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HIGH COURT OF JUSTICE.

TEETZEL, J. JANUARY 6TH, 1910.

NEWMAN v. GRAND TRUNK R. W. CO.

Railway—Carriage of Goods—Negligence — Delay in Delivery — Shipping Bill—Condition—Notice to Agent—Failure to Give—Misprint in Condition—"Or Delivered" Read as "Are Delivered."

On the 4th November, 1907, the plaintiff shipped a car-load of beans from Ridgetown to Montreal in one of the defendants' cars, which was in the possession of the Pere Marquette Railway Company at Ridgetown. The shipping bill was issued by the Pere Marquette Railway Company, and the car was sent over their lines to London, and on the 7th November it was handed over to the defendants for transmission to Montreal, but was not delivered at its proper place for unloading in Montreal until the 3rd December.

The plaintiff charged the defendants with negligence and breach of contract in failing to deliver the beans at Montreal with reasonable speed and within a reasonable time after receipt thereof, and claimed damages therefor.

O. L. Lewis, K.C., and H. D. Smith, for the plaintiff.

W. E. Foster, for the defendants.

TEETZEL, J.:—I find, upon the evidence, that, through their yardmaster at Montreal, the defendants were guilty of negligence in unreasonably detaining, and failing within a reasonable time to deliver, the car containing the plaintiff's beans at its proper destination, by reason of which the plaintiff suffered damage to the extent of $313.

Upon the back of the shipping bill upon which the beans were intrusted to the defendants . . issued by the Pere Marquette

Railway Company, are a number of printed general terms and conditions forming part of the contract, and which have been approved by the Board of Railway Commissioners, one of which, number 12, reads: "There shall be no claim for damage to, loss of, or detention of, any goods for which the company is accountable, unless notice in writing and the particulars of the claim for said loss, damage, or detention, are given to the station freight agent at or nearest to the place of delivery, within 36 hours after the goods is respect of which said claim is made, or such portion of them as are not lost *or delivered.*"

If the proper construction of this condition is, that the plaintiff was bound to give notice in writing and particulars of his claim for detention to the station freight agent at or nearest to the place of delivery within 36 hours after the goods were delivered, I would have to find, upon the evidence, that such notice was not given within the specified time.

The defendants contend that this is the proper construction of the condition, and rely upon this condition and its non-fulfilment as a defence to the action under Mercer v. Canadian Pacific R. W. Co., 17 O. L. R. 585, and cases cited at p. 482 of Jacob's Railway Law. . . .

The plaintiff urged that the language of the condition does not bear the construction contended for by the defendants, and cannot be so interpreted without substituting the words "are delivered" for "or delivered" in the last line, and that there is nothing in the context to warrant this being done. . . .

Bearing in mind that the subject matter to which the shipping bill, with its several terms and conditions, relates, is the carriage and delivery of the goods in question, I think the plain intention of the parties, gathered from the context of the condition, was to provide for a notice being given to the agent . . within 36 hours after delivery, and that the word "or" was a misprint for "are." . . .

[Reference to Stone v. Corporation of Yeovil, 1 C. P. D. 691, 701; In re Redfern, 6 Ch. D. 133, 136; Maxwell on Interpretation of Statutes, 3rd ed., p. 344; Wilson v. Wilson, 4 H. L. C. 40, 66; Key v. Key, 4 D. M. & G. 73, 84; Mourmand v. Le Clair, [1903] 2 K. B. 216; Grennell v. Monk (1899), 24 L. R. Ir. 241; Coles v. Hulme, 8 B. & C. 569.]

Action dismissed without costs.

CLUTE, J. JANUARY 7TH, 1910.

LINDSAY v. IMPERIAL STEEL AND WIRE CO.

Company — Shares — Allotment—Illegal Agreement—Action by Shareholders to Set aside—Company Trafficking in its own Shares—Ultra Vires.

Action to have it declared that the allotment and issue of 50,000 shares, of the par value of $10 each, in the capital stock of the defendant company, to the defendant McBean, were ultra vires and void.

In July, 1907, the company entered into a contract with the corporation of the city of Fort William to establish there a plant with an output of 100 tons daily, by the 1st June, 1908. In pursuance of that agreement, and for the purpose of financing the undertaking, the company, on the 22nd July, 1907, passed a by-law to increase the capital stock of the company from $700,000 to $1,500,000 by the issue of 50,000 shares of new common stock, of the par value of $10 a share, which, the by-law stated, might be issued as a bonus, share for share, and by the issue of 30,000 shares of new preferred stock, of the par value of $10 a share, to be sold for cash. The by-law further provided that the new shares, both common and preferred, be issued and allotted in such manner and proportion as the directors of the company might deem proper for the benefit of the company; and authorised the directors to re-incorporate the company under the provisions of the Ontario Companies Act, or to incorporate a company by the same name to acquire all the assets and assume all the liabilities of the present company.

The company did not establish the plant at Fort William.

Supplementary letters patent were obtained increasing the capital of the company to $1,500,000, and authorising the issue of 80,000 shares of $10 each, all of common stock.

As soon as the letters patent were obtained, and on the 16th June, 1908, the defendant McBean applied for 50,000 shares of the common stock of the company, and requested to be allotted that number of shares, which he agreed to accept and pay for in 60 days after notification of allotment, and on the 30th June, 1908, he signed a receipt for a certificate of 50,000 shares.

McBean paid $10 on the stock before or at the time of its issue.

This was the transaction sought to be set aside.

C. A. Masten, K.C., and M. C. Cameron, for the plaintiffs.

I. F. Hellmuth, K.C., and F. E. Hodgins, K.C., for the defendants.

CLUTE, J.:—The defendant McBean is a man of no means, and did not pay and was not expected to pay for the stock. He lent his name to enable the parties interested to obtain the stock of the company that it might be given as a bonus to any one purchasing preferred stock, the issue of which the supplementary letters patent did not authorise. The transaction was worked out in this way.

