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COURT OF APPEAL.

MOSS, C.J.O., IN CHAMBERS. MARCH 17TH, 1911.

MARTIN v. BECK MANUFACTURING CO.

Appeal—Leave to Appeal to Court of Appeal from Order of Divisional Court Affirming Judgment at Trial—Questions of Fact—Contract—Amount in Controversy—Absence of Special Circumstances—Refusal of Leave.

Motion on behalf of the defendants for leave to appeal from the order of a Divisional Court, ante 680, affirming, with a slight variation, the judgment pronounced by LATCHFORD, J., ante 219, after trial without a jury.

F. E. Hodgins, K.C., for the defendants.
D. C. Ross, for the plaintiff.

MOSS, C.J.O.:—The grounds urged in support of the application are that the Courts below placed a wrong construction upon a provision in the contract between the parties with regard to the measurement or scaling of the logs and timber to be cut, taken out, and delivered by the plaintiff at the defendants' booms in Penetanguishene; that upon the question of the quantity of culls the finding of fact upon the evidence should have been in favour of the defendants; and that the matter in controversy is a sum nearly sufficient to entitle the defendants to appeal as of right.

I have read the proceedings at the trial, the contract in question, and the judgments complained of. I am not at all convinced that any serious mistake was made in the conclusions of fact arrived at. And I say this without imputing or intending to impute in any respect want of veracity on the part of any of the witnesses.

In any view, it would require a very strong case of apparent error in the findings of fact to justify granting leave to appeal on that ground.

There is no substantial question of law involved. The view taken of the intention of the parties as to the method of scaling and the persons by whom it was to be done, as appearing by the contract itself, read in the light of the circumstances, appears to be not without plausible force. No question of law of general application is raised. The contract is said not to be in common or usual form in some respects. Its meaning turns upon its special language, and there is a good deal in the case that gives colour to the view that the parties intended that the work of the Government scalers should govern in this particular instance.

The proximity to the statutory limit of the sum awarded against the defendant by the judgment is obviously not in itself a sufficient special circumstance. On the whole, there do not appear to be any special reasons for treating the case as exceptional.

The application is refused with costs.

HIGH COURT OF JUSTICE.

DIVISIONAL COURT. MARCH 16TH, 1911.

*BOYD v. CITY OF TORONTO.

Easement—Lateral Support—Withdrawal by Operations in Street Adjoining Plaintiff's Land—Subsidence—Injury to Buildings—Right to Support Independent of Prescription—Compensation for Damage Caused—Appreciable Disturbance—Absence of Negligence—Questions for Jury.

Appeal by the defendants from the judgment of RIDDELL, J., upon the findings of a jury, in favour of the plaintiff, for the recovery of $600 damages and costs.

The action was for damages for the injury caused to the plaintiff's land and house by the operations of the defendants, the city corporation, in digging a trunk sewer in Wyatt avenue, without taking proper precautions for shoring up the sides, whereby a subsidence of the plaintiff's land fronting on Wyatt avenue resulted and the walls of his house were cracked, etc.

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

*To be reported in the Ontario Law Reports.

D. C. Ross, for the defendants.
A. C. McMaster, for the plaintiff.

The judgment of the Court was delivered by BOYD, C.:— For the law in this case (in view of the doubt raised by Smith v. Thackerah (1866), L.R. 1 C.P. 564), I would be content to rest on the authority of Page Wood, V.-C., in Hunt v. Peake (1860), Johns. 705. He holds that a land-owner has a right, independent of prescription, to the lateral support of the neighbouring land owned by another so far as that is necessary to uphold the soil in its natural state as its normal level, and also to compensation for damage caused either to the land or to buildings upon the land by the withdrawal of support. . . .

[Review of the cases, including the two mentioned above; Brown v. Robins (1859), 4 H. & N. 186; Stroyan v. Knowles (1861), 6 H. & N. 454; Attorney-General v. Conduit Colliery Co., [1895] 1 Q.B. 301, 312, 313; Banks on the Law of Support (1894), pp. 36-38, 71; Mitchell v. Darley Main Colliery Co. (1884), 14 Q.B.D. 125, 137; Chapman v. Day (1883), 47 L.T. N.S. 705; Jordeson v. Sutton Southcoates and Drypool Gas Co., [1899] 2 Ch. 217, 239; Cabot v. Kingman (1896), 166 Mass. 403; Gale on Easements, 8th ed. (1908), p. 415, note.]

The unsatisfactory character of the case of Smith v. Thackerah, as reported, is incisively discussed in Banks, pp. 36-38, and the view of Bowen, L.J., in Mitchell v. Darley Main Colliery Co., 14 Q.B.D. at p. 137, is quoted. Bowen, L.J., is evidently of the opinion that the true view is, that, if a substantial or appreciable subsidence can be proved, the plaintiff is entitled to nominal damages, quite apart from the amount of actual damages; and that, I think, is the correct result, as manifested by the general trend of the cases, with the sole exception of Smith v. Thackerah. . . .

Here the plaintiff's scheme was disturbed and changed to a visible, appreciable, and substantial extent by cracks and subsidence, by the withdrawal of lateral support resulting from the trenching operations in the street. It does not matter as to the sort of soil which was found below . . . ; the removal of it caused the disturbance in the plaintiff's land. . . .

It was not necessary to prove negligence in the methods of work adopted by the defendants; the work must be done so as not to disturb the soil of the frontagers. . . .

No objection was made to the Judge's charge or as to the questions submitted to the jury. It would be a proper course in cases of this kind to ask the jury whether buildings added to

the weight of the land requiring lateral support, and whether the same subsidence would have occurred if the land had been without the buildings. But all the evidence enables us to ascertain these matters in the plaintiff's favour, and there would be no purpose in further litigation.

The judgment is affirmed with costs.

DIVISIONAL COURT. MARCH 16TH, 1911.

*MERCHANTS BANK v. THOMPSON.

Promissory Note—Liability of Accommodation Makers—Note Deposited by Customer with Bank for Collection—Right of Bank to Lien for Indebtedness of Customer Arising after Maturity of Note—Right Subject to Equities between Original Parties—Bills of Exchange Act, secs. 54, 70—Evidence—Partnership Account—Failure of Consideration.

Appeal by the defendants from the judgment of BOYD, C., 1 O.W.N. 1015.

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

Travers Lewis, K.C., and J. W. Bain, K.C., for the defendants.

J. F. Orde, K.C., for the plaintiffs.

FALCONBRIDGE, C.J.:—This appeal comes before us in unsatisfactory shape. The action was brought upon a promissory note. Two of the original parties thereto are not parties to this action, viz., the two principals in the transaction upon which the note was based—Fox, the payee, and Living, both resident at Vancouver.

