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HIGH COURT OF JUSTICE.

SUTHERLAND, J. MARCH 11TH, 1910.

RE MACDONALD AND MACDONALD.

Arbitration and Award—Determining Price to be Paid for Shares in Company — Basis of Valuation — Terms of Submission — Evidence.

An appeal by James Fraser Macdonald from an award of arbitrators.

On the 31st January, 1906, four persons, of whom the appellant was one, then comprising the wholesale dry-goods firm of John Macdonald & Co., executed an agreement in writing, pursuant to which they transferred the assets of the partnership to a joint stock company to be incorporated. The partners took stock in the company to replace their partnership holdings. The agreement provided that, if any one of the four desired to sell his stock, he should give notice in writing to the other shareholders, who should have the right to purchase; that, should the stock not be purchased by a shareholder and remain unsold for 60 days after notice, the stock should be taken over by the remaining shareholders at a valuation to be determined by the award of arbitrators; in arriving at the value the arbitrators were not to go behind the entries in the company's books, but might take other matters into consideration; the arbitrators to fix the terms of payment, as well as the price to be paid; the stock to be taken by the remaining shareholders in proportion to the amount of stock they might hold, unless they otherwise agreed.

The appellant desiring to sell his stock, there was a voluntary reference under the agreement to three arbitrators, who made an award determining the value of the appellant's stock to be $88,400 at the date of the award, the 16th December, 1909, and gave directions as to the manner of payment.

E. F. B. Johnston, K.C., and W. H. Irving, for the appellant, contended that the arbitrators had proceeded upon a wrong basis of valuation, and one which conflicted with and contradicted the terms of the submission, and that in effect they had gone behind the entries in the books.

W. E. Middleton, K.C., and G. W. Mason, for the respondents.

SUTHERLAND, J., referred to the rule stated by Ritchie, C.J., in McRae v. Lemay, 18 S. C. R. 280, 283, and, after setting out the facts, concluded:—

Having carefully read and considered the award, I can see no error on the part of the arbitrators appearing on the face thereof or of any paper accompanying and forming part of it. No error or mistake has been admitted by them. They expressly disaffirm the reception of evidence "for the purpose of controverting, varying, or falsifying the figures set forth as assets in the statement of the 1st June, 1909, or otherwise entered in the books of the company."

I think, therefore, in dealing with this appeal, I should follow the principles laid down in McRae v. Lemay, and Dinn v. Blake, L. R. 10 C. P. 388; and, doing so, must dismiss the appeal with costs.

TEETZEL, J., IN CHAMBERS. MARCH 12TH, 1910.

*GAGNE v. RAINY RIVER LUMBER CO.

Third Party Procedure — Con. Rule 209 — Relief over—Tort — Measure of Damages.

Appeal by the Minnesota and Ontario Power Co. from an order of the local Judge at Kenora dismissing a motion by the appellants to set aside a third party notice served by the defendants on the appellants, under Rule 209.

The plaintiff was the holder of a license entitling him to operate a ferry between the town of Fort Francis, in Ontario, and two towns in Minnesota, on the opposite banks of the Rainy river, which is a navigable stream and the international boundary.

The defendants, a lumbering company, were engaged in driving or floating logs down the river at the points where the plaintiff was entitled to operate his ferry; and the action was for damages arising from the plaintiff's business as a ferryman being interfered with by the defendants' logs, the plaintiff alleging that the river was so filled and blocked with logs that navigation was impossible.

*This case will be reported in the Ontario Law Reports.

The defendants alleged that, at a point below the plaintiff's ferry docks, the appellants had erected a dam and power plant in such a manner that driving logs down the river was impeded, and that the sluiceway provided by the appellants in their dam was inadequate for the purposes intended; and that, if the plaintiff was impeded in the operation of the ferry, it was by reason of the erection and construction of the dam and power plant by the appellants and the inadequacy of the means provided for floating logs past the sluice or dam.

The procedure under Rule 209 is confined to claims for contribution over, indemnity over, and other relief over, against the third party.

Featherston Aylesworth, for the appellants.

A. E. Knox, for the defendants, contended that the case came within that part of the Rule providing for other relief over.

TEETZEL, J.:—Prior to 1895 the Rule was the same as the English Rule, and was limited to claims for contribution or indemnity. In that year it was held, as to the provision for indemnity, in Payne v. Coughell, 17 P. R. 39, following the English decisions, that the Rule applied only "to claims for indemnity as such, either at law or in equity, and did not apply to a right to damages arising from breach of contract, the latter being a right given by law in consequence of the breach of a contract between the parties, while the former is given by the contract itself."

The Rule was subsequently amended by inserting the words "or any other relief over against." As was suggested in Confederation Life Association v. Labatt, 18 P. R. 266, the amendment was probably made in consequence of Payne v. Coughell and other cases shewing the former narrow compass of the Rule. . . .

[Reference to the Labatt case and remarks of Street, J., at p. 269.]

The defendants do not claim a right against the third parties by reason of breach of any express or implied contract; and I think the material falls short of charging tortious acts against the defendants, because, for all that appears, the third parties may have erected their dam and sluiceway within their legal rights.

Assuming, however, that the third parties are guilty of tort . . . no case was cited, nor have I been able to find any case, where a claim for relief over has been allowed to be made by a defendant against a third party in consequence of a tort committed by the third party—other than cases . . under sec. 609 of the Consolidated Municipal Act, 1903. . . . I am of

opinion that the amended Rule does not extend to such a case as this, but to cases where the right to relief over is given by law in consequence of a breach of contract between the third party and the defendant, either express or implied, or is a right given by statute.

Even assuming that the procedure is applicable to claims arising out of tort, how can it be said that the damages which the plaintiff has suffered by reason of the combined acts of the defendants and the third parties are the measure of damages the defendants would recover, if entitled to recover anything, from the third parties? And if the measure of damages does not correspond—and I do not see how it could in a case like this—Mliler v. Sarnia Gas Co., 2 O. L. R. 546, is a complete bar to the defendants' right to bring in the third parties. . . .