The former solicitor of the company seems to have had some bills of costs, said to amount to $1,000, against the defendant Curry, the president and manager of the company. Curry transferred to the solicitor two alleged inventions for which caveats had been entered, but for which patents had not been obtained. It is said that these transfers were in payment of this bill of costs; but of this the evidence was slight, and I am strongly of opinion that it was merely a part of the scheme. The solicitor procured the defendant McBean to act as his agent, and placed in his hands the so-called inventions, and prepared an agreement, dated the 16th June, 1908, between McBean and the company.

The agreement recites that McBean is in possession of certain new and valuable discoveries in connection with the process of wire-drawing, which inventions are more particularly described in schedule hereunto annexed. It does not appear that any schedule was annexed, and none was proven. It further recites that McBean has agreed to transfer his interest in these inventions and discoveries to the company, in consideration of the transfer to him of 50,000 shares of the common stock of the company, on the terms and conditions thereinafter set forth. The agreement then provides that McBean is immediately to apply for 50,000 shares of common stock, he to be called upon to pay over at once only $10, being the par value of one share. McBean is to transfer to the company all his rights for Canada and an undivided one-half interest in his rights for other countries in these inventions. McBean agrees to transfer 40,000 shares of the 50,000 to a person to be agreed upon between himself and the president of the company "so that the 40,000 shares, or such part thereof as shall, in the sole discretion of said person, be deemed necessary, may be given as a bonus to purchasers of preferred stock in such amounts as the said person may deem necessary or advisable to give to promote the sale of the remainder of the company's stock." The remaining 10,000 shares were to be transferred by McBean to this "said

person," and were to be held by him and not to be delivered over to McBean until a Canadian patent for said invention is obtained. The person holding the stock is to have the sole right to vote on all of the said shares. . . . "It is understood and agreed by the parties hereto that, on the fulfilment of this agreement by McBean, he is to be released from his liability on his application for shares of common stock of the company." This document is signed by McBean and the company, and is under the corporate seal. The company's signature is confirmed by the signatures of the defendant Curry and the secretary of the company.

It will be observed that this document bears the same date as the defendant McBean's application for the stock for which it provides. . . .

I think it clear, and I find as a fact, that the application for the 50,000 shares was made in pursuance of the said agreement.

I further find that the whole transaction was entered into at the instance of the defendant Curry, who was at the time president and managing director of the company; and that it was done with the object of using the stock as bonus or for other illegal purposes. . . .

Reference to Hamilton v. Desjardins Canal Co., 1 Gr. 1; Russell v. Wakefield Waterworks Co., L. R. 20 Eq. 474; Buckley's Companies Acts, 9th ed., p. 613; Holmes v. Newcastle-upon-Tyne Freehold Abattoir Co., 1 Ch. D. 682; Hope v. International Financial Society, 4 Ch. D. 327.

In the present case it is expressly charged that the acts complained of are ultra vires of the corporation.

An amendment was allowed permitting the plaintiffs to sue on behalf of themselves and all other shareholders of the company. I cannot give effect to the objection that the action is not properly constituted.

That the agreement in question is ultra vires of the company admits of no doubt: Oregum Gold Mining Co. v. Roper, [1892] A. C. 125; Welton v. Saffery, [1897] A. C. 299; In re Eddystone Marine Insurance Co., [1893] 3 Ch. 9; In re New Chile Gold Mining Co., 38 Ch. D. 475; In re Almada and Trito Co., 38 Ch. D. 415; In re London Celluloid Co., 39 Ch. D. 190; In re Weymouth and Channel Islands Steam Packet Co., [1891] 1 Ch. 66.

It was said in the present case that the shares were of little or no value in the market. . . .

[Quotation from Buckley, p. 214.]

It was contended by Mr. Hellmuth that, while the agreement was void, the application and issue of shares to the defendant McBean was valid, and the only remedy was by the com-

pany against McBean for the balance due upon the shares. . . In short, that the transaction as a whole could not be set aside. I am not of this opinion. It is true that in many cases it has been held that where the shareholder has held the shares and accepted dividends, it is too late to object when the company is being wound up: In re Weymouth and Channel Islands Steam Packet Co., [1891] 1 Ch. 75. But it by no means follows that the shareholder may not attack the whole transaction as ultra vires and void. There is nothing in the Ontario Companies Act which authorises the issue of shares at a discount, except in mining shares (sec. 141). It is true, as appears in the above cases, that where it is in the interest of the company, especally in winding-up proceedings, the holder of so-called paid up shares illegally issued may be put on the list of contributories for the unpaid balance. But here the shares were issued in pursuance of an agreement whereby they were to be held for the purpose of being given to those who subscribed for preferred shares. . . . It was a trafficking by the company in the shares of the company for an illegal purpose, and ultra vires of the company. In such a case the authorities are clear that the Court will interfere to prevent or set aside the illegal act: Holmes v. Newcastle-upon-Tyne Freehold Abbattoir Co., 1 Ch. D. 682; Hope v. International Society, 4 Ch. D. 327; Buckley, p. 613.

In the view I take, it is unnecessary to deal with the question of the legality and powers of the executive committee that assumed to make the allotment, although there are grave difficulties in the way of their appointment and the allotment they assumed to make of the shares in question.

The agreement of the 16th June, 1908, and the pretended allotment and issue of said shares, should be set aside and cancelled. The plaintiffs are entitled to costs.

TEETZEL, J. JANUARY, 7TH, 1909.

GEORGE v. STRONG.

Company — Unsatisfied Judgment against, for Wages — Action against Directors under sec. 94 of the Companies Act — Appropriation of Payments—Wages for Earlier Months Unpaid —Loan of Earnings — Wages Due more than a Year before Action—Interest.

