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HIGH COURT OF JUSTICE.

MAGEE, J. MARCH 1ST, 1910.

HUTCHINSON v. JAFFRAY & CASSELS.

Broker—Purchase of Shares for Customer on Margin—Hypothecation—Conversion—Return of Moneys Paid for Margins after Conversion—Interest—Contract.

The plaintiff sued the defendants, who were brokers in Toronto, for damages or the return of moneys paid to them as margins upon stock which he instructed them to purchase for him.

In the statement of claim he alleged that the defendants never actually bought the stock, then he alleged that they sold it, parted with it; that they converted it to their own use; and also that, although they alleged they had sold the stock on account of his not furnishing sufficient margin, they had not in fact sold it.

At the trial there was no evidence offered that the stock really was not purchased, and that branch of the claim was not pressed.

Upon the other branch, that the defendants had converted the stock to their own use, however, the claim was pressed.

R. W. Eyre, for the plaintiff.

H. M. Mowat, K.C., for the defendants.

MAGEE, J.:—It appears that on the 1st December, 1904, the plaintiff . . . instructed the defendants to purchase for him on margin 10 shares of the stock of the Canadian General Electric Company Limited.

In his evidence the plaintiff stated that there was nothing said about the amount of margin that he was to put up; and therefore it is alleged that, there being no agreement as to the amount of margin, the defendants had not a right to demand payment by him of the 15 per cent. which they afterwards did ask. But in his state-

ment of claim the plaintiff starts out with the allegation that there was to be a margin of 15 per cent., although his own is the only evidence upon that subject, and he says there was no agreement for margin. No application has been made to amend the statement of claim in that respect, and the defendants were therefore entitled to rest upon the evidence given in that respect, and having offered no evidence upon it, and no amendment having been asked which would require evidence from them, I must hold that there was an agreement, as alleged in the statement of claim, that it should be 15 per cent., and that that margin was to be kept up.

The evidence is that upon the 1st December the defendants did purchase 10 shares for the plaintiff. They purchased apparently 25 shares on that day from Mr. O'Hara, another broker, 15 of which were for another client, and 10 they intended for the plaintiff. Upon the following day, the 2nd December, they pledged 90 shares of the same sort of stock to the Bank of Hamilton for $14,400.

Now, their total purchases of that stock upon the previous day, the 1st December, had been 90 shares. The evidence is practically left there. It is very meagre upon the part of the plaintiff, and none is offered upon the part of the defendants. I have no evidence as to the exact nature of the pledge or the terms of it to the Bank of Hamilton; I have no evidence as to how long it continued; and I have no certain evidence as to whether at that time they held any other shares whatever than those which they had purchased upon the 1st December, or whether they subsequently held any.

. . . .

I am shewn that the defendants purchased 90 shares upon one day, and upon the following day they pledged 90 shares. It is said for the plaintiff that that is prima facie evidence that those were the same shares. Upon the part of the defence it is said that there is no evidence that they had not other shares.

I think that, inasmuch as the defendant Jaffray upon his examination said that the 10 shares bought from Mr. O'Hara, intended for the plaintiff, were presumably in the 90 shares—he could not ear-mark them, but he believed they were in the 90 shares—I think I must hold that there is sufficient to warrant an inference that those shares were pledged to the Bank of Hamilton.

Now, if at that time the defendants did in fact hold 10 other shares free, it would, I think, have been quite open to them to have considered that they were not committing any breach of duty in pledging the 10 shares which they got that day.

As pointed out in Ames v. Conmee, 10 O. L. R. 159, 12 O. L. R. 435, afterwards reported in 38 S. C. R. 601, as Conmee v.

Securities Holding Co., brokers are accustomed and entitled to consider the shares held by them for their clients, when all of one sort, as being practically one fund, in so far that they are not bound to ear-mark any particular shares for any particular client, but can deliver those which they receive for one to another.

If, therefore, the defendants had held 10 shares or more upon the 2nd December, when they made the pledge to the Bank of Hamilton, the plaintiff could not have complained. They have not shewn that they did. I think the result of the evidence is that they did not. It devolved upon them to shew that they did have other shares when they make the admission that the 10 shares which they bought for the plaintiff were really included in the 90. They not having offered any evidence to negative that, I think it must be assumed that they had not any other of the shares.

Then the case stands that they pledged the plaintiff's shares to the Bank of Hamilton. They had purchased the shares for $1,762.50, on which their commission would be $2.50, and they had at that time to the plaintiff's credit $263.75. The plaintiff, therefore, owed them upon those shares $1,501.25. To the extent of the amount owing them, they were quite entitled to pledge the stock, because the plaintiff could not be damnified nor endangered, if he was at any time enabled to get his stock upon paying the amount that he owed. But, as I have said, I am left in the dark entirely as to the terms of the pledge to the Bank of Hamilton. I have only the simple statement that 90 shares were pledged as security for the $14,400. The defendants could have produced the bargain, they could have offered proof that, according to an agreement or custom binding upon bankers and brokers, the shares would be given up upon payment of the amount owing in respect to them alone; but they have offered no such proof as offered in the case of Clark v. Baillie, 19 O. L. R. 545, to which I was referred during the course of the argument, and, therefore, I simply have the broad statement as to the 90 shares being pledged. That would mean that I must infer that each and all were held by the Bank of Hamilton as security for the $14,400.

That being so, the defendants were doing something which they were not warranted in doing. They could have pledged the plaintiff's shares for the $1,500, but they pledged them for $14,400, and, although the amount per share for which they pledged the 90 shares is very close to the amount the plaintiff owed to them, yet they did not take the precaution to provide that they should be entitled to get back these shares on payment of the amount owing from them, and therein I think they were guilty of conversion. See Conmee v. Securities Holding Co., 38 S. C. R. 601.

