, so that certain payments made by the committee, who died on the 4th July, 1913, and said to have been made with James Rourke's knowledge and approval after he had regained his sanity, might be validated.

The applicant asked, in the alternative, for an order directing a reference to the Master to inquire into and determine the competency of James Rourke and the validity of the payments; or for an order declaring that James Rourke became of sound mind and capable of managing his own affairs upon his discharge from a lunatic asylum on the 1st March, 1910.

No proceedings were taken to supersede the order declaring lunacy, and the property of James Rourke remained in the custody and control of the committee until the death of the committee.

E. A. Cleary, for Christina Holford.

A. C. Heighington, for some of the persons interested in the estate of James Rourke.

MIDDLETON, J., was of opinion, for reasons stated in writing, that the moneys making up the estate of the lunatic should have been paid into Court, instead of being invested by the committee: Re Norris and Re Drope (1902), 5 O.L.R. 99; the Lunacy Act, 9 Edw. VII. ch. 37, sec. 11(*d*).

(2) That the ruling of the Master that he had no jurisdiction to enter upon the inquiry referred to, or upon any inquiry, as the order under which he was acting—that is, the original order declaring lunacy and referring it to the Master to appoint a committee and directing that the committee should pass his accounts annually and pay into Court balances found in his hands—contemplated the passing of the accounts of the living committee of a living lunatic. The practice is well-established that upon the death of the lunatic a special reference is made to pass the accounts of the committee, those beneficially interested in the accounts being then represented by the administrator or executor of the lunatic.

(3) That the real issue was one between the persons to whom the payments were made by the committee—the payments being in fact gifts — and those beneficially interested in James Rourke's estate; and no good purpose would be served by directing an inquiry in which those really interested would not be adequately and properly represented.

(4) That no order superseding lunacy can be made after the death of the lunatic. Section 10 of the Lunacy Act, R.S.O. 1914 ch. 68, contemplates a superseding order only for the purpose of restoring the person to the management of his own affairs.

(5) That in any case the evidence was not adequate to shew that James Rourke had recovered his reason.

(6) That it was desirable that the real issues should be tried out in a way that would be free from all technical advantage or disadvantage to any party; but, as the parties before the Court would not agree to the matters now in question being left in abeyance until the real issues should be tried, there was no course open save to dismiss the motion, leaving the parties to work their way as best they could out of the chaos in which they had involved themselves.

Motion dismissed with costs.

MIDDLETON, J. APRIL 15TH, 1915.

RE PLUMB.

Marriage Settlement—Construction—Power of Appointment—Exercise of—Death of Appointee—Life Estate—Vested Remainder—Rights of Representative of Deceased.

Motion by the trustees under a marriage settlement, upon originating notice, for an order determining a question as to the interpretation and effect of the settlement in the events that had happened.

R. L. Defries, for the trustees.

H. J. Scott, K.C., for Augusta Maria Plumb and Frederick Plumb.

J. L. Ross, for Alice Howard Plumb.

MIDDLETON, J.:—Augusta Maria Plumb and Frederick Plumb, her husband, on the occasion of their marriage on the 10th December, 1879, in pursuance of an ante-nuptial agreement, executed a settlement by which certain properties . . . were settled.

On the 12th February, 1901, Mrs. Plumb executed an appointment, in assumed pursuance of the powers of the settlement, by

which she irrevocably appointed all the trust property to her only son, Arthur Schofield Plumb, his heirs and assigns, subject to and without prejudice to the life estate of the appointor.

Arthur Schofield Plumb died on the 25th October, 1914, then being of the age of 34 years, leaving no issue surviving, but a widow, Alice Howard Plumb. Mrs. Plumb, the settlor, is now 60 years of age, and the possibility of issue is extinct. She has now executed an instrument, purporting to be in exercise of the powers reserved to her by the settlement and any other powers in any wise so enabling her, by which she irrevocably appoints all the trust property to her own executors or administrators.

On the strength of this appointment she now asks to be given custody and control of the entire trust estate. The trustees desire the opinion of the Court as to the validity and effect of this latter appointment, and the son's widow contests its validity. . .

