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# Ontario Weekly Notes

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## APPELLATE DIVISION.

FIRST DIVISIONAL COURT. NOVEMBER 19TH, 1918.

### *RE BUTTERWORTH AND CITY OF OTTAWA.

*Municipal Corporations—By-law of Urban Municipality Requiring Weighing of Coal or Coke—Power of Council to Pass—Municipal Act, sec. 401, cl. 13 (8 Geo. V. ch. 32, sec. 8 (1))—"With the Approval of the Municipal Board"—Approval Given after Passing of By-law—Motion to Quash By-law—Discretion—Costs.*

Appeals by J. G. Butterworth from an order of FALCONBRIDGE, C.J.K.B., 14 O.W.N. 277, dismissing an application to quash a by-law of the City of Ottawa, and from an order of the Railway and Municipal Board approving of the by-law.

The appeals were heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

T. McVeity, for the appellant.

F. B. Proctor, for the city corporation, respondent.

HODGINS, J.A., reading the judgment of the Court, said that the point of issue in both the appeals was the right of the municipal council to pass a by-law regulating markets and weighhouses without the previous approval of the Board.

The legislation which requires the approval of the Board is found in sec. 401, cl. 13, of the Municipal Act, as enacted by sec. 8 (1) of the Municipal Amendment Act, 1918, 8 Geo. V. ch. 32.

The disposition of the Courts is to interfere as little as possible with the exercise of the legislative functions of municipal

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

councils, when that exercise falls within the proper limits of their powers. And, as the jurisdiction to quash a by-law is discretionary, it may be asserted further that when the subject legislated upon is clearly within municipal authority, and the objection is merely to the mode in which the particular power has been exercised, and the defect can be remedied by further or different action, the by-law will not be quashed unless it is clear that the method adopted cannot be supported in any view of the matter.

The sole question here was, whether the Board must act first and, if desirable, lay down certain limitations, restrictions, and conditions to which any by-law thereafter passed must conform before approval; or whether, when a by-law has passed its third reading, and is, but for the want of approval, a complete act of legislation, the Board can then approve of it, if its provisions seem to the Board to be proper and reasonable.

Read literally, the enactment that "by-laws may be passed by the councils of urban municipalities . . . with the approval of the Municipal Board" would seem to require concurrent consent to the act of passage; but, this being a practical impossibility, the action of the Board must be either prior or subsequent.

The by-law is inoperative till approval is gained, and that approval is intended to be a consent to the particular by-law.

If the consent of the Board were a condition precedent, and the Board delcined to initiate matters, no urban municipality could ever pass such a by-law. See Rex v. Lincolnshire Appeal Tribunal, [1917] 1 K.B. 1, 14.

As a matter of discretion, the by-law should not be quashed.

The principle was the same as that adopted in other cases where approval was needed to validate some act.

See Mackenzie v. Maple Mountain Mining Co. (1910), 20 O.L.R. 615, 618; In re Huson and Township of South Norwich (1892), 19 A.R. 343, 350, 351; In re Boulton and Town of Peterborough (1859), 16 U.C.R. 380, 386, 387; Rex v. McDevitt (1917), 39 O.L.R. 138, 140; Cartwright v. Town of Napanee (1905), 11 O.L.R. 69, 72.

Both appeals should be dismissed, but without costs, as when the original motion was launched the by-law had not secured approval.

FIRST DIVISIONAL COURT. NOVEMBER 20TH, 1918.

## TORONTO HOCKEY CLUB LIMITED v. OTTAWA HOCKEY ASSOCIATION LIMITED.

*Club—Association of Hockey Clubs—Central Association—Interference with Players of one Club—Acquiescence—Leaving Club out of Schedule of Matches—Powers of Association—Evidence—Injunction.*

Appeal by the plaintiff club from the judgment of MEREDITH, C.J.C.P., at the trial, dismissing the action with costs.

The action was brought by a hockey club against several other hockey clubs for damages for wrongful interference with the plaintiff club's players and for leaving the plaintiff club out of a schedule prepared at a meeting of the National Hockey Association of Canada held on the 11th February, 1917; and to restrain the defendant clubs from playing in future in any new league or in any league of which the plaintiff club was not a member.