Appeal allowed and third party notice set aside, with costs.

TEETZEL, J., IN CHAMBERS. MARCH 14TH, 1910.

RE GOOD AND JACOB Y. SHANTZ & SON CO. LIMITED.

Company—Transfer of Shares—Refusal of Directors to Allow—Dominion Companies Acts, sec. 45—By-laws of Company—Approval of Directors.

Motion by J. S. Good for a mandamus to compel the company to allow a transfer to the applicant of five shares of fully paid-up stock.

H. S. White and W. M. Cram, for the applicant.

E. E. A. DuVernet, K.C., and E. W. Clement, for the company.

TEETZEL, J.:—Upon the material it is quite clear that the shares in question are fully paid up, and that the applicant, J. S. Good, duly requested the transfer to be made upon the company's books of the shares in question, which stood in the name of Isaac Good, and that the directors of the company refused to allow it to be done after having been given reasonable time to comply with the request.

I would also find upon the material that the directors acted in good faith in refusing to allow the transfer to be made, and that they were honest in the position taken that it was not in the interests of the company to permit the applicant to become a shareholder.

The only question, therefore, is, whether, under the statute and by-laws of the company, the directors can be compelled to allow the transfer to be made upon the books of the company.

The company was incorporated under the Dominion Companies Act, sec. 45 of which provides that the stock of a company incorporated thereunder shall be personal estate and shall be transferable in such manner and subject to all such conditions and restrictions as are prescribed by Part I. of the Act or by the letters patent or by the by-laws of the company.

Section 80 authorises the directors to make by-laws regulating the transfer of stock.

By-law number 17 of the company provides: "That shareholders may with the consent of the board, but not otherwise, transfer their shares, and such transfers shall be recorded in a book provided for the purpose and signed by him or her and the transferee duly witnessed. But no person shall be allowed to hold or own stock in the company without the consent of the board, and all transfers of stock must first be approved by the majority of directors before such transfer is entered."

It was held in In re Imperial Starch Co., 10 O. L. R. 22, in the case of a company incorporated under the Ontario Companies Act, which contains a provision similar to that found in the Dominion Act, that the Act nowhere authorises a company to refuse to transfer on their books fully paid-up shares, notwithstanding that in that case the company had passed a by-law providing that no transfer should be valid until approved of by the directors, and that all transfers of stock should be at the discretion of the directors.

I cannot distinguish that case from this, and I am bound to follow it, notwithstanding that it may be difficult to reconcile it with such cases as Re Macdonald and Mail Printing Co., 6 P. R. 309; In re Gresham Life Assurance Society, L. R. 8 Ch. 446; and In re Coalport China Co., [1895] 2 Ch. 404.

I must therefore allow the application with costs.

BRITTON, J. MARCH 14TH, 1910.

*RE RAYCRAFT.

Quieting Titles Act—Certificate of Title free from Mortgage—Mortgagee not Heard of for Long Period—Presumption of Death — Absence of Claim by Mortgagee or Heirs—Claim of Crown by Escheat—Statute of Limitations—Claim not Proved—Certificate free from Claim—Crown Grant after Mortgage and Presumption of Death—Estoppel.

Appeals by the Crown, in a matter under the Quieting Titles Act, from the report and certificate of the Local Master of Titles

*This case will be reported in the Ontario Law Reports.

at Stratford, and from the certificate of the Inspector of Titles.

On the 24th November, 1906, Thomas Raycraft filed a petition asking for investigation and a declaration of his title to the south part of the east half of lot 4 in the 1st concession of Mornington.

The matter was referred to the Local Master, who, on the 10th April, 1907, made his report, and mentioned in it a mortgage upon the land, made by James Raycraft, the grantor of the petitioner, in February, 1877, to one John Irwin, for $900.

After the report was made, the Local Master's attention was called to the fact that there might possibly be an escheat to the Crown of the money in the mortgage mentioned or the mortgaged land. The Master thereupon notified the Attorney-General for Ontario, and on a later day all parties, including counsel for the Attorney-General, appeared before the Local Master. No evidence was offered on behalf of the Crown proving any claim to the mortgage money or any part thereof.

On the 21st November, 1908, the Local Master certified that there had not appeared before him at any time any contestant in regard to the title to the land in question or to any incumbrance or incumbrances thereon, and that on the evidence he found that the Crown had no title or interest in the land.

This certificate was filed, and a certificate of title was afterwards issued by the Inspector of Titles in favour of the petitioner.

The appeals were from these certificates.

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

R. U. McPherson, for the petitioner.

BRITTON, J.:— . . . An appeal lies from the order or decision of the Inspector . . . : see Rule 1013.

An appeal may be taken from the report of the Local Master at Stratford: see Rules 767-771. . . .

The Crown asks that the certificate of title be subject to the right of the Crown to the land. The Crown, though called upon to do so, will not attempt to prove any claim. Its position is, that, if the mortgagee, John Irwin, died intestate and without heirs, there is a claim on the part of the Crown; that this claim is not barred by any Statute of Limitations; and so the Crown is not bound to prove it, in these proceedings, and that the certificate of title, if issued, should be expressly made subject to the right of the Crown under the mortgage mentioned.

I do not think so. . . .

[Reference to the provisions of sec. 25 of the Quieting Titles Act.]

Under this Act the Crown is to be treated as an individual and the rights of the Crown as the rights of individuals. The alleged possible right of the Crown is that John Irwin may have died intestate and without heirs. That right, if it exists, can as well be established now as later, because, to establish it, John Irwin must, in any possible view of the case, have died before the 2nd February, 1896.

The mortgage from James Raycraft to John Irwin is dated the 2nd February, 1877; the first instalment became due on the 2nd February, 1878. Assuming . . . that the payment to one William Kerr was a valid payment on the mortgage, then the next instalment fell due on the 2nd February, 1879. This was not paid, and nothing has been paid since, and John Irwin, so far as appears, has not been heard from or heard of as being alive since a date prior to the 2nd February, 1878.

