The
# Ontario Weekly Notes

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## COURT OF APPEAL.

JUNE 20TH, 1910.

## REX v. HENDERSON.

*Criminal Law—Murder—Evidence—Judge's Charge—Misdirection—Nondirection—Insanity — Onus — Testimony of Experts—Circumstances Tending to Reduce Crime to Manslaughter—Recalling Jury—Remarks of Judge—Tendency to Hurry Jury—Recommendation to Mercy—Executive Clemency.*

Crown case reserved by RIDDELL, J., after a conviction of the prisoner for the murder of Margaret Macpherson, an aged woman.

The case was heard by MOSS, C.J.O., GARROW, MACLAREN, MAGEE, JJ.A., and TEETZEL, J.

F. D. Kerr, for the prisoner.

J. R. Cartwright, K.C., for the Crown.

On the day of the hearing, after a short adjournment, the judgment of the Court was delivered by MOSS, C.J.O.:—At the conclusion of the argument before us this morning we intimated our intention to further consider during adjournment the points which Mr. Kerr on behalf of the prisoner argued with much force and ability. Having considered them, we have reached conclusions which we think we should not delay in declaring. Mr. Kerr has left unsaid nothing that could be said on behalf of the prisoner. Throughout this case Mr. Kerr has performed his full duty as counsel, doing his utmost on behalf of the prisoner at the trial, and not relaxing his efforts on his behalf until the last. He has to-day forcibly presented every point that could be brought forward in favour of the prisoner. It is unfortunate for the prisoner that the

facts of the case, and the circumstances surrounding the commission of the crime, were so strong as to prevent the jury agreeing with Mr. Kerr's position on behalf of the prisoner, that at most they should only find him guilty of the lesser crime of manslaughter. All the arguments that were presented to the jury are not up before us for review; the Court has only to deal with the points that have been presented by the reserved case, and such additional points as Mr. Kerr, with the consent of the Crown, has raised. The limitations of the Criminal Code are such that we can only deal with the case on that basis. This Court has been constituted by the Parliament of Canada to deal with questions of law arising out of the trial, and not for the purpose of considering whether, notwithstanding the verdict of the jury, there are circumstances attending the prisoner's life and character that in another quarter might be considered influential in varying the sentence pronounced—the only sentence that could be pronounced by the trial Judge upon the verdict rendered.

The first point brought forward by Mr. Kerr was a question whether there was misdirection, or nondirection, on the part of the trial Judge in regard to the defence of insanity. The Judge clearly charged the jury that the defence had sought to prove insanity on the part of the prisoner, and told them that this would have to be proven beyond reasonable doubt in the minds of the jurors. He told them that, should they take such a view, they could bring in a verdict of "not guilty on the ground of insanity," which would have meant, not that the prisoner would go free, but that he would be detained in custody until some arrangement would be made for his future control—until the Court would direct some course to be followed by the authorities. The Criminal Code places the onus on the prisoner to shew that his condition was such that he would not be found guilty of murder; that he was labouring under natural imbecility or disease of the mind to such an extent as to render him incapable of appreciating the nature and quality of the act, and of knowing that it was wrong. And the learned trial Judge pointed out that this had to be proven "beyond reasonable doubt." In saying this, he did not, as Mr. Kerr sought to shew, go beyond proper bounds. The jury were bound to presume that the prisoner was sane until they were reasonably satisfied that the contrary was proved. If they had reasonable doubts, they could not properly find that the contrary was proved. The prisoner could not well complain of the attitude of the Crown on this branch of the case. Everybody connected with the trial in an official capacity desired to give the jury the fullest possible information on the point in question, and it seems clear that when

all the evidence was laid before the jury, they were not of two minds on the subject. Medical experts were furnished by the Crown with instructions to see the young man, and ascertain the state of his mind. From what these experts said, as a result of their inquiries, he was evidently a person of very low moral status. With regard to that there could be no doubt. Certainly he was unconscious of many things that go to make a well-regulated character. But the medical experts felt obliged to state that, so far as they could ascertain, there was no reason to suppose that he was not, at the moment of the commission of the crime, capable of understanding the nature and quality of the act and of knowing it to be wrong. There was other evidence, some of which tended to the opposite view, but the jury must have felt not convinced as reasonable men that the plea of insanity was proven.

In the second place, Mr. Kerr contended that there was not a sufficiently accurate charge on the part of the trial Judge on those as well as some other points that would have enabled the jury to reduce the crime to manslaughter. But, in going over the charge at the trial, we find that the presiding Judge took up these points at Mr. Kerr's instance, going fully into the law on the subject. There is no reason to suppose that the jury did not understand what was necessary to find upon the evidence in order to come to the conclusion that the crime was manslaughter and not murder.

Mr. Kerr, in the third place, laid stress upon the fact that the Judge, after the jury had been out for an hour, recalled them to ascertain if there were any points upon which they were in doubt. Mr. Kerr's point was that, in following this course, the learned Judge indicated that there was need for haste—that the jury was proceeding too leisurely in arriving at their verdict. We are agreed that it was quite within the right of the Judge to recall the jury at that time, or at any time, if he thought the jury were desirous of further explanation about any question. We desire to emphasise in the strongest possible way our view that it is not desirable or right that a jury should be hurried in the slightest degree. They should be permitted to take all the time they want in any case, and particularly in a case of this kind. But nothing that was said by the trial Judge in this instance would lead one to suppose that he wanted the jury to hurry. He recalled them, not to ask them to hurry, but to give them any additional assistance they might need.

Mr. Kerr, in the fourth place, took exception to the trial Judge's reference to the right of the jury to accompany their verdict with a recommendation to mercy. He sought to shew that, in making this allusion, the learned trial Judge was in danger of detracting from the responsibility which the jury should feel, and

which it is always the duty of a Judge to make the jury feel, in a case of such moment as the one now under review. A reference to the right that a jury have to accompany their verdict with a recommendation to mercy is not an impropriety or such an act as we could hold to amount to a misdirection. An allusion of this kind is probably made by counsel in most murder trials at some stage or other of the trial, and in these days of wide-spread reading it ought to be pretty well known to juries that it is open to them to make such a recommendation, and that such a recommendation, if made, must be dealt with by the Governor in Council. With circumstances that might be considered to render it expedient or proper to reduce the penalty, this Court has nothing to do. They should be referred to a different tribunal than the trial Judge or this Court; they can be acted upon by the Executive alone. It is there that such considerations are to be urged, and it is there that they are to be acted upon, if at all.

We have had an opportunity of fully considering in another case* all the points that were brought out in argument. We have also had the advantage of Mr. Kerr's forcible presentation of the case. If we thought that further consideration of the case would lead to a conclusion different from that which we have reached, we would be only too glad to postpone our decision. As it is, we do not believe that it would be merciful to the prisoner to raise any hopes of that kind. It is better that he should know that, so far as the Courts are concerned, he has nothing more to hope for. The responsibility for further action is now with the Executive; a recourse to executive clemency is open to him to the last moment.

The questions submitted will be answered in accordance with the views I have endeavoured to express.

* **Rex v. Ventricini, ante 961.**

JUNE 30TH, 1910.

## SMALLWOOD BROTHERS v. POWELL.

*Building Contract—Construction—Payment — Performance of Work — Satisfaction of Architect — Proof — Certificate — Changes in Specifications—Authority of Owner or Architect— "They" — Extras — Deductions — Arbitration — Progress Certificates—Evidence—Rejection—New Trial.*

Appeal by the defendant from the judgment of CLUTE, J., of the 22nd December, 1909, in favour of the plaintiffs, contractors, in an action to recover $1,470 for work alleged to have been done for the defendant in the erection of a house and stable in Toronto, and for a declaration of a lien on the defendant's lands for that amount. Judgment was given for the full amount of the plaintiffs' claim. There was also a counterclaim, which was dismissed.