By the trust deed the settlor is given a life estate, and it is then provided: "From and after the decease of the said Augusta Maria Dickson to and to the use of all and every the child and children of the said Augusta Maria Dickson by the said Frederick Plumb to be begotten and their children in case any of them shall be dead leaving issue for such estates and interests and in such shares and proportions and to be vested in him her or them at such respective ages or times and in such manner as the said Augusta Maria Dickson alone and notwithstanding her coverture by any deed or instrument in writing to be sealed and delivered by her in the presence of two credible witnesses or by her last will and testament in writing or by any writing in the nature of her last will and testament to be signed and published by her in the presence of two or more credible witnesses shall direct or appoint and in default of such direction or appointment or so far as the same shall not extend to the use of all and every the child and children of the said Augusta Maria Dickson by the said Frederick Plumb to be begotten and their children in case any of them shall happen to be dead leaving children but so as that the children of the sons and daughters of the said Augusta Maria Dickson and Frederick Plumb as shall happen to be dead shall be entitled only to the share which his her or their father or mother would have been entitled to if living equally to be divided between or amongst them if more than one share and share alike as tenants in common."

This provision is followed by a clause "and in default of such issue to the use" of such person as the settlor may by deed or will appoint, and in default of appointment to the use of her next of kin.

If the main clause above quoted is simplified by eliminating all that is not now material, bearing in mind that there was only one child and that that child died without issue, it will be seen that the remainder expectant upon the decease of the settlor was to the son "for such estate and interest . . . to be vested in him at such age or time and in such manner as" the settlor might by deed appoint. She has unconditionally appointed the whole estate to the son absolutely, subject to her own life estate. The clause contemplates an appointment during the lifetime of the settlor, for it may be made by deed as well as by will, and when once made it appears to me to be irrevocable, and that upon the death of the appointee the remainder passed as part of his estate.

It is true that the clause evidently contemplates only those children alive at the death of the life-tenant, and the issue of those who pre-deceased her, taking; and the provision giving a general power of appointment in default of such issue may well be read as applicable where there is no issue living and where there can be no issue living at the death of the settlor. This does not affect the result; for then the general power of appointment found in the latter part of the settlement would become operative, and the appointment is then equally an absolute and completed gift by the mother to the son. . .

[Reference to Kennedy v. Kingston (1821), 2 J. & W. 431; Farwell on Powers, 2nd ed., p. 474; Duke of Marlborough v. Lord Godolphin (1750), 2 Ves. Sr. 61.]

Where a power is executed by will, and the appointee dies in the testator's lifetime, before the will becomes operative, the property cannot vest in the appointee, as he is not in existence at the critical time, nor can his representative take, because the appointment is not in their favour.

In Faulkner v. Lord Wynford (1845), 15 L.J.N.S. Ch. 8, Vice-Chancellor Wigram points out that where there is a life-tenancy, and the life-tenant has the power of appointment, and the power may be exercised either by deed or will, "there is nothing to oblige the tenant for life to suspend her judgment, as to the parties who shall take, till her death."

Applying that to the present case, the mother chose to give the property absolutely to her son, subject only to her own life estate. Applying also the familiar principle that where an appointment is made the appointment is to be read into the settlement, the situation then becomes perfectly plain. The mother

had the life estate, the son had the remainder. Upon the son's death, intestate, his widow became entitled to one-half of the property, subject to the mother's life estate, and the mother and father became absolutely entitled to the remaining one-half.

Costs of all parties may come out of the estate.

LENNOX, J. APRIL 17TH, 1915.

CURRY v. SANDWICH WINDSOR AND AMHERSTBURG R.W. CO.

Negligence—Collision between Street Car and Automobile—Derailment of Car—Res Ipsa Loquitur—Evidence—Findings of Jury.

The facts are stated in the judgment of MIDDLETON, J., 7 O.W.N. 140.

The action was tried a second time, before LENNOX, J., and a jury, at Sandwich, a new trial having been directed by the First Divisional Court of the Appellate Division: 7 O.W.N. 739.

The jury found that the defendant company was guilty of negligence in running at too high a rate of speed around a curve and in the car being derailed by a pin dropped by some preceding car, to which it was not properly fastened.