If John Irwin was not in fact dead on the 2nd February, 1896 —putting that as the longest possible period required to bar him or his heirs, if any—there could be no claim on the part of the Crown to this land or the mortgage money. But the Crown's possible case is based upon the death of John Irwin on or prior to the 2nd February, 1885. . . . The Crown, in asserting a claim by escheat, cannot rely solely upon the presumption of Irwin's death. There is no presumption that he died on any particular day within the seven years, or that he died without heirs. The presumption would be that he left heirs. The presumption would be sufficient to establish death, but intestacy and death without leaving heirs would require to be proved.

Why is the Crown not as well able to establish that now, if a fact, as it may be at any time later, and, if not able, why should the Crown be in any other or better position under the Act than an individual?

It would not, as I view it, be any ground for an individual mortgagee to prove his claim in quieting title proceedings, that his mortgage, although past due, was not barred by the Statute of Limitations. An opportunity should be given to a person claiming to be a mortgagee to establish his right. . . . As the Crown was not in a position to assert its right, and did not, but merely suggested a possibility of being able to do so within sixty years from the time the cause of action arose to the Crown—that, in my opinion, will not do. . . .

There is another objection . . . . The Crown's right . . . arose upon Irwin's death. At that time the title to the mortgaged land was in the Crown, and on the 25th October, 1890, was granted under the great seal to James Raycraft, the

mortgagor, who mortgaged to Irwin. This grant contains only the usual exceptions as to waters, access thereto, etc., and there is no reservation as to any right of the Crown to the mortgage mentioned or to any right, present or future, to the land or in any way as to the alleged right, either of John Irwin or of the Crown, to John Irwin's estate. I am of opinion that this grant cut out the mortgage as between James Raycraft and the Crown. The petitioner . . is a purchaser for value from James Raycraft.

Appeals dismissed with costs.

DIVISIONAL COURT. MARCH 14TH, 1910.

WARD v. TOWN OF OWEN SOUND.

Municipal Corporations — Local Option By-law — Repealing By-law—Submission to Electors—Voting on—Form of Ballot—Directions to Voters—Action to Compel Council to Submit another By-law—Change in Territorial Limits of Municipality.

This action was brought by the plaintiff, a ratepayer of Owen Sound, on behalf of all other ratepayers of that place, to have it declared that a certain by-law which the council introduced and submitted to the electors was not validly dealt with or submitted or voted upon, and for an order compelling the municipal council to submit to the electors another by-law for the repeal of the existing local option by-law.

The action was tried at Owen Sound by CLUTE, J., without a jury, and was dismissed.

The plaintiff appealed, and asked to have judgment entered in his favour.

Counsel consenting thereto, the appeal was heard by BRITTON and SUTHERLAND, JJ.

J. B. Mackenzie, for the plaintiff.

A. G. MacKay, K.C., for the defendants.

BRITTON, J.:—On the 15th January, 1906, the council passed local option by-law No. 1172, prohibiting the sale by retail in the town of Owen Sound of spirituous liquors. This by-law is now in force.

In December, 1908, the council, without any petition, and of their own mere motion, introduced a repealing by-law, being by-law No. 1321, and gave this a first and second reading. The votes of the electors of the municipality were ordered to be taken on this by-law "by the same deputy returning officers and polling clerks

and at the same polling places as may be duly appointed by by-law of the said council for the next annual election of the members of the said council, and shall be taken on the same day and during the same hours as the said annual election, that is to say, on Monday the 4th day of January, 1909, commencing at 9 o'clock in the forenoon and continuing until 5 o'clock in the afternoon."

A by-law, No. 1331, for the then next election for members of the council for Owen Sound, was passed on the 15th December, 1908. This seems perfectly regular, since the amendment of sec. 338 (a), of the Consolidated Municipal Act, 1903, by 4 Edw. VII. ch. 22, sec. 8.

The votes of the electors upon repealing by-law No. 1321 were taken, and upon the new form of ballot as prescribed by 8 Edw. VII. ch. 54, sec. 10, amending in that respect sec. 141 of the Liquor License Act. This amendment changes the ballot from—

	For the By-Law.
	Against the By-Law.

to

	For Local Option.
	Against Local Option.

The votes were 1312 for local option and 1126 against local option, giving a majority in favour of local option of 186. The by-law was therefore defeated by the ratepayers. The "directions for the guidance of voters in voting," as prescribed by the Municipal Act, were changed to meet the requirements of the new form of ballot. The voting was strictly in accordance with "the directions for the guidance of voters voting" as posted up in the different polling places.

The plaintiff's counsel contends that, notwithstanding the changed form of ballot, the change in the directions was unauthorised. With this I do not at all agree. The by-law was one repealing the local option by-law, and, if the directions were not changed, they would read thus: "The voter will go into one of the compartments, place a cross (thus X) on the right hand side in the upper space, if he votes for the by-law, and the lower space if he votes against the by-law." That vote would then be for local option and against it. The matter was made very clear and plain by the directions as given. No one was misled; a large majority declared in favour of local option, in an apparently fair contest, where there was no chance of confusion or of not understanding the issue. To use the words of the Act, the repealing by-law "was not approved by the electors."

The plaintiff in bringing this action desires to clear the way for the council to introduce and submit, if they desire to do so, another repealing by-law before the expiration of three years from the 4th January, 1909.

I am of opinion that, if the repealing by-law had been approved by the requisite majority of the electors, it would have been impossible, upon the facts shewn, and for reasons given, to have quashed it; and so I am of opinion that nothing in the directions to voters, or in any other matter or thing brought before the Court, can avail to set aside the submission of or voting upon the repealing by-law.

Even if my decision had been the other way, I am of opinion that the plaintiff could not, upon the facts, maintain this action. It is not shewn that the ratepayers, or any of them, desire to have another by-law submitted, or that the council either desire to submit or intend to submit or refuse to submit another by-law.

In Re Vandyke and Village of Grimsby, 19 O. L. R. 402, a petition had been presented to the council, signed by 143 ratepayers, asking to have another repealing by-law submitted. That was a motion to a Judge in Chambers for a mandamus. Such an application gives no warrant for an action at law by a ratepayer who, without petition or application to the council, and without knowing what, if any, action the council intends to take, finds some flaw in what the council has done.