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

I. F. Hellmuth, K.C., and J. F. Boland, for the appellant club.

R. T. Harding, for the defendants, respondents.

The judgment of the Court was read by FERGUSON, J.A., who said, after stating the facts, that the learned trial Judge had come to the conclusion that the substantial part of the action was the alleged interference with the plaintiff club's players, and that in respect of that claim the plaintiff club had acquiesced in what had been done. With that finding the Court agreed. The part of the resolution authorising the sale of the franchise was not acted upon and was rescinded, and it was not necessary to work out just what was meant by the sale of the franchise or what was the contract in reference thereto.

The rules and provisions of the so-called constitution in reference to a schedule were founded upon the assumption that each and every one of the six clubs named in the schedule would continue in existence as active playing organisations; and those rules were not applicable when one club went out of existence. Consequently, no provision was made in the agreement of the parties or the constitution regulating the action of the members of the association in case the number of clubs should fall below six. In these circumstances, the members of the association had power,

acting honestly, to adopt a schedule leaving out one of their number.

The evidence demonstrated that this was the only arrangement that could be carried out, with any reasonable hope of avoiding financial loss to the majority of the members and players.

The association not being formed for any definite period, it was impossible to control the future actions of the clubs by injunction.

*Appeal dismissed with costs.*

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## HIGH COURT DIVISION.

ROSE, J. NOVEMBER 18TH, 1918.

## *BANK OF MONTREAL v. STAIR.

*Fraudulent Conveyance—Action by Execution Creditors of Husband to Set aside Conveyances of Lands Made by Husband to Wife—Evidence—Belief of Both Parties that Wife True Owner—Demand by Wife for Conveyances—Consideration—Absence of Intent to Defeat or Delay Creditors—Rule as to Voluntary Conveyances—Evidence—Dismissal of Action—Costs.*

Action to set aside conveyances of lands by the defendant F. W. Stair to his wife, the other defendant, as fraudulent and void as against the plaintiffs, execution creditors of F. W. Stair.

The action was tried without a jury at a Toronto sittings.

Wallace Nesbitt, K.C., and J. A. Worrell, K.C., for the plaintiffs.

H. J. Scott, K.C., and T. R. Ferguson, for the defendant Della M. Stair.

G. W. Mason, for the defendant F. W. Stair.

ROSE, J., in a written judgment, after setting out the facts, said that it did not seem to be necessary to decide whether, as a matter of law, the lands conveyed would, in the absence of special agreement, belong to the wife or to the husband or to the two as partners; because it was clear upon the evidence that both defendants believed the wife to be the owner and to be entitled to conveyances.

If there was no agreement that the husband should be the owner, there would be nothing unnatural in a belief that lands

paid for out of the profits of a business conducted in premises bought with the wife's money were the wife's lands; and such a belief would be very natural if, as in this case, one of the parcels was acquired and used as a site for an extension of the building originally purchased and promptly conveyed to the wife. In a case like this, it would probably be unsafe to hold upon the evidence of the parties alone that, natural as such a belief might be, it actually existed: see Coop v. Smith (1915), 51 Can. S.C.R. 554; but the evidence of the solicitor for the wife should be accepted, and his statement of the circumstances in which the conveyances were made convincingly shewed that F. W. Stair was telling the truth when he said in the witness-box that, when he had thought about the demand made upon him (by the solicitor for the wife) for conveyances, he came to the conclusion that he "had not a leg to stand upon," and that he had better make the best bargain possible. The learned Judge did not believe that Stair was actuated by any desire to defeat, hinder, or delay the plaintiffs or any other creditor.

It was argued that the conveyances were voluntary, notwithstanding the release of F. W. Stair from liability to account and the engagement of him as manager. The learned Judge was not, having regard to the circumstances, prepared to deal with the case upon the footing that there was no consideration for the conveyances; but, upon his finding as to the reason why the conveyances were made, it made no difference in the result whether there was or was not consideration.

Reference to Freeman v. Pope (1870), L.R. 5 Ch. 538; Ottawa Wine Vaults Co. v. McGuire (1912), 27 O.L.R. 319.