The note is as follows:—

$2,000.00. Due Oct. 4/07.

Vancouver, July 1, 1907.

Three months after date I promise to pay to the order of C. H. Fox at the Union Bank of Canada, Vancouver, the sum

*To be reported in the Ontario Law Reports.

of two thousand dollars with interest at the rate of 5 per cent. per annum until due and 5 per cent. per annum after due until paid. Value received.

ALF. H. LIVING.
SARAH C. TURLEY.
T. W. THOMPSON.

Indorsed: "Pay to the Merchants Bank of Canada or order. C. H. Fox."

Thus, according to the form and style of the note, Living was a joint and several maker with the two defendants, who were his uncle, Thompson, and his mother-in-law Mrs. Turley. It is alleged and not denied that the defendants, who live at or near Ottawa, were merely sureties for Living.

The plaintiffs are the indorsees of the note, but there is dispute as to the purpose for which the note was indorsed.

The plaintiffs' manager at Vancouver was examined upon commission, and his deposition was read as part of the evidence at the trial.

The statement of defence, as it appears in the record, sets up in effect: (1) that the defendants were sureties for Living, to the knowledge of Fox and the bank, and that the defendants were not liable, (*a*) because they were released by a binding agreement made by the bank giving an extension of time to the principal debtor, or (*b*) because no notice of dishonour was given to them at maturity; (2) that the note was made without consideration and was indorsed to the bank without consideration and after maturity and subject to the equities between the original parties.

At the trial counsel for the defendants asked leave to amend the defence to meet the facts as shewn by the manager's depositions. . . . Before us, without objection, a memorandum was put in . . . adding some new paragraphs to the statement of defence.

The following additional matters are now set up: (3) that the note was not discounted with or given as collateral security to the bank, but was left by Fox with the bank merely for collection, and that, subsequently, Fox, having become free of liability to the bank, and being, therefore, the owner of the note free from any claim on the bank's part, released the defendants (sureties) by making a binding agreement giving further time to the principal debtor; (4) that the consideration for the note, as between Fox and Living, failed; (5) that in either case the bank took the note (if at all) after maturity (when Fox subse-

quently became again indebted to the bank) and therefore subject to any equities which would be good as against Fox.

So far as the first ground of defence is concerned, the defendants did not succeed in proving, or getting the bank manager to admit, that the fact that the defendants were sureties was known to the bank at any stage of the proceedings prior to the commencement of the action. The manager knew that the note was given as the purchase-price of a share in Fox's business in British Columbia which Living was acquiring, and that the defendants were responsible persons residing near Ottawa; but, so far as appears, he drew no inference as to the existence of the relation of suretyship. For aught he knew, the defendants might be sureties or they might have a silent interest in the business. . . . The first ground of defence, therefore, fails, both as to the alleged extension agreement and as to the lack of notice of dishonour.

The third ground is, in effect, the first ground recast in consequence of the manager's evidence, from which it appeared that the bank had no part in the alleged agreement to give time to the principal debtor. If a binding agreement between Fox and Living to give time to the latter had been proved, in the circumstances alleged, it might have been a serious obstacle in the plaintiffs' way; but I agree with the Chancellor that no binding agreement was proved; and, therefore, the third ground also fails.

The validity of the other grounds of defence turns on the question whether the plaintiffs became the holders of the note in such circumstances that they are entitled to claim free from any defence which might be available between the original parties.

The Chancellor has held that the plaintiffs are holders for value to the extent of Fox's indebtedness to the plaintiffs at the commencement of this action, and are entitled to judgment under secs. 54 and 70 of the Bills of Exchange Act for this amount ($1,046.90) with interest and costs, and that as to the balance of the $2,000 and interest the plaintiffs hold as trustees for Fox, who is at liberty to bring action against the makers (in which action the question of failure of consideration could be tried.) . . .

[Summary, in chronological order, of the facts relevant to the bank's interest in the note, omitting any reference to the alleged suretyship or the alleged extension agreement.]

The manager says that the plaintiffs are suing in respect of advances "made to Fox in April, 1908, and subsequent there-

to;" but it appears that on the morning of the 24th November Fox was again clear of direct liability, although there were outstanding notes under discount.

Apparently during these periods in which Fox was free of direct indebtedness to the plaintiffs, there was always what the manager called an indirect liability, *i.e.*, there were outstanding drafts made by Fox, upon which he would be liable in case of dishonour at the hands of the drawees.

After the 24th November, 1908, Fox again became indebted to the bank, and this indebtedness increased until it amounted to $1,046.90 at the time of the issue of the writ, made up of an overdraft of $196.90 and two notes of $400 and $450 respectively, which were charged up to the account. Both these notes, or notes of which they were renewals, were outstanding on the 24th November, 1908.

The note sued on remained in the hands of the plaintiffs from its maturity on the 4th October, 1907, till the commencement of this action on the 2nd March, 1909.

Fox had, before the last-mentioned date, asked the plaintiffs to use pressure to obtain payment, but nothing had been done. . . .

Notwithstanding Fox's evidence, the impression made on me is, that the note was indorsed to the bank merely for collection and not as collateral. . . .

Judging not merely by the entries in the books, but also by all the dealings between the parties, the note in question seems to have been treated as a note which remained the property of the customer: see Grant on Banking, 6th ed., pp. 209, 215; Hart, 2nd ed., pp. 478, 479; Dawson v. Isle, [1906] 1 Ch. 633. . . .

[Reference to sec. 54 of the Bills of Exchange Act, sub-secs. 1 and 2.]

Under the first sub-section the plaintiffs would be entitled to recover although they had given no value, if Fox had given value; but I do not think the sub-section helps the plaintiffs in this case if the consideration given by Fox had failed before the plaintiffs became entitled to hold the note in their own right. When the alleged failure of consideration took place, the plaintiffs were mere indorsees for collection and had given no value, unless sub-sec. 2 can be invoked. If the plaintiffs had held the note as collateral security, they would have had a lien arising from contract, within the sub-section, at any period of the transactions in question, as there was always an indirect liability in existence: Canadian Bank of Commerce v. Woodward, 8 A.R. 347; cf. sec. 53. . . .

Even as mere indorsees for collection, the plaintiffs would have a banker's lien upon the note and would be holders for value under sub-sec. 2 of sec. 54, so long as their customer was in their debt, i.e., so long as there was a debt presently payable owing by their customer; but, if the note were not pledged as collateral security, the plaintiffs could not claim to be holders for value in respect of a mere liability: Grant, 6th ed., pp. 89, 215, 306; Hart, 2nd ed.. p. 240. . . . Halsbury's Laws of England, vol. 1, sec. 1256, p. 623, citing Bower v. Foreign and Colonial Gas Co., 22 W.R. 740, and Jefferys v. Agra and Masterman Bank, L.R. 2 Eq. 674.