J. H. Rodd, for the plaintiff.

H. H. Dewart, K.C., and G. A. Urquhart, for the defendant company.

LENNOX, J.:—The defendants' car was off the track. Unexplained, this in itself would be some evidence of negligence: McArthur v. Dominion Cartridge Co., [1905] A.C. 72; Flannery v. Waterford and Limerick R.W. Co. (1877), Ir. R. 11 C.L. 30; Dawson v. Manchester Sheffield and Lincolnshire R.W. Co. (1862), 5 L.T.N.S. 682; Byrne v. Boadle (1863), 2 H. & C. 722; Halsbury's Laws of England, vol. 21, p. 440. . . .

The defendant company, here, attempted to shew that the railway car did not jump or leave the track, and so did not run into the plaintiff's limousine, but was run into and dragged off the track by the limousine. The jury rejected this contention. I do not see how they could have come to any other con-

clusion. As to Spitalsky's evidence—which did not go to the root of the matter—they might accept it or they might not; they evidently did not. . . .

I have come to the conclusion, though not without some hesitation, that the findings of the jury entitle the plaintiff to judgment.

There will be judgment for the plaintiff for the amount assessed by the jury, with costs.

LENNOX, J. APRIL 17TH, 1915.

INTERURBAN ELECTRIC CO. LIMITED v. CITY OF TORONTO.

Contract—Municipal Corporation—Electric Light Company—Erection of Poles in Highways—Removal at Instance of Municipal Corporation—Expense of, by whom Borne—Construction of Agreements—Control of Highways.

Action to recover from the defendant corporation $1,366.78, the expense of removing poles placed on various streets of the city of Toronto and putting them in other places, pursuant to orders issued from time to time by city officials.

The action was tried without a jury at Toronto.

R. McKay, K.C., and D. Inglis Grant, for the plaintiff company.

G. R. Geary, K.C., and C. M. Colquhoun, for the defendant corporation.

LENNOX, J.:—The plaintiff company is the successor in title to the rights of the Humber Power and Light Company and the Stark Telephone Light and Power System Limited. The Humber company was incorporated by letters patent on the 15th October, 1901, and on that day an agreement was entered into between the Municipal Corporation of the Township of York and that company, by which the company acquired the right to erect poles upon roads and streets of the township of York in a defined area, upon terms and conditions therein set out. The privilege was not to be exclusive, was to continue for 20 years only, and was subject to several drastic terms of forfeiture. It

was not a voluntary franchise—in consideration of it, the company bound itself to begin and complete its work by certain dates and to furnish light and power to inhabitants of the municipality and to the municipality itself at or below certain maximum rates; and it was provided that the company's poles should be made available for the municipality and other companies; that the company should maintain the line and keep it in repair and for indemnity of the municipality from damages or loss.

Clause 3 of the agreement, the construction and effect of which is, I think, directly in issue, is as follows; "The size, length, and quality of the poles to be erected by the company, the location and removal of the said poles along the said streets, and the location of poles changed at any time in the future, and the voltage, shall be subject to the approval of the council and the township engineer or such other officer as the council may designate, and no wires shall be strung at a less height than eighteen feet from the ground." Clause 9: "And it is further understood and agreed that, in all cases that shall arise hereafter during the continuance of this agreement, where the services of the township engineer or of the township solicitor or other officer shall be required by the township in connection with any matters arising out of this agreement or from the extension of the rights, privileges, and franchseis above set out or similar rights, privileges, or franchises, to other streets or roads within the limits of the corporation, the remuneration of said engineer, solicitor, or other officer, for such services, shall be paid and borne by said company."

The Stark company above mentioned succeeded to the rights of the Humber company under the agreement just recited; and, by an agreement of the 3rd April, 1905, between the Corporation of the Township of York and the Stark company, reciting the devolution of title, that company took upon itself the duties and obligations of the former company; and the municpal council, in addition to confirming its title, granted to the Stark company a similar franchise to that theretofore granted, "upon such other streets and highways in the township as may from time to time be designated by resolution of the council." By a resolution of the same day, certain streets were designated by the council.

The territory covered by these agreements, or a part of it, has become part of the city of Toronto.

