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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. FEBRUARY 17TH, 1919.

ROWNSON DREW & CLYDESDALE LIMITED v. IMPERIAL STEEL AND WIRE CO. LIMITED.

Contract—Supply of Manufactured Goods—Formation of Contract—Evidence—Authority of Agent—Ratification—Damages—Findings of Trial Judge—Appeal.

Appeal by the defendants from the judgment of SUTHERLAND, J., 14 O.W.N. 298.

The appeal was heard by MEREDITH, C.J.C.P., BRITTON, RIDDELL, and LATCHFORD, JJ.

W. N. Tilley, K.C., for the appellants.

Gideon Grant, for the plaintiffs, respondents.

THE COURT dismissed the appeal with costs.

SECOND DIVISIONAL COURT. FEBRUARY 21ST, 1919.

*ANDERSON v. TOWNSHIPS OF ROCHESTER AND MERSEA.

Highway—Nonrepair—Traveller in Motor-vehicle Killed—Ditch—Negligence of Municipal Corporations—Absence of Fence or Guard—Negligence of Driver of Vehicle—Proximate Cause.

Appeal by the plaintiff from the judgment of MIDDLETON, J., ante 269.

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

The appeal was heard by MEREDITH, C.J.C.P., BRITTON, RIDDELL, and LATCHFORD, JJ.

T. Mercer Morton, for the appellant.

J. H. Rodd, for the defendants, respondents.

THE COURT dismissed the appeal with costs.

HIGH COURT DIVISION.

LENNOX, J. FEBRUARY 24TH, 1919.

HAWLEY v. OTTAWA GAS CO.

Negligence—Injury to Person by Explosion of Gas—Subsequent Death from Pneumonia—Proximate Cause of Death—Findings of Jury—Nonsuit.

Action by the widow and administratrix of the estate of Allan J. Hawley to recover damages for his death, said to have resulted from the negligence of the defendants.

The action was tried with a jury at an Ottawa sittings.

A. E. Fripp, K.C., for the plaintiff.

George F. Henderson, K.C., for the defendants.

LENNOX, J., in a written judgment, said that the defendants had completed or professed to complete, in Hawley's cellar, certain work which they were engaged by Hawley to perform, early in the afternoon of the 24th September, 1918; and on the evening of that day, there being a slight odour of gas in the house—which the plaintiff had noticed for several hours—Hawley went to the cellar and there lighted a match; there was an explosion of gas; Hawley's eyes were severely injured, and he sustained other injuries. He was taken to a hospital, and made a good recovery, except as to one of his eyes. He was about to leave the hospital, upon instructions of the attending physician, when he became very ill, with pneumonia it was supposed, and died on the 13th October, 1918.

The plaintiff alleged that her husband's death was the result of the explosion, and that the explosion was caused by the defendants' negligence in the execution of their contract.

There may have been some slight evidence of connectino between the accident and the death in the suggestion of a physician who was called as a witness, that "weakened vitality" might

render the patient more susceptible to disease; but, granting that, it was very far from proving or raising a reasonable inference that Hawley's death was the direct, immediate, and natural consequence of the injuries he sustained by the explosion.

Questions were submitted to the jury; they found negligence on the part of the defendants; "that there was a small escape of gas and not sufficient to drive out the air which would make an explosive mixture in the meter;" no negligence on the part of the deceased; and that the explosion occurred in the meter. Question 7 was: "Was the death of Hawley the natural or ordinary consequence of the injuries he sustained on the 24th September, 1918?" A. "Yes." The jury assessed the plaintiff's damages, on the assumption that the injuries caused death, at $2,000; and damages for injuries not occasioning loss of life, $500.

"There must be . . . a link strong or weak to connect cause and event. It is not enough to establish a possibility and stop there:" Reed v. Ellis (1916), 38 O.L.R. 123, 136. The death must appear to be not only a proximate and immediate result, but it must be independent of an intermediate cause: Scholes v. North London R.W. Co. (1870), 21 L.T.R. 835; Halsbury's Laws of England, vol. 10, pp. 318 to 322, paras. 586 to 592.

There was no evidence upon which the answer to question 7 could be based.

The action should be dismissed, and with costs, if asked.

LENNOX, J. FEBRUARY 24TH, 1919.

BARRY v. CANADIAN PACIFIC R.W. CO.