The plaintiff was a servant of the Dominion Pressed Steel Co. Limited, of which the defendants were directors, and the

action was brought under sec. 94 of the Ontario Companies Act, 7 Edw. VII. ch. 34, in execution of an unsatisfied judgment obtained by the plaintiff against the company for wages.

D. Robertson, K.C., for the plaintiff.

M. C. Cameron, for the defendants.

TEETZEL, J.:—In an action against the company, started on the 2nd June, 1908, the plaintiff recovered judgment for $276.86. If the plaintiff's argument as to appropriation of payments on account should be adopted, the judgment is $17.70 more than the plaintiff would be entitled to recover in this action because that sum represents wages due prior to the 2nd June, 1907, and the plaintiff's rights are not only limited under the statute to one year's wages, but to a debt for which the company is sued within one year after it became due.

From the beginning of his employment in August, 1906, until November, 1906, the plaintiff, at the request of the company, through his father, one of the directors, allowed his wages to remain with the company, but in November he began to receive weekly payments—generally less than his weekly wages would amount to—though sometimes the payments were the exact amounts of his wages, and on two or three occasions they were greater than his weekly wages. I am unable to find, upon the evidence, that these payments were appropriated by either of the parties in payment of the current wages then being earned by the plaintiff—and, consequently, the well-established rule must be adopted, and these payments applied in satisfaction of the earlier items of the account.

Mr. Cameron argued, with great ingenuity, that the position of the plaintiff towards the company was that of lender of his earnings from time to time, and that he had, therefore, lost his rights as a servant to recover against the directors under the statute. Further consideration of the evidence confirms the view I expressed at the trial, which was that the plaintiff's relationship to the company or his rights under the statute are not affected by what was done in regard to leaving his wages undrawn.

In the result, judgment must be for the plaintiff for $286.52, made up of $259.16, being the amount of the judgment sued on, less $17.70, together with costs of judgment and execution, amounting to $27.36, together with costs of this action. . . .

I think that, in the circumstances, interest should not be awarded.

BRITTON, J. JANUARY 7TH, 1910

BENNETT v. HAVELOCK ELECTRIC LIGHT CO.

Company—Shares — Agreement — Sale of Property to Company —Payment by Allotment of Shares—Action by Shareholders to Set aside — Directors — Control of Company — Absence of Fraud—Laches.

Action for the cancellation of 200 shares of stock allotted by the company to the other defendants; or that the sale of certain property by the defendant Mathieson to the company be set aside; or that the defendants, other than the company, be ordered to pay for the stock received by them, and to account for secret profits retained by them as the result of a fraudulent scheme for acquiring certain land from the defendant Mathieson, which he had purchased at a much smaller price than that received from the company.

D. O'Connell and G. N. Gordon, for the plaintiffs.

S. T. Medd, for the defendant company.

E. G. Porter, K.C., for the defendants Holcroft and Rose.

W. F. Kerr, for the defendants Bryans and Curtis.

R. Ruddy, for the defendant Mathieson.

BRITTON, J. (after stating the facts):—To summarise, I find the facts, and upon these findings base my decision, realising that the case presents points of nicety and difficulty.

(1) Mathieson did not purchase the property as trustee for any person or persons individually or for any company or persons to form a company, or for any company to be formed.

(2) After Mathieson purchased, there was an understanding or agreement, not in writing, between Mathieson and the four individual defendants, that a company should be formed, and, if that company should be formed, and should purchase the property, he was willing to give to each of the other four one-fifth of the purchase price, all to get stock in the company in lieu of cash for the property.

(3) There was no binding agreement on the part of Mathieson to sell, or on the part of the company to buy, until the 4th May, 1903.

(4) Upon the evidence, the sum of $5,000 was not an extravagant or exorbitant amount to ask for the property. Apart from

the fact that the purchase price was only $300, there was no evidence that the property was not actually worth $5,000 for the purposes of the company.

(5)The sale to the company was at a time when the plaintiffs were not shareholders, and when there were no other shareholders or any persons interested, other than the five persons named as defendants.

(6) There was no disclosure to the plaintiffs, prior to their subscribing for stock, of the real arrangement between Mathieson and his co-defendants as to the purchase of Mathieson's property. The conveyance of the property stated the consideration as $5,000. It really made no difference to the shareholders whether these men paid $5,000 in money, which money was handed over to Mathieson, or the stock was issued as the consideration for the conveyance of the land.

(7) After the conveyance of the land and after the company had taken possession and work had been done for installing the plant for operation, some persons characterised the stock of the defendants as "watered stock," and then the four of the defendants asserted payment in cash for the stock they held, when in fact the transaction was as I have mentioned.

(8) I am of the opinion that no fraud was intended. Very likely the five were advised to carry through the transaction as apparently for cash, to get over the difficulty of directors of the company voting in a matter in which they were personally interested.

Upon these facts, have the plaintiffs any remedy in this form of action? What are the plaintiffs' strict rights? The company is a going concern, and, so far as a company can express its wish in such a matter, does not desire cancellation or that the plaintiffs shall succeed in this action. The property acquired is not only the best but is the only property that as water power can be acquired for the very useful purpose for which the company was incorporated. The plaintiffs did not assert any right in themselves to redress a wrong to them by reason of any deceit practised upon them. The suit is for an alleged wrong done to the company; therefore the action should prima facie be brought by the company itself. The exception to the rule is given in Burland v. Earle, [1902] A. C. at p. 93: "When the persons against whom the relief is sought, themselves hold and control the majority of the shares in the company, and will not permit an action to be brought in the name of the company." It was not shewn here that at the time of the commencement of this action these defendants held or controlled the majority of the shares.

The many cases cited upon this point by counsel for the plaintiffs have this distinguishing feature that the impeached directors had the controlling power in the company and did not assent to an action being brought by the company.