By an agreement of the 30th November, 1903, between the

Stark company and the Corporation of the Town of Toronto Junction, which town now and during the currency of the account sued for was a part of the city of Toronto, this company, in consideration of services to be rendered similar to but more numerous and specific than those in the township agreement referred to, and upon similar but more onerous conditions, acquired the right to erect poles and string wires in the town of Toronto Junction.

Bearing directly upon the issue in this action, namely, whether the plaintiff company is entitled to be paid for changing the location of poles at the instance of the defendant corporation, clause 8 of this agreement is in part as follows: "The said poles shall be placed in such positions upon such streets and lanes and wires placed thereon in such manner as may be determined by the said town engineer, or other person designated by the council of the said corporation; and, if any pole or poles are erected contrary to the provisions of this clause, the company shall remove the same forthwith upon notice in writing from the said town engineer, or other person aforesaid, and upon refusal to do so the said corporation may have the same removed at the company's expense, and recover the cost thereof from the said company in any Court of competent jurisdiction."

By an agreement of the 31st March, 1906, between the Stark company and the Corporation of the City of Toronto, that company acquired the right to erect poles and string wires along the streets of the city, within an area therein defined, and covenanted therein "that it will properly locate and erect the said poles, and paint the same, and also insulate the wires, under the supervision and to the satisfaction of the city engineer, and will immediately remove the poles and wires from off the streets and roads in the said district, at any time, upon receiving two weeks' notice so to do from the city engineer or other officer appointed by the council of the said corporation to give such notice, and restore the streets and roads to their former condition without any compensation therefor," and that upon default the work might be done by the municipality at the expense of the company; and, by an another agreement of the 11th August, 1906, between the same parties, the erection of poles and the stringing of wires upon other streets of the city is provided for upon the same terms and conditions.

The question to be determined in this action is, whether the paintiff company has a right to be paid by the defendant cor-

poration the expense occasioned by taking out and replacing poles upon the streets and highways covered by these agreements, or upon any of these streets, or upon streets not covered by any agreement.

A great deal of argument was addressed to me, and many authorities referred to, to shew the impossibility of a municipality divesting itself of its paramount power and duty to control, safeguard, and keep in repair the highways within its territorial jurisdiction. I need not refer to these cases or others that I have consulted; the most interesting of them, perhaps, being Butchers Union v. Crescent City (1883), 111 U.S. 746. I entertain no doubt as to the law of the contest narrows to the question of whether the plaintiff company shall occupy the highway or the people's right to its unobstructed use be maintained. As was well said in National Waterworks Co. of New York v. City of Kansas (1886), 28 Fed. Repr. 921—a principle which can be applied in Canada—"the plaintiff took its right to lay pipes subject to the paramount and inalienable right of the city to construct sewers therein whenever and wherever in its judgment the public interest demanded;" and the same may be said of the paramount right and duty of the municipality to maintain its highways, as highways, in proper and efficient repair. There is no dearth of authority upon this point in English, American, or Canadian Courts. But this is very far from saying that the law of ultimate control is to be seized upon by a municipality as an excuse for impairing or ignoring the obligation of its contracts, or imposing upon the purchasers of a franchise burdens incident to unforeseen contingencies, new conditions, or change of municipal methods or policy. There is no question arising here of ridding the streets of the poles—it is simply a question of who shall pay.

In the main it is a question of the meaning of the contracts.

There are items of account, however, not covered by contract. For these items, for obvious reasons and upon the authority of many cases, the plaintiff company cannot recover. Neither can the plaintiff company recover for the removal of poles upon the streets embraced in the agreements of the 31st March and the 11th August, 1906; the wording is explicit and conclusive. That the council did not demand all it could insist upon does not affect the matter.