That was at a time when the shares were practically at about the same value as when the plaintiff himself bought. At all events, there is no evidence that upon that day they had either fallen or risen. Therefore, the plaintiff suffered by that conversion practically no damage, for he could have gone into the market the same day and bought shares to the same amount. But the plaintiff did not know; and, although not holding these shares, the defendants go on demanding from him further margins on account of the stock, which was in a falling market, and from time to time he did pay to them considerable sums.

Now, as I said, I am left also in the dark as to how long that loan contract with the Bank of Hamilton continued. The plaintiff's transactions with regard to this very stock with the defendants ran over nearly three years, from December, 1904, to October, 1907. I cannot assume, in the absence of evidence on the part of the defendants, that that loan from the Bank of Hamilton was ever paid up; there is nothing in the evidence to indicate that it was. I do not know that I have any right to assume that the bank would not continue a loan for that length of time. It is a matter within the defendants' knowledge. They have not shewn that that stock was ever freed from that pledge, and I think I must infer, in the absence of evidence, that the pledge continued.

The market goes on falling, the defendants keep demanding from the plaintiff further payments, and he makes them, and eventually, when the stock had got down from 176 to something like 97, he decided he would not pay any more of the margin. The margin then in the hands of the defendants, as I understood from the plaintiff, not being equal to 15 per cent., they sold out his shares.

The shares which they sold were not at that time shares actually held for him; they were shares apparently which they got from the Bank of British North America. They were not shewn to be held for them as being free from any debt; indeed, they are not shewn to be free from a pledge at all. But the very fact that they did take shares for the purpose of ostensibly selling them on behalf of the plaintiff, would be some evidence to shew, I think, that at that time the shares which had been received for the plaintiff were not held free from the former pledge or from some existing pledge.

It was disputed that they had in fact sold any shares, but they did sell, and the fact that they chose to sell shares from some other source or client would not, I think, prevent it becoming a sale on behalf of the plaintiff, if shares were held for him.

But there is the fact that during this period of nearly three years the plaintiff had been going on paying the defendants moneys under a misapprehension, owing to their concealment of the fact that these shares were pledged. I do not for one moment mean to say that there was any improper concealment or any intention to conceal from him the fact. It is most likely that the defendants thought that they were entitled to pledge these 90 shares to the Bank of Hamilton in the way in which they did.

It may be, probably it is, the fact that there is an understanding among brokers and bankers such that they were entitled to get the 10 shares out at any time by paying $1,500 in respect of them, but they have offered no evidence of that sort. The absence of such evidence was observed upon in Conmee v. Securities Holding Co., 38 S. C. R. 601, as to the custom in Philadelphia, but it was offered in Clark v. Baillie as to the custom in Toronto; and it has not been proved here, and, being only a matter of custom or agreement and not of law, I cannot take judicial notice of it.

I simply say that, in order to make it clear that I am casting no imputation whatever upon the good faith of the defendants in relation to the matter. I am simply dealing with it on the evidence as I find it, and on the inferences I feel I am bound to draw from the evidence.

Then it stands in this way, that they had in fact converted that stock to their own use on the 2nd December. The plaintiff, when he entered into the transaction, supposed that he was pledging his money and his credit as against the stock, not as against a liability of the defendants to make good the stock. That principle was pointed out by Mr. Justice Davies and Mr. Justice Duff in the Supreme Court in Conmee v. Securities Holding Co. The plaintiff having $260 odd in the defendants' hands here, and being liable for $1,500 more, was entitled, in the very nature of things, to expect that the shares did exist in such a shape that he could get them by paying that $1,500. It is no answer, I think, for the defendants to say, "Oh, we were responsible during all that time to get those shares for him." That was not the bargain between them.

Then, that not being the bargain, and the defendants not having the shares in respect to which they were making demands for margin, the plaintiff paid those moneys under a misapprehension, a mistake of fact, and a mistake of fact arising from the defendants' non-disclosure of the conversion of the stock.

That being so, the plaintiff, in my judgment, is entitled to a return of those moneys so paid after the conversion of the stock.

The conclusion at which I arrive is not, in my opinion, in any way opposed to the decision in Clark v. Baillie, by which I am bound. . . .

[Reference to Clarkson v. Snider, 10 O. R. 561; Mara v. Cox, 6 O. R. 359; Ellis v. Bond, [1891] 1 Q. B. 428.]

If it had been only a question of wrongful conversion, the plaintiff would not be entitled to any damages beyond the amount then paid by him, $263.75. But when, instead, he says, "I want back the moneys which I paid under a mistake of fact, a mistake of fact caused by the defendants themselves," then the matter stands upon a different footing, and I think it does not rest merely on a question of damages to be rendered to him while he continues to pay money for a non-existing transaction, but that I must give full effect to his contention that the transaction in respect of which he paid these moneys did not in fact exist after the 2nd December. . . .

The plaintiff is entitled to a return of all the moneys that he paid after the 2nd December in respect of the 10 shares, and I think judgment must be with costs.

DIVISIONAL COURT. MARCH 3RD, 1910.

*REX v. TEASDALE.

Liquor License Act—Conviction for Second Offence—Amendment of sec. 72 after First Conviction—Change in Penalty for First Offence—Interpretation of Statutes—Refusal of Judge to Discharge Defendant—Right of Appeal to Divisional Court — Rule 777—Proof of Previous Conviction—Procedure at Trial before Police Magistrate—Failure to Comply with R. S. O. 1897 ch. 245, sec. 101.

Appeal by the defendant from the order of CLUTE, J., ante 398, dismissing an application by the defendant, on the return of a habeas corpus and certiorari in aid, for his discharge from custody under a warrant of commitment pursuant to a conviction for a second offence against the Liquor License Act.

The appeal was heard by BRITTON, LATCHFORD, and SUTHERLAND, JJ.