The single question in such cases as this is, whether the transaction impeached was actually made with intent to defeat, hinder, or delay creditors.

The general rule as to inferring the fraudulent intent where the conveyance is voluntary gives way when it conflicts with the very truth as disclosed by all the evidence: Carr v. Corfield (1890), 20 O.R. 218, a case not distinguishable from the present.

Reference also to In re Vingoe & Davies (1894), 1 Mans. B.C. 416, 419; In re Fletcher (1891), 9 Morr. B.C. 8; In re Vautin, [1900] 2 Q.B. 325; Gibbons v. Tomlinson (1891), 21 O.R. 489, 497.

The action failed; but the circumstances were such as to arouse suspicion and to justify an inquiry; and the dismissal ought to be without costs.

RIDDELL, J. NOVEMBER 20TH, 1918.

## RE ARMSTRONG.

*Will—Construction—Effect of Codicils—Estate—Fee Simple—Life-estate—Remainder—Wills Act, sec. 31—Devolution of Estates Act, secs. 3 (1), 30, 31—Devise to "Grandchildren" of Children Read as Devise to "Children" of Children—Context—Intention of Testatrix.*

Motion by the executor of the will of Mary Ann Armstrong for an order determining two questions arising upon the will and three codicils thereto.

The motion was heard in the Weekly Court, Toronto.

Grayson Smith, for the executor.

F. W. Harcourt, K.C., for the grandchildren of the testatrix.

RIDDELL, J., in a written judgment, said that the will was dated the 16th June, 1896, and the testatrix died on the 24th November, 1899, leaving six children, her only heirs at law.

The material parts of the will were as follows:—

"I give devise and bequeath all my real and personal estate of which I may die possessed in the manner following, that is to say:—

"The dwelling and lot opposite the Penman Mill on West River street and dwelling and lot on corner of Warwick and Jane streets . . . I desire that my children, viz., Susan Richardson, Maria Myers, Emily Detroer, Annie Lamb, Thomas Edwards, and Alice Lefor, receive the above named property in equal shares and at their decease their grandchildren to receive the same in equal shares. . . ."

The three codicils were dated the same day as the will and were all written on the same day.

The first codicil was: "Whereas I desire to make the following change in my said will, that the dwelling and lot opposite the Penman Mill named in said will be disposed of as follows, one half the interest in said property to be given to Annie Lamb and that no grandchildren are to sell after her death.

Second codicil: "Whereas I desire to make the following change in my said will, that the half interest in the property opposite the Penman Mill be given to Annie Lamb and at her death to be divided between her three children, Lottie, Edward, and Norman, in equal shares."

Third codicil: "Whereas I desire to make the following change in my said will, that the half interest named in the property opposite the Penman Mill to be given to Alice . . . the other half to Mrs Annie Lamb and at her death to be divided between her three children. . . ."

Maria died in February, 1907, a widow, intestate, and without issue; Susan died in March, 1909, intestate, leaving her surviving her husband and five children; Emily died in May, 1918, intestate, leaving her husband and five children surviving her; Thomas died in June, 1911, leaving a widow and one child; Annie Lamb was living at the date of the application, with two children, Lottie and Norman; Alice was also living.

At the time the will and codicils were made and at the time of the death of the testatrix, Susan and Emily (at least) had grandchildren.

Of the property called "the dwelling and lot opposite the Penman Mill," Alice was entitled to one half in fee simple: Wills Act, R.S.O. 1914 ch. 120, sec. 31; the other half Annie took for life with remainder to her three children named; but, Edward having died in December, 1912, intestate and unmarried, his estate in fee simple—Wills Act, sec. 31—in one third of his mother's one half was vested, and must be divided according to the Devolution of Estates Act, R.S.O. 1914 ch. 119, secs. 3 (1), 30, 31.

With "the dwelling and lot on the corner of Warwick and Jane streets" the will alone dealt; it was devised for life to the six children of the testatrix in equal shares and upon their decease to their grandchildren in equal shares.