What is the result of the fact that subsequent to the alleged failure of consideration between the original parties in July, 1908, Fox's direct indebtedness to the plaintiffs was cleared off (in November, 1908)?

If the plaintiffs are holders for value in respect of the indebtedness subsequently arising, it would seem to be on the theory that the note may be regarded as repledged to the bank after it was overdue. Even on this hypothesis, the Chancellor has held that there is no equity attaching to the note and that the bank may recover. This might be so if it had been proved that the note was deposited, prior to the maturity, as collateral security for a running account, even if there were intervals during which there was no indebtedness: Atwood v. Crowdie, 1 Stark. 483, cited in Chalmers, 7th ed., p. 94; but the plaintiffs have failed to prove that at any period the note was deposited as collateral security.

I think that the plaintiffs are in no better position than if they took the note for the first time when Fox became again indebted to the bank after the 24th November, 1908. Immediately prior to that time, they were mere holders for collection, subject to any defence that might be set up against their customer.

Under sec. 74 the plaintiffs may sue in their own name. But their right to recover is that of holders taking the note when it is overdue. The note then comes to the indorsee "disgraced," as Lord Ellenborough said in Tinson v. Franers, 1 Camp. 19. . . .

[Reference to Chalmers, 7th ed., pp. 107, 108, 130; Holmes v. Kidd, 5 H. & N. 775, 28 L.J. Ex. 112; Ching v. Jeffery, 12 A.R. 432, 435-6.]

The note was given for a share in a business, and . . . the termination of the partnership, if it results in a failure of consideration, is a defence to the action on the note.

It is true that no defect of title affecting the note "at its maturity" has been proved under the strict reading of sec. 70; but the section proceeds to declare that thenceforward, *i.e.*, after the negotiation, "no person who takes it can acquire or give a better title than that which had the person from whom he took it."

There is nothing in sec. 70 or sec. 74 prohibiting the setting up of the subsequent failure of consideration, and, in the absence of any clear rule derived from the language of the Act, we must apply the common law as declared in Holmes v. Kidd and Ching v. Jeffery. Compare Union Insurance Co. v. Wells, 39 S.C.R. at pp. 629, 632, 640. . . .

In this view of the matter, it becomes necessary, in order to decide whether the plaintiffs may recover, to pass upon the partnership transaction between Fox and Living. Although neither is a party to the action, both were called as witnesses at the trial. Apparently Fox dismissed Living—perhaps for good cause if he had been an employee. But there is no provision in the agreement for terminating the arrangement, and the method which Fox adopted to sever the business connection seems inapplicable to a partnership and involves an entire failure of consideration.

Living, on his own evidence, did receive some moneys, perhaps $1,000, beyond his expenses; but we are quite in the dark as to the state of the partnership account, except that Living stated that there were thousands of dollars in the business which he had assisted in making. Fox was asked about it in reply, and, on objection being taken, the Chancellor was willing to receive it for what it was worth, but the plaintiffs' counsel preferred to leave it at that."

Thus apparently the plaintiffs were willing to take their chance, without availing themselves of the opportunity given by the Chancellor of shewing that the $2,000 or some part of it is payable to Fox, notwithstanding the alleged termination of the partnership.

In my opinion, the appeal should be allowed with costs and the action dismissed with costs.

LATCHFORD, J.:—I agree in the result.

BRITTON, J., dissented, agreeing with the Chancellor, for reasons stated in writing.

CLUTE, J. MARCH 17TH, 1911.

JOHNS v. STANDARD BANK OF CANADA.

Banks and Banking—Cheque Marked "Good" by Bank—Acceptance by Payee of Draft from Bank in Lieu of Payment in Cash—Suspension of Payment by Bank—Rights and Liabilities of Drawer and Drawee.

Action to recover a sum of money alleged to have been deposited with the defendants, in the circumstances mentioned in the judgment.

G. H. Hopkins, K.C., for the plaintiff.

R. J. McLaughlin, K.C., and T. H. Stinson, for the defendants.

CLUTE, J.:—On the 16th December, 1910, the plaintiff had on deposit in the local branch of the Farmers Bank at Lindsay, $2,880.06. Owing to revelations made in an action then being tried at Lindsay, the plaintiff became alarmed as to the solvency of the Farmers Bank, and having on a former occasion deposited his money with the Standard Bank at one of their local agencies, he went to advise wtih the local manager of the Standard Bank at Lindsay as to what he had better do with regard to his deposit. The manager was not in, but the assistant-manager, Mr. Hutcheson, said that if he had anything deposited in the Farmers Bank he would change it at once. The plaintiff replied "all right." Hutcheson asked for the plaintiff's pass-book, which was given him. Hutcheson drew out a cheque in favour of the Standard Bank, which the plaintiff signed for the full amount of the deposit, and handed to Hutcheson, who thereupon sent a clerk with the pass-book and the cheque to the Farmers Bank with instructions to have the cheque marked. This was accordingly done. The pass-book was delivered up, the cheque was marked and returned to the Standard Bank, and thereupon the plaintiff was credited in the books of the defendants' bank with $2,880.06. This amount was entered in a pass-book which was delivered to him, and he left the bank.

On Friday the 17th December the Standard Bank entered a deposit slip in the Farmers Bank for $2,945.06, which amount included the plaintiff's cheque, and of which $65 was cash, and this sum was entered in the Standard Bank's pass-book by the Farmers Bank.

On the 16th there had been deposited in the Farmers Bank by the Standard Bank $117.12, which made a total of $3,062.80. The Farmers Bank had deposited with the Standard Bank $70.33, which left a balance of $2,991.85 due the Standard Bank by the Farmers Bank, as shewn by the ledger, and for this adjusted balance the Farmers Bank gave what was called a settlement draft on Toronto to the Standard Bank for that amount. The draft was dishonoured, the Farmers Bank having stopped payment.

The evidence of the manager of the Farmers Bank shews that if, instead of the adjusted settlement asked for, the Standard Bank had demanded payment of the cheque given by the plaintiff, the amount would have been paid on the 17th. The local manager of the Standard Bank admits that he received the adjusted settlement as payment, and that the plaintiff's cheque was in fact paid in that way.

Settlements which took place between the banks from time to time, and for which the balance in favour of either was arranged by cheque upon the principal office in Toronto, were a matter of convenience between the banks, and had nothing to do with the plaintiff, except that his cheque happened to form one of the items.