By the stock it appears that 385 shares of stock had been subscribed. If of that the five defendants actually held at the time of the commencement of the action the 250 shares, i.e., 10 shares originally subscribed by each and the 40 shares allotted in payment of the property, they of course held a majority of the shares, but the defendants had sold, and it was not clearly shewn what the holding of each was at the time of the commencement of this action. That was not shewn probably because the plaintiffs were in difficulty as not having taken any formal steps to get the directors to allow an action to be brought in the name of the company. The company was never asked to bring an action. But suppose the plaintiffs are within the exception and so right in bringing the action in their own names on behalf of other shareholders, can they succeed in this case? . . .

[Quotation from Burland v. Earle.]

I am of the opinion that what was done at the meeting of the 4th May, 1903, was capable of being confirmed by the majority of the shareholders, when what had been done was complained of, and, as already intimated, these acts were not of a fraudulent character. The company has approved of all that has been done, and has ratified it in the most formal way. A special general meeting of the shareholders, duly called, was held on the 17th May, 1909, for the purpose of considering, among other matters, all things appertaining in any way to the acquiring and purchase by the company of the Mathieson property. The plaintiff Bennett was present at the meeting and took part in the proceedings. There was no protest that the meeting was not properly constituted or that it was not fully advised, but, on the contrary, after discussion, ratification was carried by a vote of 122 shares for and 50 shares against . It was argued that the four defendants controlled the meeting. There can be no objection to legitimate control by the holders of majority stock. In this case the ratification was carried by votes outside of the impeached shares. These were not voted.

I am of opinion that, upon the merits, the plaintiffs fail. They ought not to succeed merely because the defendants, other than Mathieson and the company, gave an entirely different version from what I think was the true one of the real understanding and agreement with Mathieson. There was not any conspiracy on

the part of the defendants to defraud the company or any incoming shareholder.

As to laches. The plaintiff Bennett subscribed for his shares in 1903. He obtained his certificate on the 12th March, 1904. He heard rumours of "watered stock" from time to time, and he had all the information which he possessed at the trial, as early as the 17th March, 1908. On that date he attended a general meeting of shareholders and knew everything to which he now objects. At that meeting he told Holcroft and Rose that he had no objection to their holding and receiving dividends upon the stock in question, but he said they were not to vote upon that stock.

The plaintiff Nolan subscribed for his stock in 1903. He attended the meeting of shareholders in 1904, and then heard it alleged that the five individual defendants held $5,000 worth of stock not paid for. He also heard rumors of what he now complains of. He attended the general meeting of shareholders in 1905, and then voted for Holcroft, Mathieson, and Rose as directors. I think he said he attended all the general meetings of 1906, 1907, 1908, and 1909, and at each of these, in some form or other, the matter of "watered stock" was brought up for discussion.

This action was not commenced until 28th March, 1909. The plaintiffs have been guilty of laches.

For reasons given, the action should be dismissed, but it will be without costs.

RIDDELL, J. JANUARY 8TH, 1910.

SELKIRK v. WINDSOR ESSEX AND LAKE SHORE RAPID R. W. CO.

Company—Powers of Provisional Directors — Contract—Representation of Power to Make—Representation of Fact — Liability of Persons Making Representation—Damages for Misrepresentation.

Action against the railway company to enforce a contract purporting to be made on behalf of the company, with the plaintiffs, by the defendants Newman and Nelles, as president and secretary; and against the latter defendants, in the alternative, for damages for misrepresentation.

The Essex and Kent Railway Company was incorporated by 1 Edw. VII. ch. 78 (O.) to build an electric railway. The plaintiffs were the two persons most active in promoting this railway and in opposing the rival railway of the defendant company. The defendant company was incorporated by 1 Edw. VII. ch. 92 (O.), for the like purpose; the defendant Newman being one of the corporators.

In January, 1904, the promoters of the latter railway project found themselves checked at many points by the plaintiffs. The provisional directors of that company gave power to the defendants Newman and Nelles, president and secretary, to make a bargain with the plaintiffs; and they did so, reporting the result to the provisional board, and the board ratifying what had been done.

The contract purported to be made between the defendant company and the plaintiffs. The plaintiffs were to cease all operations in support of any other electric railway in opposition to the defendant company, and to assist the latter company in securing franchises, etc., receiving $500 when the road should be running from Windsor to Essex, and the remainder of a sum of $1,000 promised, when the road should be running from Windsor to Leamington.

A. H. Clarke, K.C., for the plaintiffs.

J. M. Pike, K.C., for the defendant company.

E. S. Wigle, K.C., for the defendants Newman and Nelles.

RIDDELL, J.:—There were no misrepresentations by the plaintiffs, and they were acting for themselves, and not for the Essex and Kent Railway Company, and were guilty of no breach of trust in making the contract; and they have fully carried out their part thereof.

The defendant company had not been organised at the time of this contract, though both Newman and Nelles believed that the company had the power to enter into the contract, and they represented to the plaintiffs that they had the power to make the contract in question. The plaintiffs believed them.

Newman and Nelles were guilty of no fraud in so representing their powers, as they believed that what had taken place justified them in making the contract.

The road being completed, this action is brought against the company, and also against Newman and Nelles—these have long severed all connection with the company, having sold out all interest in it.

As to the company's position, there has been nothing done in any way to ratify the contract; and, consequently, unless the act of the provisional board binds the company, the company is not liable. . . .

[Reference to the Act of incorporation, 1 Edw. VII. ch. 92, sec. 12, and the provisions of the Electric Railway Act, R. S. O. 1897, ch. 209, incorporated therewith; sec. 44 of the latter Act defining the powers of provisional directors.]