J. B. Mackenzie, for the defendant.

E. Bayly, K.C., for the Crown.

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

BRITTON, J.:— . . . The main objection relied upon before my brother Clute was that no conviction for a second offence could be made because of the amendment of sec. 72 of the Liquor License Act after the alleged first conviction and before the second conviction. Upon that objection judgment was reserved, and all other objections were upon the argument disallowed. I do not know what the specific objections raised, and so disposed of on the argument, were, but as to the one reserved and afterwards decided as reported, I may say that I wholly agree with the learned Judge.

The Crown took as a preliminary objection that there is no appeal: (1) no appeal under the Habeas Corpus Act, as here, to a Divisional Court; although the writ of habeas corpus could have been made returnable before a Divisional Court or before a single Judge, in either case the appeal is only to the Court of Appeal; (2) no appeal because of the provisions in the Liquor License Act in regard to appeals, ch. 245, secs. 118, 121, R. S. O.

Neither Act in terms prevents such an appeal as is now taken, from a Judge in the ordinary course to a Divisional Court. Unless there is a prohibition in terms or by necessary implication, there is no reason why the case is not covered by Rule 777. The judgment pronounced by Mr. Justice Clute, if it stands, finally disposed of the matter.

Under the Liquor License Act (sec. 121) the appeal will lie to the Court of Appeal from a judgment of the High Court or a Judge thereof, "but no such appeal" (i.e., appeal to the Court of Appeal) "shall lie from the judgment of a single Judge or from the judgment of the Court if the Court is unanimous, unless in either case the Attorney-General for Ontario certifies," etc. That seems to imply that a party may as of right and in the ordinary case go from a single Judge to a Divisional Court: Rex v. Lowery, 15 O. L. R. 182.

I am of opinion that the Divisional Court had jurisdiction, and so the objections must be considered.

Assume that the offence charged as of the 3rd November, 1909, was proved, and that the prisoner was found guilty, then, and not before, the prisoner should have been asked "whether he was previously convicted, as alleged in the information."

The allegation in the information is that the prisoner was on the 28th July, 1908, at the town of Cobourg, before the police magistrate in and for the town of Cobourg, duly convicted of having on the 11th June, 1908, at the village of Colborne, in the county of Northumberland, unlawfully sold liquor without the license therefor by law required. The prisoner, after having been made aware of that allegation, should have been asked, in sub-

stance at least, with some regard to the requirement of the statute, whether he was previously convicted as so alleged, or not. If, upon this inquiry being made, the prisoner had answered that he was so previously convicted, he could have been sentenced. Had the prisoner denied or had he not answered directly, proof of the previous conviction would have been required.

The record does not shew that the statutory procedure was complied with.

The police magistrate says in his minute of conviction that subsequently, and on the same 11th December, 1909, the defendant pleaded guilty upon a charge of having been previously convicted on the 28th July, 1908, of having on the 11th June, 1908, at the village of Colborne, in the county of Northumberland, sold liquor without the license therefor by law required. The place of conviction is not stated, nor is the name of the convicting magistrate, although both are in the information. Then the police magistrate, no doubt acting in perfect good faith, and intending to comply with the law, puts the previous conviction in the form of a charge against the prisoner. He is charged with having been previously convicted, and to this charge it is alleged that the prisoner pleaded guilty. It could not be put in the form of a charge. It is not an offence to have been convicted of an offence. . . . Putting the matter in this form is conclusive evidence to me that the police magistrate did not in fact comply with the statute, and it may be a matter of regret that the prisoner, if in fact guilty of the previous offence and subsequent offence of selling liquor without license, should escape without the full punishment to which he was sentenced; yet that cannot be avoided. It is important that, before imprisonment, guilt should be established, and that the conviction should be in due form of law. I do not give effect to any of the many objections taken by prisoner's counsel.

My decision is that sec. 101 of ch. 245 was not, in form or substance, complied with. . . .

[Reference to Rex v. Brisbois, 15 O. L. R. 264; Regina v. Fee, 13 O. R. 590.

Order will go for discharge of prisoner. No costs.

LATCHFORD, J., concurred, stating his reasons briefly in writing.

SUTHERLAND, J., also concurred.

FALCONBRIDGE, C.J.K.B. MARCH 7TH, 1910.

*REX v. BECKETT ET AL.

Criminal Law—Conspiracy—Trade Combination—Criminal Code, sec. 498—Restraint of Trade — Prevention of Competition—Evidence—Findings of Fact.

A prosecution for an alleged conspiracy connected with trade and commerce, laid under sec. 498 of the Criminal Code.

The indictment was found by a grand jury at Hamilton; the defendants exercised the option given by sec. 581 of the Code, and elected to be tried before the Chief Justice without a jury, and by consent the venue was changed to Toronto.

The indictment charged that Henry C. Beckett, George E. Bristol, John I. Davidson, Thomas B. Escott, W. G. Craig, Joseph E. Eby, Thomas Kinnear, the Dominion Wholesale Grocers' Guild, and the Ontario Wholesale Grocers' Guild, did, in and during the years 1898, 1899, 1900, 1901, 1902, 1903, 1904, and 1905, at the city of Hamilton, and elsewhere in the province of Ontario, unlawfully conspire and agree and arrange one with the other and others of them, and with some 208 named persons, firms, and corporations, and with the several members, officers, etc., and other persons, firms, and corporations at present unknown: (1) unduly to limit the facilities in producing, manufacturing, supplying, and dealing in sugar, tobacco, starch, canned goods, salt, and cereals, and other articles and commodities, being articles and commodities which are the subject of trade and commerce; (2) and to restrain and injure trade and commerce in relation to such articles and commodities; (3) and unduly to prevent, limit, and lessen the manufacture and production of such articles and commodities; (4) and unreasonably to enhance the price of such articles and commodities; (5) and unduly to prevent and lessen competition in the production, manufacture, purchase, barter, sale, and supply of such articles and commodities; against the form of the statute, etc.

