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COURT OF APPEAL.

APRIL 21ST, 1913.

*WADSWORTH v. CANADIAN RAILWAY ACCIDENT INSURANCE CO.

Accident Insurance—Death Claim—Cause of Death—Construction of Policies—"Caused by the Burning of a Building"—"Injuries Happening from Fits"—Efficient Cause—Quantum of Indemnity.

Appeal by the defendants from the order of a Divisional Court, 26 O.L.R. 55, 3 O.W.N. 828, varying the judgment of MIDDLETON, J., at the trial, and directing judgment to be entered for the plaintiff for $10,750 and interest.

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

I. F. Hellmuth, K.C., and J. G. Gibson, for the appellants.

R. V. Sinclair, K.C., and H. Aylen, K.C., for the plaintiff.

THE COURT allowed the appeal with costs and restored the judgment of MIDDLETON, J.—MACLAREN and HODGINS, JJ.A., dissenting.

The reasons for allowing the appeal were not given when judgment was pronounced; but will be given later.

*To be reported in the Ontario Law Reports.

APRIL 21ST, 1913.

*HITCHCOCK v. SYKES.

Principal and Agent—Sale of Land—Commission Received by Partner of Purchaser from Vendors—Failure to Disclose to Purchaser—Fraud—Action by Vendors for Specific Performance—Counterclaim by Purchaser for Rescission.

Appeal by the defendant Webster from the order of a Divisional Court, 3 O.W.N. 1118, affirming the judgment of FALCONBRIDGE, C.J.K.B., 3 O.W.N. 31.

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

G. H. Kilmer, K.C., for the appellant.

C. H. Cline and Featherston Aylesworth, for the plaintiffs, the respondents.

HODGINS, J.A. (after referring to the opinions given in the Divisional Court and to certain portions of the evidence) :—The question raised on the appeal is the right of the appellant to rescission, and repayment of the $20,000 paid by him, or to the payment to him of the $2,000 commission, or to all these remedies combined. . . . We have to decide whether these rights fail, because to insist upon the duty of disclosure is to set up an artificial standard of morals (as put by the Divisional Court), or whether the respondents were guilty of fraud in law, as asserted by Mr. Justice Middleton in his dissenting judgment, or of a breach of duty in not disclosing the fact that they were paying Sykes a commission.

I am unable to come to the conclusion that what took place on the 12th April, 1910, amounted to a disclosure of the latter fact, or that the appellant's want of suspicion or inability to realise that he was being deceived is equivalent to disclosure. See Bartram v. Lloyd (1904), 90 L.T.R. 357. Reference may be made to the examination for discovery of the respondent Wilbur Hitchcock, in which he admits that he cannot put his finger upon anything that was said or upon any act done on or before the 12th April, 1910, that would indicate that the appellant knew that Sykes was being paid a commission.

*To be reported in the Ontario Law Reports.

The cases most similar in their facts to this case are Beck v. Kantorowicz, 3 K. & J. 230; Lands Allotment Co. v. Broad (1895), 13 R. 699, 2 Manson B.C. 470; and Grant v. Gold Exploration and Development Syndicate Limited, [1900] 1 Q.B. 232. . . .

[References to and quotations from the judgments in these cases.]

These cases, which, to my mind, cover the extreme right which the appellant contends for, have to be applied with care. No doubt, the respondents here were unaware, until Sykes telephoned the day before, that he had found a purchaser, nor did they realise, until the day the contract was signed, that Sykes himself was interested as a partner with that purchaser. It was perhaps a difficult situation; the loss of the sale was the probable price of candour; but the whole evidence—which I have read more than once—leaves no doubt on my mind that the respondents deliberately refrained from saying anything directly, while salving their conscience with the reflection that it could not be said that they had actively misled the appellant. Hence their pretence, as it seems to me, that enough was said, if he had heard it, to put the appellant upon inquiry—a suggestion which, when analysed, is not backed up by any direct evidence that the vital thing, a commission, was named in so many words.

There is more difficulty in determining the question of whether Sykes was an agent of the appellant or of the partnership formed on the 7th April, 1910, and whether Sykes was put in such a position that his interest and duty conflicted.

In answering the first of these questions, it is obvious that the agreement of the 7th April, 1910, contemplated more than a mere co-ownership. It formed a partnership; and, on the face of it, imposed a joint duty on each of the parties to seek to acquire the whole property at the lowest figure, notwithstanding that a price had been named for part of it. Sykes had the experience, and the appellant had the money; and the latter relied both on that experience and on the knowledge of the property and of its owners which Sykes had then acquired through his trip to Cobalt. If Sykes, without any contract at all, had agreed to assist the appellant to acquire the property for himself and to get it at the lowest price and on the best terms possible, he would have been Webster's agent beyond doubt; and I cannot see how the agreement alters this position, except that technically he might have to be considered as the agent of the partnership, instead of the agent of Webster

alone; a difference of relationship, not a change in duty. If the fact of partnership makes a difference in this respect, then neither the appellant, nor the appellant and Sykes as partners, could sue Sykes to return the commission; a result not consonant with the decision in Beck v. Kantorowicz, 3 K. & J. 230, nor, as I think, consonant with the ordinary principles governing the relations of partners. . . .

[Reference to Cassels v. Stewart (1881), 6 App. Cas. at p. 73, per Lord Selborne; Kerr on Frauds, 3rd ed., p. 159.]

I think, having regard to the agreement of the 7th April, 1910, that Sykes may be regarded as a partner, and, as such, the agent of the partnership, either upon the principle suggested in Kay v. Johnston (1856), 21 Beav. 536, or in Reid v. Hollinstead, 4 B. & C. 867, and Fereday v. Wightwick, 1 R. & M. 45.

As pointed out by Middleton, J., in his dissenting judgment, Sykes is a party to this action, and the $2,000 can be recovered, at all events, as money of the partnership; and, under the facts disclosed in evidence, the appellant would be entitled to it, in view of his having made the payment himself, or it might be applied as to one-half of it upon Sykes's note.

Upon the other question, it is true that, in one aspect, Sykes's interest was to reduce the price, because, as partner, he would benefit to the extent of $500 for every $1,000 by which the price was reduced; while as agent he would only lose $100. And, on this method of calculation, Buckley, J., in Rowland v. Chapman (1901), 17 Times L.R. 669, decided that the principal could not complain because he could not establish a conflict of duty. But, speaking for myself, I am not prepared to accept an arithmetical calculation of loss and gain as exhausting the subject.

In the case in hand there are other factors—one of them, that familiarly indicated by the proverb "A bird in the hand is worth two in the bush." To an impecunious man $2,000 in cash is much more attractive than the saving of many times that amount, when a payment has to be made some months later, and even then probably not by himself. Another is, that in a mining speculation of this character the price is expected to be paid by others to whom the property is to be turned over, and its reduction figures only as a possible increase of future and contingent profits; whereas an immediately available sum of money represents a personal and tangible advantage.

So far as the evidence discloses Sykes's resources, the only

moneys he spent were less than the $2,000 and were directly taken out of this sum.

I have been unable to find that the case of Rowland v. Chapman has been considered in any subsequent decision; and while, in the circumstances presented to Buckley, J., the decision may have been correct, I do not think it can be considered as at all conclusive upon the facts of this case. As said by Lord Alverstone, C.J., in Andrews v. Ramsay, [1903] 2 K.B. 635, "It is impossible to say what the result might have been if the agent in this case had acted honestly." See also Harrington v. Victoria Graving Dock Co. (1878), L.R. 3 Q.B. 549, and Shipway v. Broadwood, [1899] 1 Q.B. 369, where it is laid down that the effect of a bribe is not important, but rather the intent.

The Courts seem to have shewn a tendency in the later cases to lay stress upon the breach of duty to disclose rather than upon fraud in the transaction. In Harrington v. Victoria Graving Dock Co., the giving of a bribe, or even the promise of a bribe, though it did not influence the mind of the agent, was said to be an obviously corrupt bargain and could not be enforced.

In Mayor, etc., of Salford v. Lever, [1891] 1 Q.B. 168, the ground of action is expressly stated to be fraud; "the truth is, there are two frauds, both separate and distinct; one by the agent with regard to his principal, the other a combination fraud by the two persons by conspiring to defraud:" per Lord Esher, M.R.

In Lands Allotment Co. v. Broad, 13 R. 699, Romer, J., says that the only ground on which the plaintiff company can make the defendant liable is by establishing a case of fraud on his part. But in Grant v. Gold Exploration and Development Syndicate Limited, [1900] 1 Q.B. 232, emphasis is put upon the breach of what Vaughan Williams, L.J., calls "a constructive fiduciary duty:" and Collins, L.J., holds that the seller is responsible as for money had and received to the use of the buyer, even though possibly he could not have been made liable in an action of deceit.

This aspect of the case is pointed out in Hovenden v. Millhoff (1900), 83 L.T.R. 41, by Vaughan Williams, L.J.; and in Rowland v. Chapman, 17 Times L.R. 669, Buckley, J., limits the fiduciary duty to cases where in fact the duty and interest of the agent conflicted. See also the judgment in appeal in Krolik v. Essex Land Co. (1904), 3 O.W.R. 508; Andrews v. Ramsay & Co., [1903] 2 K.B. 635.