There is no power in terms conferred by the Act on provisional directors to enter into such a contract as this. Consequently, no such power existed with the provisional directors; and the contract is not binding upon the company. The general law is considered in such cases as Municipal Corporation of Peterborough v. Grand Trunk R. W. Co., 18 U. C. R. 220; Michie v. Erie and Huron R. W. Co., 26 C. P. 566; Thomson v. Feeley, 41 U. C. R. 229; Re Wakefield Mica Co., 7 O. W. R. 104 (C.A.); and see Lindley on Companies, 6th ed., bk. 2, ch. 1.

As to Newman and Nelles, it is sought to make them liable upon the ground of misrepresentation. . . .

[Reference to Struthers v. Mackenzie, 28 O. R. 381, distinguishing it.]

The company was not, at the time of the contract, in a condition to make the contract, because it had not then become organised. There was nothing in the name of the company to cause the plaintiffs to believe that it could not make the contract. Then, as to the representation: had the defendants Newman and Nelles stated to the plaintiffs the actual condition of the company, so that the plaintiffs could judge as well as themselves, then any representation as to the powers of the company would have been a misrepresentation of law. This is not what they did: they represented that the company could enter into such a contract. Remembering that the power of the company so to do was not excluded by its Act of incorporation, but depended upon facts as to organisation, etc., this was not a representation as to law, but a representation as to fact.

Beauchamp v. Winn, L. R. 6 H. L. 223, especially p. 234, may be looked at—on a cognate subject. . . .

[Reference to Cherry v. Colonial Bank of Australasia, L. R. 3 P. C. 24; Weeks v. Propert, L. R. 8 C. P. 427; Collen v. Wright, 8 E. & B. 647, 657; Beattie v. Lord Ebury, L. R. 7 Ch. 777, L. R. 7 H. L. 102; Chitty on Contracts, 15th ed., pp. 276, 277.]

I think the action should be dismissed against the company, but without costs, and judgment entered for the sum of $1,000 against the defendants Newman and Nelles with costs.

SUTHERLAND, J. JANUARY 10TH, 1910.

DAVIS v. SHAW.

Vendor and Purchaser—Contract for Sale of Land—Specific Performance—Option—Acceptance — "Vacant Lot"—Property Capable of Ascertainment—Part Performance.

Action by purchaser for specific performance of an agreement, dated the 8th May, 1908, as follows:—

"I agree to purchase from James Shaw the brick house on Wortley road with feet to the south of the dwelling, making a roadway to the back yard, that is, a line to the back fence where there is a jog and from that to the Wortley road—the price being $2,850. Evan Davis" (the plaintiff.)

"I, James Shaw, agree to sell the above property for the above stated sum. I also promise to give the purchaser the option of purchasing the vacant lot to the south of this lot for the sum of $1,000, providing that this offer be accepted within one year from date. Dated at London, May 8th, 1908. James Shaw" (the defendant.)

J. H. A. Beattie, for the plaintiff.

J. M. McEvoy, for the defendant.

SUTHERLAND, J.:—There is a conflict of evidence as to whether the offer of the plaintiff and the acceptance of the defendant were signed at the same time or at different times. I find in favour of the plaintiff's contention that they were signed at the same time.

This seems to be a case in which I should follow the principles applied in Uxford v. Provand, L. R. 2 P. C. 135. . . . The parties to the agreement and the consideration are certain. The property in the minds of the parties and the subject matter of the contract was capable of being made certain.

After the execution of the agreement and in pursuance thereof, the defendant conveyed to the plaintiff, by deed dated the 21st May, 1908, the following lands and premises: . . .

[Description by metes and bounds of two parcels.]

Being the land referred to in the plaintiff's offer as understood by the parties, and upon which was a brick house on the Wortley road therein mentioned. It was the only brick house on that road then owned by the plaintiff or his wife. The title to the portion of lot 19 particularly mentioned and described in the deed was apparently in the wife of the defendant, and she joined in the

said conveyance as one of the grantors. The defendant admits that he was acting, so far as the portion of lot 19 was concerned, as the agent of his wife. The title to that portion of lot 18 comprised in the deed was at the time in the defendant, and his wife also joined in the deed to bar her dower therein.

The plaintiff paid to the defendant the agreed purchase money for the land comprised in the deed, namely, $2,850, went into possession of the property, and expended moneys thereon. . . . The plaintiff, having intimated verbally to the defendant a number of times his acceptance of the offer, finally on or about the 11th March, 1909, formally did so in writing. . . .

On the 12th November, 1908, the defendant conveyed a portion of lot 18 covered by the option and having a frontage of 21 ft. on Wortley road to . . William Smith, for a named consideration of $500, which deed was registered . . . on the 13th November, 1908. This was before Smith had learned of the option. On the property described in such last mentioned deed Smith had, before the commencement of the action, commenced the erection of a plumbing shop.

In view of the acts of part performance by the parties to the agreement and of the exercise of the option by the plaintiff within the time stipulated, I think he is entitled to succeed in this action. . . . At the time the defendant made the deed to the plaintiff, he owned all of lot 18 south of the land comprised in the deed, with the exception of the portion sold . . to one William Gorman. This was the "vacant lot" referred to in the acceptance. During the pendency of the option, he has made it impossible, by his conveyance to Smith of the 21 ft. above mentioned, now to convey to the plaintiff the whole of the vacant lot which was the subject of the contract between them.

There should be judgment for the plaintiff for specific performance of the agreement in question, in so far as the same can now be performed by the defendant, that is to say, to the extent of obtaining from the defendant a conveyance (free of dower) of all of lot 18 owned by him at the time the contract was entered into, except those portions comprised in the deeds to the plaintiff and Smith . . . For this the plaintiff should pay him the additional sum of $1,000 mentioned in the option, less the $500 already paid by Smith to the defendant for the 21 ft., or such other sum as the parties can agree upon. . . . as representing the value of the land conveyed to Smith. In case the parties cannot agree upon such value, there will be a reference. . . . The plaintiff will have the costs of the action, and also of such reference, if the same should be necessary.