The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

C. A. Moss, for the defendant.

I. F. Hellmuth, K.C., and D. Urquhart, for the plaintiffs.

MAGEE, J.A.:—The defendant's undertaking was that, in consideration of the plaintiffs strictly performing their covenants and agreement, he would pay in the manner specified, that is, 75 per cent. fortnightly on account of the contract as the work should proceed, the balance of the contract and all extras to be paid within 33 days from the completion of the work, and after the contractors should have rendered to the architect a statement of the balance due. The plaintiffs covenanted to perform the work well and thoroughly agreeably to the plans and specifications, to the satisfaction, and under the direction, of the architect, and to provide such material as should be proper and sufficient for completing the works shewn on the plans and specifications—but this was subject to the right of the defendant or his architect to require changes.. What, then, was this right of change? The provision in clause "third" is, that, should the defendant or his architect require alterations, deviations, or omissions, "they shall have the right and power to make such change or changes . . . and the same shall in no wise affect or make void the contract." The fair construction of the word "they" is, I think, "whoever so requires." It might be very proper to provide for joint action

before making changes, but the question is, do the words used imply that the plaintiffs were not to make changes, unless both the defendant and his architect made the requisition for them? I think they do not so imply, but that the plaintiffs were bound to comply with the requisition of either, and, if so, that the authority of either for a change would entitle the plaintiffs to be paid accordingly. The use of the word "require" supports, as I think, this construction, as it is manifestly used in the sense of demanding and not of needing, and a demand would be useless which could not be enforced; also the work was to be done under the "direction" of the architect.

Then, if the architect required a change, and the plaintiffs complied, they would in so complying be fulfilling their contract, and if they refused they would not be fulfilling it. Having so fulfilled their part, they would be entitled to ask the defendant to fulfill his part by paying them.

It is not, therefore, a question whether the buildings have been constructed in accordance with the original plans and specifications, but whether any changes therefrom have been made in accordance with the contract.

Then what proof did the plaintiffs offer of their performance of the work? The defendant did not agree to pay except 33 days after its completion. The only exidence offered was the defendant's answers on his examination for discovery admitting that he had four progress certificates, the last under protest because the plaintiffs were not entitled to it, and practically admitting, as being signed by the architect and as being unpaid, another progress certificate for $200 and the final certificate for $1,270 and a letter received by him from the architect stating that the plaintiffs had completed their work, and it was not fair to hold back the final certificate any longer, and he had given it to them. . .

The defendant . . . stated that he did not authorise any departure from the contract or authorise or require any alterations or deviations from the contract, and that he had been living in the house since October, 1908. He was then asked what bond the brickwork was in, and objection was at once made that no evidence could be given as to the actual work not being in accordance with the plans and specifications, in the face of the architect's certificate, no fraud being alleged. To this objection the trial Judge gave effect. A number of instances were mentioned by the defendant's counsel in which it was alleged that the contract had not been complied with, and reference was made to the particulars delivered for other instances, and it was proposed to examine the defendant and call other witnesses to establish these departures,

and in support of the defendant's counterclaim to prove the damage arising from them; but the evidence was rejected, and judgment given in the action and on the counterclaim against the defendant.

The first question which arises is, whether there is proof that the contract has been complied with to the satisfaction of the architcet. Neither he nor the plaintiffs are called. Proof of facts necessary to be proved should be under oath. We have here the fact proved that the architect has given a certificate, but we have not the truth of the certificate established. . . . The defendant did not agree to pay in 33 days after the architect's final certificate, but after completion. The contract, it is true, contains a clause, "Provided further that, if required, in each case a certificate shall be obtained by the contractor from the Registrar . . . that he . . . finds no mechanics' liens or claims recorded . . and thereupon and on or before the said thirty-third day after completion of the said works, a final certificate shall be obtained from and signed by the architect. But the same proviso goes on to declare that "if, from any reasonable cause whatever, such final certificate should not be obtained or the giving of the same should be refused by said architect, the said contractor shall nevertheless . . . be entitled to proceed at law to enforce payment of the balance due to him . . . and the production of a final certificate shall not in any case be a condition precedent to his right to recover . . . and such balance . . shall be recovered, if justly due, without the necessity of any production in evidence of any final certificate, and the right of action hereby provided shall not be controlled by the arbitration clause hereinafter set forth."

It is, I think, manifest that the giving of the final certificate is of little importance, and that the rights of the parties in the action are to be determined wholly irrespective of its being obtained or not. . . . The fact to be proved at the trial, therefore, is not the giving of his certificate, but the fact of his satisfaction; and that, in so far as it may be availed of, should be proved by oral testimony. If it were a question of previous instruction for a deviation, the previous instruction in writing would be established by the proof of the writing, but subsequent written statement of satisfaction is not proof of satisfaction. Then there is nothing in this contract enabling the architect to forgive default of performance. He may in advance, when he has the choice, require a change to be made, but that does not authorise him always to say, "You have done that which you should not have done, or, you have left undone that which you should have done, but, although I am not satisfied,

I shall overlook it," or "I shall deduct so much from your price." The contract is, that the work shall be done in accordance with it to his satisfaction, not to his indulgence, and the performance should be proved by some one who can prove it. There was, therefore, here, I think, a failure of proof on the part of the plaintiffs as to the performance of the contract itself.

But as to the extras claimed and deductions, the contract shews that the architect's is not the final word. Clause "sixth" provides that, should any dispute arise as to the value of any claim for extras or deductions after the architect has given his final certificate in writing on the completion of the contract, the same shall be referred to arbitration. The parties have not here chosen to seek arbitration, but the dispute exists, and . . . they are entitled to have it properly tried.

Another matter to be referred to is, that part of the plaintiffs' claim is on a progress certificate for $200. It is expressly declared that such certificates in no way lessen the total and final responsibility of the contractor nor exempt him from liability to replace work if it be afterwards discovered to have been badly done or not according to the drawings and specifications either in execution or materials. That, of course, does not touch the question of his exemption after a final certificate, but when we find that the final certificate is not itself necessary nor conclusive, the provision I have alluded to goes to shew that thorough performance of the work was what the parties had in mind, and the contractors were not to escape through temporary non-discovery of inferior work.

On the whole, I think the case should go back for trial, not merely on account of the failure of proof on the part of the plaintiffs, but also on account of the refusal to allow the defendant to prove, if he can, wherein the contract has not been performed, either according to its terms or as varied according to its terms. The costs of the former appeal should be to the defendant. The costs of the former trial should be dealt with by the Judge at the new trial.

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., concurred.

MEREDITH, J.A., was of opinion, for reasons stated in writing, that paragraph 5 of the contract applied; that the architect, acting under that paragraph, was an arbitrator; that no award had been made; and that the appeal should stand over until such an award should be made.

JUNE 30TH, 1910.

## FOLEY v. BARBER.

*Company—Winding-up—Contributories — Misrepresentations — Action to Set aside Application for and Allotment of Shares —Evidence—Incorporated Company Becoming Shareholder—Powers of Company—Manitoba Joint Stock Companies Act —Powers of Vice-President and Manager — Absence of By-law—Resolution.*

Appeal by the plaintiffs, an incorporated company, from the judgment of MAGEE, J., ante 40, dismissing the action.

The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, and MEREDITH, JJ.A.

E. D. Armour, K.C., and H. W. Mickle, for the plaintiffs.

J. A. Macintosh and Britton Osler, for the defendant Barber.

H. H. Shaver, for the defendant Carpenter.

The judgment of the Court was delivered by MEREDITH, J.A.:—The learned trial Judge's findings, upon conflicting evidence, cannot be disturbed; it may indeed be that there should be no inclination to disturb them, even if our opportunities for finding the truth, regarding the facts in question, were as great as his; and I may add that the plaintiffs have far from satisfied me that in taking the stock they relied upon any of the things which they now call misrepresentations; that, if no such misrepresentations had been made, they would not have acted just as they did.

