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APPELLATE DIVISION.

NOVEMBER 23RD, 1915.

SHENANGO STEAMSHIP CO. v. SOO DREDGING AND CONSTRUCTION CO. LIMITED.

Negligence—Allowing Boulder Placed in Stream to Remain Unmarked without Warning to Navigators—Injury to Vessel—Navigable Waters' Protection Act, R.S.C. 1906 *ch.* 115, *sec.* 14—*Evidence—Findings of Fact of Trial Judge—Appeal.*

Appeal by the plaintiffs from the judgment of BRITTON, J., 8 O.W.N. 530.

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

R. McKay, K.C., and Gideon Grant, for the appellants.

W. N. Ferguson, K.C., for the defendants, respondents.

FALCONBRIDGE, C.J.K.B., agreed with the learned trial Judge in finding that the plaintiffs had failed to make out their case.

LATCHFORD, J., reviewed the evidence in a written opinion of considerable length, and stated his conclusion that the learned trial Judge was right in holding that the plaintiffs had failed to establish that their vessel, the "W. P. Snyder," had grounded on a boulder placed in the channel by the defendants. His (Mr. Justice Latchford's) finding would have been that what the vessel did ground upon was the large boulder situated about 1,000 feet south-east of the south pier and 15 to 20 feet outside of the channel, as to which no negligence whatever was attributable to the defendants.

KELLY, J., also gave written reasons for judgment, in which, after a careful review of the evidence, he stated his conclusion

that the plaintiffs had failed to satisfy the onus of proving what was essential to establish their claim. In the view he took, it was unnecessary to discuss the effect of sec. 14 of the Navigable Waters' Protection Act, R.S.C. 1906 ch. 115, invoked by the plaintiffs—that enactment had no application to the circumstances of the present case.

RIDDELL, J. (dissenting), was of opinion, for reasons stated in writing, that the ship was in the channel when the accident happened; that the boulder which caused the accident was placed where it was by the defendants; that sec. 14 of the Act did not apply; but that at common law the channel was a highway, and no one had any right to obstruct it; that at one time the builder was protected by a buoy, which disappeared at least 2½ hours before the accident; that the whole duty of the defendants was not performed by placing the buoy without provision that it should remain where it was; that 2½ hours was an unreasonable time to allow an obstruction to remain without notice, and much more than a reasonable time to allow the defendants, if necessary, to discover the absence of the buoy, and certainly to replace it; and, therefore, the plaintiffs were entitled to succeed.

Appeal dismissed with costs; RIDDELL, J., *dissenting.*

NOVEMBER 25TH, 1915.

CROCKER v. GALUSHA.

Contract—Sale of Company-shares and Money-claim—Terms of Payment—Acceleration—Forfeiture—Findings of Fact of Trial Judge—Appeal.

Appeal by the defendant Galusha from the judgment of SUTHERLAND, J., 8 O.W.N. 610.

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

A. C. Heighington, for the appellant.

J. H. Coburn, for the plaintiff, respondent.

The judgment of the Court was delivered by RIDDELL, J., who said that he was unable to find any error in the judgment

appealed against. The contention most earnestly pressed by the appellant was, that the acceleration of the payments was a forfeiture and should be relieved against; but that contention was untenable. Boyd v. Richards (1913), 29 O.L.R. 119, and the cases followed—In re Dagenham (Thames) Dock Co. (1873), L.R. 8 Ch. 1022, and Kilmer v. British Columbia Orchard Lands Limited, [1913] A.C. 319—had no application to such a case as this.

Appeal dismissed with costs.

NOVEMBER 26TH, 1915.

*ROBINSON v. MOFFATT.

Infant—Contract to Purchase Land—Title—Repudiation—Absence of Fraud—Vendor and Purchaser—Action to Recover Money Paid on Account of Purchase—Rescission—Specific Performance—Costs—Appeal.

Appeal by the plaintiff from the judgment of SUTHERLAND, J., ante 99.

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

J. J. Gray, for the appellant.

W. E. Raney, K.C., for the defendant, respondent.

The judgment of the Court was delivered by RIDDELL, J., who said that it is well established that a purchaser may, on discovering the vendor's lack of title, repudiate the contract, but he must do this with reasonable promptness: Dart on Vendor and Purchaser, 7th ed., vol. 2, p. 1067. Here the plaintiff knew of the defect, and thereafter himself tried to sell the land, made payments on it, tendered a mortgage made by himself upon it, and in all things acted as though the contract was valid—it is not open to him to repudiate on that ground alone.

As to the failure to convey, the vendor must be in a position to make a good conveyance at the date fixed for completion: Murrell v. Goodyear (1860), 1 DeG. F. & J. 432; and a conveyance by himself and not another: In re Bryant and Barningham's Contract (1890), 44 Ch. D. 218; In re Thompson and

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

Holt (1890), 44 Ch. D. 492; In re Head's Trustees and Macdonald (1890), 45 Ch. D. 310. If, therefore, the purchaser was entitled to a deed on tender of the balance of the 50 per cent. and the mortgage, he became entitled to rescission.

Reference to Pioneer Bank v. Canadian Bank of Commerce (1915), 34 O.L.R. 531, ante 96.

In the present case, it was plain that what was contracted for by the defendant was a document which would give him security on the land; and this the plaintiff's mortgage did not. It was no answer to say that the plaintiff could not give a valid and registrable mortgage; he was unable to perform a condition precedent, and that was fatal.