Railway—Collision—Negligence—Death of Person Travelling as Caretaker of Livestock at Reduced Rate—Special Contract—Approval of Railway Board—Exemption from Liability—Knowledge of Deceased—Action under Fatal Accidents Act.

Action under the Fatal Accidents Act, brought by the father of Matthew Lorne Barry, who was killed while travelling on a freight train of the defendants, to recover damages for his death, for the benefit of the plaintiff and his wife.

The action was tried without jury at a Brockville sittings.

J. A. Hutcheson, K.C., and M. M. Brown, for the plaintiff.

R. A. Pringle, K.C., and W. L. Scott, for the defendants.

LENNOX, J., in a written judgment, said that it was admitted that the plaintiff's son was killed on the 28th March, 1918, in a collision, while he was travelling on a freight-train, and that he

was not travelling on a passenger-ticket, but was being carried free as a caretaker in charge of livestock.

There was undisputed evidence that the son regularly contributed substantial sums towards the support of his parents, that they were in need of assistance, and expected it to continue during their lives if their son lived.

Negligence was denied in the statement of defence, but appeared to be tacitly admitted at the trial.

The only question apparently in issue was whether, assuming negligence on the part of the defendants, they were exempted from liability by reason of the special conditions under which they undertook to carry the plaintiff's son—he was being carried at a reduced rate under a limited liability contract approved by the Railway Board under the Railway Act. He was neither a trespasser nor a bare licensee, but was rightfully upon the train. The provision of the contract relied upon by the defendants was as follows:—

"In case of the company granting to the shipper or any nominee or nominees of the shipper a pass or privilege less than full fare to ride on the train on which the property is being carried for the purpose of taking care of the same while in transit, and at the owner's risk as aforesaid, then as to every person so travelling on such pass or privilege at less than full fare the company is to be entirely free from liability in respect of his death, injury, or damage, and whether it be caused by the negligence of the company or its servants or employees or otherwise howsoever. It is further agreed that under no circumstances shall any officer, agent, or employee of the company, waive verbally or otherwise the provisions of this contract or any of them."

This provision is in the defendants' "Livestock Special Contract Form 18," approved by the Board.

This case did not differ in principle from Grand Trunk R.W. Co. v. Robinson, [1915] A.C. 740, according to which the defendants escaped liability by virtue of the provisions of the contract.

The deceased had knowledge, before the 25th March, of the terms upon which reduced rates were granted, had acted for the same consignee, been carried on the same terms and in the same capacity on a previous occasion, and must be presumed to have become acquainted with the conditions and provisions of the "Contract Form 18," which he had in his pocket on the day of his death. The deceased did not sign the contract, but the bill of lading was signed by one Webster as the agent of the deceased, and it referred to the 'Contract Form 18" and in effect incorporated it; the case was not distinguishable from the Robinson case.

The action should be dismissed, and with costs, if costs are asked for.

MASTEN, J., IN CHAMBERS. FEBRUARY 25TH, 1919.

DOAN v. EMERSON.

Trial—Place of—Rule 245 (b)—Place of Residence of Plaintiff at Date of Delivery of Statement of Claim—What is Necessary to Effect Change in Place of Residence.

Appeal by the plaintiff from an order of one of the Registrars, sitting in Chambers in lieu of the Master in Chambers, changing the place of trial from Hamilton to Milton.

W. S. MacBrayne, for the plaintiff.
E. H. Cleaver, for the defendants.

MASTEN, J., in a written judgment, said that the plaintiff laid the venue at Hamilton, and the defendants moved to change the venue to Milton, relying on Rule 245 (*b*), and maintaining that the cause of action arose in the county of Halton, and that all the parties resided in that county at the time when the statement of claim was delivered.

It was admitted that the cause of action arose in Halton, and that the defendants resided in that county; but it was contended that on the 21st January (the day on which the statement of claim was delivered) the plaintiff was residing in Toronto; and the controversy turned on the evidence regarding his residence on that date.

It was not disputed that down to the 10th January, 1919, the plaintiff resided in Burlington, in Halton, and on that date was a tenant by the month of a house in that village. His wife and his household goods and chattels remained in the Burlington house until the 3rd February, when they moved to Toronto. Meantime, on the 10th January, the plaintiff had secured permanent employment in Toronto, and was engaged in such employment. He rented a room in Toronto and slept there. He returned occasionally over Sunday to Burlington, and occasionally his wife joined him in Toronto over the week-end—but the home in Burlington was not broken up till the 3rd February. On that day the plaintiff went back to Burlington, voted at the local election in the village, and then moved his wife and furniture down to Toronto.