The first matter to be determined was the meaning of "their grandchildren." "Grandchild" means the child of a son or daughter. The word may sometimes have a special meaning—e.g., under a gift to "grandchildren" a great-grandchild may sometimes take: Hussey v. Berkeley (1763), 2 Eden 194, Ambl. 603; but, unless explained by the context or otherwise, that would not be so: Earl of Orford v. Churchill (1814), 3 V. & B. 59; cf. Schouler's Law of Wills Executors and Administrators, 5th ed., sec. 533, pp. 671, 672.

Here the wills and codicils indicated that the testatrix had in mind her own grandchildren, the children of her children.

The "grandchildren" in the first codicil were the "her three children" of the second and third: the testatrix used "grandchildren" to describe the relationship of the devisees to herself.

The will should read, "at their decease their children to receive the same in equal shares."

As all the children of the testatrix were alive at the time of her death, each took a life estate in an aliquot part of the "lot on corner of Warwick and Jane streets," with remainder to their children in equal shares.

Order declaring accordingly; costs out of the estate.

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ROSE, J. NOVEMBER 20TH, 1918.

## RYND v. TOWNSHIP OF BLANSHARD.

*Municipal Corporations—Deepening of Ditch—Creation of Outlet—Injury to Plaintiff's Land by Overflow of Water—Negligence—Award under Ditches and Watercourses Act, R.S.O. 1914 ch. 260—Application of sec. 23—Damages for Injury to Crops—Assessment of—Injunction—Leave to Apply if Cause of Complaint not Removed—Costs.*

Action for damages for flooding the plaintiff's land and for an injunction.

The action was tried without a jury at Stratford.

J. M. McEvoy, for the plaintiff.

G. G. McPherson, K.C., for the defendants.

ROSE, J., in a written judgment, said that his conclusion, upon all the evidence, was that the work done by the defendants created an outlet from the hollow, north of the road, at lot 9 in the 8th concession, through the ridge on lot 9 and down the slope, past the plaintiff's land, lot 8; and that water which, if the outlet had not been created, would have seeped away gradually, or would have run from the hollow over the road on to lot 9 in the 9th concession, did, in consequence of the provision of the outlet, find its way into the ditch in front of lot 8 and from that ditch to the plaintiff's land, doing damage.

It was argued that the award made under the Ditches and Watercourses Act, R.S.O. 1914 ch. 260, in August, 1917, after the work was done—the award not having been appealed against—was a bar to the plaintiff's claim. But, assuming the plaintiff to be an "owner affected by the award," and therefore to be a person entitled to appeal, sec. 23, which makes the award valid and binding, has no application to this case. The award relates solely to the tile drain which had been laid before the award was made, and

which, moreover, did not seem to have been designed for taking care of the water which would flow over the surface of lot 9 into the ditch in the time of a spring thaw. Such water could not flow through the tile drain; and the plaintiff's case was, that it ought to have been allowed to follow the natural course, and ought not to have been brought into the ditch adjacent to his land and allowed to overflow his land. The award did not authorise the deepening of the ditch where it passes through the ridge; and the deepening of it and the bringing of a large quantity of water into the part of the ditch lying in front of lot 8, without providing an outlet through the culvert into the stream to the west, or without taking some other means of preventing its overflow from the ditch on to lot 8, seemed to have been a negligent act on the part of the defendants: see Manie v. Town of Ford (1918), 14 O.W.N. 83, 15 O.W.N. 27.

The plaintiff ought to have damages for the injury to the crops and to the potatoes in the cellar, etc.; for this injury $250 would be a fair amount to allow.

The plaintiff sought an injunction restraining the defendants from continuing to discharge the water from the hollow at lot 9 into the ditch at lot 8 until they should take adequate measures for preventing its overflow from the ditch on to lot 8. Such an injunction should not now be granted. There might be difficulty in framing the order without further evidence as to exactly what ought to be done; and the best course was to confine the judgment to the damages, reserving to the plaintiff leave to apply in case the defendants should not take steps to remove the cause of complaint.

Although the damages for the injury already sustained might have been recovered in a County Court, the action was one which it was proper to bring in the Supreme Court, and the costs ought to be upon the higher scale.

LATCHFORD, J. NOVEMBER 22ND, 1918.