I find as a fact that the Standard Bank accepted the Farmers Bank as their debtor for this amount, and received such credit by the Farmers Bank in payment of the cheque, for which, had they been pleased to demand it, cash would have been paid. I find that this arrangement was so accepted by both banks on Saturday the 17th December, and the matter was closed, and the defendants became debtors to the plaintiff for $2,880.06, as represented by a credit to him of that amount in their books and by the pass-book delivered to him on that date.

It may be mentioned that these settlements are, as a usual thing, made twice a week. Between the Farmers Bank, however, and the other banks, they had been made once a week, and finally for the last three or four weeks, on account of the questionable solvency of the Farmers Bank, these settlements had always been made from day to day, where the amounts exceeded $500, and, where it exceeded $1,000, the settlement was made immediately. The draft taken by one local bank from another upon the head office was for the convenience of adjusting the balances from the various agencies at the clearing-house in Toronto.

In my opinion, the plaintiff ceased to have any claim against the Farmers Bank when his pass-book was delivered up to the Farmers Bank by the Standard Bank, and his cheque marked

good, which I find was accepted by the Standard Bank in lieu of money on the 16th. This possession was further confirmed and acted upon on the 17th, when the adjustments were made and the balance struck and the draft on Toronto accepted instead of payment direct.

At the close of the case, I was strongly of opinion that the plaintiff was entitled to judgment for the amount of his claim, but reserved judgment to enable me further to examine the cases cited by counsel.

Boyd v. Nasmith, 17 O.R. 40, seems directly in point. . . .

[Quotations from the report of that case.]

This seems to be the first case of the kind in the English or Canadian reports. . . .

[Reference also to First National Bank of Jersey City v. Leach, 52 N.Y. 350, 353; Brown v. Leckie, 43 Ill. 497.]

If it could be argued that the cheque was not in fact presented for payment until Monday, it would not have been presented, in my judgment, within a reasonable time, and the drawer, as between him and the bank, would be entitled to damages caused him by the delay, which in the present case would appear to be the amount of the deposit. See Bills of Exchange Act, R.S.C. 1906 ch. 119, sec. 166.

As to the effect of the act of the ledger-keeper in charging up the cheque in the Farmers Bank to the Standard Bank, giving credit to the plaintiff in their ledger, and entering the amount in his pass-book, see Nightingale v. City Bank of Montreal, 26 C.P. 74.

Mr. McLaughlin referred to Gaden v. Newfoundland Savings Bank, [1899] A.C. 281; The Queen v. Bank of Montreal, 1 Ex. C.R. 154; Capital and Counties Bank v. Gordon, [1903] A.C. 240; Farmers Bank v. Newland, 31 S.W. Repr. 38; Morse on Banking, 4th ed., sec. 220; Giles v. Perkins, 9 East 12.

On examination of these cases it appears to me that the decision in each case is on facts wholly different from the present case, and I find nothing in any of these decisions to modify the law as laid down in Boyd v. Nasmith.

There was a further defence raised on the pleadings. It appears that on the Tuesday following the suspension of the Farmers Bank the defendants procured an instrument to be signed by the plaintiff, not under seal, purporting to release and discharge the defendants from any liability to the plaintiff and to restore the parties to the position that they were in prior to the transfer of the deposit from the Farmers Bank to that of the defendants. The circumstances under which this document was

obtained were such as to make it, I think, quite impossible to be supported as a valid instrument, whatever its effect might be; and, after the plaintiff had given his evidence as to the manner of obtaining his signature to the same, the defendants' counsel, very properly, I think, by instructions from the general manager, abandoned all defence arising out of the instrument in question and as pleaded in par. 4 of the statement of defence, and left the question to be considered as if the instrument had never been signed.

The plaintiff is entitled to judgment for the amount of his deposit in the defendants' bank, as evidenced by the entry in their pass-book given to the plaintiff and in their ledger, namely, the sum of $2,880.06, with interest from the 16th December, 1910, and costs of this action.

DIVISIONAL COURT. MARCH 17TH, 1911.

ROCHE v. ALLAN.

County Courts—Removal of Action into High Court—Application after Final Judgment—County Courts Act, 1910, *sec.* 29.

After the delivery of the judgment of a Divisional Court, ante 787, dismissing (with a variation) the appeal of the plaintiff from the judgment of the County Court of York dismissing the action, the plaintiff moved, under sec. 29 of the County Courts Act, 1910, for an order removing the action into the High Court, so that the plaintiff might have the opportunity of a further appeal to the Court of Appeal.

The motion was heard by BOYD, C., LATCHFORD and MIDDLETON, JJ.

F. J. Roche, for the plaintiff

H. E. Choppin, for the defendant.

The judgment of the Court was delivered by BOYD, C.:—The application to remove to the High Court under sec. 29 of the County Courts Act of 1910, 10 Edw. VII. ch. 30, is only in a case where it appears that the case is one fit to be tried—of which the manifest meaning is, that it is to be brought up for the purpose of trial—not for the purpose of appealing from the

judgment given by the Divisional Court on an appeal from the County Court. The statutory writ in this regard corresponds to the common law right to certiorari, in that it is not granted after judgment except for purpose of execution: Sherk v. Evans, 22 A.R. 242; Walker v. Gann, 7 D. & R. 769.

There is no jurisdiction in a Judge or a Divisional Court now to interfere. Application refused with costs.

SUTHERLAND, J. MARCH 17TH, 1911.

RE WILSON AND VILLAGE OF WARDSVILLE.

Municipal Corporations—Local Option By-law—Day Fixed for Taking Vote More than Five Weeks after First Publication of By-law—Publication in Newspaper in Neighbouring Municipality—Copies of By-law not Posted in Four Public Places—Municipal Act, 1903, *sec.* 338 (1)—*Ballot Box not Provided with Lock and Key—Sec.* 138 (2) *of Act—Secrecy and Security of Receptacle Used—Irregularity Cured by sec.* 204.

Application by Jacob Wilson to quash by-law No. 199 of the village of Wardsville, being a by-law to prohibit the sale by retail of spirituous, fermented, or other manufactured liquors in the village.

The voting was on the 2nd January, 1911, when 90 votes were polled, 55 of which were cast for the by-law and 34 against, one ballot being spoiled. The result was that the by-law was apparently carried by a majority of $1\frac{3}{5}$ beyond the three-fifths of the votes polled and counted.

C. St. Clair Leitch, for the applicant.
J. M. Gunn, for the village corporation.

SUTHERLAND, J.:— . . . Three of the grounds of attack arise under sec. 338, sub-sec. 1, of the Consolidated Municipal Act, 1903. . . .

[Quoting sub-secs. 1 and 2 of the section.]