Upon the question of law involved, my opinion also agrees with that expressed, and given effect to, by the trial Judge. The plaintiffs had power to purchase stock in the other company, though they could not regularly do so except when authorised by a by-law confirmed at a general meeting; but the want of such a by-law seems to me to be but one of those irregularities which the decided cases make ineffectual against the other company, acting, as it did, in good faith. The case would, of course, be very different if the plaintiffs had no power to purchase such stock; so, too, if the Act had provided for the registration of the by-law in a manner accessible to those dealing with the plaintiffs.

If these things be so, it is needless to consider any of the other questions argued here at such great length; and, considering that they are so, I would dismiss the appeal.

JUNE 30TH, 1910.

## *BEARDMORE v. CITY OF TORONTO.

*Constitutional Law—Powers of Provincial Legislature—Authorising Municipal Corporations to Acquire and Distribute Electric Energy—B. N. A. Act, sec. 92 (8), (10)—Validation of Contracts with Hydro-Electric Power Commission—Stay of Pending Actions—Right of Court to Inquire into Validity of Statutes.*

Appeal by the plaintiff from the order of a Divisional Court, 20 O. L. R. 169, affirming the judgment of BOYD, C., ib. 165.

The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, JJ.A., and BRITTON, J.

E. F. B. Johnston, K.C., and H. O'Brien, K.C., for the plaintiff.

H. L. Drayton, K.C., and H. Howitt, for the defendants.

J. R. Cartwright, K.C., for the Attorney-General for Ontario.

MOSS, C.J.O.:— . . . Upon the appeal to this Court the argument was substantially confined to the discussion of two questions, viz., whether the legislature had legislative power to authorise and empower the city of Toronto to manufacture, or, by contract with the Hydro-Electric Power Commission, to acquire, electric power and energy, and not only use such power and energy for lighting its streets and buildings and for purposes of a cognate character (which, it was conceded, might be done), but also sell and dispose thereof to private citizens and others for use by them; and whether recourse to the Courts for the purpose of testing the constitutional validity of the legislation is barred by the provisions of the Act 9 Edw. VII. ch. 19. . . .

In dealing with this appeal, it does not seem to be necessary for us to go beyond the well-considered judgment pronounced by the learned Chancellor, speaking for a Divisional Court, in Smith v. City of London, 20 O. L. R. 133. All the considerations pressed upon us by counsel for the appellant in this case appear to be fully and completely answered, and it would be but idle repetition to travel once more over the same ground. . . .

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

The conclusions of this Court accord with those of the learned Chancellor.

Appeal dismissed with costs.

MEREDITH, J.A., gave reasons in writing for the same conclusion.

GARROW and MACLAREN, JJ.A., and BRITTON, J., also concurred.

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JUNE 30TH, 1910.

## *DOMINION EXPRESS CO. v. MAUGHAN.

*Partnership—Holding out—Estoppel—Representation of Authority—Publicity—Knowledge—Scope of Business.*

Appeal by the defendant John Maughan from the order of a Divisional Court, 20 O. L. R. 310, reversing the judgment of RIDDELL, J., at the trial, whereby the action was dismissed as against the defendant John Maughan, and directing that judgment be entered for the plaintiffs against that defendant, in an action for $1,395.13, being the amount of certain money orders alleged to have been drawn by John Maughan & Son, as agents for the plaintiffs, and for indemnity in respect of another order not accounted for. The defendant John Maughan denies any agency either by him or his firm for the plaintiffs, and asserted that the agency, if any, was the defendant Harry Maughan's individually, and also denied that Harry Maughan was a member of the firm of John Maughan & Son, and denied that Harry Maughan had any right to sign the name of John Maughan & Son. The Divisional Court considered that the defendant John Maughan had so held out the defendant Harry Maughan as his partner as to make the former liable to the plaintiffs.

The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, JJ.A., and MIDDLETON, J.

W. R. Smyth, K.C., and W. J. Boland, for the defendant.

Shirley Denison, for the plaintiffs.

MIDDLETON, J.:—The law governing this case, as presented by the plaintiffs, is accurately stated by Lord Wensleydale in Dickin-

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

son v. Valpy (1829), 10 B. & C. 128, 140. . . . In the later case of Ford v. Whitmarsh (1840), Hurl. & Walm. 53, Parke, B., in giving the judgment of the Exchequer Chamber, said: "The defendant would be liable if the debt was contracted while he was actually a partner, or upon a representation of himself as a partner to the plaintiff, or upon such a public representation of himself in that character as to lead the jury to conclude that the plaintiff knowing of that representation, and believing the defendant to be a partner, gave him credit under that belief." Accepting this as the test, in the case at bar the plaintiffs must fail, because, assuming in their favour that there was a holding out, no attempt was made at the trial to bring the case within either branch of the rule. No evidence was given to shew that at the time credit was given the plaintiffs knew of the circumstances now relied on as constituting a holding out, or that they gave credit upon the faith of any public repute which would satisfy a jury "that the plaintiffs knew of it and believed him to be a partner." The trial Judge, who here occupied the position of the jury, was not so satisfied, and there was not any evidence upon which he could be asked so to find. . . .

[Reference to Edmonson v. Thompson and Blakley, 8 Jur. N. S. 235; Thompson v. Toledo National Bank, 111 U. S. 529; Pott v. Eyton, 3 C. B. 32.]

The necessity of knowledge by the plaintiff of the facts relied upon would appear to be plain when it is remembered that the liability is based upon estoppel: Scarf v. Jardine, 7 App. Cas. 345.

For another reason, the plaintiffs, in my view, fail. The holding out was of a partnership as "general insurance agents." The liability sought to be imposed is as "agents for the sale of signed money orders" issued by the plaintiff. Such an agency is beyond the scope of the business held out.

Upon the argument of the appeal it was suggested that the plaintiffs might have presented their case in a more formidable way thus: "At the request of Harry Maughan, we supplied 'John Maughan & Son' with the money orders in question. We gave credit to 'John Maughan & Son,' and, if John Maughan is the sole member of the firm, he is liable for that which was supplied to him under his trade name at the instance of his agent, be he partner or servant." The same answer, I think, is open to the defendant. The act was beyond the apparent scope of the agency. Had the money orders been supplied for use in the business carried on, the contention would have been sound, but the sale of money orders is, as I have said, beyond the scope of the business of "general insurance agents," and I do not think the plaintiffs' case

is in any way helped by the fact that the plaintiffs may have thought that John Maughan & Son would have been themselves purchasers of the orders required in their business. If it was intended that the money orders should only be used in the business, the agreement actually signed does not carry out the intention.

The appeal should be allowed and the judgment of Riddell, J., restored, with costs throughout.

Moss, C.J.O., agreed in the result reached by Middleton, J., for reasons stated in writing.

Garrow and Maclaren, JJ.A., also concurred.

Meredith, J.A., dissented, for reasons stated in writing.

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June 30th, 1910.

## PURSE v. GOWGANDA QUEEN MINES LIMITED.

*Company—Subscription for Shares—Contract under Seal—Action for Relief from—Fraud and Misrepresentation by Agents — Non-existent Company—Parties—Sale of Mining Claims to Company at Excessive Price—Absence of Prospectus—Allotment of Shares—Calls.*

Appeal by the plaintiff from the judgment of Boyd, C., who tried the action without a jury, dismissing it.

The object of the action was to relieve the plaintiff from a contract under seal to take 5,000 shares of the capital stock of the defendant company.