But, upon whichever ground it is finally rested, I am glad

to cite the observation of Lord Justice Bowen in Boston Deep Sea Fishing Co. v. Ansell (1888), 39 Ch.D. at p. 362; "There never, therefore, was a time in the history of our law when it was more essential that Courts of justice should draw with precision and firmness the line of demarcation which prevails between commissions which may be honestly received and kept, and commissions taken behind the master's back and in fraud of the master."

My judgment is, that the appellant is entitled to rescission of the contract. I am quite unable to understand the argument that the appellant, with knowledge, ratified the transaction by his solicitor's letter of the 4th October, 1910. . . .

It follows that the appellant is entitled to repayment of the $20,000 paid on the 12th April, 1910. This includes the $2,000 which the appellant could claim as an alternative. The pleadings should be amended, if necessary, as asked at the trial. The appellant should, at his own expense, have the mechanics' liens discharged; and I think, in view of some evidence given, that the cost of cementing and fencing the shaft should also be borne by him, and the ore handed over to the respondents.

All parties seem to agree that the property is a good mining property and valuable; and, except as indicated above, no damage has been occasioned. But, in any event, nothing has been done, save that permitted by the contract of sale, and the circumstances shew that the parties can be put back in their original positions.

The respondents should pay the costs of the action and counterclaim. The appeal should be allowed, and the action should be dismissed.

GARROW, MACLAREN, and MAGEE, JJ.A., concurred.

MEREDITH, J.A., dissented, for reasons stated in writing. He was of opinion that, assuming that all that the appellant contended for was right, in fact and in law, the appeal must fail because the respondent had no knowledge of any partnership, or of any kind of fiduciary relationship, between the appellant and his co-defendant Sykes in the transaction in question; and the appellant's contention could hardly have gone, and did not go, so far as to charge fraud without knowledge. The want of proof of a partnership was also fatal to the appeal.

Appeal allowed; MEREDITH, J.A., *dissenting.*

APRIL 22ND, 1913.

McKENZIE v. ELLIOTT.

Building Contract—Parol Modification of Written Agreement—Evidence—Onus—Allowance for Materials—Services of Architect—Quantum Meruit—Appeal on Questions of Fact—Further Appeals—Judgment Disposing of Action without Reference back—Costs.

Appeal by the plaintiff from the order of a Divisional Court, 3 O.W.N. 1083, affirming the order of BOYD, C., 2 O.W.N. 1364, setting aside the report of the Master in Ordinary.

The appeal was heard by GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A., and LENNOX, J.

I. F. Hellmuth, K.C., and W. Mulock, for the plaintiff.

A. W. Anglin, K.C., and J. Shilton, for the defendant.

MEREDITH, J.A.:—There is, of course, no law against an appeal in a case which has been determined upon the credibility of witnesses; an appeal lies in such a case just as much as in any other, and it is not only the right but the duty of an appellate Judge to hear and duly consider such an appeal; the exception to the general provisions giving a right of appeal in cases not tried by a jury, is, generally speaking, only of matters in the discretion of the trial Judge or judicial officer; as to them it is generally provided that there shall be no appeal except by leave.

But it is quite obvious that where the findings depend altogether upon the credibility of the witnesses, and there is nothing to indicate that the parties have not had a full and fair trial, an appeal would be hopeless, because those who hear and see the witnesses have so much better opportunity for forming a right judgment upon such a question.

Cases of that kind, however, are few and far between. Circumstantial evidence enters very largely into almost all cases; and in regard to the probabilities arising from such circumstances a court of appeal sometimes has advantages which a trial Judge had not.

This case is very plainly not one depending altogether, or anything like altogether, upon the credibility of the witnesses; the learned Master did not so treat it; and, if he had, would have erred; his view was that he must look at the "surrounding cir-

cumstances and attendant facts to arrive at the truth;" but I cannot think that, after all, he really did; or, if he did, that he gave them sufficient consideration.

We start with an agreement in writing duly signed by both parties; an agreement not to be got rid of merely because some of its provisions were not filled out or were inapplicable; it was a general form, not one drawn for the purposes of this contract. In making light of this signal writing; in treating it very much as if it were not more than waste paper, the Master, I think, got off at a false start in his inquiry. His observation that, if it were in force as to the price, it must be in force for all purposes, or, in other words, if not in force for all purposes, cannot be as regulating the price, was a mistake, and one which, I am inclined to think, dominated to a considerable extent his conclusions against the defendant.

He has given at length his reasons for not giving weight to the testimony of the witnesses Coleman and the defendant's wife —reasons which do not seem to me to be of anything like the most convincing character. He was also apparently very considerably impressed by the fact that the defendant's sons were not called as witnesses, expressing the firm belief that there must have been conversations between father and sons as to the nature of the contract; but apparently forgetting that such conversations could not be given in evidence by the defendant.

No object, however, would be gained by going over the many other circumstances, not depending on the credibility of witnesses, which weigh against the Master's finding upon the question of an agreed-upon general price or no agreement as to cost; the case has been so fully and so carefully investigated and considered by the Chancellor, with the assistance of the Master's reasons for his findings, and again in the Divisional Court, with the assistance of all that had previously been said upon the subject, that further discussion would be merely putting in my own words those things which have been plainly and well said. I quite agree in that which was said in each Court as to the Master's finding upon this important initial question.

But I cannot think that the case is a proper one for sending the parties back to the morass of another reference; the costs of which might amount to more than the real amount in difference. I agree with the Divisional Court in the view there expressed, that the evidence already taken suffices to do justice between the parties as to the amount due to the plaintiff, based upon the price named in the agreement, and making all proper allowances for variations in all respects.

On the 15th December, 1910, the plaintiff wrote to the defendant that he had decided to accept the amount the defendant had offered him, $3,315, in settlement, provided that he should have also some posts and shingles described in the latter; that sum, with the amount already paid on account of the contract, amounting to $8,315.

A very careful examination of the whole evidence satisfies me that in the making and accepting of the offer of this amount each of the parties knew pretty accurately the true amount which was really due from the one to the other; that in truth the sum so due is the amount mentioned in that letter; and that any number of references, and the waste of any amount of additional costs, could not rightly lead to any better conclusion.

For the order made in the Divisional Court I would substitute one directing judgment for the plaintiff for $3,315, with interest from the date mentioned; with costs to be paid as already adjudged; but without costs of this appeal: when parties to an action have left the subject-matter of their litigation so tangled or uncertain that the interposition of the Court is needed to make plain that which they should have themselves made plain, neither party, whether winner or loser, or partly each, can well complain if part of the costs falls on him.

GARROW and MAGEE, JJ.A., and LENNOX, J., concurred.

MACLAREN, J.A.:—The judgment will be varied (the parties consenting that this Court dispose of the whole case without application to the Court below for further directions); the plaintiff to recover the sum of $3,315, with interest from the 15th December, 1910; no costs in this Court or in the action up to the judgment of reference; costs of the reference to the defendant; other costs disposed of by paragraph 7 of the judgment of the Chancellor and by the Divisional Court to stand.

Judgment accordingly.

APRIL 23RD, 1913.

*RE DAVIES AND JAMES BAY R.W. CO.

Railway—Expropriation of Land for Right of Way—Compensation of Land-owner—Arbitration and Award—Minerals under Right of Way not Expressly Taken or Purchased—Railway Act, R.S.C. 1906 *ch.* 37, *secs.* 170, 171—*Allowance for Value of Minerals—Board of Railway Commissioners—Jurisdiction—Compensation Deferred until Time when Minerals to be Worked—Minerals in Slopes Supporting Strip Taken for Right of Way—Common Law Right to Support—Taking of Land Specially Valuable in Owner's Business—Loss of Trade Profits—Quantum of Allowance for Damage—Severance Affecting Value of Mineral Lands—Haulage across Railway Lines—Proof of Damage—Onus—Appeal—Powers of Appellate Court—Deferred Working—Basis of Calculation—Cost of Grading—Set-off for Benefit to Land by Railway—Present Value—Period of Years—Cross-appeal—Costs.*

Appeal by the railway company and cross-appeal by Robert Davies from the award of arbitrators appointed under the Dominion Railway Act to ascertain the compensation to be paid by the company for the expropriation for right of way of 11 $\frac{55}{100}$ acres of land situate in the Don valley, near the city of Toronto, owned and used by Davies for a brick-making industry. By the award, signed by two of the three arbitrators, on the 14th April, 1912, they estimated the damage to Davies at $313,583, under various heads, but deducted therefrom $75,000 for benefit to the remainder of his land by reason of the railway, and so awarded that $238,583 should be paid by the company. The company's appeal was on the ground that the amount awarded was excessive. The cross-appeal was on the grounds that some of the allowances for damage should be increased and that nothing or at all events a less sum than $75,000 should be allowed for set-off of benefit.

The appeal was heard by GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

*To be reported in the Ontario Law Reports.

E. D. Armour, K.C., and R. B. Henderson, for the railway company.

M. K. Cowan, K.C., and A. W. Ballantyne, for Robert Davies.

The judgment of the Court was delivered by HODGINS, J.A.:—By sec. 170 of the Railway Act, R.S.C. 1906 ch. 37, minerals must be expressly purchased, i.e., bought or expropriated, and the railway company have not expressly purchased them in this case. The arbitrators have, nevertheless, allowed the respondent $123,046 for these minerals under and in the slopes supporting the right of way, made up . . . as follows:—

2. Damage by taking 196,500 yards of shale in right of way from C.P.R. to test-pit 7, less 33 yards, at 75 cents	$73,886
3. Damage by taking 20,666 yards of shale in slope supporting right of way to test-pit 7, at 75 cents	7,905
6. Damage by taking 128,744 yards of shale in right of way 1.33 acres from line belt, lots 14 and 15 opposite North Hill to a point 550 feet south, at 55 cents	36,113
7. Damage for taking shale contained in slope along 550 feet on right of way opposite North Hill, 18,333 yards, at 55 cents	5,142
	$123,046

. . .