A further objection strongly urged by the plaintiff's counsel was that the change of the territorial limits of Owen Sound, by county by-laws 728 and 735, in some way affected the voting upon the repealing by-law. The former of these county by-laws did not come into force until the 15th January, 1909, and the latter until the 29th January, 1909. In no way has either by-law any bearing upon the repealing by-law or the voting thereon. Part of the township of Brooke was attached to Owen Sound by order of the Ontario Railway and Municipal Board. That order was not made until the 4th February, 1909, and it signifies nothing, as to the matter now under consideration, that the order, for the purpose of adjusting matters dealt with, took effect as if passed on the 31st December, 1908.

I agree with the decision of the learned trial Judge. There are not any grounds disclosed in the evidence or mentioned in argument upon which this action is maintainable.

The motion should be dismissed with costs.

SUTHERLAND, J.:—I agree.

OSLER, J.A. MARCH 15TH, 1910.

*HESSEY v. QUINN.

Landlord and Tenant—Provision in Lease for Rebate—Distress for Rent Reserved without Making Rebate—Tenant's Remedy —Replevin—Action on Covenant—Pleading — Excessive Distress—Damages—Counterclaim for Rent — Reference—Costs.

Action for wrongful and excessive distress, for replevin, etc. Counterclaim for rent.

The plaintiff was tenant of the defendants of the hotel and premises in the town of Orillia known as "The Orillia House" for a term of ten years from the 1st May, 1899, renewable for a further term of ten years, at the yearly rental of $1,200, payable in equal sums of $100 on the first day of each month, commencing on the 1st June, 1899. The lease contained the usual covenant by the lessee to pay the rent, and a proviso for re-entry by the lessors on non-payment, and at the end a proviso as follows: "Provided that, in the event of any law being enacted in the future which shall prohibit the sale of intoxicating liquors upon the demised premises, the said lessors shall make a reasonable rebate in said rent during the period of such prohibition."

On the 8th February, 1908, a "local option" by-law was passed by the town of Orillia to prevent the sale of intoxicating liquors. The by-law was quashed on the ground of some irregularity, but, the Provincial Secretary having refused his consent, under 8 Edw. VII. ch. 54, sec. 11, to the issue of licenses to sell liquor in the town, the by-law having been in fact carried by the requisite majority of the persons entitled to vote thereon, the sale of intoxicating liquors became and was, in fact, by law prohibited therein, as held by RIDDELL, J., in a former action between the parties: Hessey v. Quinn, 18 O. L. R. 487.

Shortly after the execution of the lease, the plaintiff rented from the defendants, for use in connection with the hotel, three bed-rooms over an adjoining store, for $48 per year, payable at the rate of $4 per month at the same time as the rent of the hotel, and later on also rented, for a similar purpose, three sample-rooms over another adjoining store, at $80 per annum, payable monthly at $6.66 per month in the same way; and the necessary communications were made between these sets of rooms and the hotel.

In May, 1908, the plaintiff objected to paying the rent for the hotel until the amount of the rebate had been ascertained by

*This case will be reported in the Ontario Law Reports.

agreement or by arbitration, but the defendants refused to take less than the whole, apparently desiring that the plaintiff should surrender the lease. The defendants continued to demand and the plaintiff to refuse payment, and in the beginning of November, 1908, the rent as reserved by the lease was distrained for. The plaintiff paid the amount under protest, on the 11th November, having in the meantime (6th November), brought the action above mentioned for a declaration as to the rebate which should properly be allowed under the proviso. The judgment of RIDDELL, J., declared the plaintiff entitled to a rebate, and referred it to a Master to ascertain the amount. The formal judgment declared "that the plaintiff is entitled to a reasonable rebate in the rent payable under the lease, and that such reasonable rebate shall be calculated from the 1st May, 1908, during such portion of the plaintiff's tenancy as the prohibition may be in force."

Notwithstanding the pendency of the action, the defendant on the 18th March, 1909, again distrained on the plaintiff, and on this occasion also for the whole of the rent as reserved by the lease, payable in November and December, 1908, and January and February, 1909, and for the rent said to be due in respect of the six additional rooms rented—in all $482.64.

The plaintiff thereupon, on the 22nd March, 1909, brought this action, paying into Court (presumably under Rule 1069) the amount of the rent in question. He sued also for an excessive distress, the goods distrained being, it was said, more than were necessary to satisfy all rent that could, in any circumstances, be due and in arrear.

It was stated at the trial that the Master's report in the first action had been made on the 8th October, 1909, finding that the sum of $300 was a reasonable rebate; it was also said that an appeal from the report was pending.

J. M. Ferguson and J. T. Mulcahy, for the plaintiff.

A. E. H. Creswicke, K.C., for the defendant Quinn.

F. G. Evans, for the defendant Reeve.

OSLER, J.A.:—The principal contention was that, while the amount of the rebate was unascertained, the right of distress was suspended or non-existent, the amount payable for rent being, in the circumstances, no longer a fixed and ascertained sum.

As regards the rent in respect of the six rooms, it was contended that there was no right to distrain for it on the plaintiff's goods in the hotel, the only place where the distress was in fact made.

I have not now to consider the question of the plaintiff's right to have a reasonable rebate. That has been settled, so far as I am concerned, by the judgment of Riddell, J.; but it was not necessary for him to decide, and he did not decide, whether the defendants could distrain without having made it, or at all.

The questions are: (1) whether the right of distress was gone, the rent reserved having, as the plaintiff contends, become uncertain because the rebate had not been ascertained; (2) whether the lessors could distrain without having first made the rebate; or (3) whether the tenant's only remedy, apart from the question of the distress being excessive, is by action for breach of covenant.

It rested with the lessors, in the first instance at all events, to determine what rebate should be allowed. It was not, necessarily, to be the result of agreement between the parties, or of arbitration; but, if the lessors did not or would not make it, or if the amount was not reasonable, the Court would, as has been held, enforce the performance of the lessors' covenant by action, and so ascertain what the rebate should be. . . .