G. T. Blackstock, K.C., and S. F. Washington, K.C., for the Crown.

E. F. B. Johnston, K. C., E. H. Ambrose, and Eric N. Armour, for the defendants.

FALCONBRIDGE, C.J.:— . . . Counsel for the Crown admitted that no case had been made out against the defendants under clause (1) of the indictment, corresponding to sub-sec. (a)

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

of sec. 498 of the Code . . . and that the case would have to be maintained, if at all, under the remaining charges, corresponding to sub-secs. (b), (c), and (d) of sec. 498. . . .

[The Chief Justice referred to portions of the evidence; and then cited and quoted from the following authorities: Jolly on Contracts in Restraint of Trade; Nordenfeldt v. Nordenfeldt-Maxim, [1894] A. C. 535, 553, 556; Ontario Salt Co. v. Merchants Salt Co., 13 Gr. 540, 542, 543; Rex v. Elliott, 9 O. L. R. 648; Rex v. Master Plumbers' Association, 14 O. L. R. 295, 300, 302, 309; Mogul S. S. Co. v. McGregor, [1892] A. C. 36; Allen v. Flood, [1898] A. C. 138; Wampole & Co. v. F. E. Karn Co., 11 O. L. R. 619; Quinn v. Leathem, [1901] A. C. 506; The King v. Clark, 14 Can. Crim. Cas. 46, 57; The King v. Gage, 13 Can. Crim. Cas. 415; Gibbins v. Metcalfe, 15 Man. L. R. 583; Eddy on Combinations, vol. 1, sec. 556: Bohn Manufacturing Co. v. Hollis, 54 Minn. 223, 55 N. W. R. 1119, 1120; Commonwealth v. Grimstead, 108 Ky. 59, 111 Ky. 203; Gibbs v. Consolidated Gas Co., 130 U. S. 396, 409; People's Gas Light Co. v. Chicago Gas Light Co., 20 Ill. App. 492.]

I find the facts then to be as follows:—

1. The defendants have not, nor has any of them, intended to violate the law.

2. Nor have they, nor has any of them, intended maliciously to injure any persons, firms, or corporations, nor to compass any restraint of trade unconnected with their own business relations.

3. They have been actuated by a bona fide desire to protect their own interests and that of the wholesale grocery trade in general.

As far as intention and good faith or the want of it are elements in the offence with which they are charged, the evidence is entirely in their favour.

Have they been guilty of a technical breach of law? This question is answered by the citations which I have given above, and which cover every branch of the case.

I therefore say that the defendants are not, nor is any of them, guilty as charged.

There are minor matters as to which I, sitting as a jury, give the defendants (as I am bound to do) the benefit of the doubt, and as to which I warn the defendants and those in like case to be careful, e.g., as to alleged efforts to coerce wholesale dealers into joining the guild.

It is of the essence of the innocence of the defendants that the privileges which they seek to enjoy should be extended to all persons and corporations who are strictly wholesalers, whether they choose to join the guild or not.

DIVISIONAL COURT. MARCH 7TH, 1910.

*BARNETT v. GRAND TRUNK R. W. CO.

Railway—Collision—Negligence—Injury to Licensee or Trespasser on Train Run into by Car of another Railway—Liability for Gross Negligence—Highway—Findings of Jury—Reversal of Judgment of Trial Judge—Judgment for Plaintiff instead of New Trial.

An appeal by the plaintiff from the judgment of MEREDITH, C.J.C.P., upon the findings of a jury, in favour of the defendants, in an action for damages for injuries sustained by the plaintiff by reason of a collision between a train of the Pere Marquette Railway Company upon which the plaintiff was riding and a van or car of the defendants in the railway yard at London, the collision being caused by the negligence of the defendants, as the plaintiff alleged.

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

J. F. Faulds and P. H. Bartlett, for the plaintiff.

W. Nesbitt, K.C., for the defendants.

The judgment of the Court was delivered by BOYD, C.:—Though the conductor was on the train of empty cars which were being backed to the junction, he was not in charge of the movement; it was in the hands of Cole, who gave the signal to switch—for the information of the Grand Trunk officials—and was at the moving end of the coach with lantern on the look-out. Before the backing began, the plaintiff was on the platform, which was then at the front of the backward movement, close beside Cole, to whom he spoke, and also leaned over him to see what delayed the starting after the signal had been given. From the evidence of the plaintiff and the plaintiff's wife, I would infer that what Cole says as to his being on the platform before the backing began and at the time of the collision, actually occurred, and that he was there with the permission of the man in charge of the cars. This may have been in contravention of rules or orders not known to the plaintiff, but with the knowledge of Cole, who, however, made no objection to the plaintiff being where he was. This was the only occasion when the plaintiff had taken this ride on this train, for his own convenience, when in charge of these men, and he did not know Cole—

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

but the uncontradicted evidence is that he had done this on many other occasions without check or comment from the officials—so that he was not a mere trespasser, but acting under an honest mistake that he was not transgressing this permissive use of the train. I should find on this evidence his legal status to be that of a licensee getting a gratuitous lift on the cars to the stopping place at the junction. The duty of the defendants was to manage their cars so that no negligent injury should be done to the Pere Marquette cars using this "lead," which is said to be their property. It is conceded that this caboose of the defendants was moved violently against the backing cars of the Pere Marquette Railway Company so as to injure the plaintiff. This is characterised by the learned Chief Justice as the "result of gross negligence." If the plaintiff was not wrongfully where he was on the Pere Marquette train, then he is entitled to recover damages against the defendants —by the English authorities. . . .