As to changes of location upon streets embraced in the other agreements, I think the expense must be borne by the defendant corporation. As I have pointed out, the franchises in these

cases were not gifts from the municipalities granting them. The concessions are coupled with benefits to the grantors and obligations upon the grantees, are confined within a reasonable time, and in no way conflict with the paramount duty of keeping the highways in repair. The companies are invited to invest their funds, and bound to continue to invest and keep their plant in operation for the advantage of the municipalities, at the peril of confiscation. The municipalities retained absolute control over the original placing of the poles, and the right to say, without question, as to any point upon any street, "a pole shall not be placed here." If other charges were to be imposed upon the companies by reason of changed conditions, or changed municipal policy, it was for the municipalities to provide for this in distinct terms; and that the Corporation of the Township of York provided for legal and engineering expenses, and the Corporation of the Town of Toronto Junction for the expense of removing poles "erected contrary to the provisions" of that agreement, is in itself a cogent argument against the unlimited right to impose burdens now set up by the defendant corporation. The issue here does not touch the right of the municipality to dictate the manner in which the highways shall be used or occupied. The correspondence shews, and common knowledge confirms it, that no uniform method of lining the poles has yet been adopted—sometimes they are inside the walks, oftener they are by the kerb, and occasionally along the fences or lot lines. Re-alignment of the roadway, grading and changes of grade, opening up of cross-roads—annual changes too in the personnel of the governing body—experience, new methods, and the laudable ambition for civic improvement, have occasioned and will involve the re-location of poles from time to time. There was evidence to shew, and it was not controverted, that the original location was with the concurrence and approval of the council for the time being representing the municipality affected. I cannot read the clauses of the agreements above set out, either as a matter of construction or matter of obvious intent, as meaning that the council of 1914, though acting bona fide and in the public interest, was to have the right to undo the work of the council in control when the location was originally determined, to the detriment of the company, or that the council of 1916 may undo the work of either or both at the expense of the owners of a purchased franchise; or that, contrary to the actual agreement of the parties, the general law as to the inalienable control of the highways, so strenuously urged by coun-

sel for the defence, compels the application of a principle, in the circumstances of this case, so intolerable and unjust.

The rights of the parties and the basis of taking the accounts being declared, counsel can have no difficulty in agreeing upon the items of claim which the plaintiff company is entitled to.

There will be judgment for the aggregate of expenditure in question upon the streets embraced in the agreements referred to, other than those of the 31st March and 11th August, 1906, with interest upon this sum from the 29th May, 1913, and the costs of this action, with a stay of execution for 20 days. There will be no set-off of costs.

DELAP v. CANADIAN PACIFIC R.W. CO.—MIDDLETON, J., IN CHAMBERS—APRIL 13.

Pleading—Statement of Claim — Amendment — Prejudice —Refusal of Motion in Chambers—Leave to Renew at Trial.]—Motion by the plaintiff for leave to amend the statement of claim. The learned Judge said that two of the amendments sought ought to be allowed. The third amendment ought to be left to be dealt with by the trial Judge. The action was a very peculiar one, and much might turn upon the way in which the case was put forward. There was a written agreement, the result of long negotiations. It was now alleged that there was, in addition to this, a collateral parol agreement, which, if it existed, was manifestly of great pecuniary value. The late George M. Clark acted for the defendants in the transaction. Owing to his death, the defendants might be unable to give any evidence as to what took place, and the Court might be compelled to rely entirely upon the statements of the plaintiff and his representatives. The transaction took place many years ago. The written agreement was dated the 11th February, 1898. Mr. Clark did not die until 1905. This action was not commenced until September, 1912. What was said in the statement of claim, para. 13, was that it was not suggested by anybody that the verbal agreement should be reduced to writing, though at the time it was entered into it was, in the minds of Mr. Clark and the plaintiff's representatives, essential for the purpose of the written agreement and to protect the transaction thereby contemplated. This was followed by the statement which it was now desired by amendment to strike out: "There existed then and until the death of the said George M. Clark in or about the

year 1905, the most implicit trust and confidence between the said George M. Clark and the plaintiff, and no necessity arose at any time for reducing to writing the agreement in respect of the said shares.'' This amendment was sought as of right, without any evidence shewing why that which was once stated and admitted should now be withdrawn. It was not to be supposed that such a statement, deliberately made, could be without foundation; and the defendants were justified in asking that it should remain of record, so that they might have whatever advantage it might give them. Possibly, at the trial, when the evidence is given and the case is more fully developed, it will be proper to give the relief sought. At present, the amendment should not be made; but the learned Judge thought it proper to add nothing which would in any way hamper or interfere with the course at the hearing. F. Arnoldi, K.C., for the plaintiff. Angus MacMurchy, K.C., for the defendants.

RE DIXON—MIDDLETON, J.—APRIL 13.