[Reference to Davis v. Stacey, 12 A. & E. 306; Chambers v. Mason, Cro. Jac. 34; Dalman v. King, 4 Bing. N. C. 105; Graham v. Tate, 1 M. & S. 609; Smith v. Fyler, 2 Hill (N.Y.) 648; Bickle v. Beatty, 17 U. C. R. 465; Hydraulic Brick Co. v. McTaggart, 76 Mo. App. 347, 354; 33 Cyc. 1570.]

Here the rebate was to be made by the lessors, and from time to time while the prohibitory law was in force. Their covenant did not directly affect the reservation. If the lessors had expressly agreed to allow, say, $300 per annum during that time, it would not have affected their right to distrain, according to the cases I have referred to, that not being a "defalcation" of the rent; and I cannot see how it makes any difference in this respect that the rebate had not been ascertained by the lease. It would be ascertained on payment of the rent, which was not, though the rebate may have been, uncertain. For the lessors' refusal to make it, the tenant's remedy was, in my opinion, by action for breach of covenant, and therefore, so far as the action is founded on replevin, it fails, the rent not having been tendered before the distress.

In respect, however, of the claim for making an excessive distress, I think a cause of action has been well proved. The value of the goods distrained, making every allowance which is usually made in such case, was, as I find, wholly out of proportion to the rent distrained for, part of which, indeed, that is to say, the arrears of rent for the six rooms, was not distrainable for at all on the goods in the hotel. The goods were not in fact removed

or sold, but the tenant was put to considerable inconvenience, and I assess the damage on this head at $100.

I am not satisfied that any cause of action had arisen for breach of covenant for not making a reasonable rebate in respect of the rent distrained for, the rent not having been paid or tendered before the distress; nor is it clear from the statement of claim that such cause of action is stated or relied upon. This, however, seems immaterial, as any relief to which the tenant may be entitled in respect of the rebate can be administered under Rules 1069 and 1072 in dealing with the money which has been paid into Court as security for the rent distrained for. This also makes it unnecessary to direct judgment for the return of the goods replevied, as all claims of the parties can be adjusted in the present action.

On their counterclaim the defendants are entitled to recover the rent accrued due under the lease from the 1st March, 1909, to the 1st October, 1909, subject to the rebate as ascertained or to be ascertained under the judgment of Riddell, J. They are also entitled to recover the rent due in respect of the six rooms during the same period.

The claim for double the yearly value for holding over these rooms I disallow. I find that, by the agreements under which they were rented, the plaintiff was to hold them during the term of his lease of the hotel.

Reference to the Master at Barrie to ascertain:—

(a) The amount of rent due to the defendants at the date of the distress and up to and inclusive of the 1st October, 1909, in respect of the hotel premises, at the rate mentioned in the lease, and for the additional sum of $10 per month agreed to be paid in consideration of putting in heating plant and apparatus.

(b) The rent due at and for the same periods for the six rooms in connection with the hotel.

(c) The rebate of the rent of the hotel as reserved by the lease, as the same may be or has ben ascertained . . under the judgment of Riddell, J.

(d) The amount of the rebate and the sum I have allowed as damages for excessive distress to be set off against the sum which may be found due for rent under the above heads; and the defendants to have judgment for the excess.

The plaintiff will have the costs of the action except in so far as such costs relate to his claim in replevin. The conduct of the defendants was harsh and unreasonable . . . and they should have no costs of the action or counterclaim.

Further directions and subsequent costs reserved.

SUTHERLAND, J. MARCH 15TH, 1910.

HAMMOND v. BANK OF OTTAWA.

Company—Winding-up—Mortgage Made by Company when Insolvent—Action by Liquidator to Set aside—Existing Debt to Bank—Security—By-law — Authorisation — Ratification—Ontario Companies Act, 1907, secs. 73, 74, 78.

Action by the liquidator of the New Ontario Brewing Co. Limited to set aside, as fraudulent or unauthorised, a mortgage of land made by the company to the defendants shortly before a winding-up order was made.

M. G. V. Gould, for the plaintiff.

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

SUTHERLAND, J.:—The New Ontario Brewing Co. Limited was incorporated under the laws of the province of Ontario, with its head office at North Bay. On and before the 8th December, 1908, the company was indebted to the Bank of Ottawa, the defendants, in the sum of $6,000. On that day the directors of the company passed a resolution in the following terms: "Whereas the Ontario Companies Act, sec. 73, authorises the directors of this company to borrow money for the purposes of the company. And whereas the directors of the company have borrowed from the Bank of Ottawa the sum of $6,000 for the purposes of the company. And whereas the directors have deemed it necessary and expedient to give to the Bank of Ottawa a mortgage upon the property of the company to secure the sum of $6,000. Now therefore be it enacted and it is hereby enacted that the directors of the company, having borrowed the sum of $6,000 from the Bank of Ottawa, upon the credit of the company, may issue bonds, debentures, mortgages, or other securities of the company, charge, hypothecate, mortgage, or pledge all or any part of the real or personal property, rights and powers, of the company, to secure such bonds, debentures, mortgages, or other securities, or any liability of the company. And it is further enacted that the president and the secretary be empowered to sign all documents necessary to secure the said loan of $6,000."

On the 22nd December, 1908, a special meeting of the shareholders of the company was held at its head office in North Bay for the purpose, among other things, of considering this by-law. In pursuance of the by-law and of the alleged confirmation thereof by the shareholders at that meeting, a mortgage, also dated the 22nd December, 1908, was executed by the company in favour of the bank for $6,000, upon property in North Bay then owned by the company.

The company was then undoubtedly in financial difficulties and unable to pay its debts in full, and the defendants later applied for a winding-up order, under R. S. C. 1906 ch. 144, and amending Acts, which they obtained on the 11th February, 1909. On the same day an order was also obtained appointing John W. McNamara, of North Bay, provisional liquidator, and a reference directed to the Local Master at North Bay to appoint a permanent liquidator.