The statement of claim set forth that the defendants, "through their agent," procured the plaintiff to sign a subscription for 5,000 shares, and on the 30th December notified him that he had been allotted 5,000 shares, and thereafter placed him upon the register of shareholders, and called upon him to make payment in respect of calls upon the said shares, and that the subscription was obtained by fraud and misrepresentation and fraudulent concealment of material facts "on the part of the defendants and their agents." A certain agreement of the 7th December, 1908, between Henry Barber, Robert Greig, and the American Securities Limited, which was referred to in the contract signed by the plaintiff and annexed thereto, was then referred to, and it was alleged

that before its date Barber had obtained an option from the owners of mining claims for about $12,500 and about 25,000 shares of stock in the company to be incorporated to acquire the claims, and that, in order to induce the plaintiff to subscribe, the defendants "and their agents Barber and Greig" fraudulently concealed from the plaintiff the fact that Barber or Barber and his associates were to receive the difference in cash between the $12,500 and the $95,000 to be paid him under the agreement; that they also represented that no stock was to be issued other than for cash as set out in the agreement, while in fact about 25,000 shares were to be transferred to the original owners of the claims, and that they represented to the plaintiff, contrary to the fact, that all the information which could be obtained was contained in the agreement. It was further alleged that at the date of the plaintiff's subscription no prospectus of the company had been filed in accordance with the Mines Act; that the plaintiff's subscription was obtained by oral representations; and that he had repudiated his subscription and made no payments. And the plaintiff claimed a declaration that his subscription was not binding upon him, and that he was not a shareholder, and an order for the removal of his name from the stock register.

The defendants, in their statement of defence, set up and insisted upon the plaintiff's agreement to subscribe, denied all fraud and fraudulent misrepresentation, asserted the regularity and validity of all the proceedings, and counterclaimed for the calls.

BOYD, C., found against the plaintiff on the alleged fraud and held him bound as a subscriber for the 5,000 shares, but did not give effect to the counterclaim, as the American Securities Limited were not before the Court. He dismissed both the action and the counterclaim.

Upon the plaintiff's application for leave to appeal directly to the Court of Appeal, his counsel consented to an amendment being made by adding the American Securities Limited as defendants in the action and plaintiffs by counterclaim. This was done, and the pleadings were amended accordingly.

The plaintiff having appealed, the defendants gave notice of a cross-appeal as to the counterclaim, but it was agreed between counsel that it should not be proceeded with, it being understood that such disposition of it was without prejudice to the defendants' right to proceed by action for the recovery of the calls, if entitled to be paid them.

The appeal was heard by Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A.

R. S. Robertson, for the plaintiff.

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

Moss, C.J.O.:— . . . In so far as the plaintiff seeks relief founded on misrepresentation and fraud in inducing him to become a party to and sign the subscription agreement, the plaintiff, while alleging in his statement of claim that Barber and Greig were the agents of the Gowganda Queen Mines, takes the position in argument that no contract can be made on behalf of a non-existent corporation, and that there has been no transfer to and adoption by the Gowganda Queen Mines nor any novation so as to create privity between that company and the plaintiff.

Upon this hypothesis the plaintiff has not brought before the Court the proper parties interested in upholding the agreement, viz., Barber and Greig. But, apart from this, the Chancellor has found, upon the evidence, that the charges of fraud and imposition are not sustained, and upon the plaintiff's own shewing it was made plain that no representation or statement was made to him other than such as are contained in the agreement of the 7th December, 1908. This was left with the plaintiff, and he admits having read and understood it, and, after a night's deliberation, he decided for himself to become a subscriber.

As to the large profits said to have been intended to be made by Barber out of the transfer to the company, that is something in respect of which the company may yet call Barber to account. But at present the company is not the complainant, and the plaintiff is not entitled to put forward on its behalf an alleged improper or dishonest sale to it at an excessive price as a ground for relief from the agreement he signed.

The plaintiff, therefore, not being in a position to be relieved from his agreement on the record upon which he has come into Court, is still bound by the obligations it imposes upon him. He cannot ask for a declaration as to his position in the company. His agreement to subscribe being under seal, it may be that he is not in a position to repudiate it. See Nelson Coke and Gas Co. v. Pellatt, 4 O. L. R. 481; Re Provincial Grocers Co., 10 O. L. R. 705.

If, as he contends, only these persons who signed the petition for letters of incorporation and the accompanying memorandum of agreement and stock became incorporated and formed the company—as to which see Re Nipissing Planing Mills Co., 18 O. L. R. 80—it follows that they must act for and as the company until

others are made or become shareholders by allotment of shares to persons subscribing or applying therefor or otherwise. At this stage the time when it became incumbent upon the company to issue a prospectus had not arrived.

The company assumed, whether regularly or otherwise it is not proper to determine at this stage, to allot to the plaintiff the number of shares for which he agreed to subscribe.

The Chancellor determined that it was not proper to give to the plaintiff a declaration which might have the effect of debarring recovery of calls, leaving open to all parties all grounds of action or defence that might be open in such an action.

In the circumstances, he appears to have adopted the proper course, and his judgment should be affirmed.

The appeal, should, therefore, be dismissed with costs, and the cross-appeal without costs. But both dismissals should be without prejudice to such further steps for recovery of or defence to any claim for calls as either party may be advised to take.

MEREDITH, J.A., for reasons stated in writing, agreed that the appeal should be dismissed.

GARROW, MACLAREN, and MAGEE, JJ.A., also concurred.

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JUNE 30TH, 1910.

## McLEAN v. TOWNSHIP OF HOWLAND.

*Highway — Way Substituted for Original Road Allowance—Payment—Presumption — Lapse of Time — By-law Establishing Deviation Road—User by Public — Dedication—Acquiescence.*

Appeal by the plaintiff from the judgment of BRITTON, J., dismissing the action, which was brought to restrain the defendants from breaking down or removing the plaintiff's fences and using his land as a public highway, and for damages, etc.

The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

M. Wilson, K.C., and C. R. Atkinson jun., for the plaintiff.

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

MEREDITH, J.A.:—I have no manner of doubt that, from the facts proved in this case, there can be no other reasonable conclusion than that there was a sale of the way in question by the

elder McLean to the municipality, afterwards confirmed, and acted upon for many years, by him as well as by the defendants. The provision for the appointment of an "arbitrator" to lay out the new road, is not inconsistent with, but supports, my view of the existence of this agreement; the new road had to be laid out by some one, and the parties agreed upon a competent indifferent person to lay it out.

The original allowance for road had been opened for traffic, and so the municipality were bound to keep it in repair; that road crossed two ravines, which necessitated the construction of two bridges; the bridges had been burned; in the interests of all concerned it was thought better to acquire a new way which would avoid the necessity for any bridges; and it is quite clear to me that it was agreed, on all hands, that such a road as that in question should be substituted for the original road; it is manifest that it was so agreed upon between the municipality and the elder McLean, as well as that he should give such new way through his land and have the old road instead; whether he was to have a sum of money in addition is not proved; but, if it had been, that can make no difference; for it ought, after such a lapse of time, especially having regard to the municipal offices held by the elder McLean, to be presumed to have been paid; and, if not paid, any claim to it is now barred by lapse of time. The municipality passed a by-law in the year 1876 to establish the new road as a deviation from, and instead of, the old bridged road; and ever since, now almost 34 years, effect has been given, by all concerned, to this arrangement —the elder McLean, his son (the plaintiff), the municipality, and the public, with this single exception, that, in recent times, the plaintiff set up the contention that $60 was to have been given in addition to the old road for the new one, but had never been paid; it was demanded, and, being refused, this costly litigation was begun, litigation inexcusable, as it seems to me, having regard to its cost in comparison to the value of the land in question, or the sum demanded, $60, as well as to all the circumstances of the case. During all those years there was no attempt to compel the repair of the original road, nor even a suggestion, from any quarter, that any such obligation still existed; the fences were erected by the owners of the land so as to avoid interference with the new road; the new road was, during all that time, used in lieu of the old one —it can make no difference that there may have been a deviation from its true line; and the traffic went around the ravines instead of across them, the very thing which was agreed upon by the parties and provided for in the by-law. Since that transaction the

elder McLean was for two years, clerk of the municipal council, and for nine years treasurer of the municipality; so that the very strongest kind of a case in favour of an exchange is made out.