The first of these grounds is, that the day fixed for taking the vote was more than five weeks after the first publication of the by-law. It is admitted that the by-law was published in the "Glencoe Transcript," a newspaper published in the village of

Glencoe, on the 24th November and on the 1st, 8th, and 15th December, 1910. The five weeks, being calculated from the date of the first publication, namely, the 24th November, would expire on the 29th December, and consequently the date of polling, which was fixed for the 2nd January, 1911, was three days more than five weeks after such publication.

In view of the decisions in Re Armstrong and Township of Toronto, 17 O.R. 766, and Re Van Dyke and Village of Grimsby, 12 O.L.R. 212, I think this objection must be held to be fatal to the by-law.

The second objection is, that the by-law was published in the newspaper already mentioned, and that, as the village of Glencoe is not an adjoining or neighbouring locality of the municipality, the advertisement does not comply with the statutory requirement. The reeve of the village of Glencoe in an affidavit . . . says, however, that "the village of Glencoe . . . is the nearest municipality in the county of Middlesex to the village of Wardsville, and about eight miles' distance from Wardsville. There is no newspaper published in Wardsville." In these circumstances, I am inclined to think that this objection is not well taken.

The third objection is that the respondents did not "put up a copy of the by-law at four of the most public places in the municipality." It is admitted by the reeve, who was examined in connection with the application, that the by-law was only put up at one place in the municipality . . . namely, on the town-hall door. I think, following Re Mace and County of Frontenac, 42 U.C.R. 70, and Re Salter and Township of Beckwith, 4 O.L.R. 51, that this objection must also be held to be fatal to the by-law.

The fourth objection is, that the statutory requirement contained in sec. 138, sub-sec. 2, of the Municipal Act, namely, "The ballot boxes shall be made of some durable material, shall be provided with a lock and key," etc., had not been complied with. . . .

[Setting out the evidence of the clerk as to this, which shewed that the box used was a tin used for coffee, with a screw-top; that it was closed with the screw-top and sealed with wax.]

While it is plain that the box used was not one prepared in the usual form, and was not provided with a lock and key, nevertheless it is clear that it was a secret and secure receptacle for the ballots, and, upon the evidence of the clerk, served the purpose for which it was intended, with apparently satisfactory results.

I think that any irregularity as to the lock and key might well be considered as cured by sec. 204 of the Act.

The by-law will, therefore, be set aside with costs.

MIDDLETON, J., IN CHAMBERS. MARCH 18TH, 1911.

McILHARGEY v. QUEEN.

Appeal—Leave to Appeal to Divisional Court from Order of Judge in Chambers—Con. Rule 1278—*No Reason to Doubt Correctness of Decision—Scale of Costs—County Court Appeal—Con. Rule* 1132.

Motion by the defendant for leave to appeal from the order of RIDDELL, J., ante 781.

R. T. Harding, for the defendant.
Featherson Aylesworth, for the plaintiff.

MIDDLETON, J.:—Under Con. Rule 1278, I can give leave to appeal only (*a*) when there are conflicting decisions, and (*b*) when there appears to be good reason to doubt the correctness of the order in question. There is an additional requirement in each case, not necesary to consider, because it is admitted that there are no conflicting decisions, and I am satisfied that the order in question is correct.

It is enough to say that Con. Rule 1132 applies only to the taxation of costs up to the judgment, and does not apply to the costs of appeal. It does not make any difference that the judgment is not entered in the Court below till after the appeal—when entered it speaks from its date—in fact it is operative from the moment it is pronounced.

The costs of an appeal depend entirely upon the order of the Court of Appeal. That Court can mould its order so as to do justice. When the order gives costs, and nothing more is said, there is nothing to cut down the costs from those prima facie applicable to such an appeal. There is no jurisdiction in the Taxing Officer to enter upon an inquiry under Con. Rule 1132 as to the amount involved. If this result is not deemed just, the onus is upon the party liable to pay to draw the attention of the Court to the matter and to ask for an adjudication upon the point. The Rule in question places the onus upon

the plaintiff with reference to the costs up to the trial. He must seek an order to the contrary.

When once the order of the Divisional Court has issued, the defendant is too late. The Court is functus. The order issued accords with the judgment pronounced, and it is of no avail to suggest that the Court, if asked, might have otherwise ordered: Port Elgin Public School Board v. Eby, 17 P.R. 58.

While it may be unfair that a defendant should be made to pay more costs of an unsuccessful appeal because the action was improperly brought in the higher Court, it would be quite as unfair that he should have the right to appeal, and, no matter how hopeless and improvident the appeal, cast the greater part of the costs upon his opponent. The Court could well deal with the matter so as to avoid injustice, but any arbitrary rule would often be unfair.

Leave refused, with costs fixed at $10.

SUTHERLAND, J. MARCH 18TH, 1911.

KLINE BROTHERS v. DOMINION FIRE INSURANCE CO.

Fire Insurance—Goods on Described Premises—Transfer to other Premises—Re-transfer to Original Premises—Assent to—Want of Authority of Clerk of Former Agent—Ratification after Fire—Mistake of Fact.

Action upon a policy of insurance against fire in respect of a stock of tobacco contained in a building in Quincy, Florida, destroyed by fire on the 19th March, 1909. The policy was issued in the city of New York, for the defendants, by Dickson & Co., insurance agents, who were acting under an oral arrangement with the defendants, and were in the habit of filling out and issuing the policies. They had been supplied with a rubber stamp facsimile of the signature of the president of the defendants, for use as required. The policy was dated the 1st September, 1908. In October the plaintiffs applied for permission to transfer the policy so as to cover similar property contained in another building (the Owl Commercial Company building) in Quincy, and a form of consent to a transfer, not attached to the policy, was issued to the plaintiffs by the New York agents, and the signature of the president was put on with the rubber stamp. This was intended to be put on the back of the policy by way of indorsement. This transfer did not come

to the knowledge of the defendants until about the 4th December, 1908, after they had (in November) discontinued the authority of the New York agents, and taken away the stamp. Shortly before the 14th January, 1909, the plaintiffs, desiring to secure a re-transfer of the policy so as to cover similar property in the premises where the merchandise originally was, again applied to the New York agents, and one Strekira, a clerk employed by the latter, issued a document, initialled by him, purporting to be a consent to the re-transfer. This did not come to the knowledge of the defendants till after the action was brought. The goods destroyed were upon the original premises, and the plaintiffs alleged that they were covered by the re-transfer, and they alleged a ratification by the defendants.

L. G. McCarthy, K.C., and Frank McCarthy, for the plaintiffs.

H. Cassels, K.C., and R. S. Cassels, K.C., for the defendants.

SUTHERLAND, J. (after setting out the facts at length) :—The plaintiffs have apparently, and upon the evidence, sustained loss entitling them otherwise to make and maintain their claim if the policy was at the time of the fire in force so as to cover goods in the original premises.