With regard to items 2 and 6, the effect seems to be to give the respondent the value of the minerals under the railway line, although they are not taken. And it is urged that deprivation . . . is equivalent to actual taking, because the Railway Act provides for giving compensation once only, and that, unless the land-owner can recover compensation now for this deprivation, he can never get it at all. The provisions of the English Railway Clauses Consolidation Act, 1845, 8 & 9 Vict. ch. 20, secs. 77 to 85, are contrasted with those in our Railway Act, R.S.C. 1906 ch. 37, secs. 170 and 171, and the above conclusion is drawn from what the comparison shews. . . .

[Reference to Howley Park Coal Co. v. London and North Western R.W. Co., [1911] 2 Ch. 97, affirmed in the House of Lords, London and North Western R.W. Co. v. Howley Park Coal Co., [1913] A.C. 11, 107 L.T.R. 625; Fletcher v. Great Western R.W. Co., 4 H. & N. 242, 5 H. & N. 689; Great Western R.W. Co. v. Bennett, L.R. 2 H.L. 27; Errington v. Metropolitan R.W. Co., 19 Ch.D. 559; Ruabon Brick Co. v. Great Western R.W. Co., [1893] 1 Ch. 448; In re Lord Gerard and London and

North Western R.W. Co., [1894] 2 Q.B. 915, [1895] 1 Q.B. 464; Eardley v. Granville, 3 Ch.D. 826; Bwllfa and Merthyr Collieries v. Pontypridd Waterworks Co., [1903] A.C. 426; Duke of Hamilton v. Caledonian R.W. Co., 7 F. (Ct. of Sess. Cas., 5th series) 847; Great Northern R.W. Co. v. Inland Revenue Commissioners, [1901] 1 K.B. 416; In re Richards and Great Western R.W. Co., [1905] 1 K.B. 68; London and North Western R.W. Co. v. Evans, [1893] 1 Ch. 16; Rex v. Pease, 4 B. & Ad. 30; Hammersmith R.W. Co. v. Brand, L.R. 4 H.L. 11; secs. 48, 59, and 179 of the Canadian Railway Act; Grand Trunk Pacific R.W. Co. v. Fort William, etc., Co., [1912] A.C. 224; Smith v. Great Western R.W. Co., 3 App. Cas. 165.]

My conclusion is, that our Act has substituted for the English system of notice, counter-notice, and compensation, the interposition of the Board of Railway Commissioners, and that the latter has jurisdiction to protect the mine-owner and the railway company by its order. It is not to be anticipated that the Board would be unreasonable enough to make no adequate order. Its record indicates the reverse. It is not likely to disregard the rights of the mine-owner nor to allow the railway company to confiscate his property. See remarks of Bowen, L.J., in Ruabon Brick Co. v. Great Western R.W. Co., [1893] 1 Ch. at p. 460; see also Wyrley Canal Co. v. Bradley, 1 B. & Ad. 368.

But I think the matter is left to the Board. In these circumstances, and applying the English decisions, to the extent that the sections of the Canadian Railway Act profess to deal with the same subjects as the sections of the English Act, I think the mine-owner, who in this case is not in the least degree prejudiced meantime, must wait for his compensation or other relief till he thinks it expedient to work these minerals.

Apart from this aspect of the legislation, I do not think it requires a very strained construction of the Railway Act to hold that, as the railway company do not acquire the minerals by taking the surface, and remain co-owners with the respondent in the combined land and minerals, they do not take the minerals or exercise any of their powers in relation thereto until they come to the Board and assert the necessity of these minerals remaining in situ for the support of their line.

Under our Railway Act, the company own the land, the surface and all below, except only the minerals therein. They do not disturb or injure the owner until he desires to get at his minerals. When he does, then the company must either pay him or submit to any order made by the Railway Board; and, if that

involves taking the minerals, the right to compensation then and there arises. . . . I think . . . that the items of damage Nos. 2 and 6—$73,886 and $36.113—for minerals under the railway, must be struck out. . . .

As to the two remaining items under this head—No. 3, $7,905, and No. 7, $5,152—which are given for the shale in the slopes necessary to support the forty yards strip, but outside and beyond that strip and the railway line—these stand upon a different footing. For the reasons given in London and North Western R.W. Co. v. Evans, [1893] 1 Ch. 16, and Howley Park Coal Co. v. London and North Western R.W. Co., [1911] 2 Ch. 97 (see particularly p. 130), London and North Western R.W. Co. v. Howley Park Coal Co., [1913] A.C. 11, 107 L.T.R. 625, these should be allowed. These slopes are outside the area to which the statutory provisions which have been discussed apply, and as to these the railway company and the owners are relegated to their common law rights, which include a right to support, and that right must be paid for.

Upon item No. 1, $53,870 for the taking of the 287 acres lying south of the present brickyard plant, there is, to my mind, great difficulty in arriving at the proper amount of damages. Two arbitrators concur in awarding this amount as the present value of $100,000, while the other allows $18,000. There is no doubt that this land is the natural outlet for the expansion of the works, and that its absorption by the railway company is a serious drawback to the owner's business. It has a peculiar value to him. . . . The majority of the arbitrators compute the value of this acreage by estimating how much the respondent could make out of the $2\frac{4}{5}$ acres used in connection with his main holding, the whole considered as one block of property, and allowing him the amount of such estimated profits of which he has suffered deprivation by the taking.

The allowance for loss of profits of trade appears to be entirely proper as coming within the proposition laid down as deducible from the cases cited in Caledonian R.W. Co. v. Walker's Trustees, by Lord Selborne, L.C., 7 App. Cas. 259, at p. 276, by reason of the taking directly affecting the land on which a trade has been carried on. It is justified by Ripley v. Great Western R.W. Co., L.R. 10 Ch. 435; Bailey v. Isle of Thanet R.W. Co., [1900] 1 Q.B. 722; In re Mayor of Tynemouth and Duke of Northumberland, 19 Times L.R. 603; Paint v. The Queen, 2 Ex. C.R. 149; Marson v. Grand Trunk Pacific R.W. Co., 14 Can. Ry. Cas. 26; Ford v. Metropolitan R.W. Co., 17 Q.B.D. 12; and by the cases of which In re Gough and Aspatria,

etc., Co., [1903] 1 K.B. 574, is an example. The only question is the amount. . . .

I agree with the majority of the arbitrators that the rule urged by the appellants is not the only rule for ascertaining the . . . damages. In Eagle v. Charing Cross R.W. Co., L.R. 2 C.P., . . . Montague Smith, J., at p. 651, says: "That the saleable value of the premises has not been diminished is not the only and certainly not a conclusive test. A man is not to be driven to sell his property. He may choose to continue his business." . . .

It is improper to assume, as the award does, that the whole profit said to arise out of the utilisation of the two and four-fifths acres can be allowed. It is the damage to the remaining portion that has to be considered, not the earning of the $2\frac{4}{5}$ acres apart from its conjunction with the present occupied land. . . . While no method can be adopted which will work out exactly or be entirely satisfactory, I think a fair amount to allow, upon the evidence, would be $40,000, as representing the added value of this land as part of an entire undertaking, the loss in profits by reason of its taking, and its special adaptability. . . . This item should, therefore, be reduced to $40,000.

The items next to be considered are:—

4. Damage by severing 238,000 yards of clay in South Hill, at 15 cents	$18,207
5. Damage by severing 170,747 yards of shale in South Hill, at 15 cents	13,062
8. Damage by severing 632,000 yards of clay in North Hill, at 15 cents	48,348
9. Damage by severing 586,667 yards of shale in North Hill, at 15 cents	44,880
	$124,497

In regard to these amounts, there is no doubt that the severance has affected the value of the mineral lands known as the South and North Hills. They cannot be got at and worked in the restricted area left by the construction of the railway. Having regard to the evidence upon this point, I think it is clear that some method of transporting the minerals across the line of rail is essential. . . .

The majority of the arbitrators have adopted the view that an allowance based on the cost of cartage across is proper, and have given 15 cents a cubic yard on the estimated contents of the hills. . . . The majority of the arbitrators have declined to take into consideration any method of treatment other than a

level crossing; and they were perhaps justified in so doing by the decision in Re Armstrong and James Bay R.W. Co., 12 O.L.R. 137, [1909] A.C. 624, and by the statement . . . that the respondent had a farm crossing there. . . .

[Reference to Toronto Hamilton and Buffalo R.W. Co. v. Simpson Brick Co., 17 O.L.R. 632; Grand Trunk R.W. Co. v. Perrault, 36 S.C.R. 671; Ontario Lands and Oil Co. v. Canada Southern R.W. Co., 1 O.L.R. 215; Re Cockerline and Guelph and Goderich R.W. Co., 5 Can. Ry. Cas. 313; Wright v. Michigan Central R.W. Co., 6 Can. Ry. Cas. 133; New v. Toronto Hamilton and Buffalo R.W. Co., 8 Can. Ry. Cas. 50; McKenzie v. Grand Trunk R.W. Co., 14 O.L.R. 671.]