The whole question then was as to the effect of the plaintiff's infancy; and the Court was bound by Short v. Field (1915), 32 O.L.R. 395, to hold that the plaintiff could not recover back the moneys already paid by him: he became the "potential owner of the place," listed it for sale, tried to sell it, and acted much more as the owner than did the infant in Wilson v. Kearse (1800), Peake Add. Cas. 196.

Appeal dismissed with costs, with the same right to specific performance as that given by Sutherland, J., on payment of all costs, including the costs of this appeal.

NOVEMBER 27TH, 1915.

CROMWELL v. RIOUX.

New Trial—Evidence—Amendment—Costs.

Appeal by the plaintiff from the judgment of the County Court of the County of York dismissing an action brought to recover damages for the alleged wrongful seizure of the goods and chattels of the plaintiff.

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

R. S. Robertson, for the plaintiff.

R. U. McPherson, for the defendant.

FALCONBRIDGE, C.J.K.B., delivering the judgment of the Court, said that at the opening of the trial the plaintiff asked

leave to amend the pleadings so as to set up want of reasonable and probable cause on the defendant's part in making the seizure. The defendant's counsel opposed this, and objected to the trial then proceeding if the amendment were allowed—alleging the necessity of calling, on the issue to be raised in the amendment, witnesses who were not present and could not be obtained on short notice. The amendment was refused, and the trial proceeded. Notwithstanding that the new issue was not raised on the record, and that not a little evidence upon it was admitted, it could not be said that that evidence was exhaustive—counsel might well have felt it needless to pursue the evidence on a matter not formally in issue.

The County Court Judge, however, decided the issue in favour of the defendant. This should not have been done. Even on the record without amendment, there were several legal questions of much nicety which should not be decided without further evidence—evidence which will perhaps be available in a new trial.

Order made for a new trial; all parties to be allowed to amend as they may be advised; and the costs of the former trial and of this appeal to be disposed of by the trial Judge.

HIGH COURT DIVISION.

NEVILLE, OFFICIAL REFEREE. NOVEMBER 16TH, 1915.

WHALEY v. LINNENBACK.

Mechanics' Liens — Improvements to Buildings — Work and Materials—Valid Lien against Estate of Owner of Equity of Redemption—Claim to Priority over Mortgages upon Increased Selling Value—Claim not Made until after Expiry of Time for Registering Claim of Lien — Mechanics and Wage-Earners Lien Act, R.S.O. 1914 *ch.* 140, *secs.* 8(3), 17, 19(1), 22, 23, 24.

The plaintiff, a carpenter and builder, was employed by the defendant Linnenback to alter and improve buildings on land owned by Linnenback subject to two prior mortgages to the defendants Martin and Bowman.

The last work was done on the 13th May, 1915; the claim of lien was registered on the 9th June, 1915; and the date of the filing of the statement of claim (the commencement of the action) was the 9th August, 1915.

The claim of lien was confined to the estate of Linnenback in the lands—in it nothing was said of the mortgages, and the mortgagees were not mentioned. The claim against them was first made when the statement of claim was filed, which was after the 30 days allowed by sec. 22, sub-sec. 1, of the Mechanics and Wage-Earners Lien Act, R.S.O. 1914 ch. 140, for registering the lien, but within the 90 days limited by sec. 24 of the Act for bringing the action and registering a certificate of lis pendens.

By the statement of claim, the plaintiff claims the enforcement of his lien under the Act, and priority upon the increased selling value as against the two mortgagees.

The action was tried by R. S. Neville, Esquire, K.C., an Official Referee.

J. Y. Murdoch, for the plaintiff.

J. F. Boland, for the defendant Linnenback.

Hattin, for the defendants Martin and Bowman.

THE REFEREE found that the plaintiff's claim of lien was valid, and that by reason of the work done and materials furnished by the plaintiff there was an increase in the selling value of the land to the extent of $500.

The objection was raised by counsel for the mortgagees that no claim against them or for priority over their mortgages was made till after the 30 days allowed by the Act for registering the lien had expired; and this objection must prevail.

Reference to secs. 8(3), 17, 19(1), 22, 23, 24 of the Act.

A claimant may begin an action and register a certificate of lis pendens within the time limited by sec. 22 (see sec. 23); and, if he claims priority upon the increased value over a prior mortgage, the prior mortgagee must be made a defendant and the claim against him set up: Bank of Montreal v. Haffner (1884), 10 A.R. 592, 598, 599.

Where a claimant registers his claim under sec. 22, his lien, according to sec. 24, shall absolutely cease at the expiration of the periods therein mentioned (90 days in this case) unless in the meantime an action is commenced to realise *the claim* and a certificate of lis pendens is registered. "The claim" is that made in the registered document; and if in that there is only a claim against the owner of the equity of redemption, that is all that can be realised in an action begun after the 30 days have expired.

The claim made against the mortgagees was, therefore, dismissed.

BRITTON, J. NOVEMBER 22ND, 1915.

GRATTON v. LAVOIE AND OTTAWA COBALT MINING AND LUMBER CO. LIMITED.

Malicious Prosecution—Reasonable and Probable Cause—Finding of Trial Judge—Malice—Verdict of Jury—Damages—Costs.

Action for malicious prosecution, tried with a jury at Haileybury.