On the 31st March, 1909, the plaintiff was duly appointed by the Master permanent liquidator of the company, and, on the 15th October, 1908, he secured the approbation and consent of the Master to this action being brought, as appears by a certificate filed.

The plaintiff in his statement of claim seeks relief under sec. 94 of the Winding-up Act, alleging that the mortgage in question, having been made within three months next preceding the commencing of the winding-up of the company, and being voluntary or gratuitous, without consideration, or with a merely nominal consideration, must be presumed to be made with intent to defraud the creditors.

In face of the fact that the consideration mentioned in the mortgage, $6,000, was proved at the trial to have consisted of an existing debt from the company to the bank, and that the bank were endeavouring to get security therefor, I cannot find that the plaintiff is entitled to succeed under that section.

The mortgage is, however, attacked by the plaintiff on the further ground that no by-law of the directors of the company was passed authorising the said mortgage, as required by the Ontario Companies Act. I assume the plaintiff to refer in his pleading to sec. 73 of the Ontario Companies Act, ch. 34 of 1907. At all events, it is under that section of the Act that the directors assumed to act in passing the by-law, as appears on its face. So far as the mere formal passing of the by-law is concerned, it has apparently been regularly passed. It is the only action of the directors of the company apparently intended to authorise the giving of the mortgage in question, and it is expressly said to have been taken under and in pursuance of the section referred to. But, when we come to read carefully sec. 73, can it be said to apply or can it be construed as applying to a mortgage given to secure an existing debt or liability? Is not the clear deference in the section to the borrowing of money on the part of the company by the issue of bonds, debentures, or other securities? I think it is, and, if so, this by-law, which was not passed for such a purpose, but to secure an existing debt, is without effect for the purpose of making valid the mortgage in question. If this be so, then the mortgage never was properly authorised by the company, and the question of its ratification under sec. 74 becomes of no practical importance. As a matter of

fact, if it is important to decide whether the by-law was properly ratified under sec. 74, I find that it was not. Upon the evidence it does not appear to have "been confirmed by a vote of two-thirds in value of the shareholders present in person or by proxy at a general meeting of the company."

But it was contended on behalf of the defendants that it is sec. 78 that applies, and that under it no confirmatory by-law is necessary. A sufficient answer to that contention is that the by-law on its face expressly assumes to be passed under sec. 73, and a by-law so passed has no effect until it is so confirmed. Section 78 appears to be merely supplemental to sec. 73, and to authorise the directors to "charge, hypothecate, mortgage," etc., the "property" of the company "to secure any bonds," etc., duly authorised under sec. 73.

I find, therefore, that the mortgage in question was not properly authorised by the company, and must be set aside. There will therefore be judgment for the plaintiff, as liquidator of the New Ontario Brewing Co. Limited, to that effect, and the defendants will execute a discharge of the said mortgage. The plaintiff will have the costs of the action.

MEREDITH, C.J.C.P., IN CHAMBERS. MARCH 16TH, 1910.

* KEMERER v. WATTERSON.

Writ of Summons—Service out of Jurisdiction—Con. Rule 162 (e), (h)—Place of Contract—Place where Payment to be Made—Assets in Ontario—Garnishable Debt—Conditional Appearance.

Appeal by the defendant from the order of the Master in Chambers, ante 433, dismissing a motion by the defendant to set aside the order of a Registrar, sitting for the Master in Chambers, and the writ of summons and the service of it upon the defendant in Montreal, but giving him leave to enter a conditional appearance.

E. P. Brown, for the defendant.

W. R. Smyth, K.C., for the plaintiff.

MEREDITH, C.J.:—The material upon which the Registrar's order, which gave leave to serve the writ out of Ontario, was made,

* This case will be reported in the Ontario Law Reports.

was, no doubt, insufficient, but, upon the material before the Master on the motion, he, upon the authority of Great Australian Co. v. Martin, 5 Ch. D. 1, properly dealt with the motion upon the material before him, which would have been sufficient in the first instance to have warranted the making of the order.

The right to have service out of Ontario allowed is rested by the plaintiff upon the provisions of Con. Rule 162, clauses (e) and (h).

The Master, following Canadian Radiator Co. v. Cuthbertson, 9 O. L. R. 126, being of opinion that, upon the material before him, it was in doubt, "(1) whether payment under the contract was made in Ontario or Quebec, and, if made in Quebec, whether payment was to be made in Ontario, and (2) whether the defendant had assets in Ontario sufficient to satisfy Rule 162, clause (h)—though that seemed not unlikely"—made the order which is complained of.

If, as Mr. McCoomb deposed, there was no binding contract prior to the shipment of the goods at Morrisburg, the case comes, according to Blackley v. Elite Costume Co., 9 O. L. R. 382, within clause (e) of Rule 162, for the contract would then be governed by the law of Ontario, and in that case the place of payment would be in Ontario, where the creditor resides.

Mr. McCoomb's statement is disputed by the defendant, and in such cases, as decided by the Chancellor in Canadian Radiator Co. v. Cuthbertson, the proper practice is "not to try the disputed question of jurisdiction upon affidavits, but to permit the defendant to enter a conditional appearance, and thereafter raise his contention on the record."

It is also, I think, shewn that the defendant, at the time the order was made, had assets in Ontario, within the meaning of clause (h) of Rule 162. That one person or firm, at all events, owed him a garnishable debt of more than $200, is not open to question.

It was contended . . . that this debt was not assets in Ontario within the meaning of the Rule, but I am unable to agree with that contention. That a garnishable debt is assets within the meaning of a similar Rule was the opinion of the Court of King's Bench in Manitoba in Brand v. Green, 13 Man. L. R. 101; of Mathers, J., in Gullivan v. Cantelon, 16 Man. L. R. 644; and of Macdonald, J., in Bank of Nova Scotia v. Booth, 10 W. L. R. 313.