The result is, that, while even the right to team clay and shale across may be doubtful—i.e., if a farm crossing does not permit the hauling of clay across it—and although permission would have to be got for that purpose from the Railway Board, who may at any time revoke their order if granted, the arbitrators have chosen a method described by the witnesses on both sides as really impracticable on account of cost, and base their award upon it, or take the cost of adopting it as giving a guide to the proper damages.

I confess I am not satisfied with this result, nor with the process by which it is arrived at; but this Court must deal with the questions as best it can, upon the evidence already given: Atlantic and North-West R.W. Co. v. Wood, [1895] A.C. 257. We have apparently no power to remit the case to the arbitrators to take further evidence because we think the amount of the damages might be better estimated if other evidence were given: see Re McAlpine and Lake Erie and Detroit River R.W. Co., 3 O.L.R. 230, per Meredith, J. . . .

I think the onus was on the appellants to demonstrate their contentions by clear evidence. The view of Lord James of Hereford in Eden v. North Eastern R.W. Co., [1907] A.C. at p. 611, that it is not right to "throw upon the coal-owners the duty of looking around to find some other workings which should compensate them for the loss sustained through obeying the notice of the railway company" to leave certain coal unworked, seems in principle applicable here.

On the whole, while I am not satisfied with the award on these items . . . I do not see how this Court can, on the evidence before the arbitrators, reverse or reduce the 15 cents allowed. But the evidence points strongly to the conclusion that the working of the south and north hills may be deferred for very many years. . . .

We can, and, I think, ought, while allowing the damages on

these four items to stand, to calculate them on a basis of at least 40 years, instead of 25. If so, the sums allowed, in all $124,497, would become $104,719; and the award should be reduced accordingly.

The item (No. 12) of $200 is not unreasonable; and, if allowed as the cost of grading, as it seems to be, I do not think this Court should interfere, even if the usefulness of the grading depends upon the future consent of the Railway Board to a crossing.

The cross-appeal has been practically dealt with in the reasons given above.

The only remaining question is the set-off of $75,000 allowed by the arbitrators as increased value, under sec. 198 of the Railway Act. Necessarily this is not and cannot be based upon any exact calculations. The majority of the arbitrators may have erred in allowing too large a sum for this benefit, as applied to the north hill and the present main works. But, beyond the broad fact that railway facilities at one's door are, for a manufacturer, an undeniable advantage, no witness can truthfully say just what the money value of it is. . . .

I think that, as the benefit accruing from the north hill may not become an actuality for very many years, the amount should be reduced as to it. . . . Assuming that $75,000 is intended to represent its present value—as it must be, because it is deducted from the items so calculated—I think it gives the present value of a sum payable in 25 years. It should be treated also on a 40-year basis; and, if so dealt with, should be reduced to $46,875.

The final result, then, is as follows:—

Item 1,	$53,870	reduced to	$40,000
" 2,	73,886	struck out.	
" 3,	7,905	stands	7,905
" 4,	18,207	See 8 and 9.	
" 5,	13,062		
" 6,	5,142	stands	5,142
" 8,	48,348	These items and No.	
" 9,	44,880	4 and 5 reduced to...	104,719
" 10,	4,970	stands	4,970
" 11,	2,000	"	2,000
" 12,	200	"	200
" 13,	5,000	struck out.	
	$313,583		$164,936
Less set-off of benefit	75,000	reduced to.....	46,875
	$238,583	" "	$118,161

The result of the calculations upon a basis of 40 years should be checked by the Registrar; and the judgment may, if the respondent desires, contain a recital to the effect that the amount of the reduced award does not include any compensation under the Railway Act relating to the minerals under the right of way and under the 40-yard strip on each side thereof; the Court being of opinion that the respondent is not entitled to compensation until the appellants resist any application he may be advised to make under sec. 171 of the Railway Act.

The appeal and cross-appeal should both be allowed to the extent I have indicated, and dismissed as to the other items, and the amount of the award reduced accordingly.

Success being divided, there should be no costs of the appeal to either party.

APPELLATE DIVISION.

MARCH 27TH, 1913.

*COCKBURN v. KETTLE.

Malicious Prosecution—Proof of Favourable Termination of Prosecution—Dismissal of Charge—Right to go behind Record and Shew Abandonment of Prosecution as Result of Compromise—Abuse of Process of Court—Issue of Warrant in Lieu of Summons—Action for.

Appeal by the plaintiff from the judgment of FALCONBRIDGE, C.J.K.B., at the trial, dismissing an action for malicious prosecution.

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

W. M. McClemont, for the plaintiff.

S. F. Washington, K.C., for the defendant.

At the close of the argument, the judgment of the Court was delivered by MEREDITH, C.J.O.:—The authority of Baxter v. Gordon Ironsides & Fares Co. (1907), 13 O.L.R. 598, has not been successfully attacked, and the principle upon which it proceeded is, in our opinion, sound.

*To be reported in the Ontario Law Reports.

The principle of the decision is, that in an action for malicious prosecution, although the prosecution may have in fact been terminated prima facie in favour of the plaintiff, it is competent to shew that it did not in fact terminate in his favour, and that the termination of it was the result of a compromise or agreement to withdraw the prosecution.

The facts in that case were somewhat different from the facts in the present case, because all that was noted in that case by the magistrate was, that the matter was dropped—"settled out of court." In this case the magistrate made a note that "the prosecutor says he has no evidence to offer, and the charge is dismissed."

It cannot be, I think, that the mere production of the record of the dismissal of the complaint is all that the plaintiff is bound to shew. No doubt, that would be sufficient prima facie, but it cannot be that it is not open to shew that the proceedings did not in fact terminate in favour of the plaintiff, but that their termination was the result of a compromise. If it were not so, if the record were conclusive, it would practically mean that where a man was properly prosecuted for an offence which he had committed, and, in mercy to him, the prosecutor had made up his mind not to prosecute, and had not, therefore, appeared to prosecute, with the result that the information or complaint was dismissed, the man whom he had befriended in that way could turn around and say that the prosecution had terminated favourably to him, and that he was entitled to maintain an action for malicious prosecution.

It seems to me that this decision is right, and that you may go behind the record of the magistrate for the purpose of shewing that, while it may appear that the prosecution terminated in favour of the plaintiff, it was really not so.

It is hard enough, from the moral standpoint, that the agreement which was entered into between the parties in this case, the benefit of which the appellant got, has been held by the Court to be one not binding on him. The agreement recites that Cockburn, the appellant, purchased from the respondent certain cattle for $562, which the latter claimed were obtained under false pretences, which the appellant denied; and that he was placed under arrest; and that "whereas security has been given by the said Cockburn for his indebtedness to the said Kettle, and the said Kettle has agreed to drop his prosecution of the said action instituted by him: now, therefore, in consideration of the premises and of the sum of one dollar now paid by the said Kettle to the said Cockburn (the receipt whereof is hereby

acknowledged), the said Cockburn, for himself, his heirs and assigns, hereby agrees to release and waive all his claims for damages which he may or may not have against the said Kettle by reason of the institution by the said Kettle of the said proceedings and the arrest of the said Cockburn or anything in connection therewith or in any wise howsoever."

Now it is manifest from this document that the reason for the respondent going to the magistrate and abandoning the prosecution was to implement the promise which he had made, and it could not in any way be treated as an acknowledgment that he had no case against the appellant; and it would appear to me as a great hardship if, where a prosecution was abandoned under circumstances such as these, the man in whose favour it was abandoned, and who had taken the benefit of what was done, were entitled to maintain an action for malicious prosecution.

I do not think that the prosecution terminated favourably to the appellant, and upon that ground his action fails.

Upon the other ground, on which Mr. Washington was not called upon, no case has been cited by Mr. McClemont in which, an action having been brought for, as he put it, abusing the process of the Court by obtaining a warrant where a summons would have been the proper proceeding, or where perhaps no proceeding ought to have been taken, it was held that that was a sufficient ground to support an action. That is one of the elements in an action for malicious prosecution, and the same principle which requires that there shall be—and it is required in the interests of the public—a termination of the prosecution, is applicable. Otherwise, in every case the wholesome principle that a man must prove his innocence would be entirely got rid of, if he could split up the various proceedings which had taken place in the course of a prosecution, and bring his action without being required to shew, prima facie at all events, that the prosecution had terminated in his favour.

This Court ought not, in my opinion, to lay down any such rule.

The appeal must be dismissed with costs.

APRIL 21ST, 1913.

*AVERY v. CAYUGA.

Indian—Attachment of Debts—Bank Deposit—"Personal Property outside of the Reserve"—"Property Liable to Taxation"—Indian Act, R.S.C. 1906 *ch.* 81, *secs.* 99, 102—*Construction of.*

An appeal by the primary debtor from the judgment of the Judge of the County Court of the County of Haldimand, in an action in the First Division Court in that county, adjudging that the garnishees should pay to the primary creditor the debt due from the garnishees to the primary debtor.

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

G. D. Heyd, for the appellant.

H. Arrell, for the primary creditor, the respondent.

The judgment of the Court was delivered by MEREDITH, C. J.O.:—The appellant is an unenfranchised Indian, living upon an Indian reserve; and the debt due by the garnishees to him is represented by a deposit standing at his credit in the branch of the garnishees' bank at Hagersville.