Reference to Powell v. Guest (1864), 18 C.B.N.S. 72.

Down to the 3rd February, the plaintiff's home was in Burlington. He had the intention of returning from time to time, and he must be deemed to have had a constructive legal residence there, notwithstanding the fact that he was actually living in Toronto:

Regina ex rel. Horan v. Evans (1899), 31 O.R. 448; In re Ladouceur v. Salter (1876), 6 P.R. 305.

Rule 245 (*b*) provides categorically: "Where the cause of action arose and the parties reside in the same county the place to be named shall be the county town of that county."

The learned Judge said that the plaintiff was now, no doubt, residing in Toronto; and, if any legitimate ground could be found, the venue should be restored to Hamilton, which was a more convenient place for trial, and afforded an earlier opportunity for trial; but he thought that the plaintiff was bound to lay his venue at Milton under the Rule, and that he could not now secure an advantage because he violated the Rule.

The appeal should be dismissed with costs to the defendants in any event.

KELLY, J. FEBRUARY 25TH, 1919.

RE TESSIER.

Will—Construction—Provision for Maintenance of Widow and Children—Income—Corpus—Executors—Power of Sale—Discretion—Provision for Widow in Event of Remarriage—"Possession"—Ownership—Absolute Gift of Part of Estate.

Motion by the executors of Magloire Tessier, deceased, for an order determining three questions as to the proper construction of the will of the deceased.

The motion was heard in the Weekly Court, Ottawa.

J. P. Labelle, for the executors.

A. C. T. Lewis, for the Official Guardian, representing the infants.

KELLY, J., in a written judgment, answered the questions submitted as follows:—

(1) By para. 3 of the will the testator gave the income ("usufruct") of his whole estate to his wife, so long as she should remain his widow, to pay her debts and keep his children. There was nothing in that paragraph to authorise the application of the corpus or any part of it for the support of the children or for the support or maintenance of the widow. The power given by that paragraph to the widow, "if it is necessary to sell my stock or anything else," "with the permission of the executors," did not imply a power also to apply the proceeds of the sale for these

purposes. There was nothing objectionable in the widow, during her widowhood and while supporting (or "keeping" as it is put in the will) the testator's children, sharing with them the income derived during her widowhood.

(3) The third question was, whether, according to para. 5 of the will, the executors were entitled to sell the real estate of the deceased. The meaning of para. 5 needed no explanation. The testator evidently intended that, should necessity arise for making a sale, the executors should have power to do so, exercising their judgment and the wise discretion which executors are required to use in the discharge of their duties.

(2) Question 2 was, whether, according to para. 4 of the will, the widow was entitled, if she remarried, to one-third of the estate absolutely or to the revenue only of one-third of the estate. The testator's direction was that, in the event of his wife marrying again, she should "take possession" of one-third of all—referring to his "properties movable and immovable." Though possession did not necessarily mean ownership, reading the whole will, the learned Judge was of opinion that what the testator intended was that his widow, in the event which had happened (her remarriage), should take absolutely one-third of the estate.

Order declaring accordingly. Costs out of the estate, those of the executors as between solicitor and client.

KELLY, J. FEBRUARY 25TH, 1919.

RE COLBERT.

Will—Construction—Bequest of Residue to Specific Legatees in Proportion to the Amount or Value of their Legacies—Inclusion of Beneficiaries of Bequest in Trust of Sum of Money to "Purchase a Home"—Exclusion of "General Fund" of Church—Bequests of Mortgages—Interest Accrued and Unpaid at Testator's Death.

Motion by the executors of Thomas Colbert, deceased, for an order determining certain questions arising as to the construction of the will of the deceased.

The motion was heard in the Weekly Court, London.

P. H. Bartlett, for the executors.

F. E. Perrin, for Wesley Edwin Colbert and the other legatees having a like interest to his under the will.

W. R. Meredith, for George Colbert, Margarite Colbert, and Winnifred Colbert.

Archdeacon Richardson was present at the hearing in the interests of the General Fund of the Church of England in the Village of St. Johns.