The decisions of the Manitoba Courts are in accordance with the statement of the law by Mr. Dicey in his Conflict of Laws, 2nd ed., p. 310; . . . Commissioner of Stamps v. Hope, [1891]

A. C. 476, 481, 482; . . . Winans v. The King, [1908] 1 K. B. 1022, 1030.

If, as was contended . . ., the statement of Mr. Dicey is to be limited in its application to the determination of the situation of the debt for the purposes of an administration, the reasons which led to its adoption in the case of administration, I think, apply to clause (h) of Rule 162.

The purpose of the Rule manifestly is to enable a creditor, who is not otherwise entitled to sue his debtor in an Ontario Court, to do so for the purpose of obtaining satisfaction out of the debtor's property in Ontario which may be made available to satisfy a judgment recovered in an Ontario Court, and it must, therefore, I think, have been intended that whatever property in Ontario might be made available for that purpose should be assets within the meaning of the Rule. . . .

[Reference to Love v. Bell Piano Co., 10 W. L. R. 657, disapproving it.]

Appeal dismissed; costs in the cause.

DIVISIONAL COURT. MARCH 17TH, 1910.

McCABE v. BELL.

Fraud and Misrepresentation—Exchange of Properties—Misstatement as to Existence of Stable — Knowledge — Reliance on Statement—Damages—Costs.

Appeal by the plaintiff from the judgment of BRITTON, J., dismissing without costs an action for misrepresentation and fraud arising out of the exchange of a stock of general merchandise owned by the plaintiff for 300 acres of land in Muskoka and a house and lot in Toronto. Representations were alleged to have been made by the defendant, orally and in writing, in substance, that there was erected on the Muskoka land a barn 30 x 50, and that there was a stone stable underneath the whole of the barn; that about 100 acres of the land were cleared; and that machinery could be run over any part of the cleared 100 acres.

The plaintiff never saw the property until after the transaction was closed. The defendant had visited the property at least twice before that.

There was in fact no stone stable underneath the barn, and there were only 45 or 50 acres cleared.

The appeal was heard by BOYD, C., CLUTE and LATCHFORD, JJ.

W. A. Proudfoot, for the plaintiff.

R. McKay, for the defendant.

BOYD, C.:—Representations alleged to be made were, that on land was a barn 30 x 50, and that there was a stone stable underneath the whole of the barn, and that 100 acres were cleared, and that machinery could be run over any part of such 100 acres.

It is not clearly made out that the acres cleared were no more than 40 or 50, but the evidence of Arnott goes to shew that the plaintiff was told by the defendant that he would not vouch for the number of acres cleared, and that he had better go and see for himself. It is proved, however, that the statement as to the stone stable underneath the barn is not according to the fact, and this is a misstatement which must have been known to the defendant, who twice visited the place and went into the stable. He told the plaintiff that he had been on the place and could speak of it personally. There is no doubt that the defendant gave a typewritten statement to the plaintiff as to the acres cleared and as to the stone stable underneath, and that, at the time, he knew it was incorrect as to the stone stable. The onus is on the defendant to get rid of the effect of this misstatement, and I do not think it is accomplished by his saying that it was made pursuant to information derived from a former owner, Edwards. This is explicitly denied by the plaintiff, and it was known to the defendant, when the option was signed by the plaintiff, that he had not been to see the place—and the defendant had told the plaintiff that it was a difficult place to get to (in the winter.)

Upon the evidence, it seems to me manifest that the defendant had made representations as to the clearing and stable apart from the typewritten paper, and that these were of such a nature as to trouble him. At p. 59, the defendant says (at the time when Arnott was there): "I told the plaintiff plainly that any representations that had been made by myself or any person else in reference to the farm, that I did not know anything at all about them, or that I would not vouch for them, and I told him to go and see the property himself." According to Arnott, the plaintiff said he would take the defendant's word for it: pp. 52 and 48. According to the defendant, he made no statement to the plaintiff (i.e., on the 9th November): p. 74.

The matter is considerably confused, but I have no doubt that misstatements were made knowingly by the defendant and relied on by the plaintiff, which (at all events) as to the stone stable were not effectively displaced.

The size of the stone stable was not given in the representation, and it will be enough to assess the damages from this misstatement at, say, $300, which the defendant should pay, with costs of appeal. The Judge gave no costs of the action, and this should not be disturbed.

CLUTE, J., wrote an opinion to the same effect, in which he referred to Redgrave v. Hurd, 20 Ch. D. 1; Brownlee v. Campbell, 5 App. Cas. at p. 950; Smith v. Chadwick, 9 App. Cas. 187, 190; Arnison v. Smith, 41 Ch. D. 367.

LATCHFORD, J., concurred.

STOW v. CURRIE—MASTER IN CHAMBERS—MARCH 14.

Security for Costs—Bond—Condition — Costs.]—Motion by the plaintiff for the allowance of a bond filed for additional security for costs pursuant to orders of the 25th January and 16th February: see ante 418, 458. The Master was of opinion that the condition of the bond was defective, and directed that a new bond should be filed; but, after that direction, the plaintiff elected to pay $1,000 into Court in lieu of giving a bond, and did so. The only order made was one allowing the plaintiff to remove the bond from the files, and providing that the costs of the motion should be costs to the defendants in the cause. G. E. McCann, for the plaintiff. F. Arnoldi, K.C., for the defendants.

DAVIDSON v. ST. ANTHONY GOLD MINING CO.—SUTHERLAND, J.—MARCH 14.

Principal and Agent—Authority of Agent to Pledge Credit of Company—Evidence—Onus.]—Action for the price of goods alleged to have been supplied by the plaintiff to the defendants, an incorporated company. The plaintiff alleged that the goods were ordered for the defendants by S., who had authority to bind the defendants, or to whom an option had been given to purchase a mine of the defendants in such circumstances as to make it incumbent upon the defendants to notify the plaintiff that S. had no such authority. Held, that the onus was upon the plaintiff to establish S.'s agency in order to bind the defendants: Bowstead

on Agency, 3rd ed., p. 14. This he had not done; but, on the contrary, the defendants had clearly shewn that he was not their agent at the time. The plaintiff had not shewn any continuous course of dealing between the defendants and S. upon which the defendants could be charged. Action dismissed with costs. W. A. Dowler, K.C., for the plaintiff. A. J. McComber, for the defendants.