## *BANK OF OTTAWA v. HAMILTON STOVE AND HEATER CO.

*Company—Powers of Manufacturing Company Incorporated by Dominion Authority—Guaranty of Indebtedness of another Company to Bank—Special Clause in Charter—Benefit of Company—Business Conducted for such Benefit—Directors Acting through Officers—Power to Affix Seal—Contract Binding on Company—Continuing Guaranty—Amendment.*

Action upon a guaranty, dated the 22nd March, 1917, made by the defendants to secure advances etc. by the plaintiffs to the Tilden-Gurney Company, Limited, a corporation organised to sell the goods manufactured by the defendants.

The action was tried without a jury at an Ottawa sittings.

Wentworth Greene, for the plaintiffs.

H. A. Burbidge, for the defendants.

LATCHFORD, J., in a written judgment, said that the defendants were incorporated in 1910 by a charter of the Dominion of Canada. Among the powers conferred were: (*b*) to manufacture, buy, and sell hardware and kindred goods and articles; (*i*) to enter into any arrangement for union of interests, co-operation, joint advantage, reciprocal concession, or otherwise, with any company carrying on or about to carry on or engage in any business or transaction which this company is authorised to carry on or engage in, or any business or transaction capable of being conducted so as directly or indirectly to benefit this company; and to guarantee the contracts of or otherwise assist any such person or others having dealings with the company.

The powers set forth in clause (*i*) are identical with those stated in sec. 23 (*d*) of the Ontario Companies Act, R.S.O. 1914 ch. 178, as incidental and ancillary to any powers set out in the letters patent incorporating a company under the Ontario Act.

The Tilden-Gurney Company were incorporated under the Ontario laws; they had the same directors and officers and approximately the same shareholders; and conducted from Winnipeg a business which the defendants were authorised to engage in. That business was capable of being conducted and was in fact conducted for the benefit of the defendants. The Gurney-Tilden Company sold throughout the Western Provinces the articles

manufactured by the defendants in Ontario. The guaranty was given as directly for the benefit of the defendants as for the benefit of their selling agency.

The giving of the guaranty was plainly within the powers of the defendants.

Union Bank of Canada v. A. McKillop & Sons Limited (1913-15), 30 O.L.R. 87, 51 Can. S.C.R. 518, distinguished.

Hovey v. Whiting (1887), 14 Can. S.C.R. 515, 531, 532, gives the rule applicable: "All deeds executed under the corporate seal of an incorporated company which is regularly affixed are binding on the company unless it appears by the express provisions of some statute creating or affecting the company, or by necessary or reasonable inference from the enactments of such statute, that the Legislature meant that such deed should not be executed; and the directors of the company have authority to affix the seal of the company to all such deeds not so, as above, forbidden. . . ."

Applying this rule to the facts established, and bearing in mind that the directors of the defendants acted in matters incidental to the business of their company through their general manager and secretary or acting secretary, the defendants could not escape liability.

The plaintiffs should be at liberty to amend the writ of summons by setting up the continuing guaranty of 1914 as an additional basis of their claim.

Judgment for the plaintiffs against the defendants for $100,-528.42, with interest from the 30th June, 1918, and with costs.

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ROSE, J. NOVEMBER 23RD, 1918.

## McKIBBON v. WELBANKS.

*Trusts and Trustees—Conveyance of Land to Defendants—Parol Agreement with Plaintiff to Sell and for Payment to him of Surplus of Proceeds of Sale after Payment of what it "Cost" Defendants—Enforcement of Trust—Ascertainment of "Cost"—Deduction for Improvements—Claim for Wages—Services Rendered by Member of Household.*

The plaintiff, the owner of land, conveyed it in 1909 to B., who, by an instrument under seal, agreed that if, on or before the 11th November, 1909, the plaintiff paid $2,922, be (B.) would convey the land to the plaintiff. If the plaintiff did not make his pay-

ment within the time named, the land was to become the absolute property of B., and the plaintiff was to give up possession. If the plaintiff paid the $2,922, he was also to pay taxes and insurance premiums. The plaintiff was to have the right to possession and to receipt of the rents and profits until the time came for making the payment of the stipulated sum.