Will—Construction—Legacy to Daughter — Settlement in Trust.]—A question as to the true construction of clause 4 of the will of B. Homer Dixon, deceased, came before MIDDLETON, J., in the Weekly Court, upon originating notice. Clause 4: ''I give and bequeath to my . . . daughter E. a legacy of $25,000 free of legacy duty, the same to be invested by and in the names of my trustees, and the income or part thereof, according to their discretion, to be paid and applied by my trustees for her education and maintenance until she attains the age of 21 years, or until her marriage, whichever shall first happen, and in the event of her marriage the same shall be settled in form and manner and subject to discretion on the part of my trustees in all respects similar to the settlements mentioned in the eleventh paragraph hereof. And with respect to the investment dealing with and settlement of the said legacy and the income therefrom it shall be in all respects dealt with according and subject to terms and provisions similar to those set forth in the said eleventh paragraph hereof.'' The eleventh clause provided that, upon the decease of the testator's wife, his estate should be divided among his then surviving children and the lawful issue of any child who predeceased him, the share of each child, either son or daughter, to be settled upon the terms of trusts therein very carefully and elaborately set forth;

these trusts giving to the child the right to receive the income during life without power of anticipation, and in the case of daughters free from any control or interest of any husband. The question which now arose was whether the legacy of $25,000 given to the daughter E. by the fourth clause was required to be settled in accordance with the scheme set out in the eleventh clause; E. having arrived at the age of 21 years and desiring to have the legacy paid to her. MIDDLETON, J., said that he had come to the conclusion that the daughter was not entitled to the legacy and that it must be settled. The difficulty having arisen from the testator's language, the estate and not the legacy should bear the costs of interpretation. J. T. Small, K.C., for the executors. W. K. Fraser, for the legatee. G. L. Smith, for adults interested. F. W. Harcourt, K.C., for infants interested.

LESTER v. CITY OF OTTAWA—LENNOX, J.—APRIL 17.

Negligence—Removal of Dangerous Substance from Burning Building by City Firemen—Explosion after Removal—Injury to Person—Liability—Agency of Firemen for Owner of Building—Findings of Jury—Liability of City Corporation—Evidence.]—Action against the Corporation of the City of Ottawa and one Brunton for damages for injuries sustained by the plaintiff from an explosion of a can of chemicals removed from the house of the defendant Brunton by the corporation's firemen during a fire in that house and left standing upon the lawn of a neighbour, where it exploded. The action was tried with a jury at Ottawa. LENNOX, J., said that at the conclusion of the plaintiff's case, and again when the evidence was all in, he (the learned Judge) entertained serious doubts as to whether, as to the city corporation, there was any negligence, and, as to the defendant Brunton, any evidence that the injuries complained of could be said to be in the result of his failure—assuming it to be negligence—to keep water in the can in which the explosion occurred. As a matter of precaution, the learned Judge decided to take the findings of the jury; and they answered the questions left to them favourably to the plaintiff as against both defendants. If there were any circumstances from which the jury might reasonably infer negligence of either party, these circumstances should be left for the consideration of the jury. In this case there was not any circumstance from which the negligence of the city corporation's servants could fairly be in-

ferred by ten reasonable men; but it was proper to regard the fireman as the involuntary, and, as regards the danger, unconscious, agents of the defendant Brunton; and (with hesitation) the combustion of the materials in the can, the removal of the smouldering can from the room, the placing of it upon the lawn, the explosion and the casualty, were connected cause and effect, and a natural consequence of the negligence of the defendant Brunton, in the matters found by the jury, sufficient to cast liability upon him. Counsel for the city corporation did not ask for costs. Judgment for the plaintiff against the defendant Brunton for $1,100, with such costs as would have been incurred by the plaintiff had this defendant been sued alone, and judgment dismissing the action as against the Corporation of the City of Ottawa without costs. A. E. Fripp, K.C., for the plaintiff. F. B. Proctor, for the defendant city corporation. G. F. Macdonnell, for the defendant Brunton.

BELISLE v. BELISLE—LENNOX, J.—APRIL 17.