The questions for decision are: (1) whether this deposit is "personal property outside of the reserve," within the meaning of sec. 99 of the Indian Act, R.S.C. 1906 ch. 81; and (2) whether it is property within the exception mentioned in sec. 102 of that Act. . . .

That the deposit is property situate outside of the reserve, within the meaning of sec. 99, seems not to be open to question: Commissioner of Stamps v. Hope, [1891] A.C. 476, 481-2; Lovitt v. The King (1910), 43 S.C.R. 106; (1911), 28 Times L.R. 41.

The answer to the second question depends on the meaning of the exception expressed in the words "except on real or personal property subject to taxation under the last three preceding sections," contained in sec. 102. . . .

Are the words "subject to taxation under the last three preceding sections" to be read as meaning, "may be subjected to taxation under the authority of these sections," or as meaning "are subjected to taxation under that authority."

*To be reported in the Ontario Law Reports.

If the latter is the proper construction, the judgment appealed from is wrong, because personal property is no longer subjected to taxation by the Assessment Act of this Province.

I am, however, of opinion that what the exception means is, that property which secs. 99, 100, and 101 has rendered liable to be taxed is not to be within the prohibitory enactment of the section, or, in other words, that security may be taken and a lien or charge by mortgage, judgment, or otherwise may be obtained on any property of an Indian which under the earlier sections may be taxed, that is to say, applying the exception to sec. 99, real estate held by an Indian in his individual right under a lease or in fee simple or personal property outside of the reserve or special reserve. . . .

It is the ownership of the property which gives the right to tax, and at the same time excludes the property from the prohibition contained in sec. 102.

It is also to be observed that secs. 99, 100, and 101 are headed "Taxation," and the group of sections of which sec. 102 is the first is headed "Legal Rights of Indians."

In short, my view is, that the exception in sec. 102 is the equivalent of the expression "except on real and personal property which by the last three preceding sections is made liable to taxation."

I would dismiss the appeal with costs.

APRIL 21ST, 1913.

*TOWNSEND v. NORTHERN CROWN BANK.

Banks and Banking—Securities Taken by Bank—Sawn Lumber—Wholesale Purchaser—"Products of the Forest"—Bank Act, sec. 88(1)—Assignment of Book-debts—Proceeds of Pledged Lumber.

Appeal by the plaintiff from the order of a Divisional Court, ante 514, affirming the judgment of Sir William MEREDITH, C.J.C.P., 26 O.L.R. 291, 3 O.W.N. 1105.

The appeal was heard by MACLAREN, MAGEE, and HODGINS, JJ.A., SUTHERLAND and LENNOX, JJ.

W. Laidlaw, K.C., for the appellant.

F. Arnoldi, K.C., for the defendants, the respondents.

*To be reported in the Ontario Law Reports.

The judgment of the Court was delivered by MACLAREN, J.A.:— . . . The appellant contends: (1) that Brethour, who gave the bank the securities in question, was not a wholesale purchaser or dealer; and (2) that the lumber in question was not a product of the forest.

Neither of these terms is defined in the Bank Act or in the Dominion Interpretation Act, R.S.C. 1906 ch. 1. Not having acquired a technical meaning or being used in a technical sense, but dealing only with matters relating to the general commercial public, they should be given the ordinary or popular meaning which they bore in this country at the time they were first embodied in the Bank Act, that is, in 1880, or when the section was amended by the insertion of the word "dealer" in 1890.

So far as I am aware, the words "wholesale purchaser or dealer" have not been defined by our Courts. . . .

[Reference to Treacher v. Treacher, [1874] W.N. 4.]

Brethour appears to have been the only lumber dealer in the village of Burford. He had a planing mill, and manufactured doors and windows, and was also a builder and contractor. He bought his lumber by the car-load and usually kept on hand a stock of two or three hundred thousand feet. He sold lumber to farmers, builders, and contractors, and used it in carrying out his own contracts. While he may not have been a wholesale dealer, I think he was clearly a wholesale purchaser, within the meaning of sec. 88.

The other question, as to whether sawn lumber is a "product of the forest," within the meaning of this section, came before the Quebec Court of Appeal in Molsons Bank v. Beaudry, Q.R. 11 K.B. 212. . . .

It was argued before us that sawn lumber was not a product of the forest, but of the saw-mill. As well might it be argued that wheat is not a product of agriculture, but of the threshing-mill; or that dried or salted fish are not a product of the sea, lakes or rivers, but of the flakes where they were dried, or of the establishment where they were dressed or salted. If the mere expenditure of a small amount of labour upon such products is to withdraw them from the section, where is the line to be drawn? Counsel for the appellant argued, with respect to the forest, that it should be drawn at saw-logs, and that it would not comprise hewn or square timber; but why exclude these latter, as all the labour is applied in the forest as in the case of logs? Or would it include hemlock logs from which the bark was stripped, or the tanbark itself?

In passing this section Parliament probably had in mind

the manner in which the trade of the country was generally carried on and banking assistance usually given, and meant to facilitate such trade in the products from the sources indicated, so long as they remained in a comparatively raw state and had not changed their general nature, although a certain amount of labour had been expended upon them. For instance, it is well known that the trade in saw-logs is an insignificant part of the trade of this country in the products of the forest; and to restrict these bank securities to them would not give the dealers the financial assistance they require and desire.

I am of opinion that we should give a much broader meaning and application to these words. I think that the words, "products of agriculture, the forest, quarry and mine, the sea," etc., in sec. 88, mean substantially the same as the like words embodied in the trade returns of exports laid before Parliament from year to year, and that Parliament had probably this well-known classification in mind. There we find agricultural produce, animals and their produce, fisheries produce, mineral produce, forest produce, etc. In the latter are enumerated, logs, lumber of various kinds, railroad ties, square timber, etc.

With respect to the book-debts, I agree with the Divisional Court that the claim of the bank should be limited to the proceeds of the pledged lumber.

In my opinion, the appeal should be dismissed and the judgment of the Divisional Court affirmed.

APRIL 21ST, 1913.

*REX v. GIBSON.

Criminal Law—Murder—Evidence—Murderous Assault Committed on Another Person—Relevancy to Immediate Charge—Admissibility.

Case reserved and stated by MULOCK, C.J.Ex., before whom and a jury the prisoner was tried and found "guilty" of the murder of one Rosenthal at Toronto on Friday the 5th April, 1912.

The question stated was, whether the trial Judge was right in admitting the evidence of Eli Dunkelman as to an assault alleged to have been made upon him by the prisoner.

*To be reported in the Ontario Law Reports.

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

A. A. Bond, for the defendant.

J. R. Cartwright, K.C., for the Crown.

The judgment of the Court was delivered by MAGEE, J.A.:— Under the circumstances set forth by the learned Chief Justice of the Exchequer, who presided at the trial, in his statement of the case and in the evidence, the whole of which he has made part of that statement, it is clear that the testimony of Eli Dunkelman was properly admitted as to a murderous assault alleged by him to have been made upon him by the prisoner near to the building where the prisoner falsely said Rosenthal was, and within a few yards of the spot where Rosenthal's body was afterwards found murdered, and within about an hour after the prisoner had, under false pretences, induced Rosenthal to leave Dunkelman and go alone with him to that locality.

Before that evidence of Dunkelman was received, the Crown had, by him and other witnesses, offered evidence of other facts in support of the charge of murder which could not be withheld from the jury. . . .

[Summary of the facts.]

It is, of course, the general rule, in justice to a person accused of an offence, that he shall not, on his trial therefor, be called upon to answer other charges not connected therewith, nor shall evidence of an unconnected offence be given merely to prove his vicious character or his readiness to commit such a crime as he is upon trial for. As put by the House of Lords in Rex v. Ball, [1911] A.C. 47: "You cannot convict a man of one crime by proving that he had committed some other crime." Nevertheless, evidence of facts relevant to the immediate charge against him is not the less admissible because it necessarily discloses the commission of other crimes by him. But it must be evidence of facts relevant to that immediate charge. Here there are several grounds upon which the attack upon Dunkelman was relevant to the charge of having murdered Rosenthal.

The other evidence pointed to a scheme by the prisoner to get possession of the $60 which he wished Rosenthal to bring, and shewed that his conduct towards the two men was all part of one and the same scheme and one and the same transaction carried out upon the same occasion, and that the mode in which it was carried out would necessarily be relevant to the proof of the scheme and its accomplishment.

Then also, on the question of motive for the murder of

Rosenthal, who had only a quarter of the money, it was quite relevant and competent for the prosecution to shew that the prisoner contemplated and attempted to effect a crime against Dunkelman, to hide which, when effected, it would be important to the prisoner first to put an end to Rosenthal, and thus get rid of his testimony, or to effectuate which more readily it was necessary to prevent Rosenthal's return to Dunkelman.

Again, the other evidence for the Crown having made out a prima facie case against the prisoner for the murder of Rosenthal, proof of an attempt by the prisoner to get rid of any of the evidence of his crime would be confirmatory and relevant. If, for instance, he attempted to destroy his clothing having on it blood spots . . . of or to get Dunkelman to leave the country and not give evidence against him, or to deny having met him, evidence of any such attempt would clearly be relevant and admissible. And, when he attempted to get rid of Dunkelman's evidence more effectually, the proof of that attempt was not less admissible.