George Mitchell, for the plaintiff.
C. A. Seguin, for the defendants.

BRITTON, J., said that the defendant Lavoie, who was the general manager and president of the defendant company, caused an information to be laid on the 10th March, 1913, charging the plaintiff with having stolen on the 6th March, 1913, certain trees of a value of at least 25 cents, the property of the defendant company. On this information a summons was issued by a magistrate; the plaintiff was served with the summons, and appeared before the magistrate on two or three occasions; he was finally discharged, although evidence was given against him, and the charge was pressed.

The plaintiff claimed the right to cut small pieces of timber called "laggins" upon the defendant company's lands, by virtue of permission given by the defendant company.

There was no doubt, in the learned Judge's opinion, that the plaintiff honestly believed that he had the right to cut "laggins," and that the defendants had no right to prevent him doing so, so long as they were cut and taken off within a reasonable time. The defendant Lavoie did not think that the plaintiff was stealing the timber; the defendant Lavoie laid the information and prosecuted the charge as a short cut, as he thought, to prevent the plaintiff from going on cutting.

Upon the evidence, there was an entire absence of reasonable and probable cause for the prosecution. This was found by the Judge at the trial; and the question of maliciously laying the information and putting the criminal law in motion was left to the jury, who found a verdict for the plaintiff with $200 damages.

A claim was made by the plaintiff against the defendants for the cutting and drawing out of certain of the "laggins," which, it was said, were appropriated by the defendants, but nothing was allowed upon that head.

Judgment for the plaintiff for $200 damages, with costs upon the proper scale, without set-off. This judgment will be without prejudice to the right of the plaintiff to recover in any other action for any matter outside of the malicious prosecution.

HODGINS, J.A. NOVEMBER 23RD, 1915.

*K. AND S. AUTO TIRE CO. LIMITED v. RUTHERFORD.

Guaranty—Indefinite Basis of Contract—Increase in Liability—Release of Guarantor—Duty of Disclosure—Variation of Sealed Instrument by Unsealed Letter—Construction and Scope of Contract—Account—Reference—Costs.

Action upon two guaranties signed by the defendant in favour of the plaintiffs.

The first was dated the 7th February, 1914, and was under seal. By it, the defendant, in consideration of the plaintiffs supplying goods to a new company intended to be formed, guaranteed to the plaintiffs the payment to them of $4,000 owing by the Kelly Tire Company and $2,800 owing by the MacDonell Tire Company and the payment for all goods which might be sold by the plaintiffs to the new company, and the due payment of all notes, etc., which might be at any time given to the plaintiffs in respect of the indebtedness of the new company. This guaranty was expressed to be a continuing one for the benefit of the plaintiffs and their assigns to the extent of $15,000 in addition to the sums owing by the Kelly and MacDonell companies.

The second guaranty was dated the 27th February, 1914, and was not under seal. It was in the form of letter, stating that, as a new company was not to be incorporated, the "agreement of the 7th February will hold good for the Kelly Tire Company Limited just as if you had incorporated a new company."

The action was tried without a jury at Toronto.

Leighton McCarthy, K.C., for the plaintiffs.

George Wilkie, for the defendant.

HODGINS, J.A., delivering judgment, said that the substantial objection urged to the method adopted by the plaintiffs of acquiring control of the Kelly and MacDonell companies and installing one McLaren as manager was, that the cash price paid for the majority stock of the Kelly company, $4,250, was in effect added to the liabilities of the Kelly company. The arrangement by which the Kelly company purchased the desired agency for the Springfield tires, etc., for $4,250, was a device by which the plaintiffs would be recouped out of the profits of the business for the amount paid to Smith for the majority stock. But that did not affect the liability of the defendant. The complaint made was, that this increase in the liabilities of the Kelly company was of moment to the defendant as guarantor, and that it changed the basis of the contract, and so released him. This argument overlooked the fact that the basis of the contract was not fixed and definite as in Holme v. Brunskill (1877), 3 Q.B.D. 495, but was nebulous, and contemplated the acquisition of two companies and the launching of a new venture under the management of McLaren, with money provided on the credit gained by the guaranty. There was no deliberate concealment. No clear and definite basis for the guaranties was ever stated; the idea upon which all the parties acted was that the plaintiffs and McLaren were to make such arrangements as they could to effectuate the end in view, and that whatever those arrangements necessitated would be acceptable to the defendant—his view being that McLaren would act in his interest. The case must be decided upon the principle illustrated by such cases as Stewart v. McKean (1855), 10 Ex. 675, Webster v. Petre (1879), 4 Ex. D. 127, and Stewart v. Young (1894), 38 Sol. J. 385, where the basis of the contract was indefinite and lacked the precision which would enable a departure from it to be readily ascertained. There is no universal obligation to make disclosure in cases of guaranty: Davies v. London and Provincial Marine Insurance Co. (1878), 8 Ch. D. 469.

It was argued that the second guaranty was an attempted alteration of a contract under seal by an instrument not sealed; and, that being ineffective, the original guaranty remained as expressed, and, owing to the changed conditions, did not bind the defendant. But, if the original guaranty was to operate only on the formation of a new company, then it was competent for the parties to change that condition and to agree to substitute a new state of affairs, which, upon completion, caused it to become effective. A guaranty need not be under seal; and the

reason for the rule asserted, if now existent, is absent in cases where the agreement, though under seal, is not one which requires a seal to make it valid.