If there had been no agreement, there would, in my opinion, be strong evidence of dedication, by the elder McLean, acquiesced in, and acted upon all these years, by the plaintiff and all concerned in the way.

Upon this ground the plaintiff's case seems to me to fail so plainly that it is quite unnecessary, and so not advisable, to deal with any other of the many subjects discussed, at such great length, here.

Appeal dismissed with costs.

MAGEE, J.A., agreed, for reasons given in writing.

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., also agreed.

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## HIGH COURT OF JUSTICE.

DIVISIONAL COURT. MAY 17TH, 1910.

### *RE MOLSON, WARD v. STEVENSON.

*Will—Two Testamentary Writings of Different Dates—Issue of Letters of Administration with both Annexed—Revocation—Intention—Residuary Clause—Presumption against Intestacy.*

Appeal by the defendants Horatio Stevenson and Henry J. Stevenson from the judgment of the Surrogate Court of the United Counties of Northumberland and Durham finding that two testamentary writings, dated respectively the 17th December, 1875, and the 16th October, 1879, together contained the last will and testament of Sophia Molson, who died on the 23rd December, 1908, and directing that letters of administration with the two testamentary writings annexed should be issued to H. A. Ward, the plaintiff.

The first will appointed executors, and, having a residuary clause, disposed of the whole estate. The second will appointed the same executors, was called "my last will," did not in any way refer to the former document, had no revoking clause, no residuary

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

clause, and did not dispose of the whole estate actually existing at the date of the decease, so that as to the part undisposed of, if the second will alone were admitted to probate, there would have been an intestacy.

The appeal was heard by MEREDITH, C.J.C.P., TEETZEL and MIDDLETON, JJ.

J. O. Dromgole, for the appellants, contended that only the later will should be admitted to probate, relying chiefly on In the Estate of Bryan, [1907] P. 125, 76 L. J. N. S. P. 30.

William Kingston, K.C., for the respondents, contended that the decision of the Judge below was right.

THE COURT affirmed the decision of the Surrogate Court Judge, distinguishing the Bryan case.

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DIVISIONAL COURT. JULY 2ND, 1910.

## *HESSEY v. QUINN.

*Landlord and Tenant — Rent — Excessive Distress — Statute of Marlbridge—11 Geo. II. ch. 19, sec. 19—R. S. O. 1897 ch. 342 — Damages — Evidence — Nominal Damages — Damages for Holding over—Terms of Letting—Costs.*

Appeal by the defendant Quinn from the judgment of OSLER, J.A., 20 O. L. R. 442.

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

A. E. H. Creswicke, K.C., for the appellant.

F. G. Evans, for the defendant Reeve.

J. M. Ferguson, for the plaintiff.

The judgment of the Court was delivered by MIDDLETON, J.:— The right to damages for excessive distress given by the Statute of Marlbridge was not interfered with or modified by the Imperial statute 11 Geo. II. ch. 19, sec. 19, which provides that "when any distress shall be made for any kind of rent justly due, and any irregularity or unlawful act shall be afterwards done by the party

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

or parties distraining," the party aggrieved "may recover full satisfaction for the special damage . . . sustained thereby, and no more." These statutes, somewhat modified in language, but substantially the same, are now found in R. S. O. 1897 ch. 342.

In Foa, 3rd ed., p. 528, it is said that the statute of George applies to actions for excessive distress. Whitmorth v. Smith, 5 C. & P. 250, is cited as authority for this proposition. All that case determined was, that when some rent was due trover would not lie. The statement is in conflict with other authorities, and erroneous.

The statute in question was passed, as its preamble shews, to relieve landlords from the decisions holding that any irregularity in the proceedings authorised by the statute 2 W. & M., leading up to the sale of the things distrained, rendered the landlord a trespasser ab initio. The true view is, that the statute is confined to irregularities or illegalities arising after the distress, and has no application to the taking of an excessive distress. No doubt, if applicable, special damage would have to be shewn: Rogers v. Parker, 18 C. B. 112; Lucas v. Tarleton, 3 H. & N. 116.

Piggott v. Birtles, 1 M. & W. 441, and Chandler v. Doulton, 3 H. & C. 553, shew that in the case of an excessive distress there is a breach of the statutory duty to make a reasonable distress only, and that some damage must be presumed. Black v. Coleman, 29 C. P. 507, is also in point. But, even when the statute read that in such case the landlord should be "grievously amerced," nominal or nearly nominal damages were allowed, unless substantial damage was shewn. The cases cited give as indications of real damage: (1) deprivation of the custody and use of the excess taken; (2) deprivation of the power of selling while in custody; (3) extra expense in replevin proceedings.

Upon the evidence in this case, there has been no substantial damage—the bailiff took nominal possession only, and did not interfere with the use and enjoyment of the goods; and, as replevin was granted upon payment into Court of the rent due, there is nothing upon which to found an award of more than nominal damages. In none of the cases is there any indication that exemplary or punitive damages are proper. Had any substantial damage been sustained, substantial and liberal damages might well be awarded.

The damages should be reduced to $5.

Upon the evidence, it is impossible to disturb the finding of the trial Judge as to the terms upon which the six rooms are held.

The disposition of costs by the trial Judge should stand; but, as success is divided, there should be no costs of the appeal.

DIVISIONAL COURT. JULY 2ND, 1910.

## *RE SCHUMACHER AND TOWN OF CHESLEY.

*Municipal Corporations — Local Option By-law — Voting on — Vote of Town Clerk—9 Edw. VII. ch. 73, sec. 9—Passing by Council—Special Meeting—Good Friday—Printing of Voters' List Done by Town Clerk—Contract with Corporation—Scrutineer — Appointment — Sufficiency — Right to Vote in Subdivision where Appointed to Act—Deputy Returning Officer—Qualification as Voter—Finality of Voters' List—Inability to Mark Ballot—Declaration—Voter Named in List—Qualification not Given—Misnomer of Voter—Right to Vote of Person Intended—Voter's Christian Name not Given—Votes of Illiterates—Names Entered in Poll Books before Day of Voting—Unauthorised Persons Present when Electors Voting — Appointment of Agents—Time for—Municipal Act, secs. 341, 342—Irregularities—Application of sec. 204 to Save By-law.*

Appeal by Schumacher from an order of MEREDITH, C.J.C.P., of the 16th May, 1910, dismissing a motion to quash a local option by-law of the town.

The by-law was submitted to the voters of the town on the 3rd January, 1910; 440 voters cast their votes, of whom 264 voted for the by-law, giving it exactly the three-fifths majority required by the statute.

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

J. B. Mackenzie, for the appellant.

C. J. Holman, K.C., for the town corporation.

RIDDELL, J.:—The notice of motion contains some 22 reasons in all, which I shall deal with in the order in which they were argued.

Objection 1. The by-law had not the necessary three-fifths of the electors in its favour. It is said that the clerk of the town voted, and that he had no right so to do. . . . There was much difference of opinion in the Courts upon a similar question; i.e., as to the right of a deputy returning officer to vote; and I think the legislature intended to settle that vexed question and also this when the Act of 1909 was passed. The Liquor License Act, R. S.