The plaintiff made unsuccessful efforts to find some one to put up, before the 9th November, the amount required to secure a reconveyance; and he said that he induced B. to extend the time until the 13th. On the 13th, the defendant G. F. Welbanks paid B.; and B., with the consent or at the request of the plaintiff, although without any writing signed by the plaintiff, conveyed the land to the defendants. In 1917, the defendants sold the land for $3,800.

The plaintiff's claim was to enforce a parol agreement, alleged to have been made with him by the defendants, prior to the conveyance from B., that they would hold the land, keep the place in repair, pay the taxes, and do the road-work, and, when they resold, would give him the difference between the cost to them and the price at which they sold; instead of interest, they were to have, the plaintiff alleged, the right to occupy the land until it was sold. The plaintiff also claimed wages for services performed by him for the defendants from the time when they took possession of the land until they sold it.

The action was tried without a jury at Picton.

E. M. Young, for the plaintiff.

Thomas Walmsley, for the defendants.

Rose, J., in a written judgment, after setting out the facts, said that, assuming that the agreement alleged had the effect of creating a trust, it was proved with all the clearness and precision required by the cases—e.g., Hull v. Allen (1902), 1 O.W.R. 1, 782, and McKinnon v. Harris (1909), 1 O.W.N. 101, 14 O.W.R. 876, that the defendants did agree with the plaintiff that they would pay B. and would take over the land, and, when they sold it, would pay to the plaintiff the difference between what it had "cost" them, or what they "had in it," and the price at which they sold. It was a real agreement, not a mere expression of intention; and there was no qualification of it.

The plaintiff was, therefore, entitled to judgment upon this branch of his claim.

During their occupancy the defendants spent some money in making improvements or repairs. The plaintiff's allegation that

they agreed to keep the place in repair was not proved; and much of the money was spent upon what ought probably to be classed as improvements, rather than as such repairs as would be contemplated by the parties, if they spoke of "keeping the place in repair." This expenditure must be taken into account in ascertaining what the place "cost" the defendants, or what they "had in it." On this head the defendants should be allowed $285, which, added to $2,932 paid to B., made $3,217; so that, out of the $3,800 for which the land was sold, the plaintiff ought to have $583.

The plaintiff was not entitled to payment for his services, which were rendered to the defendant G. F. Welbanks as a member of his household (they were brothers-in-law) without thought of recompense.

Judgment for the plaintiff for $583 with costs.

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FOLLICK v. WABASH R.R. CO.—BRITTON, J.—NOV. 20.

*Railway—Injury to Person Attempting to Cross Tracks—Accident—Absence of Actionable Negligence—Nonsuit.*]—Action for damages for injuries sustained by the plaintiff by reason of an engine of the defendants running him down. The plaintiff alleged negligence of the defendants in driving the engine at too great a speed and in not stopping before reaching a level crossing where the interlocking system was not in use. The plaintiff was employed by another railway company as section foreman. When struck by the engine he was about to cross the track, not at the highway crossing, which was east of the spot where the plaintiff was injured. The action was tried with a jury at Welland. BRITTON, J., in a written judgment, said that he allowed the case to go to the jury, after reserving judgment upon a motion for a nonsuit made upon the ground that, upon the whole evidence, no actionable negligence had been shewn. The jury found for the plaintiff with $3,000 damages. The learned Judge was of opinion that the motion should prevail. The injury to the plaintiff was occasioned by a mere accident for which the defendants were not responsible, and there was no evidence that could properly be submitted to the jury to establish liability on their part. The evidence brought the case within the decision of Hanna v. Canadian Pacific R. W. Co. (1908), 11 O.W.R. 1069, 1074. Action dismissed. G. H. Pettit, for the plaintiff. R. S. Robertson, for the defendants.

## CORRECTION.

In the note of SMITH v. ONTARIO AND MINNESOTA POWER CO. (1917), 11 O.W.N. 337, in which MASTEN, J., made certain rulings upon an appeal from the taxation of costs, it is erroneously stated that the taxation was a taxation of the plaintiffs' costs of several actions. The taxation was in fact of interlocutory costs in the actions, under an order postponing the trial of the actions—the costs of the motion to postpone and the costs incurred by the plaintiffs in respect of proceedings which were rendered useless by the postponement, referred to by MASTEN, J., as "costs thrown away."