It was also contended that the later guaranty included only so much of the earlier one as dealt with the indebtedness of the Kelly company recited therein, viz., $14,000; but that was not the correct construction of the letter of the 27th February.

The guaranties, however, did not extend to cover three notes given for the acquisition of the exclusive agency. These notes were not included in the description of "notes for goods to be supplied"—and the contract of guaranty is strictissimi juris.

Judgment for the plaintiffs, with a reference to the Master in Ordinary to take the accounts; the plaintiffs to have their costs up to and including the trial; further directions and costs of the reference reserved. The third party to be bound by the account, while its liability is to be the subject of subsequent trial.

MIDDLETON, J. NOVEMBER 24TH, 1911.

*BANK OF BRITISH NORTH AMERICA v. STANDARD BANK OF CANADA.

Banks and Banking—Obligation of Bank on which Cheques Drawn by Customer to Bank Holding Cheques for Value Given—Clearing House—Misrepresentation as to Funds of Customer—Liability—Costs of Former Litigation.

Action by the plaintiff bank, as holder of five cheques drawn by Maybee & Wilson upon the defendant bank, to recover the sum of $2,918.23, being the aggregate amount of the cheques, less payments made thereon, and also to recover $1,836.23, being the amount of costs incurred in litigation with the endorsers of the cheques: see Bank of British North America v. Haslip, Bank of British North America v. Elliott (1914), 30 O.L.R. 299, 31 O.L.R. 442.

The cheques were deposited in a sub-branch of the West Toronto branch of the plaintiff bank, on the 1st October, 1913, and were put through the Clearing House in the ordinary course, and were received by the defendant bank at its head office on the morning of the 2nd October, and at its St. Lawrence Market branch (about a quarter of a mile from the head office)

on the morning of the 3rd October. The cheques were held until just before noon on the 4th October, when they were returned to the plaintiff bank unaccepted and marked "not sufficient funds." The plaintiff bank thereupon gave a Clearing House slip—equivalent to cash—to take up the cheques.

The action was tried without a jury at Toronto.

W. N. Tilley, K.C., and G. L. Smith, for the plaintiff bank.

Wallace Nesbitt, K.C., and R. Wardrop, for the defendant bank.

MIDDLETON, J., said that this action was brought upon the theory that there was money standing to the credit of Maybee & Wilson at the time the cheques were presented, or that there would have been such money save for the improper acts of the defendant bank; and that it was, therefore, the duty of the defendant bank, which had received the cheques through the Clearing House, to have marked them good and to have treated them as paid.

If the plaintiff bank's claim were based upon the mere fact that there were funds in the hands of the defendant bank available for payment of the five cheques, the plaintiff bank would fail: Hopkinson v. Forster (1874), L.R. 19 Eq. 74. But here the situation was entirely different.

The obligation of the defendant bank to the plaintiff bank was not that of a bank to the payee of a cheque drawn by its customer. When it, by virtue of the Clearing House transaction, had itself become the holder of the cheque, its obligation was to mark the cheque good if there were funds then available, or funds which would have been available to meet the payment but for its own wrongful act. So long as it had or ought to have funds to answer the cheque, it had no right to demand recoupment from the depositing bank, and the recoupment was obtained by that which was in truth a misrepresentation of the true state of affairs. The defendant bank had improperly charged against Maybee & Wilson's account three other cheques, and so left the account without sufficient funds to pay the five cheques held by the plaintiff bank.

The case is of importance as indicating the possibilities of a situation which must frequently arise; and it is open to question whether legislation is not needed to remedy the evil. When a customer draws a cheque upon his bank, and there are funds to answer it when presented, why should the bank be at liberty to

refuse to honour it, retaining the money to meet some demand of its own which has not yet matured, or to pay some other cheque drawn by the customer? Or again, when cheques come in through the Clearing House, in one bundle, which in the aggregate exceed the amount at the customer's credit, why should the bank be at liberty to determine which should be paid and which should be rejected?

No case was made here on which the plaintiff bank could recover in respect of the costs in the previous unsuccessful litigation.

Judgment for the plaintiff bank for the balance remaining due upon the five cheques, with interest and costs.

CLUTE, J. NOVEMBER 25TH, 1915.

O'HEARN v. FRIEDMAN.

Vendor and Purchaser—Agreement for Sale of Land—Default in Payment of Purchase-money—Forfeiture of Moneys Paid—Liquidated Damages—Actual Damage Suffered by Vendor—Mortgagors and Purchasers Relief Act, 1915, *sec.* 2(1)(*c*), 4(3)—*Recovery of Possession—Costs.*

On the 22nd July, 1913, the plaintiff entered into a written agreement to sell to the defendant Friedman certain lands and goods for $1,700—$100 down and $1,600 by monthly instalments of $100 each, with interest. The defendant Friedman went into possession, and had paid, when this action was brought, $1,100. The agreement contained covenants by the defendant Friedman against waste, to pay taxes, and to give up possession on breach of any of the covenants and allow the plaintiff to retain all moneys paid as liquidated damages; time was declared to be of the essence of the agreement. No payment had been made since the 22nd July, 1914, when the defendant Friedman made an assignment for the benefit of creditors to the defendant White, who had since been in receipt of the rents and profits of the premises, and had committed waste. The taxes for 1914 and 1915 had not been paid.