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

O. 1897 ch. 245, by sec. 141 (1), provides that the by-law, before the final passing thereof, is to have been duly approved by the electors, "in the manner provided by the sections in that behalf of the Municipal Act." The marginal note here is to R. S. O. 1897 ch. 223, secs. 338 sqq.; and this section of the Liquor License Act has been always considered to require a vote in the same way and by the same electorate as R. S. O. 1897 ch. 223 secs. 338 sqq., including sec. 351. Section 351 makes applicable to such an election "all the provisions of secs. 138 to 206 inclusive, except sec. 179, of this Act." There was a difference of opinion in the Courts as to the effect of this upon deputy returning officers—we need not go into that question. The legislature in 1909, 9 Edw. VII. ch. 73, sec. 9, amended sec. 351 by making the exception cover only sub-secs. 1 and 2 of sec. 159. It follows, then, that the legislature have said that the provision that a clerk shall not vote shall not apply to voting of this character; while they have excluded from the exception the case of deputy returning officers. Whatever else the legislature may mean, it must, I think, certainly mean that the clerk can vote at such a voting.

Objections 2, 3, and 4. The by-law was read the third time on the 25th March. A special meeting had been called for the 21st March for the final passing of the by-law—that meeting was adjourned to the 28th March. On the 24th March another special meeting was called for the following day, and upon the 25th March, all the members being present, the by-law was given its third reading. Two objections are taken to this: (1) that the 25th March was Good Friday; and (2) that there was no power to call a meeting pending the adjournment of the former. The statute 6 Edw. VII. ch. 47, sec. 24(4), makes it the plain duty of the council to pass the by-law; and I am unable to find anything in the statute forbidding the holding of a meeting on Good Friday. Nor is there anything at the common law. . . .

[Reference to 4 Bl. Com. 63, 64; 27 Hen. VIII. ch. 5; Foster v. Toronto R. W. Co., 31 O. R. 1, 4.]

It may be that, if any councillor objected on conscientious grounds to the meeting being held, there might have been some ground of complaint. I do not think that the act of the council, unanimous and without objection, can be said to be other than valid, though done on Good Friday.

Nor does the fact that a special meeting had been adjourned, and was still, therefore, pending, make any difference. Section 270 (1) gives to the head of every council the right "at any time" to "summon a special meeting thereof." . . . No exception is made of the time between the adjournment of any meeting and

the time to which the meeting is adjourned. . . . It must be clear that if all are present and none objects, the special meeting is regular. . . .

Objections 5, 6, and 7 were not pressed.

Objections 8 and 9. The printing of voters' list, etc., was done by the town clerk. There is no incompatibility in the dual position of the clerk and printer, such as in Rex v. Tizard, 9 B. & C. 418. . . . It is true that "before entering on the duties of his office" he must make and subscribe a solemn declaration that he has not . . . any interest in any contract with . . . the . . . corporation. "It is unnecessary to consider what would be the effect upon the contract if the clerk entered into one after his taking office—it is sufficient to say that the statute does not avoid the office. The same remark applies to the argument that he must be held to have vacated his office by reason of the alleged fact that he printed material for the temperance people. This disposes of objection 21.

Objection 10. This is directed against the vote of the clerk already dealt with in objection 1.

Objection 11. W. J. Durst lived in polling subdivision No. 2, having property in both No. 1 and No. 2. An appointment was drawn up for him to act as scrutineer in No. 2, but a change was made in pencil to No. 1, and then the mayor signed the appointment. This change was made at the request of one Armstrong. The clerk swears that he gave this to Durst at his request; and Durst swears that he received it and a certificate from the clerk, and delivered both to the deputy returning officer in polling-booth for No. 1 on the morning of the election. This is sufficient proof—the appointment is regular. . . . Upon the production of the certificate Durst was entitled to vote: 3 Edw. VII. ch. 19, sec. 347 (2). . . .

J. J. Neelin was the deputy returning officer in No. 2. His certificate reads, "is a duly qualified tenant in polling subdivision No. 1, and is therefore entitled to vote in No. 2." Here not the property but the "other qualification" is given, viz., that Neelin is a tenant—and the rest of the certificate shews that that means a tenant qualified to vote. He is "a person claiming to vote as a tenant," whose case is provided for by sec. 113. The oath does not specify the property, and I can see no difficulty, in case of suspicion, in requiring the voter to take an oath. I am of opinion that this objection fails. . . .

Objection 12. George B. Nicol voted in a polling subdivision where he had no property as owner. His name, however, appears

on the voters' list for No. 2, he voted in No. 2, and we cannot inquire into his real qualification: 7 Edw. VII. ch. 3, sec. 24.

Objection 13. A number of persons voted openly without having previously made declarations of inability. This objection goes not to the right to vote, and cannot be considered, for reasons given in Re Ellis and Town of Renfrew, ante 710. . . .

Objection 14. Henry Specht is on the voters' list as "Henry Specht, farmer, pt. S." The objection is made that this is not sufficient. The Act (1907) 7 Edw. VII. ch. 3 says that the voters' list "shall . . . be final and conclusive evidence of the right of all persons named therein to vote," except in certain cases not of importance here. This was held to apply to voting of this nature and to such applications as this in In re McGrath and Town of Durham, 17 O. L. R. 514. It cannot be successfully contended that Henry Specht was not "named" in the voters' list. I may add that it is sworn that he is a freeholder.

Neil Taylor thus appears on the voters' list: "Taylor, Neil, gentleman, lot 180 con. or street E. Dobie." Whatever his qualification, he is "named" in the voters' list.

Objection 15. Arthur Bashford was allowed to vote. No name "Arthur Bashford" appears in the voters' list, but there is found—"499. Barbford, Geo. S., labourer, lot V. Pt. Park M. F. & O." The assessor swears that this should have been Arthur S. Bashford, and that Bashford was at the time of the voting a freeholder, assessed for $300, and that Bashford is the person he intended to place upon the list. . . . Bashford could take the oath set out in sec. 112 of the Act of 1903; he, therefore, had the right to vote, as he was "the person . . . intended to be named" in the voters' list: Re Armour and Township of Onondaga, 14 O. L. R. 606, 608.

The same remarks apply to Mrs. Jean Martha Dobie. . . .

Objection 16. A person described thus, "648. Morgan, Dr., Surgeon, lot 36 E. McGraw, M. F. & T.," was allowed to vote. This was Henry E. Morgan, a surgeon; and I see no necessity for having the full name. . . . So also "Mrs. Nichols" should have been "Elspeth Nichols."

Objection 17. A number of illiterates voted without oaths of secrecy and in the presence of unauthorised electors and persons. I have in Re Ellis and Town of Renfrew, ante 710, considered the case of illiterates, and have decided that the formalities laid down for voting by illiterates are not conditions precedent to the right to vote. . . I . . . adhere to the views there expressed.

Objection 18. The names of those on the voters' list had been improperly entered in the poll-books before the day of polling.

This is, of course, irregular, but it could not affect the result of the election, and could not affect the right of any voter to vote.

Objection 19 is not pressed.

Objection 20. Unauthorised persons were allowed to be present when electors were voting. This is covered by Re Ellis and Town of Renfrew.

Objection 21 is not pressed, nor is objection 22.

An objection was taken to the by-law in the matter of fixing the time for appointing agents, etc. The statute provides, sec. 341, that "the council shall by the by-law fix . . . a time and place for the appointment of persons to attend at the various polling places. . . ." This was done, and a time and place fixed, but it is said that at the time so fixed the head of the municipality did not so appoint. . . .

[Reference to Re Kerr and Town of Thornbury, 8 O. W. R. 451; Re Bell and Township of Elma, 13 O. L. R. 80.]