[Reference to Harris v. Perry, [1903] 2 K. B. 219; Wilton v. Middlesex R. R. Co., 107 Mass. 108; Philadelphia and Reading R. Co. v. Day, 14 How. S. C. 468; R. R. Co. v. Stout, 17 Wall. S. C. 661; Sievert v. Brookfield, 35 S. C. R. 494; Grand Trunk R. W. Co. v. Richardson, 91 U. S. 454, 471; Nightingale v. Union Colliery Co. of British Columbia, 35 S. C. R. 67.]

Now the law is with the plaintiff clearly if he is a licensee, and I think so also if he is an honest or mistaken trespasser. Such an one is described by Beven, Can. ed. (1908), vol. 2, pp. 952, 953. I do not read the answers of the jury to the questions submitted as a finding that the plaintiff was a trespasser upon the defendants' train. All they have found is that the plaintiff was not on the train or platform by the permission of the Pere Marquette Railway Company.

It is not without significance that the accident—the collision—happened upon the tracks laid on the public highway on Waterloo street. . . . Given the circumstances of this case, it does not seem to me that the defendants are exempt from liability, though the plaintiff was nothing else than a mere trespasser.

As to the degree of liability incurred by the Pere Marquette Railway Company, had they been the authors of the injury, and imputing a like degree of liability as to the defendants—and for the defendants the situation cannot be put more favourably to them—the authorities mark a distinction of duty between the case of permitting a licensee to be on a place or pass over a place, and that of taking him on a vehicle or otherwise carrying him. That is discussed in Harris v. Perry, and it is indicated that a greater degree

of care is called for in the latter case. But, after all, it is a question for the jury, and the observations of Esher, M.R., in Thatcher v. Great Western R. W. Co., 10 Times L. R. 13, are very pertinent. "No doubt," he says, "in strict logic, the railway company had not the same amount of duty to persons permitted to come on their premises as they had to persons who paid money in consideration of being taken as passengers. But, so far as regarded the taking of means for providing for personal safety, it was impossible to measure the difference between their duty to the one class of persons and their duty to the other." And in the same case Lopes, L.J., says (discarding the term "licensee"): "If a person permitted another to come on his premises, and knew him to be there, it was his duty to take reasonable care not to injure him." See Barnes v. Ward, 9 C. B. 392, 420.

It appears to me that the plaintiff is entitled to a verdict, and that it is not necessary for us to direct (in view of the consent of counsel to our dealing with the case) that there should be a new trial.

Judgment for the plaintiff with costs.

DIVISIONAL COURT. MARCH 9TH, 1910.

RE BAUMAN.

Will—Construction — Residuary Bequest to Children—Right of Grandchildren to Deceased Parents' Shares—Gift of Residue Construed as to Persons Designated and not to a Class—Republication of Will by Codicil—Death of Children before Codicil—Wills Act, sec. 36.

Appeal by Clara Irving, appointed to represent the adult grandchildren of the testator as a class, from the order of BRITTON, J., ante 293, determining certain questions arising in the administration of the estate of Wendell H. Bauman, deceased, as to the construction of his will and codicil.

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

Eric N. Armour, for the appellant.

J. C. Haight, for the executors.

E. C. Cattanach, for the official guardian.

The judgment of the Court was delivered by CLUTE, J., who said that upon the first point he agreed with Britton, J., that the gift of the residue was to persons designated, and not to a class: In re Stansfield, 15 Ch. D. 85. He also agreed with Britton, J., that, as the testator mentioned each of his children by name in the will, the case was distinguishable from Re Williams, 5 O. L. R. 345; Re Clark, 8 O. L. R. 599: see Theobald on Wills, Can. ed., p. 787. . . .

The second point taken by Mr. Armour was that, under sec. 26 of the Wills Act, the will is to operate from the death, and that the codicil operates as a re-execution of the will, and therefore that the four children having died prior to the date of the codicil—the 9th May, 1908—their heirs do not come within sec. 36 of the Wills Act. . . .

If, as . . . is undoubtedly the law, the codicil amounts to a republication of the will, then the question is to be considered as if the will had been made on the date of the codicil, at which time the four sons were dead. Does the statute (sec. 36) cover a case of that kind? . . . In Wisden v. Wisden, 2 Sm. & G. 396, it is pointed out that the words of the section refer to no particular period within the testator's lifetime, and that the words "shall die" speak from the death of the testator. In that case the devisee had in fact died before the execution of the will. It was nevertheless held that the heir of the devisee was entitled. The authority of this case has not, so far as I can find, in any way been impugned, and is referred to in the various text books as still the law. See Theobald on Wills, 6th ed., p. 752.

The decision in the Court below is, in my opinion, right, and should be affirmed and this appeal dismissed without costs.

FALCONBRIDGE, C.J.K.B. MARCH 10TH, 1910.

VILLAGE OF NEW HAMBURG v. NEW HAMBURG MANUFACTURING CO.

Municipal Corporations—Bonus to Manufacturing Company—By-law—Contract—Variation by Settlement of Action—Mortgage—Mistake — Reformation — Company—Authorisation—Ratification—Provision for Payment of Fixed Sum if Certain Number of Persons not Employed in Factory—Exception—"Unforeseen and Unavoidable Causes"—Conditions of Trade—Penalty or Liquidated Damages.

Action to recover $500 under a contract between the parties.

The plaintiffs, by by-law No. 259, finally passed on the 12th May, 1902, intended to grant aid to the defendants to the extent of $10,000—$5,000 by way of bonus and $5,000 by way of loan. A mortgage was to be given by the defendants for $10,000, partly to secure the $5,000 lent, and containing the provision that the defendants should commence and carry on business for 10 years continuously, and should constantly and continuously during at least 10 months in each year bona fide employ in the business no fewer than 40 persons on every working day, "excepting temporary interruptions arising from fires, accidents, strikes, or other unforeseen and unavoidable causes;" but, if the defendants should fail to do so, they should pay to the plaintiffs $500 for each year, except the first year, in which they should employ less than 40.