The plaintiff sought to have the agreement declared null and void from the 22nd August, 1914, and to be allowed to retain as liquidated damages the $1,100 paid; the plaintiff also claimed a reasonable rental from the 22nd August, 1914, and possession of the property.

The action was tried without a jury at Toronto.

J. H. Fraser and G. M. Willoughby, for the plaintiff.

H. E. Rose, K.C., for the defendants.

CLUTE, J., said that the defendants did not ask for specific performance and did not offer to pay the amount due under the agreement; but, by an amendment made at the trial, the defendants stated their willingness that the plaintiff should have judgment for possession of the lands in question, upon condition that she pay over to the defendant White the amount of the purchase-money already paid, less interest and taxes; or, in the alternative, that payment of the moneys due under the agreement should be postponed until the close of the present war, on condition that the defendants pay the interest and taxes.

The defendants had not brought themselves within sec. 2, sub-sec. 1(*c*), of the Mortgagors and Purchasers Relief Act, 1915; the plaintiff was within the exception declared by sec. 4, sub-sec. 3; and the defendants had neither paid into Court nor tendered to the plaintiff interest, rent, or taxes.

The defendant White did not offer evidence as to the disposition of the chattels or the amount realised therefor, nor to shew why the taxes had not been paid. That defendant was not entitled to claim relief as under a forfeiture.

The defendants were not entitled to a refund of the $1,100 paid.

The learned Judge finds that the plaintiff has suffered loss to an amount in excess of $1,100; that $50 a month would be a reasonable rental for the premises; that the waste committed amounted to $400; that the taxes for the three years amounted to $225.

Judgment declaring that the plaintiff is entitled to possession of the premises free of any claim thereto by the defendants or either of them; that the plaintiff has suffered damage in excess of the purchase-money paid by the defendant Friedman by reason of her default and breach of her contract in not carrying out the agreement; and that the defendants are not entitled to claim a return of any part of the purchase-money paid to the plaintiff.

Reference to Kilmer v. British Columbia Orchard Lands Limited, [1913] A.C. 319; Vansickler v. McKnight Construction Co. (1914), 31 O.L.R. 531; McKnight Construction Co. v. Vansickler (1915), 51 S.C.R. 374.

The plaintiff should have costs of the action.

MASTEN, J. NOVEMBER 25TH, 1915.

*LINSTEAD v. TOWNSHIP OF WHITCHURCH.

Highway — Nonrepair of Bridge — Collapse under Weight of Traction-engine—Liability of Township Corporation—Municipal Act, 3 & 4 Geo. V. ch. 43, sec. 460(1)—Inspection—Absence of Notice or Knowledge of Nonrepair—Traction Engine Act, 2 Geo. V. ch. 53, sec. 5(4)—Failure to Comply with Requirements of — No Causal Connection between Failure and Accident—Fatal Accidents Act—Damages for Death of Son.

Action by Sarah Jane Linstead against the Corporation of the Township of Whitchurch to recover damages for an alleged breach of duty on the part of the defendants in failing to maintain in proper repair a bridge on the highway known as the Bogarton road, situate in that township; the plaintiff alleged that such want of repair resulted in the death of her son, Walter Linstead, and she sued as sole beneficiary, under the Fatal Accidents Act.

There were two main defences: (1) that the bridge, shortly before the accident, was regularly and thoroughly inspected on behalf of the defendants and reported sound, and that the defendants had no notice of any want of repair; (2) that the deceased, when he met his death, was crossing the bridge on a traction-engine, and, as he failed to lay down planks, he was illegally on the bridge and could not recover: Traction Engine Act, 2 Geo. V. ch. 53, sec. 5(O.)

The traction-engine belonged to one Pipher, who was operating it, with the assistance of the deceased, a volunteer, at the time of the accident, which occurred on the 1st August, 1913. When the tractor was crossing the bridge, the bridge collapsed, the tractor fell into the stream beneath, and Linstead was found dead, probably from being scalded by the escaping steam.

The action was tried without a jury at Toronto.

T. Herbert Lennox, K.C., for the plaintiff.

W. M. Douglas, K.C., and James McCullough, for the defendants.

MASTEN, J., reviewed the evidence in a considered opinion; he found that the damages to the plaintiff arose in consequence

of the disrepair of the bridge; the accident happened by reason of the stringers giving way under the weight of the engine, and the collapse was owing to the rotten condition of the stringers.

As to the first defence, he was of opinion that, a statutory obligation having been imposed on the defendants by the Municipal Act, 3 & 4 Geo. V. ch. 43, sec. 460, sub-sec. 1, together with a liability for all damages sustained by any person by reason of default, the question of notice to or knowledge of the defects by the corporation was, in the circumstances here shewn, immaterial: City of Vancouver v. Cummings (1912), 46 S.C.R. 457; City of Vancouver v. McPhalen (1911), 45 S.C.R. 194; McClelland v. Manchester Corporation, [1912] 1 K.B. 118. But, if notice was necessary, the defendants had, as early as in 1911, adequate notice of the disrepair into which the bridge had fallen. The fact that corporation officials inspected the bridge in May, 1913, without appreciating its defective condition, could not operate to relieve the defendants of liability.