I do not think that, granting that sec. 341 is obligatory, and cannot be cured by sec. 204, the same rule must apply to sec. 342. The latter, in my view, may well be considered a provision "as to the taking of the poll" and so covered by sec. 204; whereas sec. 341 is not. . . . I am of opinion that, if the provisions of sec. 204 would otherwise be effective, the fact that sec. 342 was not lived up to (if this be a fact) does not exclude the operation of sec. 204.

Notwithstanding the several irregularities, I am unable to say that the learned Chief Justice is wrong in holding that sec. 204 is effective in saving the by-law.

Appeal dismissed with costs.

FALCONBRIDGE, C.J., and BRITTON, J., agreed that the appeal should be dismissed with costs.

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DIVISIONAL COURT. JULY 2ND, 1910.

## * REX v. FARRELL.

*Liquor License Act—Magistrate's Conviction for Selling Liquor to Minor—7 Edw. VII. ch. 46, sec. 8—Appeal to County Court Judge—Trial de Novo—Absence of Evidence that Person Supplied Apparently a Minor—Knowledge of Accused—Conviction Quashed.*

Appeal by the License Inspector of the north riding of the county of Oxford, by virtue of a certificate given by the Attorney-

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

General for Ontario, under sec. 120 of the Liquor License Act, R. S. O. 1897 ch. 245, from an order of the Judge of the County Court of Oxford quashing a conviction by the Police Magistrate for the city of Woodstock of the defendant, a licensed hotel-keeper, for that he "did unlawfully give, sell, or supply liquor to one Charles B. Cowley, who was apparently or to the knowledge of the said Patrick Farrell under the age of 21 years.

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

J. R. Cartwright, K.C., for the appellant.

James Haverson, K.C., for the defendant.

RIDDELL, J.:—The Act of 1902, 2 Edw. VII. ch. 33, never came into force, and, therefore, the absolute prohibition made by sec. 161 of that Act never became effective. The statutory provision is now (1907) 7 Edw. VII. ch. 46, sec. 8, introducing a new provision for sec. 78 of R. S. O. 1897 ch. 245. The section prohibits selling to two classes of minors: (1) those apparently under 21; and (2) those to the knowledge of the vendor under 21.

Upon the appeal before the County Court Judge it was agreed that "the evidence taken before the Police Magistrate should be used instead of calling the witnesses;" and the written depositions were put in.

The Act R. S. O. 1897 ch. 245, by sec. 118, provides that the practice and procedure upon the appeal and all the proceedings thereon shall be governed by the statute R. S. O. 1897 ch. 92: this statute, ch. 92, by sec. 13, provides that the Judge "shall hear and determine the charge or complaint . . . upon the merits . . . and if the person charged or complained against is found guilty, the conviction shall be affirmed . . ." It is plain, and it has been the uniform view of practitioners, that the so-called appeal to the County Court Judge is not really an appeal but a trial; that the County Court Judge must himself find the appellant guilty before the conviction can be affirmed. The wording of the section is, I think, conclusive.

The burden of proof is the same before the County Court Judge as before the Magistrate—the burden of proof is not upon the appellant, as it would be in the case of an appeal properly so-called, to prove that the court below is wrong; the findings of the court below are wholly irrelevant; and it is for the County Court Judge to determine the complaint himself upon the evidence brought before him. Rex v. McNutt, 4 Can. Crim. Cas. 392, may be referred to upon this point.

The only evidence of the age of the so-called minor is his own—he says he "will be 18 years of age on the 27th January, 1910." I have great doubt—more than doubt—whether this testimony is proof of the minority of the age of the witness—and I have heard it ruled more than once by Judges of great ability and experience that a witness cannot be allowed to testify to his own age. But suppose that to be got over, there is no evidence that the accused knew that the young man was under 21, and none that he was apparently under 21. It may be that the young man appeared to the Police Magistrate to be under 21; we have no evidence of that; and in any case we are not determining an appeal from the Police Magistrate. I do not at all hold that the Police Magistrate had the right to determine without evidence and upon his own view that the young man was apparently under 21. There is no necessity of expressing an opinion upon that point. Rex v. Turner, [1910] 1 K. B. 362, may be looked at on the point.

There was nothing but some writing before the County Court Judge, and he could not see the person—for anything that appeared before him he may have looked 30 or 35. And although he might disbelieve, as the Police Magistrate did, the evidence of Farrell, who said, "They are all big enough to go to work, I think they are all 21 years old in appearance," he could not hold that this evidence proved the opposite: Gilbert v. Brown, ante 652, at p. 654 ad fin. The whole effect of disbelieving evidence is to wipe out the evidence.

The conclusion of the County Court Judge being correct, we are not concerned with his reasons: Rex v. Boomer, 15 O. L. R. 321; see p. 322.

The appeal should be dismissed with costs.

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DIVISIONAL COURT. JULY 4TH, 1910.

## CROWN ART STAINED GLASS CO. v. COOPER.

*Costs — Mechanics' Liens — Action to Enforce Lien — Plaintiffs Allowed to Complete Work pendente Lite—Incidence of Costs —Deduction of Defendants' Costs of Action and Appeal from Payment to be Made.*

Appeal by the plaintiffs from the judgment of the Local Master at Goderich, in an action to enforce a lien under the Mechanics' and Wage-Earners' Lien Act, finding that the plaintiffs had not proved a lien and were not entitled to a lien.

The appeal came on for hearing on the 11th January, 1910, before FALCONBRIDGE, C.J.K.B., RIDDELL and LATCHFORD, JJ.

A. J. Russell Snow, K.C., for the plaintiffs.

Frank McCarthy, for the defendant Cooper.

C. Garrow, for the defendants the Trustees of the Union Presbyterian Church.

At the hearing the Court suggested that the plaintiffs should be given an opportunity to do the work for which they claimed a lien. This was acceded to by the defendants without abandoning any rights as to costs. The further hearing was adjourned, and the work was done to the satisfaction of the defendants.

The question of costs was then argued by the same counsel.

The judgment of the Court was delivered by RIDDELL, J.:—I had occasion recently to consider the proper disposition of costs in such a case, Dodge Manufacturing Co. v. Hortop Milling Co., 14 O. W. R. 3, 115, 265, where it is said (p. 4): "I think that the plaintiffs should not have brought this action at the time it was brought; that the offer . . . of the defendants to accept the machine, upon being allowed their damages, should not prejudice them on the question of costs. The order will, therefore, be that the plaintiffs . . . pay the defendants their costs of action, reference, and this motion; such costs to be set off against the amount to be paid." A motion was made for leave to appeal, and, after full argument and consideration of the authorities, this leave was refused: p. 115. A Divisional Court dismissed an appeal from the order for costs: p. 265.

All the relevant authorities are set out on p. 115; and, after reconsideration of these and of the principles which should govern the award of costs, I am of opinion that the proper rule is laid down in the Dodge case.

The plaintiffs, then, will pay the costs of all proceedings, including the costs of this motion—the defendants to be allowed to retain such costs from any sum payable by them to the plaintiffs.

DIVISIONAL COURT. JULY 6TH, 1910.

## AUSTIN v. RILEY.

*Free Grants and Homesteads Act—Crown Grant—Reservation of Mines and Minerals—Sale by Patentee of Mineral Rights—8 Edw. VII. ch. 17, sec. 4, sub-sec. 3—Cancellation of Reservation—Construction—R. S. O. 1897 ch. 29, sec. 20—Wife of Patentee not Joining in Conveyance of Mineral Rights—Subsequent Conveyance of Land with Bar of Dower—Defendant Succeeding on Ground not Urged at Trial—Costs.*

Appeal by the defendant from the judgment of GARROW, J.A., at the trial, in favour of the plaintiff, in an action for a declaration that he was the owner of all the mineral rights in lot 34 in the 17th concession of the township of Monmouth, and for an injunction restraining the defendant from interfering with the plaintiff in his use of the lot.