This by-law was attacked by action, but on the 12th November, 1902, a settlement was made of the action between the parties to this action and the plaintiff in that action, whereby the defendants agreed to accept the bonus of $5,000 provided by the by-law and to relinquish all claim to the loan of $5,000, and it was further provided that the number of hands to be employed by the defendants should be reduced from 40 to 30.

By mistake the mortgage executed by the defendants contained all the provisions mentioned in the by-law, disregarding the modifications made by the settlement.

The defendants did not in 1908 constantly and continuously during at least 10 months bona fide employ in their business not less than 40 persons.

The plaintiffs began this action in the County Court of Waterloo, alleging the defendants' failure to employ the requisite number of workmen, and claiming $500. The statement of claim followed the

mortgage in alleging default in employing 40 persons. The defendants filed their statement of defence, following the statement of claim in ignoring the modifications to the by-law, and setting up that the plaintiffs were indebted to the defendants for the $5,000 loan, and counterclaiming for that amount, and further setting up that, if the agreement of the 12th November, 1902, was binding upon the parties, the covenants in the mortgage did not properly represent the true agreement, and the mortgage was, therefore, null and void. The defendants further submitted that the County Court had no jurisdiction.

On the 1st October, 1909, the action was transferred to the High Court.

The trial was at Berlin, without a jury.

C. A. Moss, for the plaintiffs.

J. A. Scellen, for the defendants.

FALCONBRIDGE, C.J. (after setting out the facts as above):—I have amended the pleadings to follow the true agreement between the parties, and, if necessary, the mortgage must be reformed accordingly. This is for the benefit of the defendants, and is not a bar to the plaintiffs' recovery.

The first defence was that the only authorisation of the company to execute a mortgage was for the original amount (the one that was in fact executed), but that after the settlement, the shareholders gave no authority for the execution of any mortgage following the terms of settlement. The defendants do not offer to pay back the $5,000 advanced, and this defence is not open to them. They received the money, to the knowledge of the shareholders, and the company had the benefit of it for their legitimate purposes. The defendants must, therefore, be taken to have adopted the transaction, and cannot be heard to say the contrary: Everest & Strode's Law of Estoppel, 2nd ed., pp. 242, 454; Lindley on Companies, 6th ed., p. 220; National Malleable Castings Co. v. Smith's Falls Malleable Castings Co., 14 O. L. R. 22.

I do not think that the conditions of trade and other circumstances shewn to have been existing in 1907 and 1908 give the defendants the benefit of the excepting clause—"fires, accidents, strikes, or other unforeseen and unavoidable causes."

The only question remaining is whether it is penalty or liquidated damages. I have considered this very carefully in the light of the following authorities: Commissioners of Public Works v. Hills, [1906] A. C. 368-375; Townsend v. Rumball, 19 O. L. R. 433; Sloman v. Walton, 1 Bro. C. C.; Village of Brussels v.

Ronald, 4 O. R. 7, 11 A. R. 605-614; Village of Brighton v. Auston, 19 A. R. 305; Murfree on Official Bonds, p. 140; Brown v. Taggart, 10 U. C. R. 183; Mayne, 8th ed., pp. 178, 184, 185; City of St. Thomas v. Credit Valley R. W. Co., 15 O. R. 673; Wallis v. Smith, 21 Ch. D. 243; Hilton v. Grand Trunk R. W. Co., 19 A. R. 252, 21 S. C. R. 76. On the whole, I think it is a penalty. I do not think it can be said that the sum stipulated for can be regarded as a general pre-estimate of the defendants' probable or possible interest in the due performance of the principal obligation: Mayne, p. 185.

There will, therefore, be a reference as to damages. The plaintiffs will have their costs up to and inclusive of this judgment, on the High Court scale; further directions and subsequent costs reserved.

DIVISIONAL COURT. MARCH 10TH, 1910.

STAUNTON v. KERR.

Solicitor — Costs—Company—Contract — Retainer — Evidence—Conflict—Credibility of Witnesses — Corroboration—Finding of Trial Judge—Appeal.

Appeal by the plaintiff from the judgment of BOYD, C., ante 244, dismissing the action, which was brought by a solicitor against an incorporated company and another solicitor upon a bill of costs.

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

W. M. Douglas, K.C., for the plaintiff.

R. McKay, for the defendant company.

G. M. Clark, for the defendant Kerr.

RIDDELL, J.:— . . . The plaintiff had, as he supposed, a claim for costs against the E. Van Allen Co. Limited; negotiations were going on for the sale of the capital stock of this company to the defendant Kerr's clients; and the plaintiff and the defendant Kerr met. The plaintiff was himself the owner of some of the capital stock, and, according to his contention, the defendant Kerr "definitely agreed . . . at that time that, if I would carry out this sale, so far as myself and my friends were concerned, he would

pay me the $500 and the disbursements." The stock was transferred.

If this agreement was made in the terms set out, there can be no doubt that the defendant Kerr should pay the amounts agreed upon—the Statute of Frauds has no application to a contract of that kind. But Kerr denies that such an agreement was made; and the trial Judge is unable to find that the plaintiff's version is correct. It is true that there is some corroboration of the plaintiff's story, but there is nothing in our law to oblige a trial Judge (any more than a jury) to accept the evidence of two witnesses rather than one. The principle referred to by Taschereau, J., . . . in Lefeunteum v. Beaudoin, 28 S. C. R. 89, at p. 93, has no application to this case, even supposing it to be applicable to our law in any case. The learned Judge says: "It is a rule of presumption that ordinarily a witness who testifies to an affirmative is to be credited in preference to one who testifies to a negative, magis creditur duobus testibus affirmantibus quam mille negantibus, because he who testifies to a negative may have forgotten a thing that did happen, but it is not possible to remember a thing that never existed." I do not accept in our law either the reason for the supposed rule or the rule itself. But, assuming its application to any case, it has none here—each witness gives his version of what took place at the meeting—Kerr's evidence is as affirmative as Staunton's, and Staunton's is as much a negative of Kerr's as the converse.