It is true that as to both the two last-mentioned reasons robbery might also be a motive for the attack upon each of the men; but the existence of one motive is not inconsistent with the existence of two; and it would be for the jury to consider whether either or both and which of the motives was the moving or sufficient force in actuating the guilty person.

For a fourth reason also, the evidence was, in the particular circumstances, admissible. The prisoner was proved to have suddenly become possessed of money and more money than Rosenthal was shewn to have had. If the evidence rested there, the very fact that it was more would, unexplained, have itself been an indication that probably it had not been taken from Rosenthal. In fact the prisoner himself swore that the arrangement to meet on Thursday evening at the bridge had been made by other men, who with him met Rosenthal and Dunkelman there, and it was those other two who there told Rosenthal and Dunkelman to return on Friday evening and bring money, and that he was present with the four on the bridge on Friday evening, but left the four together and returned to his home, and on the next morning he received $40 from one of those two men. It was, therefore, proper, if not indeed necessary, for the prosecution to shew that the excess came from a source which was inconsistent with his own story and consistent with the taking of Rosenthal's money; and this was done by Dunkelman's testimony that his money was taken from him, being part of the money which the other evidence shewed that the prisoner was scheming to obtain. . . .

[Reference to Rex v. Rooney (1836), 7 C. & P. 517, and Rex v. Birdseye (1830), 4 C. & P. 386.]

The question asked by the learned Chief Justice, whether he was right in admitting the evidence of Dunkelman as to the assault by the prisoner upon him, should be answered in the affirmative.

Conviction affirmed.

APRIL 23RD, 1913.

*RE HAMILTON.

Will—Construction—Absolute Gift to Daughter—Restriction—Discretion of Trustees—Invalidity—Restriction against Encroachment during Coverture—Validity—"I Wish"—Obligatory Import—"Settled upon herself"—Extended Meaning of—Appeal—Cross-appeal—Con. Rule 813.

Appeal by Annie Seaborn Hill from the order of BOYD, C., 27 O.L.R. 445, ante 441, declaring the construction of the will of Robert Hamilton, deceased, in regard to the share of his estate bequeathed to the appellant, his daughter.

The appeal was heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and LEITCH, JJ.

R. R. Hall and S. T. Medd, for the appellant.

G. H. Watson, K.C., for the trustee.

THE COURT agreed with the decision of the Chancellor, for the reasons stated by him.

RIDDELL, J., referred to Boustead v. Boustead (1869), 21 L.T.R. 136, a decision which appeared to be opposed to that of the Chancellor. He pointed out a distinction between the two cases, citing Theobald, 7th ed., p. 644; and said that the English case stood alone, and, unless the difference suggested was substantial, it was in conflict with other cases, and should not be followed.

The same learned Judge also referred to a suggestion made by counsel for the trustee that the Court might interfere with the decision below in reference to the trustees' discretion; and

*To be reported in the Ontario Law Reports.

said that, as there was no cross-appeal, no notice under Con. Rule 813, and no request by the trustees to be put in the same position as if they had served a notice, the Court should not consider the question.

Appeal dismissed with costs.

APRIL 26TH, 1913.

*BELLAMY v. PORTER.

Promissory Note—Alteration by Payee after Note Signed—Change in Rate of Interest Stated—Materiality—Avoidance of Note—Money-Lenders Act, secs. 6, 7—Stipulation for Excessive Rate of Interest—Note Void when Made—Bills of Exchange Act, sec. 145.

Appeal by the plaintiff from the judgment of the Judge of the County Court of the County of Kent, dismissing an action upon a promissory note, in the First Division Court in the County of Kent.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and LEITCH, JJ.

B. N. Davis, for the plaintiff.

H. S. White, for the defendant.

MULOCK, C.J.:—The action was brought on a promissory note, dated the 11th May, 1901, made by the defendant in favour of the plaintiff, to recover $183.37, principal money, and interest thereon at 12 per cent. per annum from maturity. The note, when made by the defendant, and when the plaintiff became the holder thereof, was in the following words and figures:—

"Chatham, Ont., May 11th, 1907.

"183.37.

"One month after date I promise to pay to the order of S. S. Bellamy, at his banking office, Chatham, Ontario, the sum of one hundred and eighty-three..... $\frac{13}{100}$ dollars,

Value received. To obtain which I declare I own in my right 50 acres, lot No. 21 B'd., con. 9, township of Down, mortgaged

*To be reported in the Ontario Law Reports.

for $3,300, which lot I pledge as security for the payment of this note, and I fully understand this note may be registered against my land, and I further agree to pay interest after maturity at two per cent. per month till paid.

"Joseph Porter.
"P.O. Address, Baldoon."

Whilst such holder, the plaintiff, without the defendant's consent, altered the provisions as to interest, making it read: "I further agree to pay interest after maturity at the rate of 12 per cent. per annum till paid."

The plaintiff is a money-lender. Section 6 of the Money-Lenders Act, R.S.C. 1906 ch. 122, enacts as follows: "Notwithstanding the provisions of the Interest Act, no money-lender shall stipulate for, allow or exact on any negotiable instrument, contract or agreement, concerning a loan of money, the principal of which is under $500, a rate of interest . . . greater than twelve per centum per annum."

The plaintiff's argument is, that, under the provisions of this section, the contract is to be construed as if it provided for interest at the rate of twelve per cent. per annum; and, in support of his view, he refers to sec. 7 as providing for the Court giving effect to such an interpretation of the contract by reducing a claim for interest exceeding twelve per cent. per annum to twelve per cent.

I am unable to give effect to such argument. Section 6 declares that, in the case of a loan under $500, no money-lender shall stipulate for a greater rate of interest than twelve per cent. per annum; and sec. 11 declares that "every money-lender is guilty of an indictable offence, and liable to imprisonment for a term not exceeding one year, or to a penalty not exceeding $1,000, who lends money at a rate of interest greater than that authorised by this Act."

The stipulation in the note for payment of "two per cent. per month till paid" was a violation of the prohibition contained in sec. 6, and an indictable offence. Being an illegal stipulation, it is void; and the note, even if not rendered void by such alteration, must be construed as containing no contract for payment of interest, and its alteration so as to make it bear interest at the rate of twelve per cent. per annum was a material alteration which rendered the note void under the provisions of sec. 145 of the Bills of Exchange Act, R.S.C. 1906 ch. 119; and, being thus void, it is not necessary for me, for the determination of this case, to express an opinion whether it was not already

rendered void outside of the Bills of Exchange Act, by reason of the material alteration in question. Section 7 of the Money-Lenders Act, relied upon by the plaintiff, does not assist him. That section applies only to a case where it is contended that the interest paid, or claimed, exceeds the rate of twelve per cent. per annum, which is not the present case.

I think the learned Judge rightly dismissed the plaintiff's action, and that this appeal should be dismissed with costs.

CLUTE, J., was of opinion, for reasons stated in writing, that the note, when made, was void; and, even if it could be held to have been valid when made, he agreed with MULOCK, C.J., that the alteration made by the plaintiff was material, and rendered the note void. The appeal should be dismissed. The learned Judge referred to Victorian Daylesford Syndicate Limited v. Dott, [1905] 2 Ch. 624; Bonnard v. Dott, [1906] 1 Ch. 740; Re A Debtor, Ex p. Carden, 52 Sol. J. 209; Gadd v. Provincial Union Bank, [1909] 2 K.B. 353, [1910] A.C. 422; Whiteman v. Sadler, [1910] A.C. 514; Cope v. Rowlands, 2 M. & W. 149, 157; Ferguson v. Norman, 5 Bing. N.C. 76, 84; In re Robinson, 27 Times L.R. 37, [1911] 1 Ch. 230; In re Campbell, [1911] 2 K.B. 992; In re Robinson's Settlements, [1912] 1 Ch. 717; Melliss v. Shirley, 16 Q.B.D. at p. 451.

RIDDELL, J., said that the whole question was: "Would the law have supplied and substituted in the note as originally given the words which the plaintiff inserted?" "Was the legal effect of the note left unaltered?" These questions should be answered in the negative. It was not necessary to decide whether the note as originally drawn was wholly void, or whether the provision for interest was wholly nugatory; and the learned Judge expressed no opinion on either point. Assuming both in favour of the plaintiff, he still must fail. Reference to Boulton v. Langmuir, 24 A.R. 68; Sutton v. Toomer, 7 B. & C. 416; Aldous v. Cornwall, L.R. 3 Q.B. 579; Warrington v. Early, 2 E. & B. 763, 23 L.J.Q.B. 47, 18 Jur. 42, 95 R.R. 789.

SUTHERLAND, J., agreed in the result, for the reasons stated by MULOCK, C.J.

LEITCH, J., agreed in the result, for the reasons stated by RIDDELL, J.

Appeal dismissed with costs.

HIGH COURT DIVISION.

MIDDLETON, J., IN CHAMBERS. APRIL 21ST, 1913.

RE CAIGER.

Life Insurance—Death of Sole Designated Preferred Beneficiary before Death of Assured—Rights of Children of Assured—"One or more or all of the Designated Preferred Beneficiaries"—Ontario Insurance Act, 2 Geo. V. ch. 33, secs. 171 (9), 178(7)—Construction.