KELLY, J., in a written judgment, said that by his will Thomas Colbert made several specific money bequests to various persons, and these further bequests:—

"(5) I give and bequeath unto my executors and trustees . . . the sum of $2,000 in trust to purchase a home for my nephew George Colbert . . . to be used by him during his lifetime, and after his death then I give devise and bequeath the same unto Margarite and Winnifred daughters of the said George Colbert.

"(6) I give and bequeath to my niece Kate Colbert wife of my nephew Thomas Colbert . . . the mortgage now held by me against the lands or farm upon which she lives . . . to be applied towards the support and maintenance of herself and her children as she may see fit."

"(8) I give and bequeath unto my niece Catherine Macfarlane . . . the mortgage now held by me against the lands of the Benjamin Colbert estate."

"(14) I give and bequeath unto the General Fund of the Church of England in the Village of St. Johns . . . the sum of $500."

"All the residue of my estate not hereinbefore disposed of I give devise and bequeath unto all the legatees and devisees hereinbefore mentioned in this my will in proportion to the amount or value hereinbefore given devised or bequeathed to him or her in this my will."

The executors submitted the following questions:—

(1) Are George Colbert and Margarite and Winnifred Colbert entitled to share in the residuary estate, and, if so, in what proportions?

(2) If George Colbert and Margarite and Winnifred Colbert are entitled to share in the residuary estate, how ought their share in the residuary estate to be paid or secured to them?

(3) Is the General Fund of the Church of England in the Village of St. Johns entitled to a share in the residuary estate?

(4) Does Kate Colbert take the interest accrued and unpaid at the testator's death, on the mortgage given to her by para. 6; and does Catharine Macfarlane take the interest accrued and unpaid at the testator's death, on the mortgage given her by para. 8?

George Colbert and his daughters agreed that all moneys coming to them from the residue of the estate should be divided

as follows: one-half to George Colbert and the other half equally between his two daughters.

In answer to questions 1 and 2, the learned Judge was of opinion that George Colbert and his two daughters were entitled to share in the residuary estate on the basis of the bequest to them by para. 5 being $2,000; but, in view of the agreement referred to, further consideration of the proportions as between them was unnecessary. Edwards v. Smith (1877), 25 Gr. 159, was distinguishable, the interests arising in that case on the determination of the life-interest being contingent.

In answer to question (3), the language of the residuary clause indicated the testator's intention not to include in those who were to share in the residue the general fund of the church referred to in para. 14; for, while he gave the residue "unto all the legatees and devisees hereinbefore mentioned in this my will," he later on in the same sentence refers to those who are to share as "him or her"—words which plainly did not include and were not applicable to the body mentioned in para. 14, but must be taken to refer to individuals or persons whom he had already mentioned, to the exclusion of that body.

In answer to question 4, the mortgage given by para. 6 to Kate Colbert not only included the principal unpaid at the testator's death, but covered as well the interest accrued and unpaid at that time; and likewise as to the mortgage given by para. 8 to Catherine Macfarlane.

Order declaring accordingly. Costs out of the estate, those of the executors as between solicitor and client.

MIDDLETON, J. FEBRUARY 28TH, 1919.

*ATTORNEY-GENERAL FOR ONTARIO v. ELECTRICAL DEVELOPMENT CO. LIMITED.

Contract—Queen Victoria Nigara Falls Park Commissioners—62 Vict. (2) ch. 11, sec. 36 (O.)—Grant of License to Take Water from Niagara River within Park—Development of Electrical Power for Commercial Use—Construction of Contract—Assignment by Grantees to Electrical Company—Lease of Undertaking to another Company—"Amalgamation"—Assignment of License—Expert Evidence to Aid in Interpretation—Inadmissibility—Rental Payable to Commissioners—Ascertainment of—Energy Consumed in Act of Production—Limitation of Quantity of Water to be Taken—Rate of Payment for Water Taken over and above Amount Limited—Injunction against Future Breach of Contract by Excessive Taking—Counterclaim—Declaration as to Proper Construction and Maintenance of Development Plant.