In view of the decisions, which it cannot be necessary again to cite, I think it impossible to say that the plaintiff has made out a case against the defendant Kerr.

As regards the company, I do not think it necessary to go into the law affecting a director who acts as a solicitor for a company. After an attentive perusal of the evidence, I am unable to find that Staunton was either in fact or in form retained by the company. It may seem clear enough that Van Allen retained him, but the retainer (if any) was for Van Allen himself, and not for the company.

I am of opinion that the appeal should be dismissed with costs. . . .

BRITTON, J.:—I agree that the appeal should be dismissed.

FALCONBRIDGE, C.J.:—I agree with my learned brothers in their disposition of the appeal as to the defendant company.

But I have the misfortune to hold a different view as to the case against the individual defendant.

The finding of the learned Chancellor involves no expression of personal opinion, but is based on a purely academic and scientific rule; and it is not, therefore, in my humble judgment, entitled to the high deference which is accorded to the specific finding of fact of a trial Judge on conflicting evidence, as illustrated in Bishop v. Bishop, 10 O. W. R. 177; Lodge Holes Colliery Co. v. Mayor, etc., of Wednesbury, [1908] A. C. 323, at p. 326.

Without suggesting any impairment of this now well-established rule, and without dissenting from the Chancellor's theory that the parties here are entitled to equal credit, I would have decided that the plaintiff's statement was better corroborated than that of the defendant, and that it was true in fact; and so I am of opinion that the judgment on this branch of the case ought to be set aside, and a verdict entered for the plaintiff against the defendant Kerr. . . .

CASLER v. GRACE MINING CO.—FALCONBRIDGE, C.J.K.B.—FEB. 28.

Company—Managing Director—Improper Dealings with Property—Mortgage.]—Action upon the covenants for payment in certain mortgages and to recover possession of the mortgaged lands. Judgment for the plaintiff for the amount of the mortgages with interest from the 25th February, 1908. The Chief Justice finds, however, that the plaintiff, while acting as manager of the defendant company, obtained large sums of money from the company for the purpose of being applied in operations upon the company's property, and converted parts to his own use; that he failed properly to supervise and direct the work upon the company's property, and misrepresented to the company the nature of the work being carried on, the amount expended in connection therewith, and the position of the property as to the results and exposures of mineral; that the plaintiff, while a director of the company, wrongfully and improperly caused to be paid to himself and converted to his own use, under guise of salary and payment for services, a large sum of money, the taking of which was wrongful and unauthorised; and that he wrongfully procured and allowed improper payments and allotments of stock to himself and others, as set up in paragraphs 5, 6, 7, 8, and 9 of the counter-

claim. Reference directed as to all these matters; proceedings in the nature of foreclosure or recovery of possession stayed in the meantime. Further directions and costs reserved until after report. S. C. Smoke and Grayson Smith, for the plaintiff. R. McKay, for the defendants except the defendant W. J. Casler.

SWEENEY v. SISSONS—TEETZEL J.—MARCH 5.

Contract—Timber—Declaration—Injunction — Costs.]—Action to establish and enforce an agreement of the 18th February, 1907, for an interest in certain timber acquired by the defendants from one Sprague. The learned Judge is unable to find, upon all the evidence, that the plaintiff has established any agreement entitling him to an interest in the pine timber acquired by the defendants from Sprague. The defendants having elected to carry out the agreement as to the timber other than pine, upon the plaintiff agreeing to an extension of time for the removal of the same, corresponding with the time allowed or to be allowed by the Crown for the removal of the pine, and the plaintiff having agreed to this, judgment to go declaring that, with this modification, the plaintiff is entitled to have the agreement, as to all timber other than pine, carried out. In other respects action dismissed, and counterclaim also dismissed. The plaintiff to pay to the defendants all costs occasioned by his claim in respect of the pine timber, including the costs of the motion for an interim injunction. No other order as to the costs of the action or counterclaim. McGregor Young, K.C., for the plaintiff. Glyn Osler, for the defendants.

MCCARTHY & SONS CO. v. W. C. MCCARTHY—DIVISIONAL COURT—MARCH 7.

Contract—Company—Authority of Agent—Ratification.]—An appeal by the plaintiffs from an order of ANGLIN, J., 12 O. W. R. 1123, varying a report of the local Master at Ottawa by allowing to the defendant $1,000 which he alleged the plaintiffs had agreed to pay him, in consideration of his giving up the Ottawa agency of

the plaintiffs, which he held. The agreement was alleged to have been made by one Murphy, an officer of the plaintiffs, on their behalf, and ANGLIN, J., was of opinion that it had been ratified by the plaintiffs. The Court (MEREDITH, C.J.C.P., MAGEE and LATCHFORD, JJ.), were of opinion, upon the evidence, that the proper conclusion upon the whole case was that the onus which rested upon the defendant of proving the alleged agreement with Murphy had not been met. Order of ANGLIN, J., reversed, so far as it allowed the claim of $1,000, and report as to it restored. The defendant to pay the costs of the appeal. G. H. Watson, K.C., and P. K. Halpin, for the plaintiffs. O. E. Culbert, for the defendant.

KASTNER v. MACKENZIE—DIVISIONAL COURT—MARCH 8.