Husband and Wife — Alimony — Desertion — Quantum of Allowance—Leave to Apply—Costs.]—Undefended action for alimony, tried without a jury at Ottawa. The plaintiff's husband deserted her, and she asked for alimony at the rate of $100 a month. Judgment for the plaintiff for payment by the defendant of alimony from the teste of the writ of summons for a period of four years at the rate of $60 a month and thereafter at $50 a month, in each case payable quarterly, with the right reserved to either party to apply to the Court to increase or reduce the monthly payments, upon the ground of changed conditions or other sufficient cause, and with costs upon a solicitor and client basis. A. Lemieux, K.C., for the plaintiff.

MCKAY v. GOOD AND ROCHESTER—LENNOX, J.—APRIL 17.

Promissory Note—Evidence—Interest.]—Action upon a promissory note, tried without a jury at Ottawa. Judgment had been entered against the defendant Good upon default. Held, that the plaintiff was entitled to recover judgment against the defendant Rochester for the amount claimed in the pleadings. The testimony of the manager of the Royal Bank was buttressed

by probabilities, and, although upon one or two subordinate details it differed from his letter, was satisfactory and convincing. Judgment for the plaintiff for $2,072, with interest thereon at 7 per cent. per annum from the 18th April, 1914, for the period of three months, and thereafter at 5 per cent., with costs against the defendant Rochester. G. F. Henderson, K.C., for the plaintiff. R. A. Pringle, K.C., for the defendant Rochester.

BALLANTYNE v. T. J. EANSOR & CO.—LENNOX, J.—APRIL 17.

Master and Servant—Injury to Servant—Negligence—Findings of Jury—Evidence — Incompetence of Fellow-servant — Common Employment.]—Action for damages for injuries sustained by the plaintiff while in the employment of the defendants in their works. The action was tried with a jury at Sandwich. LENNOX, J., said that the plaintiff undoubtedly sustained serious injury, and his conduct after the accident shewed that he was not looking for trouble. The merits were pretty clearly with the plaintiff. The jury found that the defendants were negligent, and it was quite open to them to have specified negligence of a class which would have entitled the plaintiff to judgment. It was, however, a matter for them to say whether there was any defect in the ways, works, machinery, or plant of the defendants occasioning the plaintiff's injuries. Their attention was distinctly directed to consideration of this view of the action, and by their answer to the second question they must be taken to have negatived this suggestion. The negligence they assigned was, "By having an unskilled labourer in charge of the gun." The action could not be supported upon this finding. Rhea, the person referred to, was a fellow-labourer, more skilled and experienced than the plaintiff, but not a person in superintendence; he had no power to give orders, and was not in any sense a person in charge or control. There was a competent foreman in full charge of this part of the works, and he was in the immediate neighbourhood when the accident occurred. The plaintiff is not entitled to judgment, first, because there was no evidence that Rhea was incompetent or "unskilled"—if want of skill could be taken as equivalent to negligence—and, secondly, by reason of the doctrine of common employment. Judgment dismissing the action, and, as the defendants in the circumstances should not ask for costs, without costs. O. E. Fleming, K.C., for the plaintiff. T. Mercer Morton, for the defendants.

CUSSON BROTHERS v. KING—LENNOX, J.—APRIL 17.

Contract—Work and Labour — Items of Account — Evidence.]—Action to recover $1,423.43, alleged to be the balance due to the plaintiffs under a contract for railway work and moneys improperly retained by the defendant in the adjustment of the accounts between the parties. The action was tried without a jury at Ottawa. The first item in dispute was a sum charged to the plaintiffs in respect of insurance of their workmen against accidents. Upon this item, it was held that the plaintiffs failed. Upon the second item, painting and flooring, $215.52, the plaintiffs were held entitled to succeed. Upon the third item, wood and firing, the plaintiffs failed. Upon the fourth item, work not included in the final estimate, the plaintiffs were entitled to recover $30. Upon the fifth item, work upon the basis of force account, $446.12, the plaintiffs were entitled to recover. The defendant should be allowed a further credit of $38.73 for insurance. Judgment for the plaintiffs for $652.91, with interest from the 20th February, 1914, and with costs. No set-off of costs to the defendant. R. G. Code, K.C., for the plaintiffs. G. F. Henderson, K.C., for the defendant.