In considering the second defence, the learned Judge referred to Goodison Thresher Co. v. Township of McNab (1909), 19 O.L.R. 188, 44 S.C.R. 187, and to the statutory provision in force when that case was decided, comparing it with sub-sec. 4 of sec. 5 of the Traction Engine Act, 2 Geo. V. ch. 53. He thought that the alterations in phraseology indicated an inclination on the part of the Legislature to alter the law as it was finally determined in that case (where there was difference of opinion); but he was not sure that the Legislature had, by the last enactment, given such clear expression to the supposed desire as enabled the Court to declare that any change in the law had been effectively made; but it was unnecessary to determine that question.

In this case there could be no finding of fact such as that in the Goodison case—that "the use of planks by Jones when crossing the bridge would have added to the sustaining power of the stringers sufficiently to have enabled them to carry the weight of the engine with safety." The evidence did not satisfy the learned Judge that the absence of planks caused the accident, or that the breach of the statutory duty to lay down planks was its immediate cause.

To make the failure to comply with the requirements of the statute a defence, it must be shewn that there was a direct causal relation between such failure and the accident which followed: Walker v. Village of Ontario (1901), 86 N.W. Repr. 566; Sutton v. Town of Wauwatosa (1871), 29 Wis. 21; Welch v. Town of Geneva (1901), 85 N.W. Repr. 970.

This action is not governed by the Goodison case; both defences fail; and the plaintiff is entitled to judgment.

Damages assessed at $1,400.

Judgment for the plaintiff for $1,400 with costs.

SUTHERLAND, J. NOVEMBER 26TH, 1915.

*STONEHOUSE v. WALTON.

Deed—Renunciation of Interest in Farm—Action to Set aside—Lack of Independent Advice—Undue Influence—Laches and Acquiescence.

Action to set aside an agreement or settlement executed by the plaintiff, under seal, on the 4th July, 1902, whereby she covenanted and agreed with the defendant to deliver up possession of a certain farm upon her marriage. Her interest in the farm was under the will of the defendant's mother, and was not to begin until the death of Thomas Forfar, who at the time of the trial of the action was still alive. Under the will, the plaintiff was entitled to the farm, at a nominal rent, for her life, after the death of Thomas Forfar, who had adopted her as his child. After her death, the farm was to go to the defendant. The impeached agreement was made in order to carry out what was said to have been the intention of the testatrix, though it was not so expressed in the will. The plaintiff was married in 1908. This action was begun in April, 1914.

The action was tried without a jury at Toronto.

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

J. E. Jones, for the defendant.

SUTHERLAND, J., read a considered judgment, in which he set out the facts at length, and referred to Huguenin v. Baseley (1807), 14 Ves. 273; Allcard v. Skinner (1887), 36 Ch. D. 145; Underhill's Law of Trusts and Trustees, 7th ed., p. 95; Kerr on Fraud and Mistake, 4th ed., pp. 147, 148, 149; Cox v. Adams (1904), 35 S.C.R. 393; Bank of Montreal v. Stuart, [1911] A.C. 120; In re Howes, Ex p. White, [1902] 2 K.B. 290; Chaplin & Co. Limited v. Brammall, [1908] 1 K.B. 233.

Continuing, the learned Judge said that the onus was upon the plaintiff to shew some substantial reason why this voluntary

deed should be set aside. In his opinion, she had satisfied that onus: in view of the fact that the plaintiff had no independent advice and no opportunity to secure it, and was undoubtedly under the influence of her foster mother, exerted to induce her to execute it, the release could not, but for the laches on the part of the plaintiff, which followed its execution, be allowed to stand. Before this action was begun, the foster mother of the plaintiff had died, and thus the evidence of the only available witness, independently of the plaintiff and defendant, as to what actually occurred at the time of the execution of the release, had been lost.

While it was true that the position of the defendant had not been substantially altered in the meantime, as Thomas Forfar was still alive and presumably in receipt of the rent from the farm, though not now residing thereon, any remedy the plaintiff might have had, if she had applied promptly to the Court for relief, had been barred by her long-continued acquiescence and laches.

Action dismissed without costs.

LENNOX, J. NOVEMBER 26TH, 1915.

RE MURRAY.

Will—Construction—Right of two Beneficiaries to Occupy Dwelling-house—Privileges—Money Payment in Lieu of—Forfeiture—Abandonment—Death of one Beneficiary—"Continues to Dwell"—Judgment in Action—Originating Notice—Rules 600, 604, 605—*Scope of—Costs.*

Motion by Mira Murray, upon an originating notice under Rule 600 and subsequent Rules, for an order determining certain questions arising in the administration of the estate of William Murray the elder, deceased, as to the proper construction of his will; and motion by William Murray the younger, the respondent upon the main application, to set aside the proceedings upon the main application—this motion was made returnable before the Master in Chambers, and by him enlarged before the Judge who should hear the main application.

The motions were heard in the Weekly Court at Toronto.

G. T. Walsh, for Mira Murray.

William Laidlaw, K.C., for William Murray the younger.

LENNOX, J., said that the motion first made before the Master in Chambers was unnecessary, and should be dismissed with costs. One McGibbon, administrator with the will annexed, was served, but did not appear; probably service upon him was unnecessary. Counsel for William Murray also insisted that he was not duly served, and that the matters in question could not be dealt with upon an originating notice: neither of these objections was sustainable.