DIVISIONAL COURT. JANUARY 10TH, 1910.

RE MARTIN AND GARLOW.

Criminal Law—Certiorari—Motion to Remove Order for Payment by Prosecutor of Costs—Non-compliance with Rules of Court—Recognizance—Time—Criminal Code, secs. 576 (b), 1126—Rules of Supreme Court of Judicature for Ontario—Application to Prosecutor.

Appeal by William Martin from the order of BRITTON, J., ante 172, dismissing a motion by the appellant for a certiorari to remove into the High Court a magistrate's order dismissing the appellant's information against David Garlow for a breach of the Indian Act, and ordering the appellant to pay the costs.

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

J. B. Mackenzie, for the appellant.

H. W. Shapley, for the magistrate.

The judgment of the Court was delivered by CLUTE, J., who referred to sec. 1126 of the Criminal Code; the Rule of Court of the 17th November, 1886 (Holmested & Langton's Judicature Act, p. 1454); the Rules of the 27th March, 1908—Rules 1279-1288; and said that in the present case security had not been given, and the application was not made within the 6 months required by the Rules; but it was contended that, the application being on behalf of the prosecutor, security was not required, that it was in effect a motion on behalf of the Crown, which is not limited by time nor required to give security.

He then referred to Paley on Convictions, 8th ed., p. 448; Rex v. Allan, 15 East 333, 341-2; Rex v. Battams, 1 East 298; Rex v. Farewell, 2 Stra. 1194, 1209; Regina v. Spencer, 9 A. & E. 485; Rex v. Boutbee, 4 A. & E. 498; Rex v. Bodenham, 1 Cowp. 78; Regina v. Nunn, 10 P. R. 395; and concluded:—

While the language of the Rule requiring security would seem to be broad enough to cover the present case, if the question were now up for the first time for decision, I think the authorities are binding upon us, and that we must hold that in a case of a prosecutor a recognizance is not required.

Nor do I think the other requirements of the Rule apply where the application is by a prosecutor. See Regina v. Murray, 27 U. C. R. 134; . . . Rex v. Battams, 1 East 298, 303.

Then, is it a case where, upon the merits, a certiorari should issue? I think it is. It would appear that in the proceeding below the magistrate, having dismissed the prosecution under the Indian Act, fixed the costs and issued a warrant for the arrest of the prosecutor in the first instance, who, it is alleged, was arrested, and paid the amount under protest, and was thereupon released. This objection was not taken before Britton, J. The only objection there taken was that only one magistrate had sat upon the case. . . . We must, however, I think, give effect to the objection, although taken now for the first time: Regina v. Becker, 20 O. R. 676; Garrett v. Roberts, 10 A. R. 650, 652.

I am of opinion the certiorari should issue.

RIDDELL, J., IN CHAMBERS. JANUARY 11TH, 1909

SOVEREIGN BANK OF CANADA v. RANCE.

Appeal—Leave to Appeal from Order of Judge Striking out Jury Notice—Con. Rule 1278—Cause of Action—Guaranty—Pleading—Condition—Rectification—Equitable Claim—Discretion.

Motion by the defendants for leave to appeal to a Divisional Court from an order of MEREDITH, C.J.C.P., striking out the defendant's jury notice.

W. A. Skeans, for the defendant.

J. F. Boland, for the plaintiffs.

RIDDELL, J.:—The plaintiffs, a chartered bank, in their statement of claim set up an agreement dated the 11th June, 1906, whereby the defendant guaranteed to them payment of the indebtedness at that time of the C. K. Co., or W. P. S. They produce the written agreement. Subsequently, by an agreement in writing, the guaranty was reduced to $12,000, payable in annual instalments of $1,000 each; on this sum a balance of $10,125 remains unpaid; and for this sum the action is brought.

Before me the defendant admitted these facts, but in his pleadings he set up that he was the manager at C. of the plaintiffs' branch or agency, and was anxious that the indebtedness of the C. K. Co. (a customer of the branch) should be reduced, and, while he was not responsible for the contemplated loss, he was

willing to assist conditionally in securing and reducing it. He thereupon proposed to the bank "that he would become personally responsible for said liability, providing the plaintiffs would carry the same without interest, increase the defendant's salary to the sum of $1,600 per year, and accept on account thereof out of the said salary the sum of $1,000 a year so long as the defendant was retained in the said position at at least said salary, but as soon as he ceased to be such manager said obligation would cease." He says the bank agreed to the proposal, and "it was distinctly understood by the plaintiffs' . . general manager . . that the only obligation undertaken by the defendant was conditional as set forth . . ."

The defendant ceased to be manager for the bank, having then paid more to the bank than he was called upon to pay. The defendant does not claim a rectification of the guaranty, nor does he say that it was intended that the condition was intended to be insrted in the guaranty, nor does he say or suggest that the condition appears in writing.

Upon the application of the plaintiffs the Chief Justice of the Common Pleas struck out the jury notice; and I am now asked to grant leave to appeal from the order of the learned Chief Justice.

I have in Robinson v. Mills, 19 O. L. R. at p. 167, set out the conditions of allowing an appeal.

As it seems to me, the defendant could not take advantage of the so-called condition that he was to be liable only so long as he remained in the employ of the bank, unless he can in some way have the guaranty changed or amended: McNeely v. McWilliams, 13 A. R. 324; Mercantile Bank of Sydney v. Taylor, [1893] A. C. 317, at pp. 321-2; and similar cases.

It is not alleged that the guaranty was not to come into force until the happening of some event, and that such event had not happened; but that a written agreement, absolute on its face, is in reality conditional; and such an allegation cannot be proved.