It is admitted by the defendants that Dickson & Co. had authority to issue the policy in the first instance, and that it was in force at the time of the fire in so far as covering goods in the Owl Commercial Company building.

I do not think the "binder" left . . . with Strekira on the 14th January, 1909, was of any force. The arrangement or contract referred to therein was never indorsed to or added to the policy. It states that it is attached to and forms a part of the policy in question. It was never so attached, and neither Strekira nor Dickson & Co. nor the defendants ever had the policy in their hands to which to attach it. Neither Dickson & Co. nor Strekira, at the time it was initialled by the latter, any longer had any authority to act in any way for the defendants. I do not think Strekira at any time had. . . . In the absence of any testimony by either Dickson or Tweeddale (partner of Dickson), I cannot see or hold, that Strekira had authority to bind them, let alone the defendants: Walkerville Match Co. v. Scottish Union and National Insurance Co., 6 O.L.R. 679, and cases therein cited.

Not only did the "binder," then, in my opinion, have no

effect, but the indorsement (of transfer) left with Strekira never came to the knowledge of the defendants nor was ratified by them.

As to the second indorsement, it is clear that, at the time the fire occurred, it had not been brought to the attention of the defendants nor ratified by them. It was the duty of the plaintiffs, who knew of the fire, at once to notify the defendants . . . It is plain that the defendants had given no consent of any kind to the re-transfer at the time of the fire. There was, at that time, no binding contract between the parties to re-transfer. . . . The real date of the alleged ratification was subsequent to the date of the fire. But such alleged ratification was made under a mistake of fact, and in ignorance that, at the time, the merchandise in question had been destroyed by fire. Apart from such alleged ratification, the policy was then covering no merchandise in the premises at the corner of Love and Washington streets (the original premises), and the plaintiffs could claim no benefit as to insurance under the policy in question on the same.

I do not think the alleged ratification is binding on the defendants, in these circumstances. The defendants cannot, I think, be said to have waived their right to object to the alleged ratification when it is apparent that it was obtained without their knowledge of the fire and with that fact, known to the plaintiffs and their agent, withheld: Nippolt v. Firemen's Insurance Co. of Chicago, 59 N.W. Repr. 191; Western Assurance Co. v. Doull, 12 S.C.R. 446, 455; Grover and Grover Limited v. Mathews, [1910] 2 K.B. 401.

Judgment for the defendants with costs.

SUTHERLAND, J. MARCH 18TH, 1911.

BARTLETT v. BARTLETT MINES LIMITED.

Company—Director—Salary as Officer of Company—Approval of Shareholders—Ontario Companies Act, 1907, *sec.* 88—*Resolution of Directors—Confirmation—Performance of Duties.*

Action by John W. Bartlett to recover $2,500 as salary for a year as mineralogist for the defendants.

At the first meeting of the directors of the defendant company a resolution was passed appointing the plaintiff mineral-

ogist at a salary of $2,500 per year and travelling expenses. The plaintiff was himself one of the five directors, and the shareholders were the same five persons, and there were no other shareholders. At a shareholders' meeting, held on the same day as the directors' meeting, the by-laws passed by the directors were confirmed.

H. Cassels, K.C., for the plaintiff.
J. W. Bain, K.C., for the defendants.

SUTHERLAND, J. (after setting out the facts at length) :—The defendants contend, first, that the plaintiff never did any work as a mineralogist, and was not competent to do it if he had been asked to. He says in evidence that he had a mineralogist's outfit at the office of the defendants in Toronto, but did not set it up, as there was no occasion or opportunity for him to do so. He also says, in effect, that it was not as a mineralogist, in the strict sense of the term, that he was appointed at all; that the understanding between him and Monroe (the organiser of the defendant company) was, that he should be appointed to a position under that name, but should be available to do anything for the purposes of the company that he might be called upon to do. I think this latter is the true explanation. . . .

The defendants also say that the plaintiff's appointment was not sanctioned and confirmed by by-law, and referred to the Ontario Companies Act, 7 Edw. VII. ch. 34, sec. 88: "No by-law for the payment of the president or any director shall be valid or acted upon until the same has been confirmed at a general meeting."

It seems to me that this case is governed by the principle laid down in Mackenzie v. Maple Mountain Mining Co., 20 O.L.R. 615. Osler, J.A., says at p. 618: "I agree with Britton, J., that in substance all that the Act requires has been done. The mind of the directors has been expressed; so also has that of the shareholders, and exactly to the same purpose and with the same result."

Now what happened in the present case? The directors passed, at the meeting held on the 7th January, 1909, the resolution . . . "that Mr. J. Watson Bartlett be appointed mineralogist at the head office of the company, at a salary of $2,500 a year and travelling expenses." At an adjourned meeting of the shareholders, when all the then shareholders in the company were present, the minutes of the directors' meeting were laid before the meeting and approved, confirmed, and adopted.

Again, when the new board of directors had been elected on the same day, the minutes of the meetings of the directors and shareholders held previous to such meeting were laid before the meeting, gone over, considered, and approved.

At this time the plaintiff was a director of the company, and this approval covered many other things besides his appointment as mineralogist at $2,500 a year and expenses. . . .

It seems to me, it is clearly a case in which the mind of the directors has been expressed, and also that of the shareholders, and to the same purpose and with the same result. . . .

In these circumstances, I think the plaintiff is entitled to recover. It is clear, I think, that he was appointed to a position in the company, at the salary named, and that such appointment was ratified and confirmed. It is clear to me, and I find, that his employment was not intended to cover the technical duties of a mineralogist, but that he was to do any work that he was called upon to do for the company. It is, I think, clear that the officers of the company knew that he was constantly in attendance at the head office of the company, and that he was doing work in connection with the company. The resolution appointing him stood unchallenged and unaltered during the whole of the year for which he is claiming. Other officials appointed by similar resolutions, and at larger salaries, were being paid by the company.

The plaintiff will, therefore, have judgment for $2,500, without interest, and with costs of suit.

DIVISIONAL COURT. MARCH 18TH, 1911.

SMITH v. RANSOM.

Counterclaim—Default of Defence—Noting of Pleadings as Closed—Motion for Judgment on Counterclaim—Contract for Sale of Land—Specific Performance—Rescission of Contract—Defence and Counterclaim on Same Grounds—Practice—Method of Trial—Costs.

Appeal by the plaintiff from the order of RIDDELL, J., in the Weekly Court, on the 20th February, 1911, allowing the defendant to enter judgment on his counterclaim, after noting the pleadings (as to the counterclaim) closed for default of a defence thereto, unless the plaintiff elected to pay costs and have the noting set aside and come in and defend.