By the will, lot 9 in the 4th concession of Esquesing was given to William Murray, "subject to the rights and privileges herein given to my daughter Margaret Murray and my granddaughter Mira Murray" (the applicant) "to the use of the dwelling-house and the orchard and two acres of land." The testator also gave Mira Murray $50 a year, after the expiration of a lease, "till she attains the age of 21 years or so long as she remains in the said dwelling-house or until she marries, whichever event shall first happen." There was a similar provision for the testator's daughter Margaret. There were provisions in favour of the same daughter and granddaughter giving each an undivided half of the dwelling-house, orchard, and the two acres, "so long as she shall continue to dwell in the said house or until she shall get married, whichever event shall first happen." By another clause, the daughter and granddaughter were "to have one horse and two cows kept and stabled," and "all the wood required by them . . . from off the said lot," and certain other privileges; but no specific period of enjoyment was mentioned.

By a judgment of this Court, in an action in which the daughter and granddaughter were plaintiffs and the respondent was one of the defendants, it was declared that, in lieu of the privileges referred to, the daughter and granddaughter should be paid an annual sum of $250 each, so long as they remained entitled thereto under the will and judgment.

Margaret died on the 7th August, 1914. Since January, 1915, Mira had not actually lived in the house—being a schoolmistress, she was necessarily absent; but she swore that she regarded it as her home, intended to occupy it from time to time, and had no intention of abandoning it. Abandonment is a question of fact, often involving the question of intention: James v. Stevenson, [1893] A.C. 162; Vansickle v. James (1915), ante 146.

The first question submitted was in effect: what portion of the $250 payable for the year ending on the 16th April, 1915, is

Mira Murray entitled to, and is the annual payment to be reduced to $125 a year after Margaret's death? The learned Judge said that it was not expedient to determine, a priori, the meaning to be attached to the language of the testator as to the occupation of the dwelling-house. The effect of what Mira had done and her status in reference to the house should be carefully sifted upon viva voce testimony, and should not be determined upon an originating notice under Rule 600 et seq., but in an action; and it should be declared accordingly.

The second question was, whether the annual payment was in any way dependent upon Mira continuing to *dwell* in the house in question; and, if so, what was the meaning of the words "continue to dwell?" The learned Judge was of opinion that the privileges, benefits, and services under the will, and the substituted annual payments, were to be taken and enjoyed for so long only as the beneficiaries or beneficiary continued to be legally entitled to the possession of the dwelling-house.

There should be no abatement or reduction of the $250 annual payment by reason of the death of Margaret. The estate of Margaret was entitled to share equally with Mira any moneys overdue and the moneys accruing due on the 7th August, 1914; and, subject to any question of forfeiture by reason of what had since happened, Mira was entitled to an annual payment of $250, calculated from the death of Margaret, payable as provided by the judgment, and to half the money overdue and accruing due when Margaret died.

The motion was properly launched under Rules 600, 604, and 605; and the applicant should have the costs of it against the respondent.

MIDDLETON, J., IN CHAMBERS. NOVEMBER 27TH, 1915.

*RE STRATFORD LOCAL OPTION BY-LAW.

Municipal Corporations — Local Option By-law — Petition for, Presented to City Council—Sufficient Number of Petitioners —Ascertainment by City Clerk—Liquor License Act, R.S.O. 1914 *ch.* 215, *sec.* 137(4)—*Mandamus to Council to Submit By-law to Municipal Electors—Motion for—Costs—Members of Council Voting against First Reading.*

Motion by David M. Wright for a mandamus directing the Municipal Council of the City of Stratford and the members

thereof to give effect to a petition presented to the council, by submitting a local option by-law to the vote of the municipal electors.

R. T. Harding, for the applicant.
J. C. Makins, K.C., for the respondents.

MIDDLETON, J., said that a petition for the submission of a by-law, signed by a large number of ratepayers, was presented to the city council in September, 1915; on the 11th November, the City Clerk reported that the petition contained the names of more than 25 per cent. of the persons named in the list of voters; at a meeting of the council held on the 15th November, a motion that the by-law be read a first time was negatived. Only one more meeting of the council is to be held before the 10th December, the last day for advertising if the by-law is to be submitted on the January municipal election polling-day.

It was argued that the motion was premature, and that the council had until the last possible moment to determine whether it would pass the by-law or not. If that were so, it would follow logically that the Court could never grant a mandamus, because, after that critical moment had passed, it would obviously be too late, for the Court cannot dispense with the advertising stipulated by the Act.

It must be taken as reasonably established that it was the intention of the majority of the council to defeat the petitioners, and to avoid discharging the duty imposed upon the council by the statute, if that end could be accomplished.

There was nothing to suggest that the petition was not sufficiently signed; and the finding should be that the petition was sufficiently signed.

The statutory provision governing the matter is sec. 137, subsec. 4, of the Liquor License Act, R.S.O. 1914 ch. 215: "If a petition in writing signed by at least 25 per cent. of the total number of persons . . . qualified to vote at municipal elections is filed . . . it shall be the duty of the council to submit the same to a vote of the municipal electors." There is no provision, as in Re Halladay and City of Ottawa (1907), 15 O.L.R. 65, requiring that the council shall be satisfied that the petition is sufficiently signed.

The mandamus should be granted, with costs to be paid individually by those members of the council who voted against the by-law, and who are parties to this motion.

MIDDLETON, J. NOVEMBER 27TH, 1915.

*RE FENWICK.