The distinction between the two classes of cases will appear in Ryan v. Campbell, 6 E. & B. 370, and Wallis v. Littel, 11 C. B. N. S. 369, both referred to in McNeely v. McWilliams. Consequently, the real defence here is a rectification of the agreement, which admittedly is a head of equity; and consequently the action should be tried by a Judge without a jury.

Even if there were conflicting decisions, I do not think it desirable that an appeal should be allowed. Should I be wrong in the law, the facts are eminently for a Judge. Under Rule 1278 (b), while I do not think there is any good reason to doubt the

correctness of the order of the Chief Justice, I do not think that the appeal involves matters of such importance that leave to appeal should be given in any event.

I think the motion should be refused with costs to the plaintiffs in any event.

BOYD, C., IN CHAMBERS. JANUARY 12TH, 1910.

RE TOWNSHIP OF BLENHEIM.

Municipal Corporation—Aid to Railway Company by Portion of Municipality — Purchase of Shares — Issue of Debentures — By-law — Approval of Voters — Refusal of Council to Pass — Mandamus—Municipal Act, 1903, secs. 385, 696.

Motion by Robert McKee and others for a mandamus to the muncipal council of the township to read a third time and pass a by-law providing for aid to the People's Railway Co. and to issue debentures for the purpose of raising money to pay for $15,000 of stock in the company.

J. R. Roaf, for the applicants.

R. S. Robertson, for the township council.

BOYD, C.:—The by-law as voted on provides that it shall and may be lawful for the municipal corporation of Blenheim to assist the People's Railway Co., by taking stock in the said company to the amount of $15,000 . . . and to pay for said stock with debentures of the corporation to be made and issued, etc. (sec. 1).

The debentures are to be delivered by instalments when the right of way through Blenheim has been secured and as and when the road is graded for one mile between the village of Bright and the village of Plattsville, and so on (sec. 5 of by-law).

The debentures are to be met by levy of a sufficient rate on all the ratable property within the portion of the township through which the railway takes its course (sec. 6).

This by-law is based on the provisions of sec. 696 of the Municipal Act, 1903, which may by implication provide for the taking of stock by the municipality, though the marginal note annotates the section as "aid to railways by portions of townships." The text does in terms provide that the debentures are "to be issued by the municipality," (sub-sec. 3 (a)); and the Act contemplates that these obligations of the whole municipality are to be defrayed by particular assessment upon all the ratable property within

the portion of the municipality defined in the by-law. The taking of stock by the municipality and the issuing of debentures by the municipality would prima facie place the whole financial burden upon the township at large, but that I do not take to be the meaning or the intention of the Act.

The provisions of the law as to granting municipal aid to railways by way of loan or bonus (which does not involve the taking of stock) are to the effect that, if carried by the required majority of voters for the whole or the part of a municipality, it shall be the duty of the council to pass the by-law: see 6 Edw. VII. ch. 30, secs. 130, &c., and particularly sec. 136. This withdraws all discretion from the members of the council in such a case, which is not the present. The clauses in the Consolidated Municipal Act of 1903 relating to aid to railway companies are in phraseology permissive. The council, after successful voting, may pass the by-law, and it is so expressed on the face of this by-law—"it shall and may be lawful for the corporation to assist."

This council, as did the council of the former year, 1909, objects to the final reading and passing of the by-law. One point of difficulty raised is that the by-law is really one for creating a debt payable by local assessment, and that it falls within sec. 385 of the Act of 1903. Such a by-law shall recite that the "debt is created on the security of the special rate settled by the by-law, and on that security only." That is, I think, the fair meaning of the legislation as to the manner of granting aid to a railway by part only of the township, but this safeguard as to the public and the financial world has not been observed in the promulgation of this by-law. I think the council may have good ground for grave hesitation in committing the whole municipality to the primary burden of this entire $15,000 debt. Their action or inaction does not appear to me unreasonable or unjustifiable, and, if they have a discretion, it should not be interfered with by the Court.

Other grounds of objection were urged; I have dealt with what seems to be the most important, and the result is that I decline to grant an order for a mandamus. It is not a case for costs.

MORTON CO. LIMITED v. ONTARIO ACCIDENT INSURANCE CO.—LATCHFORD, J.—JAN. 7.

Costs — Company — Winding-up.]—In this case, ante 199, LATCHFORD, J., gave judgment for the plaintiffs with costs,

including the costs of a former trial. The defendants, an incorporated company, were in process of winding-up under the Dominion Act. The plaintiffs, speaking to the minutes of the judgment, urged, upon the authority of In re Wenborn, [1905] 1 Ch. at p. 416, and the cases there cited, that all the costs awarded to the plaintiffs should be paid in full by the liquidator of the defendants. LATCHFORD, J., ordered that only the costs of the action subsequent to the liquidation should be paid in full. For costs incurred before the liquidation, as for the damages, the plaintiffs were entitled to claim merely as creditors of the defendants. D. Urquhart, for the plaintiffs. G. Larratt Smith, for the defendants.

WOOD BROTHERS v. GALL LUMBER CO.—LATCHFORD, J.—JAN. 8.

Contract—Sale of Lumber—Breach—Damages—"Mill-run."]—Action for breach of a contract for the sale and purchase of lumber. The learned Judge found that the letters written by the parties constituted a contract for the sale by the plaintiffs to the defendants and the purchase by the defendants from the plaintiffs of all the plaintiffs' stock of hemlock, spruce, and balsam to be cut during the season of 1907 at Berriedale from the plaintiffs' logs, estimated at from 600,000 to 100,000 ft., then in the Maganetewan river. It was contended by the defendants that the term "mill-run," used in the letters constituting the contract, did not include any kind of culls. The learned Judge found as a fact that the term, as used and accepted by the parties, included all merchantable lumber except dead culls. He cited Wonderly v. Holmes, 56 Mich. 412. Judgment for the plaintiffs for $2,777.59 damages for the loss occasioned by the defendants' breach of contract, with interest from the 23rd December, 1908, and costs. Judgment for the defendants on their counterclaim for $200; counterclaim otherwise dismissed. No costs of counterclaim. J. Harley, K.C., and E. Sweet, for the plaintiffs. W. S. Brewster K.C., for the defendants.