The action was by vendor for specific performance of a contract for the sale and purchase of land; and the defendant (purchaser) counterclaimed for a return of $50 paid by him as a deposit and for a charge on the land therefor. Judgment was given for this relief.

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

F. W. Carey, for the plaintiff.

T. Hislop, for the defendant.

The judgment of the Court was delivered by BOYD, C.:—The plaintiff claims specific performance, and sets up the contract in terms, by which it appears that the purchaser had paid $50 of the price as a deposit at the date of sale.

The defendant sets up various defences, exculpating himself from delay or blame for non-completion, and asks for rescission of the contract and a return of the deposit (par. 10). Then, as an appendix, he further pleads, by way of counterclaim, that, the plaintiff being in default, the deposit of $50 should be returned and made a charge on the land.

The last paragraph was not pleaded to, and the counterclaim was noted pro confesso, and, that part of the case being moved upon before the Court, judgment was given by default for a return of the deposit, the cause of action for specific performance remaining to be tried.

This is an extraordinary method of dealing with the action—the so-called counterclaim was a repetition of what is set up in the proper defence, and in such case the whole matter being for trial (without any joinder of issue or other subsequent pleading), it is open for the Court, according to the usual practice, to give judgment for the return of the deposit and charging it upon the land, in case the plaintiff fails in his suit: Turner v. Merritt, L.R. 3 Eq. 744.

Though pleaded as a counterclaim, this matter arises out of the contract and forms part of the defence. As said by Lord Esher, M.R., in Neck v. Taylor, [1893] 1 Q.B. 562, the Court is to consider whether the counterclaim is not in substance put forward as (part of) the defence to the claim, whatever form it may take in point of pleading.

In this state of the record, there should have been no noting pro confesso as to the counterclaim; for that stood for trial upon the earlier part of the defence; and the whole issue as to the right to performance specifically should go down to trial:

the note pro confesso should be vacated and the order in appeal also vacated. There should be no costs to either party of any of these proceedings—beginning with the noting pro confesso down to this order.

O'CONNELL v. KELLY—FALCONBRIDGE, C.J.K.B.—MARCH 17.

Landlord and Tenant—Tenancy from Year to Year—Evidence—Corroboration—Use and Occupation—Statute of Limitations—Counterclaim.]—Action by landlord against tenant to recover possession of the demised premises and a money demand for use and occupation. The learned Chief Justice was of opinion that the defendant had proved a tenancy from year to year, which had not been determined by notice to quit. His evidence was sufficiently corroborated, if it required corroboration. It was significant that the claim for use and occupation from the 26th March, 1905, to the 26th March, 1910, was not made in the statement of claim, but was first put forward by way of proposed amendment a few days before the trial. It was fully answered and accounted for by the evidence of the defendant and his witnesses, and the Statute of Limitations had no application. Action dismissed with costs. Judgment for the defendant on his counterclaim for $359.80 with costs. The defendant allowed to withdraw his additional counterclaim and to set it up by way of counterclaim or set-off pro tanto when the next gale of rent becomes due. J. J. Coughlin, for the plaintiff. J. C. Makins, for the defendant.

RE ANDERSON—MIDDLETON, J.—MARCH 17.

Will—Construction—Devise—Life Estate or Fee Simple—Rule in Shelley's Case.]—Application by the son of Henry Anderson, deceased, under Con. Rule 938, for an order declaring the construction of the will of the deceased. MIDDLETON, J.:—The rule in Shelley's case applies only where the testator has used the technical words "heirs" or "heirs of his body," and has no application in a case where the words used are "children" or "issue," etc., unless the Court can find that these words are used as equivalent to the technical words. Here it is abundantly plain that the gift is a gift to the son for life and on his death to his children. The question will be answered accordingly that the applicant has a life estate only. No other

question need be considered. No order as to costs save that the applicant pay those of the Official Guardian. W. M. Hall, for the applicant. J. R. Meredith, for the Official Guardian. W. T. Evans, for the executors.

RE BROWN—MIDDLETON, J., IN CHAMBERS—MARCH 16.

Costs—Petition for Declaration of Lunacy—Costs of Relatives Intervening.]—Upon a petition for an order declaring Naomi Brown a lunatic, some of her relatives intervened, and asked for costs. An order declaring lunacy was made; and as to costs the learned Judge said:—It is well settled practice that next of kin who intervene upon a lunacy application are not allowed costs out of the estate unless it can be shewn that the fact that they have intervened has been financially beneficial to the estate—when, upon principles of salvage, costs may be allowed. There is nothing in this case upon which I can lay hold to justify a departure from this rule. Costs will, therefore, be allowed to the petitioner only. The intervening parties here have not even the status of next of kin, and their action only confirms the propriety of the petitioner's course. F. E. Hodgins, K.C., for the petitioner. Frank Denton, K.C., for the relatives.

MONTGOMERY V. COCKSHUTT PLOUGH CO.—FALCONBRIDGE, C.J. K.B.—MARCH 18.

Contract—Work and Labour—Rate of Payment—Evidence—Quantum Meruit—Costs.]—Action to recover $1,245 for teaming done for the defendants. The plaintiff claimed $5 per day or 50 cents an hour for each man and team, while the defendants alleged that the price to be paid was $4 per day or 40 cents an hour, and paid $1,000 into Court. The learned Chief Justice said that the plaintiff had failed to establish a contract by telephone to pay $5 a day or 50 cents an hour. The plaintiff swore that he said twice that the charge would be at that rate, and he was corroborated as to that, but he did not swear that this was assented to, and the person who was speaking to him, on behalf of the defendants, denied that he assented. The other teamsters hired by the defendants were getting only $4 a day. And, as to a quantum meruit, the plaintiff failed to satisfy the onus of proof that the rate ought to be $5 a day. The money

paid into Court was sufficient to satisfy the plaintiff's claim. Judgment for that amount, without costs to either party, and order for payment out of Court to the plaintiff of the $1,000. M. F. Muir, K.C., for the plaintiff. E. Sweet, for the defendants.

MILLER v. KAUFMAN—LATCHFORD, J.—MARCH 18.