Executors and Administrators—Intestate Domiciled in Foreign Country—Letters of Administration Issued by Court of Domicile—Limited Letters Issued in Ontario in Respect of Shares in Ontario Company—Claim against Intestate and Estate to Ownership of Shares—Issue as to Ownership—Forum—Supreme Court of Ontario—Jurisdiction—Title to Property Situated in Ontario.

Motion by the National Trust Company, administrators in Ontario of the estate of George G. Fenwick, deceased, upon originating notice, for an order directing the trial of an issue in the Supreme Court of Ontario to determine the title to certain shares of the capital stock of the Ford Motor Company of Canada, and to the proceeds of certan other shares of the same stock now in the hands of the administrators.

The intestate was domiciled and resident in the city of Detroit, in the State of Michigan. At the time of his death, he was the holder of 64 shares of the stock mentioned. Letters of administration were issued to the Detroit Trust Company by the Probate Court of the County of Wayne; and subsequently, for the purpose of enabling the shares mentioned to be effectively dealt with, letters of administration, limited to the property of the deceased within Ontario, were issued to the applicants.

Rachel Eby claimed the ownership of 32 of the 64 shares, and also claimed part of the proceeds of the other 32 shares, already sold. This claim was resisted by those beneficially interested in the estate of the intestate.

The motion was heard by MIDDLETON, J., in the Weekly Court at Toronto.

W. E. Raney, K.C., for the applicants.

E. C. Cattanach, for Rachel Eby.

H. E. Rose, K.C., and J. L. Ross, for beneficiaries.

MIDDLETON, J., said that the cases relied upon were all collected in In re Trufort (1887), 36 Ch. D. 600; but neither that case nor any of the cases there cited dealt with the problem here presented: in all of them, the claim which was relegated to the adjudication of the Courts of the domicile was a claim arising

with respect to the estate of the deceased made by some one claiming title under him. The claim here was a claim made against the deceased and against his estate.

Lord Westbury's statement in Enohin v. Wylie (1862), 10 H.L.C. 1, at p. 13, places the matter more favourably to the contention of Rachel Eby than any other authority, but it falls far short of being a statement that the proper forum for the adjudication of all claims made against the estate of a deceased person is the Court of his domicile.

The shares of the Ford Motor Company of Canada have a local situs in Canada, and primâ facie the title to the shares ought to be determined by a Canadian Court. The only foundation for jurisdiction in the Court of Michigan would be that indicated in Penn v. Lord Baltimore (1750), 1 Ves. Sr. 444, and repeatedly affirmed in other cases—the jurisdiction of the Court over the person of the defendant.

Had Fenwick died testate, so that the property vested in his executors, if the executors were subject to the jurisdiction of the Michigan Court, the action might well be maintained there; but the case was entirely different—the title was in the Ontario administrators, even though the Ontario letters of administration should be regarded as ancillary.

An issue should be directed to be tried for the purpose of determining the title to the shares and the proceeds of shares; Rachel Eby to be plaintiff in the issue, the onus being upon her; the trial to be at Sandwich, subject to application for a charge; costs and further directions to be dealt with by the trial Judge.

A sale of the shares should not be directed while the title is in doubt.

SEXSMITH v. MCMATH—FALCONBRIDGE. C.J.K.B.—NOV. 24.

Malicious Prosecution—Reasonable and Probable Cause—Honest Belief of Defendant in Guilt of Plaintiff—Reasonable Grounds—Advice of County Crown Attorney—Malice—Indirect Motive—Counterclaim.]—An action for malicious prosecution, tried (by consent) without a jury, at Belleville. The defendant laid an information against the plaintiff charging that the plaintiff did, "unlawfully, fraudulently, and without colour of right, take, or, fraudulently and without colour of right, convert to his own use, one yearling bull (colour black and white), the property of James McMath," the defendant, "with intent to deprive him, the said James McMath, temporarily or absolutely of

his interest in the said property . . .'' The plaintiff was arrested, committed for trial, tried in the County Court Judge's Criminal Court, and acquitted. The learned Chief Justice said that the plaintiff failed utterly in proving a want of reasonable and probable cause. The defendant made every inquiry and took every precaution to assure himself of the facts which a man could be reasonably called on to make or take. He had an honest belief in the guilt of the plaintiff, and such belief was founded on reasonable grounds. He laid the facts fully and fairly before the acting County Crown Attorney, who advised a prosecution, or, as he said when recalled in reply, told him (the defendant) that it remained with him to go and lay an information. Upon the evidence, the learned Chief Justice had no doubt that the defendant's bull was driven into the pen at the station with the plaintiff's cattle, which were young steers and heifers, and that the plaintiff received payment for him (the bull). It was quite probable that the bull escaped from the pasture and joined the plaintiff's herd. There was nothing else in the case except the unusual allegation in the statement of defence that the defendant had ''no malice or ill-will against the plaintiff, but his only object in doing as he did was to obtain his said bull.'' This frank admission of what is known by the inept name of an ''indirect motive'' was also made by the defendant in his testimony at the trial. Had there been absence of reasonable and probable cause, this might have afforded some evidence of technical or legal malice, but in the present circumstances it was not material. Action dismissed with costs. Judgment for the defendant for $25 on his counterclaim for his expenses incurred in recovering possession of his bull after the plaintiff's conversion thereof, with costs. W. B. Northrup, K.C., for the plaintiff. D. L. McCarthy, K.C., and J. English, for the defendant.