BRENNAN v. GRAND TRUNK R. W. CO.—MULOCK, C.J.Ex.D.—JAN. 10.

Master and Servant—Injury to and Death of Servant—Negligence—Railway.]—Action by the widow and children of Paul

Brennan, deceased, to recover damages for his death, caused, as they alleged, by the defendants' negligence. The deceased was a railway yardsman, and had charge of the defendants' engines and cars at their Ottawa yard. On the 17th June, 1909, he was standing on the foot-board of one of the engines, which was moving northerly, when he fell in front of the moving engine and was killed. The action was tried with a jury, and questions were submitted to them, subject to a motion for a nonsuit, upon which judgment was reserved. Upon the answers of the jury the plaintiffs claimed to be entitled to judgment. The Chief Justice (after setting out the facts and portions of the evidence) said that the proper conclusion to draw from the evidence was that as Brennan stod upon the foot-board with his hand upon the hand-grab he became unconscious, and in consequence fell; but, whether that were the correct inference or not, there was nothing in the evidence to shew that the deceased fell off the foot-board either because it was too high from the ground or because it was too narrow. Even if the foot-board was too high or too narrow, there was no evidence to shew that the accident was caused by either circumstance. Action dismissed with costs. A. E. Fripp, K.C., for the plaintiffs. D. L. McCarthy, K.C., and W. E. Foster, for the defendants.

CANADIAN STREET CAR ADVERTISING CO. v. CITY OF PORT ARTHUR—MASTER IN CHAMBERS—JAN. 11.

Venue—Change.]—Motion by the defendants the Corporations of Port Arthur and Fort William to change the venue from Toronto to Port Arthur. Motion dismissed; costs in the cause. If it should appear that the expense of a trial at Toronto has been greater than it would have been at Port Arthur, the extra costs to be to the defendants in any event. Featherston Aylesworth, for the applicants. Z. Gallagher, for the plaintiffs.

MCKERVEY v. BUTLER BROS.-HOFF CO.—DIVISIONAL COURT—JAN. 11.

Negligence—Personal Injuries.]—An appeal by the defendants from the judgment of the County Court of Essex in favour of the plaintiff in an action to recover damages for personal injuries sustained by the plaintiff owing to the negligence of the defend-

ants' servants, as alleged. The plaintiff's hand was crushed between a piece of timber which was being lowered into the Detroit river and the shield through which it was lowered. The Court (FALCONBRIDGE, C.J.K.B., RIDDELL and LATCHFORD, JJ.), held that the trial Judge had misapprehended the effect of the evidence, and that there was no negligence for which the defendants were responsible. Appeal allowed with costs and action dismissed with costs. J. H. Rodd, for the defendants. Henry Clay, for the plaintiff.

JOHNSTON v. OCCIDENTAL SYNDICATE—MASTER IN CHAMBERS—JAN. 12.

Summary Judgment—Action on Foreign Judgment.]—A motion for summary judgment under Rule 603, in an action upon a judgment obtained in the Yukon Territory, was dismissed, the Master saying that the defendants had disclosed facts sufficient to entitle them to defend the action: Jacobs v. Beaver, 17 O. L. R. 498; Bank of Montreal v. Morrison, 5 O. W. R. 90, 540. Costs in the cause. Glyn Osler, for the plaintiff. H. W. Mickle, for the defendants.

TITCHMARSH v. GRAHAM—MASTER IN CHAMBERS—JAN. 13.

Parties—Trespass and False Imprisonment—Crown Attorney.]—Motion by the plaintiff to add the Crown Attorney for the county of Peel as a defendant to an action for trespass and false imprisonment. The Master referred to Fergusson v. Adams, 5 U. C. R. 194; Thompson v. Hatch, 2 Kerr (N. B.) 425; Kelly v. Barton, 26 O. R. 608; McDonald v. Dickinson, 25 O. R. 45; Parkes v. Baker, 17 P. R. 345; Con. Rule 312; and made the order asked for upon payment by the plaintiff of disbursements of the motion within a week. All other costs lost or occasioned to the defendant Graham by this motion to be costs to him in any event. In default of payment of the disbsrsements, the motion to be dismissed with costs. J. B. Mackenzie, for the plaintiff. W. H. McFadden, K.C., for the defendant Graham and also for himself, as the defendant added.

DOHERTY v. MACDONELL—DIVISIONAL COURT—JAN. 13.

Master and Servant — Injury to and Death of Servant — Negligence—Contributory Negligence—Factories Act—Damages.] —Appeal by the defendants from the judgment of MULOCK, C.J. Ex.D., in favour of the plaintiff, upon the findings of a jury, for the recovery of $1,500 damages. The action was brought by Joseph Doherty to recover damages for the death of his son Frank Doherty, a workman employed by the defendants, alleged to have been caused by the defective condition and arrangement of the ways, works, and machinery of the defendants, which had not been remedied owing to the negligence of the defendants or some of their servants, as alleged. The Court (FALCONBRIDGE, C.J.K.B., RIDDELL and LATCHFORD, JJ.) dismissed the appeal with costs, being of opinion that the commission of a wrong according to the law of this Province had been proved by the application of the Factories Act, dangerous machinery not having been, so far as practicable, securely guarded; that the onus as to contributory negligence was on the defendants, and there was evidence to support the verdict; and that the damages were not so grossly excessive as to impel the Court to grant a new trial or put the plaintiff to the alternative of a reduction. Glynn Osler, for the defendants. T. F. Battle, for the plaintiff.