BOWLEY v. CORNELIUS—TEETZEL, J.—MARCH 14.

Vendor and Purchaser—Contract for Sale of Land—Mistake—Specific Performance.]—Action by purchaser for specific performance of an agreement for the sale of land. There had been a prior agreement by the defendant to sell the same land to W., as to which the Judge finds that, though it was binding upon the defendant, both he and the plaintiff, by mistake, assumed that it was not binding and that W. had abandoned all right under it; and holds that the case is not one in which the Court should decree specific performance or award damages in lieu thereof. Action dismissed without costs. Alexander MacGregor, for the plaintiff. R. S. Robertson, for the defendant.

BROWN v. CITY OF TORONTO—MASTER IN CHAMBERS—MARCH 15.

Jury Notice—Action against Municipal Corporation—Misfeasance or Nonfeasance.]—Motion by the defendants to set aside the plaintiff's jury notice in an action against the city corporation to recover damages for injuries caused to the plaintiff "by reason of a hole or depression in the boulevard," at the north-west corner of Elizabeth and Albert streets, "caused by the negligence of the defendants taking up the old sidewalk and not filling in." Held, a case of non-repair within sec. 104 of the Judicature Act. Reference to Burns v. City of Toronto, 13 O. L. R. 109; Keech v. Town of Smith's Falls, 15 O. L. R. 300, 302; Sangster v. Town of Goderich, 13 O. W. R. at p. 421; Dickson v. Township of Haldimand, 2 O. W. R. 969, 3 O. W. R. 52; Smith v. City of Vancouver, 5 B. C. R. 491; Goldsmith v. City of London, 16 S. C. R. 231; Barber v. Toronto R. W. Co., 17 P. R. 293. Order made striking out the jury notice; costs in the cause. H. Howitt, for the defendants. S. H. Bradford, K.C., for the plaintiff.

F. J. CASTLE CO. LIMITED v. BAIRD—DIVISIONAL COURT—MARCH 15.

Partnership—Holding out—Estoppel—Judgment—Election.] Appeal by the defendant Baird from the judgment of BRITTON, J., ante 403. The Court (BOYD, C., MAGEE and LATCHFORD, JJ.) dismissed the appeal with costs. W. L. Scott, for the appellant. J. F. Warne, for the plaintiffs.

MCDONNELL v. GREY—MASTER IN CHAMBERS—MARCH 16.

Venue—Action against License Commissioners—R. S. O. 1897 ch. 88, sec. 15.]—Motion by the defendants to change the venue from Barrie to Whitby. The action was against the license commissioners and inspector for North Ontario for an injunction restraining the defendants from removing a license from hotel premises owned by the plaintiff, or for a mandamus to restore the same, and for damages and other relief. The motion was made on the ground that the defendants were persons fulfilling a public duty, within the meaning of R. S. O. 1897 ch. 88, and that this was an action which, under sec. 15, should be tried in the county where the act complained of was committed, i.e., in the county of Ontario. The defendants relied on Leeson v. License Commissioners of Dufferin, 19 O. R. 67, and the plaintiff on Haslem v. Schnarr, 30 O. R. 89. The Master distinguished the Leeson case, and, following the Haslem case, dismissed the motion; costs in the cause. H. P. Cooke, for the defendants. D. Inglis Grant, for the plaintiff.

STANDARD CONSTRUCTION CO. v. WALLBERG—MASTER IN CHAMBERS—MARCH 17.

Conditional Appearance—Defendant Residing out of the Jurisdiction—Joint Liability.]—Motion by the defendant Wallberg for leave to enter a conditional appearance. The action was against Wallberg and a company to recover the value of work done by the plaintiffs. The defendant Wallberg resided in Montreal, and was sued as jointly liable for the work. He wished to dispute the jurisdiction of the Court, but did not move to set aside the service upon him or the order for the issue of a concurrent writ. The motion was refused. Con. Rule 162 (e) and (h), Comber v. Leyland, [1898] A. C. 527, and Emanuel v. Symon, [1908] 1 K. B. 302, referred to. Motion dismissed with costs to the plaintiffs in any event. M. Lockhart Gordon, for the defendant Wallberg. G. F. McFarland, for the plaintiffs.

SMITH v. FINKELSTEIN—DIVISIONAL COURT—MARCH 17.

Contract—Work and Labour — Non-completion — Payment—Certificate of Engineer.]—Appeal by the defendant from the judgment of the District Court of Nipissing in favour of the plaintiffs in an action to recover $460 for sinking a shaft on the defendant's mining property. The appeal was based on three grounds: (1) that the certificate of the defendant's engineer was a condition precedent to the right of the plaintiffs to recover; (2) that the plaintiffs failed to complete their contract; (3) that the flow of water into the shaft was not a sufficient reason for abandoning the work. LATCHFORD, J., delivering the judgment of the Court (BOYD, C., MAGEE and LATCHFORD, JJ.), said that there was little merit in the appeal. The plaintiffs did their work as directed, and were willing to continue to do any further work the defendant or his engineer might ask them to do. They were willing to sink another shaft, if asked, but they were not asked, and no other work was assigned to them. It was unreasonable to expect that the plaintiffs should keep themselves and their men for days, at large expense, upon the property, awaiting instructions. They were justified, in the circumstances, in abandoning the work. Further sinking in the last shaft was impossible. The strong in-flow from a source several feet below the bottom of the shaft rendered the shaft useless as a mining shaft. It could be worked (if at all) only at very great expense. The engineer's statement in his telegram to the defendant that the water was surface water was untrue. He asked the defendant whether he should withhold payment; and the defendant, misled by his false statement, so directed him. Whether there was or was not such an interference with his discretion as was discussed in Wallace v. Temiskaming and Northern Ontario Railway Commission, 12 O. L. R. 126, 37 S. C. R. 696, is immaterial. The report was, in the circumstances, not a condition precedent to the plaintiffs' right to recover. Appeal dismissed with costs. J. H. Spence, for the defendant. J. P. MacGregor, for the plaintiffs.