Motion by the three adult children of William E. Caiger, deceased, for payment out to them of their shares of insurance moneys paid into Court.

M. Macdonald, for the applicants.

E. C. Cattanach, for the infant children of the deceased.

G. F. McFarland, for the North American Life Assurance Company.

W. D. McPherson, K.C., for the P. R. Wilson Printing Company, creditors.

MIDDLETON, J.:—By policy dated the 1st October, 1901, the deceased W. E. Caiger insured his life in favour of his wife, who died on the 13th October, 1911. The deceased survived his wife, dying on the 8th November, 1912, but executed no document in any way affecting this insurance. The sum of $3,128.25, the proceeds of the policy, has been paid into Court by the insurance company, as a contest has arisen between the creditors and the children of the deceased.

The rights of the contestants depend upon the construction of sec. 178(7) of the Ontario Insurance Act, 2 Geo. V. ch. 33. If that section applies, the children take. If not, then under sec. 171(9) the money forms part of the estate of the insured.

Section 178(7) applies if the words "one or more or all of the designated preferred beneficiaries" can be held to cover the case of a "sole designated preferred beneficiary;" for then the section, as applied to this case, directs the money to go to the children.

The wording of the statute is not uniform throughout, and in some of the sections the Legislature has, as in the case of 171(9), been careful to say "all the beneficiaries or the sole

beneficiary;" but, in seeking to interpret the words used, I think the words here used, "all the beneficiaries," are wide enough to cover the case of a "sole beneficiary." To hold otherwise would be to create an unwarrantable exception and an indefensible anomaly.

The money will be declared to belong to the children, and will be paid accordingly.

The creditors must pay the costs of this motion and the costs of the company deducted when the money was paid into Court.

FALCONBRIDGE, C.J.K.B. APRIL 25TH, 1913.

RE PATERSON AND CANADIAN EXPLOSIVES LIMITED.

Vendor and Purchaser—Contract for Sale of Land—Deficiency in Acreage—Compensation by Abatement of Purchase-money—Absence of Fraud—Bona Fides—Survey—Reference to in Sale-agreement — Presumption — Application under Vendors and Purchasers Act—Scope of Act.

Application by the Canadian Explosives Limited, the purchasers, under the Vendors and Purchasers Act, for an order authorising them to retain out of their purchase-money the sum of $2,005.50 for compensation by reason of the alleged deficiency in the area of the lands described in the contract for sale between the parties.

The application was heard by FALCONBRIDGE, C.J.K.B., in the Weekly Court at Toronto.

Shirley Denison, K.C., for the purchasers.

R. J. McLaughlin, K.C., for the vendor.

FALCONBRIDGE, C.J.:—In the contract the land is described as being "the north half of lot 31, concession 1, township of Scarborough, county of York, together with all improvements thereon, being 100 acres more or less."

The area of the land, as shewn by actual survey, is 90 $\frac{45}{100}$ acres. The purchase-money is $21,000; and the purchasers claim that only the sum of $18,994.50 should be paid.

Mr. McLaughlin contended that I had no jurisdiction, on this application, to decide in effect that the purchasers are entitled to specific performance with abatement of purchase-money, and

that the compensation mentioned in 10 Edw. VII. ch. 58, sec. 4, is only compensation arising out of the contract itself. I do not pass upon this objection, because I think the case is not one in which, in any view of the case, I can give relief to the purchasers.

The facts of the case are as follows. The said north half was patented on the 23rd September, 1836, to one Robert Galbraith; and in the patent the land is described thus: "All that parcel or tract of land situate in the township of Scarborough, in the county of York, in the Home district of our said Province, containing by admeasurement one hundred acres, be the same more or less, and being the north half of our Clergy Reserve, lot number thirty-one in the said township of Scarborough."

The said half lot has always been described in the same manner, and always remained in the family of the original patentee until the transactions now in consideration.

By writing bearing date the 28th June, 1912, F. D. Galbraith, a descendant of the original patentee, entered into an agreement for the sale to Paterson, the present vendor, of the said half lot, describing it in the same way, for the sum of $18,000. Within a very few days the present agreement of purchase was made. The agreement between Galbraith and Paterson has never yet been consummated by the making and delivery of a deed. In other words, Paterson simply sold his option or agreement, at a profit of $3,000. There is no allegation whatever of any want of good faith on the part of any of the persons interested.

Mr. Denison based an argument on the following sentence in the purchasers' offer: "You shall not be bound to produce any abstract of title, or any title deeds, or evidence of title *or survey*" (the italics are my own) "except such as you may have in your possession." The contention is, that the use of the words "or survey" contemplates the making of a survey before closing the matter; and that, therefore, this constitutes a contract made with a view to a possible abatement.

The words in question appear as part of a real estate broker's printed form, and I do not think that they are open to the construction which the purchaser seeks to give to them.

The cases on this subject are reviewed and discussed in Wilson Lumber Co. v. Simpson (1910), 22 O.L.R. 452; in the Divisional Court (1911), 23 O.L.R. 253.

As I said before, there is no fraud or suggestion of fraud on the part of the vendor. He simply turned over what he had acquired the right to purchase, using the ipsissima verba of his

own contract; and I do not think that there is anything in the contract itself to raise a presumption that there should be an abatement or even a survey of the property.

The purchasers' application is, therefore, dismissed. Under all the circumstances, I shall not make any order as to costs.

KELLY, J. APRIL 26TH, 1913.

RE NORTH GOWER LOCAL OPTION BY-LAW.

Municipal Corporations—Local Option By-law—Voting on—Qualifications of Voters—Scrutiny by County Court Judge—Deduction of Votes from Total and from Majority—Premature Final Passing of By-law by Council—Absence of Prejudice—Deputy Returning Officer—Interest—Bias—Ballots Marked for Incapacitated Voters—Neglect to Require Declarations—Municipal Act, sec. 171*—Irregularity Cured by sec.* 204*—Names Added to Voters' List by County Court Judge—Voters' Lists Act, secs.* 21, 24*—Irregularities in Procedure—Certificate of Judge—Finality.*

Motion to quash a local option by-law of the township of North Gower.

F. B. Proctor, for the applicant.

G. F. Henderson, K.C., and George McLaurin, for the township corporation.

KELLY, J.:—By the notice of motion the applicant rests his case on six objections:—

1. That the by-law did not receive a three-fifths majority of the votes of the duly qualified voters.

2. That the voting upon the by-law was not conducted in accordance with the provisions of the Municipal Act and of the Liquor License Act, and that persons were allowed to vote whose names did not appear upon the last revised voters' list of the municipality as persons qualified to vote at municipal elections.

3. That unauthorised names were entered upon the list of voters used in voting upon the by-law, which names had not been entered upon the list of voters in accordance with the provisions and requirements of sec. 17 and subsequent sections of the Ontario Voters' Lists Act.

4. That illiterate voters were allowed to vote on the by-law without first having taken the declarations required by sec. 171 of the Consolidated Municipal Act.

5. That the by-law was finally passed within one month after its first publication in a public newspaper, contrary to the provisions of sec. 338 (3) of the Consolidated Municipal Act.

6. That Norman Wallace, who was appointed and acted as deputy returning officer for polling subdivision No. 1 of the township upon the taking of the vote, was disqualified by interest from holding that office.

Objections 1 and 2 rely for their effect upon the validity of the other objections or some of them.

The first publication of the by-law was on the 13th December, 1912, and the by-law was finally passed by the municipal council on the 13th January, 1913.

The result of the vote, as declared by the clerk, was, that 297 votes were cast in favour of the by-law and 191 against it, being a total of 488 votes. A scrutiny having taken place before the Senior Judge of the County Court of the County of Carleton, he, on the 19th February, 1913, certified as the result thereof as follows:—

Total No. of votes cast		487
For the by-law	295	
Against the by-law	192	487

And that, on an inquiry as to the qualifications of certain persons who had voted, he found that four such persons had not, on the date of the election, the necessary qualifications, and he deducted these four, thus reducing the total number of votes cast to 483

For the by-law	291	
Against the by-law	192	483

On this finding, which I adopt, the by-law was carried by a majority of one vote and one-fifth.

Objection 5. To this objection—that the by-law was finally passed within one month after the first publication—Re Duncan and Town of Midland, 16 O.L.R. 132, and particularly that part of the judgment of Osler, J.A., appearing on p. 135, has special application. I need not repeat the line of reasoning adopted in the judgments of the Court of Appeal in that case. In the present case the final passing of the by-law, on the 13th January, did not in any way interfere with or prejudice the rights of any elector or other person having an interest in the

result of the voting. It did not take away the right to demand a scrutiny; and it is not conceivable, and it is not alleged, that the result would have been different had the final passing been delayed for a few hours until the full month had elapsed from the first publication.

The essential thing in the submission and passing of what is known as a local option by-law is the expression of the will of the persons entitled to vote thereon; and when, as in this case, at least three-fifths of the qualified voters who have voted have expressed themselves in favour of the passing of the by-law, the statute makes it plain that it is the duty of the council finally to pass the by-law; and, on neglect or refusal to do so, they may be compelled by mandamus to take that action. Their duties in that respect are of the most formal kind.

If what the applicant characterises as a premature passing of the by-law had in any way affected the merits of the vote or deprived persons entitled to object thereto of any of their rights, a different conclusion might be reached; but, under the present circumstances, I see no reason for giving effect to this objection.