The appeal was heard by MULOCK, C.J.Ex.D., MACLAREN, J.A., and CLUTE, J.

R. J. McLaughlin, K.C., for the defendant.

A. J. Russell Snow, K.C., for the plaintiff.

The judgment of the Court was delivered by CLUTE, J.:—The facts (which are not in dispute) are as follows:—

On the 17th November, 1886, one Martin Clement (described as a "free grant settler") obtained a patent from the Crown of lot 34 in the 17th concession of the township of Monmouth, in the provisional county of Haliburton, under the Free Grants and Homesteads Act, reserving all mines and minerals to the Crown.

On the 24th August, 1899, Clement, in consideration of $1, executed an instrument in favour of the plaintiff, called a mining lease and option, whereby he "agreed to allow" the plaintiff to enter upon the said lot and mine for gold and all other metals for the term of twenty-two days from the date thereof, "provided the lessee may purchase the entire mineral right of the lands and premises, with all mines, &c., for $100"—covenant "to convey by a good and sufficient deed and clear from all incumbrances in case of purchase of the said mineral right, &c." The agreement to bind heirs and representatives. Shortly after the agreement was executed, the plaintiff paid the $100, entered upon

the lot, and began to mine, and did a considerable amount of development work.

Clement sold and conveyed the land to the defendant by deed dated the 8th March, 1902, subject to reservations, limitations, provisoes, and conditions expressed in the original grant thereof from the Crown, and his wife, Annie Clement, joined in the deed as a party of the second part and barred her dower in the said lands. Negotiations for this sale had been taken place some time previous to the execution of the deed. It was not contended that the defendant did not know of the earlier agreement with the plaintiff or that the plaintiff had entered under it and expended money.

By 8 Edw. VII. ch. 17, sec. 4, sub-sec. 3, it is provided that: "All reservations of mines, ores or minerals contained in any patent heretofore issued for lands patented under the said Act, where such mines, ores or minerals are the property of the Crown and have not been staked out, recorded, leased or granted under the Mining Act of Ontario, or any statute or regulation previously in force, are hereby rescinded and made void, and all mines, ores and minerals in such lands shall be deemed to have passed with the said lands to the subsequent and present owners thereof."

The trial Judge took the view that the case turned upon the construction to be placed on this clause of the statute, and proceeded: "In my opinion, it is consistent with the language, and is best calculated to effect its obvious purpose, to read it not as a present conveyance or release of the mineral right to the person who at that time had acquired the title conferred by the patent, but as a withdrawal ab initio of the reservation and a confirmation of the title of the original patentee and of all persons claiming under him, as if no such reservation had been made. Such a construction seems to me to work out justice and to be entirely consistent with the language of the statue."

By R. S. O. 1897, ch. 29, sec. 20 (corresponding to R. S. O. 1887 ch. 25, sec. 17), "No alienation . . . of the land, or of any right or interest therein, by the locatee after the issue of the patent, and within twenty years from the date of the location, and during the lifetime of the wife, shall be valid or of any effect, unless the same be by deed in which the wife of the locatee is one of the grantors with her husband, nor unless such deed is duly executed by her."

This section was not brought to the attention of the trial Judge. The wife, who is still living, did not join in the agreement to the plaintiff, and that agreement was void and of no

effect: American Abell Engine and Thresher Co. v. McMillan, 42 S. C. R. 377. Whether the wife's execution of the deed as a party thereto to bar her dower satisfies the requirements of sec. 20, seems open to doubt. See Canada Permanent L. and S. Co. v. Taylor, 31 C. P. 41. Section 24, which gives to the wife all the locatee's interest in the land during widowhood, also gives the widow the right to elect to have her dower in the land in lieu of the provision aforesaid. The right to elect does not arise until the death of the husband. Whether any and what interest passed to the defendant by the deed of the 8th March, 1902, it is unnecessary and inexpedient to decide, in the absence of Clement and his wife.

It is sufficient for the present case that nothing passed to the plaintiff under his agreement, and he was not, at the date of the passing of 8 Edw. VII. ch. 17, the owner of the lands, so as to enable sec. 4, sub-sec. 3, to operate in his favour to give him the minerals. He, in short, fails to shew title, and the action fails as against the defendant, who is in possession.

I think the appeal should be allowed. As the point upon which the case is now disposed of is raised for the first time at Bar, there should be no costs here or below.

[See Asselin v. Aubain, ante 986.]

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STOKES v. REYNOLDS—MASTER IN CHAMBERS—JUNE 28.

*Summary Judgment—Con. Rule 603—Special Indorsement of Writ of Summons—Defence.*] — Motion by the plaintiff for summary judgment under Con. Rule 603. The action was upon an agreement under seal by which the defendant agreed to buy certain chattels for $900, payable on the 4th April, 1910. The agreement contained covenants by the defendant for title, indemnity, and to deliver possession. The defence suggested was that the defendant had not got the goods in question, but it was not said that the plaintiff had refused to deliver them. The Master said that this was not a defence: Benjamin on Sale, 7th Am. ed., secs. 313, 314, 315, 764, citing Martindale v. Smith 1 Q. B. 395, and other cases. It was contended also that the claim could not be specially indorsed, the defendant relying on Hood v. Martin, 9 P. R. 313. The Master said that it seemed to come under clause 6 and 7 of the forms in appendix No. 5 to the Con. Rules; see Gerrard v. Clowes, [1892] 2 Q. B. 11. Judgment for the plaintiff with costs. C. F. Ritchie, for the plaintiff. J. M. Ferguson, for the defendant.

LANG v. WILLIAMS—FALCONBRIDGE, C.J.K.B.—JULY 2.

*Damages—Reference—Report—Appeal — Further Directions—Costs.*]—An appeal by the plaintiffs from the report of J. S. Cartwright, K.C., an Official Referee, in so far as the Referee found damages against the plaintiffs in respect of certain apples shipped to Niagara Falls, and in respect of apples shipped to Glasgow, and in so far as the Referee found that the plaintiffs were not entitled to damages against the defendants for failure of the defendants to supply funds. The Chief Justice said that it would be impossible for him to interfere with the findings of the Referee on questions of fact, and it had not been shewn that he had in any respect gone wrong in law. Appeal dismissed with costs. If it was competent to pronounce judgment on further directions, judgment ought to be entered in terms of the report, plus the amount of the indebtedness found by the trial Judge, with costs of the action, the reference, and this appeal. H. T. Beck, for the plaintiffs. J. A. Worrell, K.C., for the defendants.

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WADE v. BELL—DIVISIONAL COURT—JULY 5.

*Chattel Mortgage—Validity—Execution in Blank—Authority to Fill up Blanks—R. S. O. 1897 ch. 148—Compliance with.*]—Appeal by the plaintiff from the judgment of TEETZEL, J., dismissing the action, which was brought by the assignee for the benefit of the creditors of one Craig to recover from the defendants the proceeds of certain chattels seized and sold by the defendants under and by virtue of two chattel mortgages made by Craig to them. The plaintiffs alleged that these mortgages were never executed or delivered as chattel mortgages under the Bills of Sale and Chattel Mortgage Act, and that they were fraudulent and void against the creditors of Craig. The appeal was on two grounds: (1) that the trial Judge erred in finding that the defendants' solicitor was authorised to fill up the blanks in the chattel mortgages; and (2) that the Judge erred in his finding of law that the blank forms of chattel mortgages, signed and sealed, sufficiently complied with R. S. O. 1897 ch. 148. The Court (FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.), were of opinion that the forms were filled up in strict compliance with the mortgagor's request, and that the statute was sufficiently complied with. Appeal dismissed with costs. A. C. Macdonell, K.C., for the plaintiff. W. Proudfoot, K.C., for the defendants.