An action by the Attorney-General for the Province of Ontario and the Commissioners for the Queen Victoria Niagara Falls Park against the Electrical Development Company Limited and the Toronto Power Company Limited, to recover: (1) arrears of rental due by the defendants according to the plaintiff's construction of a certain agreement of the 29th January, 1903, between the Park Commissioners and William Mackenzie and others (called "The Syndicate"); (2) damages by reason of the taking of more water by the defendants than was authorised by the grant in the agreement, according to the plaintiffs' interpretation thereof; (3) an injunction restraining the defendants from taking water in excess of the grant; and (4) a declaration that a certain agreement between the two defendants was within the prohibition of clause 25 of the agreement of 1903, and consequential relief. There was a counterclaim by the defendant the Electrical Development Company Limited for a declaration of its rights as to the use of the water under the grant and a declaration that the defendants' plant as constructed was such as they were entitled to construct and use under the agreement.

The action and counterclaim were tried without a jury at a Toronto sittings.

G. H. Kilmer, K.C., and Christopher C. Robinson, for the plaintiffs.

H. J. Scott, K.C., D. L. McCarthy, K.C., and A. W. Anglin, K.C., for the defendants.

MIDDLETON, J., in a written judgment, referred to the Ontario enactment 62 Vict. (2) ch. 11, sec. 36, by which the Commissioners, with the approval of the Government, were empowered to enter into an agreement with any person or company to take water from the Niagara river, within the limits of the park, for the purpose of generating electricity etc., upon such terms and conditions as might be embodied in the agreement. Pursuant to this power, by the agreement of 1903, the Commissioners granted to the Syndicate "a license irrevocable to take from the waters of the river, within the park, a sufficient quantity of water to develope 125,000 electrical or pneumatic or other horse power *for commercial use.*"

By clause 14 of the agreement, the license was granted for a term of 50 years from the 1st February, 1903, with certain rights of renewal, the Syndicate paying therefor a clear yearly rental of $15,000, and an additional sum "for each electrical horse power generated and used and sold or disposed of over 10,000 electrical horse power."

By clause 25 it was provided that the Syndicate should not amalgamate with any other company nor should it enter into any arrangement which might have that effect.

By the interpretation clause (C) the expression "The Syndicate" was to be understood to include the assigns of the members; and by clause 27 the Syndicate agreed to sell and transfer the rights and franchises acquired under the agreement to a company to be formed.

On the 25th March, 1903, the Syndicate assigned to the Electrical Development Company, and the agreement and assignment were confirmed by the Ontario Act 5 Edw. VII. ch. 12.

On the 15th April, 1908, an agreement was entered into by the Electrical Development Company with the Toronto and Niagara Power Company (a transmission company) and the Toronto Power Company, by which the undertakings of the Electrical Development Company and of the transmission company were leased to Toronto Power Company from the date of the agreement until the 1st March, 2013. In consideration of this, the Toronto Power Company agreed to assume and pay the rental due the Commissioners and to make all accruing payments due upon debentures issued by the lessors, and, if the earnings permitted, a sum which would enable the Electrical Development Company to pay dividends upon its preferential stock.

This was not, in the learned Judge's opinion, an amalgamation of the defendant companies, nor had it the effect of an amalgamation. It was at the most an assignment of the license—a thing contemplated by the agreement: In re South African Supply and Cold Storage Co., [1904] 2 Ch. 268; City of Toronto v. Toronto Electric Light Co. (1905), 10 O.L.R. 621.

Evidence of experts to aid in the interpretation of the agreement was not properly admissible.

Evidence properly admissible established that in the generation of electrical energy some portion of the energy is consumed in the act of production, and never becomes available for sale. In Attorney-General for Ontario v. Canadian Niagara Power Co. (1912), 2 D.L.R. 425, 3 O.W.N. 545, it was determined by the Court of Appeal that, under the contract there considered, payment must be made for the entire horse power actually generated without any allowance for such losses. But that contract did not contain the words "for commercial use;" the effect of the introduction of those words was to entitle the licensee to generate not merely 125,000 horse power, but 125,000 horse power "for commercial use"—the measurement of the power was to be made at a point where the electrical energy could be delivered for commercial use

The more important question was the meaning to be attached to the limitation of the license by which the defendants might take from the river a sufficient quantity of water to develope 125,000 electrical horse power for commercial use. According to the plaintiffs' contention, that was the extreme amount of water which might be taken at any one time. The defendants contended that "for commercial use" indicated that the limit was not one to be strictly adhered to, and suggested that there should be read into the grant the words "upon the average, provided the swing does not exceed 20 per cent." But the true meaning of "for commercial use" was to be found in excluding from the computation all energy used by the company itself in the manufacture of saleable electricity.