Objection 6. The facts sworn to, to substantiate this objection, are: that Wallace, a deputy returning officer, was a strong and active worker in endeavouring to procure the passage of the by-law; that he was largely instrumental in obtaining signatures to the petition for its submission to the electors; that it was presented by him to the municipal council; and that he held the position of secretary in the local option organisation which carried on active propaganda for the passing of the by-law. There is no evidence, nor has it even been hinted, that, in the performance of his duties as deputy returning officer, Wallace committed any act which could be considered illegal or which would have had the effect of invalidating any vote or votes or frustrating the will of the voters. It is well known that at times persons appointed as deputy returning officers and poll clerks entertain strong views in favour of one or the other side of the question voted on; but I know of no express prohibition against such persons holding such positions. This objection is not sustained.

Objection 4. The facts relied upon in support of this objection are: that three voters were incapacitated from marking their ballots—two, Rusheleau and Trimble, through illiteracy, the other, Pettapiece, by reason of blindness—and that their ballots were marked for them by the deputy returning officer without his requiring them to make the declaration required by sec. 171 of the Consolidated Municipal Act. This objection is

fully met by the decision of the Court of Appeal in Re Ellis and Town of Renfrew, 23 O.L.R. 427, where it is held not to be a statutory condition precedent to the right of an illiterate person to vote that he should take the declaration required by sec. 171; that the omission to take the declaration is merely an irregularity in the mode of receiving the vote, and so covered by the curative clause of the statute, sec. 204. The reasons for the conclusions arrived at by the majority of the Court in that case are set out in the judgments of Garrow and Magee, JJ.A., and deal with declarations both of illiterate persons and of those incapacitated through blindness.

Objection 3. To affect the general result of the vote, it is necessary that at least 4 of the 483 votes allowed by the County Court Judge should be disallowed; or, in other words, that the total vote of 483 be reduced to 479 or less. The disallowance of the votes of Dalglish and McQuaig here objected to would not alter the general result. Notwithstanding this, however, I express the opinion that the objection cannot be sustained. The ground of objection is, that the procedure prescribed by the Voters' Lists Act, 7 Edw. VII. ch. 4, to be adopted in adding names to the list, was not followed. It is not contended that, apart from non-compliance with the terms of the Act in that respect, Dalglish and McQuaig were not persons who were then entitled to have their names on the list as voters. Their names not appearing on the original list, an application was made to the Judge of the County Court to have them added, and they were so added by him, after which he certified to the revised list, as required by sec. 21 of the Act. I do not think I am required to go behind this certificate and examine into the sufficiency of the various steps by which the Judge arrived at his results: Re Ryan and Village of Alliston (1910-11), 21 O.L.R. 582, 22 O.L.R. 200, 1 O.W.N. 1116, 2 O.W.N. 161, 841; 7 Edw. VII. ch. 4, sec. 24.

The applicant, on all grounds, fails, and the motion is dismissed with costs, such costs to include only one counsel fee.

BADIE v. ASTOR—MIDDLETON, J., IN CHAMBERS—APRIL 21.

Security for Costs—Increased Security—Special Circumstances—Appeal—New Evidence.]—Appeal by the defendant from an order of the Master in Chambers, ante 880, refusing further security for costs. The defendant's solicitor asked and obtained leave to file a further affidavit. MIDDLETON, J., said

that the security given, when required by our practice, ought to be adequate; but great care must be taken to avoid the requirement being oppressive. The sum of $400 mentioned in the Rules must be regarded as adequate for any normal action. In this case, the appeal from the judgment and the reference ordered in lieu of a new trial were beyond the ordinary course, and justified an order requiring $200 further security. The costs of the first trial and appeal were payable by the plaintiff in any event of the cause, and so were taken out of the general costs of the cause. The order, on the new material, should be made for $200 further security; costs here and below to be costs in the cause. G. H. Kilmer, K.C., for the defendant. R. McKay, K.C., for the plaintiff.

BICKELL v. WALKERTON ELECTRIC LIGHT CO.—MASTER IN CHAMBERS—APRIL 22.

Venue—Change—Convenience—Witnesses—Undertaking to Pay Expenses—Jury Notice—Leave to Serve.]—Motion by the defendants to change the venue from Toronto to Walkerton. The action was for damages for injuries sustained by the plaintiff while working for the defendants at Walkerton. The plaintiff moved to Toronto after his injury, and named Toronto as the place of trial. The motion was supported by the affidavit of the president of the defendant company, stating that the company would require at least ten witnesses, all necessary and material, and all resident at or close to Walkerton. The plaintiff stated in answer that he was without money and unable to work so as to earn anything considerable, and that he could not pay witness fees to Walkerton; he said that he had nine witnesses, all resident at Toronto. The Master said that the home of the action (see McDonald v. Park, 2 O.W.R. 972, per Osler, J.A.), is certainly at Walkerton, and the case was eminently one for trial there. The plaintiff was fully examined for discovery, and said on his examination that no one was present when the accident occurred. The only persons who would know anything about it would be the defendants' servants and the physician and nurses at the Walkerton Hospital. When the plaintiff was under examination for discovery, the defendants' counsel attempted to find out what the plaintiff's nine witnesses were expected to prove. But his counsel would not allow him to answer any questions on that matter. This was to be regretted, as it was done in the face of the plaintiff's affidavit that he was with-

out means, so that all the expense of the action would have to be borne by the defendants, even though they should succeed in their defence. The exepense of a separate cross-examination should not have been imposed on the defendants. It was stated by the plaintiff's counsel on the argument that these nine witnesses were men who were now in Toronto, but who were on the work at Walkerton, and could give evidence as to the condition of the pump which caused the plaintiff's injury. As to this, the Master said, it was beyond all question that two or three would be as good as nine on this point. The Master referred to Seaman v. Perry, 9 O.W.R. 537, 761, and said that the distance of Walkerton from Toronto was only about a quarter of that of Sault Ste. Marie from Toronto, so that it would not be necessary that the defendants should advance much more than a third of what was ordered there. No jury notice had been served, through an oversight; but it might be assumed that the defendants would not oppose the plaintiff being allowed to serve one, in view of Qua v. Woodmen of the World, 5 O.L.R. 51, and later cases. If the defendants agreed, an order might issue allowing the plaintiff to serve a jury notice and changing the place of trial to Walkerton, on the defendants undertaking to provide free transportation for the plaintiff and three other persons to be named by him, as in Meredith v. Slemin, ante 1038—not to exceed $24. G. H. Kilmer, K.C., for the defendants. J. M. Laing, for the plaintiff.

McPherson v. United States Fidelity Co.—Falconbridge, C.J.K.B., in Chambers—April 23.

Summary Judgment—Con. Rule 603—*Action on Security Bond—Suggested Defences—Unconditional Leave to Defend.*]—Appeal by the plaintiff from the order of the Master in Chambers, ante 1140. The learned Chief Justice said that the case presented some unnusual features, but, nevertheless, he could not disregard the long line of modern decisions gradually restricting the plaintiff's right to get judgment under Con. Rule 603; and so he thought the Master was right, and there was nothing to add to his reasons. The Chief Justice did not see his way to making any special order or condition as to payment of money into Court. Appeal dismissed, with costs to the defendants in any event. W. Laidlaw, K.C., for the plaintiff. G. H. Kilmer, K.C., for the defendants.

RE CANADIAN FIBRE WOOD AND MANUFACTURING CO. LIMITED—FALCONBRIDGE, C.J.K.B., IN CHAMBERS—APRIL 24.

Company—Winding-up—Dominion Winding-up Act — Assignment for Benefit of Creditors—Conduct of Proceedings—Several Petitions—Creditor or Shareholder—Mistake in Affidavit —Leave to File Amended Affidavit—Foreign Corporation Petitioner—Leave to File License—Stay of Winding-up Order—Leave to Apply.]—Motion for a winding-up order. The learned Chief Justice said that the winding-up, if it had to proceed, ought to take place under the Dominion Winding-up Act, and not under the assignment for the benefit of creditors, for obvious reasons. Then who should have the carriage of the proceedings? The Price Brothers Company's petition was prior in point of time—it was alleged by a trick—but of that the Court had no knowledge. It is better that a creditor should have the conduct of the matter than a shareholder. It must be assumed that the liquidator would investigate the matters alleged by the petitioners Millons, in the interests of creditors and in accordance with his duty. There was a type-writer's slip in the affidavit proving the Price Brothers Company's debt—reading "Price Brown & Co. Ltd." instead of "the Price Brothers Company Limited." But the earlier part of paragraph 2 of G. B. Ball's affidavit verified the petition, and leave should be given to these petitioners to file an amended affidavit nunc pro tunc. It was said that the Price Brothers Company were a foreign corporation. There was nothing in the material on the subject; and the Chief Justice said that he had been dealing with them as a local corporation. If necessary, they should have leave to file a license to do business here. An order should be made for winding-up. N. L. Martin named as interim liquidator. Usual reference to the Master to name a permanent liquidator, etc. This order to be stayed for a reasonable time to allow of calling a meeting of shareholders. Two days' notice of its renewal might be given by any party having a locus standi. George Wilkie, for the Price Brothers Company and other creditors, petitioners. J. A. McEvoy, for McKenzie, secretary. G. B. Balfour, for the company. W. H. Wallbridge, for Mrs. Millons, shareholder and petitioner.