Sale of Goods—Refusal to Accept.]—An appeal by the plaintiff from the judgment of TEETZEL, J., ante 287, was dismissed by the Court (FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.) G. G. McPherson, K.C., for the plaintiff. R. S. Robertson, for the defendant.

BRENNAN v. GRAND TRUNK R. W. CO.—DIVISIONAL COURT—MARCH 8.

Master and Servant—Injury to and Death of Servant—Negligence—Railway.]—An appeal by the plaintiffs from the judgment of MULOCK, C.J.Ex.D., ante 365, was dismissed by the Court (FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.) A. E. Fripp, K.C., for the plaintiffs. D. L. McCarthy, K.C., for the defendants.

ST. GEORGE MANSIONS v. KING—DIVISIONAL COURT—MARCH 9.

Landlord and Tenant — Possession after Expiry of Lease — Treaty for New Lease—Tenancy at Will.]—Appeal by the defendant from the judgment of DENTON, Jun. J. of the County Court of York, in favour of the plaintiffs in an action in that Court to

recover rent of an apartment under an alleged lease or agreement for a period after the defendant had vacated the premises on the 30th April, 1909, having given one month's previous notice in writing of his intention to quit. The Court (FALCONBRIDGE, C.J. K.B., BRITTON and SUTHERLAND, JJ.), held that the defendant, being permitted to continue in possession pending negotiations for a new lease, was not a tenant for a year nor from year to year, but only a tenant at will: Idington v. Douglas, 6 O. L. R. 266. Appeal allowed with costs and action dismissed with costs. J. M. Ferguson, for the defendant. J. A. Macintosh, for the plaintiffs.

RE CARTWRIGHT AND TOWN OF NAPANEE—DIVISIONAL COURT—MARCH 9.

Municipal Corporations—By-law—Rate for Ordinary Expenditure—Irregular Procedure—Costs.]—Appeal by Sir Richard Cartwright from an order of CLUTE, J., dismissing without costs a motion by the appellant to quash a by-law passed by the town council on the 3rd August, 1908, authorising the levy of a rate for the expenditure of 1908. The Court (FALCONBRIDGE, C.J.K.B., BRITTON and SUTHERLAND, JJ.), held that the theory of the applicant that the fiscal year was changed, and that there was, accordingly, a broken period of half a year, had been entirely displaced. The system adopted by the council was extremely crude and unbusinesslike, but the Court was assured that it had been discontinued. There was a bona fide mistake in one or more of the estimates, but no one had suffered, and the excess had gone into the general funds in accordance with the statute; e.g., the estimate and assessment for the West street sewer were not properly "labelled," so to speak, but the money was used to repay money belonging to that sewer which had been used for general purposes, instead of borrowing money from the bank. The system was irregular and improper, but there had been no "graft" or corruption, and neither the municipality nor the applicant nor any other ratepayer had been the loser by one cent. Appeal dismissed without costs. G. Bell, K.C., for the appellant. C. A. Masten, K.C., and W. S. Herrington, K. C., for the town corporation.

HOSKIN v. MICHIGAN CENTRAL R. R. CO.—DIVISIONAL COURT—MARCH 9.

Railway — Injury to Passenger Alighting — Defective Step—Negligence—Jury.]—An appeal by the defendants from the judgment of MAGEE, J., in favour of the plaintiff, upon the findings of a jury, for the recovery of $1,250 damages for personal injuries sustained by the plaintiff in alighting from a car of a train of the defendants at Amherstburg. The plaintiff alleged that the injuries were attributable to the defendants' negligence in permitting the car to be equipped with a defective and improper step. The Court (FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.) held (RIDDELL, J., dissenting) that they could not interfere with the verdict. The plaintiff was not bound to adduce specific evidence that the use of such a step constituted negligence. The jury had a right to infer that the use of a ricketty, insecure, or unsuitable box for the purpose of assisting passengers to alight, constituted negligence. RIDDELL, J., was of opinion that the jury had not found sufficient facts upon which to base a finding of negligence on the part of the defendants, even if such a finding could in any sense be based upon the fact that the portable step was not of the same length as the car step. He was in favour of directing a new trial. The judgment of the Court was that the appeal should be dismissed with costs. D. W. Saunders, K.C., for the defendants. J. H. Rodd, for the plaintiff.

HARRIS v. WISHART—MASTER IN CHAMBERS—MARCH 10.

Foreign Commission—Postponement of Trial.]—Motion by the defendant for a commission to take evidence in England and to postpone the trial until the return. Held, that, while it may be a great inconvenience to the plaintiff to have the trial delayed, the first consideration is a fair trial to all concerned: Ferguson v. Millican, 11 O. L. R. 35; and the evidence sought is material. Order made for a commission. W. J. Boland, for the defendant. J. E. Day, for the plaintiff.

WOOD BROTHERS v. GALL LUMBER CO.—DIVISIONAL COURT—MARCH 10.

Contract—Sale of Lumber—Breach—Damages—"Mill-run."]—Appeal by the defendants from the judgment of LATCHFORD, J.,

ante 565. The judgment of the Court (FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.), was delivered by RIDDELL, J., who said that the case was wholly one of fact, and depended upon the interpretation to be given to the expression "mill-run." It seems plain from the evidence that the expression is used, sometimes at least, as including the whole run of the mill in merchantable lumber, including "mill-culls." It seems plain that the plaintiffs used the expression in this sense, and a letter frequently referred to in the argument, taken in connection with other circumstances, makes it plain that the defendants also had the same view of its meaning. A contract was, therefore, made whereby the defendants undertook to purchase the lumber by "mill-run," including therein "mill-culls." They refused to accept this lumber; and it cannot be successfully contended that the plaintiffs acted in an unreasonable way in disposing of the lumber as and when they did. Appeal dismissed with costs. R. McKay, for the defendants. J. Harley, K.C., and E. Sweet, for the plaintiffs.