Clause 14 should be given the meaning attributed by the Judicial Committee to almost the same words used in the agreement in question in Attorney-General for Ontario v. Canadian Niagara Power Co., already referred to: see [1912] A.C. 852. In that case the additional rental was to be paid "for and from" the development of the higher power—in clause 14 of the agreement now in question the words "and from" were omitted; but that, in the opinion of the learned Judge, was not sufficient to distinguish the two cases. Reference to City of Montreal v. Montreal Light Heat and Power Co. (1909), 42 Can. S.C.R. 431.

Water taken for the purpose of generating electricity over and above the amount limited by the contract should be paid for at a rate not wholly different from that stipulated for by the contract for electricity generated between 30,000 electrical horse power and the maximum—i.e., 50 cents for each horse power generated, used, and disposed of. This should not be upon a cumulated peak basis—the payment should be made at the rate indicated for the highest point of excess during each half year.

The defendants had exceeded the amount of water which they were authorised to take under the agreement; and there should be an injunction to restrain them from any further breach of contract—subject to the terms of any order made under the authority of the War Measures Act.

The defendants' plant and machinery were erected in accordance with the provisions of the agreement, and were in accordance with the best obtainable expert opinion at the times of erection; but evidence going to shew that the plant was not efficient, having regard to the advance made in this branch of engineering during the last few years, was given. The evidence was insufficient for a satisfactory determination of this issue. No declaration upon the subject should be made; the question should be left open for determination in further litigation.

The limit beyond which the defendants may not go in taking water from the river is to be determined by the amount necessary for the production of 125,000 electrical horse power by the machinery installed and maintained in a reasonable state of efficiency. The agreement does not contemplate any change in the system as the standard of efficiency advances.

Judgment for the plaintiffs accordingly with the general costs of the action; the defendants to have the costs of the issue as to amalgamation; no costs of the counterclaim.

ROSE, J. FEBRUARY 28TH, 1919.

*BONISTEEL v. COLLIS LEATHER CO. LIMITED.

Company—Directors—Proposed Allotment of Unissued Shares of Authorised Capital by Directors to themselves—Means of Gaining Control of Affairs of Company—Rights of other Shareholders—Resolution of Directors—Declaration of Invalidity—Injunction.

The plaintiff, the holder of a large number of the shares of the capital stock of the defendant company and a director and secretary-treasurer of the company, sued, on behalf of himself and all shareholders other than the individual defendants, for an injunction restraining the allotment and issue of certain shares to the individual defendants, 4 of whom were the plaintiff's co-directors; the fifth was a shareholder to whom the 4 defendant directors proposed to issue some of the shares in respect of which the injunction was sought.

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

J. W. Bain, K.C., and M. L. Gordon, for the plaintiff.

H. C. Moore, for the defendant Bain.

J. M. Ferguson, for the other defendants.

ROSE, J., in a written judgment, said that the company was incorporated in 1912, under the Ontario Companies Act, with an authorised capital stock of $150,000, divided into 1,500 shares of the par value of $100 each. Before the 26th October, 1918, 1,208 of the 1,500 shares had been issued. The plaintiff was the registered holder of 458 of these, and he had agreed to buy from another shareholder, Oxley, his holding of 150 shares. The remaining 600 shares were held in various lots by 9 different persons. The plaintiff would thus, as soon as Oxley's shares were

transferred to him, have the control, as the holder of a majority of the shares actually issued.

At a meeting of the directors on the 26th October, 1918, the question of the issue of the 292 remaining shares of the authorised capital stock came up; and a resolution was passed, the plaintiff voting against it, that "the balance of the share-capital of the company unissued be offered to the shareholders at par—this offer to remain open for 20 days." Then the president asked each director present how many shares he would take, and various applications were made, the numbers asked for by the applicants bearing no fixed relation to their previous holdings. The plaintiff said he would take his proportion based upon his holding of 608 shares; but the president said that the plaintiff was not entitled to be treated as if he was the holder of the Oxley shares. The president also said that offers had been received for all but 98 of the shares available for allotment, and he asked the plaintiff whether he wanted the 98. The plaintiff repeated that he wanted his proportion. The directors then passed a resolution that the applications for the shares be accepted, that is, the applications of the 5 directors, the individual defendants in the action, and that certificates be issued accordingly. The plaintiff voted against the resolution.