Master and Servant—Injury to and Death of Servant—Dangerous Machine—Guard—Negligence—Carelessness of Deceased—Findings of Jury—Inconsistency—Explanation—Costs.]—Action for damages for the death of Frederick Miller, the father of the plaintiffs, while working in the defendant's sawmill, by reason of the negligence of the defendant, as alleged. The jury found, in answer to questions: (1) that the death of Miller was the result of an accident which occurred in the defendant's factory on the 12th July, 1910; (2) that the accident was caused by the piece of wood exhibited, while in the hands of Miller, coming into contact with the saw exhibited and flying back and striking him on the abdomen and causing death; (3) that the saw which Miller was using was a dangerous part of the machinery of the defendant's factory: (4) that the saw was not, as far as practicable, securely guarded; (5) that the saw would not have been securely guarded so as to prevent the accident if Miller had used the guard or divider with which the defendant had furnished him; (6) that Miller could, by the exercise of reasonable care and diligence, have avoided the accident;(7) that his want of reasonable care and diligence consisted in his not using the appliance provided as a guard; (8) that the plaintiffs were entitled to $1,500 damages, less $150 already received. The learned Judge said that it seemed impossible to reconcile the 5th finding with the 6th and 7th. In attempting to explain the inconsistent answers, the foreman, pointing to the divider, said that the jury did not consider it a guard which would prevent a piece of wood from falling on the saw, and that Miller's negligence was "a matter of a little bit of carelessness in dropping this wood." In other words, the appliances, if in place, would not have been effective in preventing what actually occurred, and Miller's negligence consisted in letting fall the board that he was trimming, and not, as stated in the 7th finding, in not using the appliance provided as a guard. The result is a miscarriage or at least a postponement of justice. There can be no possible doubt that it is an abuse of

language to call the divider a guard. It was not used and could not be used when the saw was cross-cutting, but only when the saw was ripping or edging, and then its function was to act as a wedge to widen the saw-kerf, and thus prevent binding, especially by hard or knotty woods. It is properly a splitter or divider. Its crescent-shaped end, rising near and slightly over the back of the saw, does indeed afford some protection; but the whole front and much of the upper edge of the saw—and it was the contact of this upper edge with the board in Miller's hand that caused his death—was absolutely unguarded. It was painful to hear the defendant and several of his employees describe, upon oath, the splitter as a guard; and, while the action should be dismissed, the dismissal should be without costs. S. F. Washington, K.C., and J. G. Gauld, K.C., for the plaintiffs. J. A. Scellen, for the defendant.

GREAT NORTHERN ELEVATOR CO. v. MANITOBA ASSURANCE CO.—MASTER IN CHAMBERS—MARCH 21.

Pleading—Reply—Embarrassment—Fire Insurance — Appraisement—Invalidity — Grounds for—Amendment—Particulars.]—Motion by the defendants to strike out the last four paragraphs of the plaintiffs' reply. The action was to recover loss by fire on the 16th October, 1909, under two policies issued by the defendants. The defendants pleaded that one of the conditions of the policies was that the amount of loss was to be ascertained by appraisement; that an appraisement was duly made, and the amount awarded by the majority of the appraisers paid into Court. They further pleaded that, after the loss and under an agreement of appraisement made on the 1st November, 1909, it was agreed that such appraisement should be final and binding on both parties. The paragraphs of the reply attacked were in substance equivalent to a statement of claim in an action to have the appraisement set aside, or to a statement of defence in an action by the insurance company to have the appraisement declared binding on the assured. The Master said that the 5th paragraph of the reply should be amended by striking out the words "among other reasons," and so confining the grounds for declaring the appraisement invalid to those stated, viz., that the defendants' appraiser was not a disinterested person, but a prejudiced person, and conducted himself as such during the appraisement, and by stating the facts on which the plaintiffs relied to prove these allegations. By paragraph 6, the plaintiffs

alleged another reason against the validity of the award, viz., the improper reception and exclusion of evidence. Held, that the instances of this should be given, if material to be relied on at the trial. By the 7th paragraph it was alleged that the appraisement was not binding because the proceedings before the appraisers were irregular and unfair to the plaintiffs. Held, that the grounds should be given. By the 8th paragraph it was submitted that the appraisement should be set aside and declared to be void. Held, not embarrassing. Order made for amendment of the 5th, 6th, and 7th paragraphs, as indicated, or for particulars thereof. The defendants to have leave to rejoin within a week after amendment or delivery of particulars. Costs to the defendants in any event. R. McKay, K.C., for the defendants. Frank McCarthy, for the plaintiffs.

KEYES v. MCKEON—CLUTE, J., IN CHAMBERS—MARCH 21.

Venue—Motion to Change—Witnesses—Expense—Costs.]—Appeal by the defendant from the order of the Master in Chambers, ante 899, refusing to change the venue from London to Goderich. The appeal was dismissed with costs to the plaintiff in any event. W. Proudfoot, K.C., for the defendant. Featherston Aylesworth, for the plaintiff.

HYATT v. ALLEN—SUTHERLAND, J.—MARCH 21.

Company—Directors—Secret Profits—Trust for Shareholders—Class Action by Certain Shareholders—Fraud—Account of Profits.]—Action by certain shareholders of the Lakeside Canning Company Limited, on behalf of themselves and all shareholders other than the individual defendants, against the company, and the directors thereof as individuals, to have the individual defendants declared trustees of the moneys and other considerations received by them from the Dominion Canners Limited for the use and benefit of the shareholders, and to have the rights and interests of all parties interested in and entitled to the proceeds of the sale of the assets of the company, including the proceeds of the sale of the shares of the stockholders therein, ascertained and declared. The learned Judge reviews the evidence at length, and finds that the conduct of the individual defendants was fraudulent, and that a class action can properly

be brought. He also finds that the individual defendants entered into a secret arrangement by which they kept concealed from the other shareholders information as to the contemplated sale of the stock and assets to the Dominion Canners Limited, and the sale-price, which it was their duty as directors to have disclosed. He makes other findings of fact in favour of the plaintiffs; and pronounces judgment for the plaintiffs, declaring that the individual defendants were trustees for the plaintiffs of the shares in the Lakeside Canning Company respectively transferred by the plaintiffs to the individual defendants, and that the plaintiffs are entitled to be paid all profits realised by the individual defendants in respect of such shares, and directing a reference to the Master at Picton to inquire and state what profits the individual defendants have respectively realised as to such shares, and for that purpose to ascertain and state of what the assets of the company consisted, what was realised by the defendants in respect thereof, and what application they have made of the money and other property received or realised by them for or in respect of the assets of the company; reserving further directions and costs. Reference to Burland v. Earle, [1902] A.C. 83; Gaskell v. Chambers, 26 Beav. 360; In re Canadian Oil Works Corporation, L.R. 10 Ch. 593; Bennett v. Havelock Electric Light and Power Co., 21 O.L.R. 120. E. G. Porter, K.C., and J. A. Wright, for the plaintiffs. J. Bicknell, K.C., and E. M. Young, for the individual defendants. No one appeared for the defendant company.