At a meeting of shareholders held on the 14th December, 1918, one Jones, the holder of 5 shares, joined forces with the plaintiff, and these two, the plaintiff voting on his registered holdings and as proxy for Oxley, carried, by a vote of 613 against 595, a resolution expressing disapprobation of and a refusal to ratify and confirm the action of the directors in attempting to issue the shares.

Upon the evidence, the learned Judge said, the purpose of the defendant directors in all they did was to deprive the plaintiff of the controlling position which he had acquired. They thought it was not in the best interest of the company that he should control its affairs, and—in that sense—they acted in good faith and in what they believed to be the best interest of the company; but, nevertheless, what they attempted to do was exactly what Martin v. Gibson (1907), 15 O.L.R. 623, shews that directors have no right to do—they were making a one-sided allotment of stock with a view to the control of the voting power.

The shares were not, it was true, shares of *new* stock, properly so called; but the proposed issue of the remainder of the authorised shares was, in all its essentials, practically the same thing as the new issue which was in question in Martin v. Gibson. No shares had been issued for a long time; the company had been carrying on a successful business with the capital which it had; the readily

saleable assets were apparently worth 3 or 4 times the par value of the issued shares; each shareholder was justified in considering that he had an interest in those assets proportionate to his holding in the issued shares; to do something which would alter those proportions, to do it without giving to each shareholder an opportunity of protecting his interest, and to do it, not in the usual course of the company's business, but for the purpose of shifting from one body of shareholders to another the power of electing directors and so of controlling the company's policy, was beyond the power of the directors.

Harris v. *Sumner* (1909), 39 N.B.R. 204, considered and distinguished. If that case was at variance with Martin v. Gibson, the latter was of course binding. See also Swayze v. Grobb (1915), 8 O.W.N. 316.

The case was reopened and the evidence of Oxley was taken after the close of the trial; but his testimony did not appear to the learned Judge to be of importance.

There should be judgment declaring that the resolution passed by the directors on the 26th October, 1918, accepting the applications of the individual defendants for shares and directing the issue of certificates was void, and enjoining the defendants from acting thereon; the individual defendants to pay the plaintiff's costs.

McGIRR v. STANDEAVEN—FALCONBRIDGE, C.J.K.B.—FEB. 25.

Timber—Cutting and Removal—Payment for—Credit—Tender—Payment of Money into Court—Payment out—Costs.]—Action for a declaration that the plaintiff was entitled, in respect of a balance due, to a lien on timber cut, for an injunction, and for damages. The action was tried without a jury at London. FALCONBRIDGE, C.J.K.B., in a written judgment, said that the reasons for the order of Middleton, J., on the motion to continue the injunction (13 O.W.N. 433), gave a fine history of the case up to trial. There was evidence that one Gregory said that the plaintiff could keep the $100 paid on the agreement to purchase the farm. If he meant this in any other sense than that the plaintiff should apply it on the "bush," it was petulantly said, and was quite without consideration. It followed that the plaintiff should credit that sum of $100. The plaintiff admitted a tender to him, in Mr. Vanstone's office, of $310. But the money was not paid into Court in pursuance of any tender, nor in such a way that the plaintiff could take it out—$310 of that money was contributed by Gregory.

The money was in Court representing the plaintiff's trees which the defendant had cut and carried away; and the plaintiff was entitled to the money in Court, less the $100—which he ought to have credited—but plus $25, the value of certain designated trees which the defendant ought not to have removed. There should be a judgment declaring the plaintiff entitled to have paid out to him the sum of $785 with accrued interest—the balance of the money in Court to be paid out to the joint order of the defendant and Gregory. The assignment of the agreement to the defendant had a very suspicious appearance. It looked like a device to get McGirr's timber without paying him, to quote the language of Middleton, J. There should be no costs of the motion for the injunction or of the action. T. G. Meredith, K.C., for the plaintiff. J. M. McEvoy, for the defendant.

CORRECTION.

In WHITE v. BELLEPERCHE, ante 443, 6th line from bottom of page, *for* "own wrong" *read* "agents' fraud."

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