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ONTARIO WEEKLY REPORTER.

(TO AND INCLUDING DECEMBER 6TH, 1902.)

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WINCHESTER, MASTER. NOVEMBER 28TH, 1902.

CHAMBERS.

NOLAN v. OCEAN ACCIDENT AND GUARANTEE CORPORATION.

Life Insurance—Action on Policy—Condition as to Arbitration—Public Policy—Application to Stay Proceedings.

Motion by defendants for an order staying all proceedings in an action brought by the beneficiary (mother) named in a policy of insurance issued by defendants on the life of the late Dennis Nolan for $1,000, to recover that sum. The motion was made on the ground that plaintiff was not entitled to maintain the action, inasmuch as there had been no award under condition No. 15 incorporated in the contract upon which the action was brought, and that the provisions of condition 15 had not been complied with. The application was made under R. S. O. ch. 62, sec. 6.

H. Cassels, K.C., for defendants, cited Guerin v. Manchester Fire Assurance Co., 29 S. C. R. 139, and McInnes v. Western Assurance Co., 5 P. R. 242, 30 U. C. R. 580.

S. Alfred Jones, for plantiff, contended that there was no submission signed by both parties, as required by R. S. O. ch. 62, secs. 2, 6; that the condition ousts the jurisdiction of the Court, and is, therefore, void as contrary to public policy, citing Caledonian R. W. Co. v. Weenock and W. B. R. W. Co., 2 H. L. Sc. 347; Davies v. Fitzgerald, 1 Ex. D. 237; Collins v. Locke, 4 App. Cas. 674.

THE MASTER held, following Scott v. Avery, 5 H. L. Cas. 811, Edwards v. Aberayson Mutual Sun Ins. Society, 1 Q. B. D. 563, Reed v. Washington F. and M. Ins. Co., 138 Mass. 572, and cases there cited, that plaintiff was entitled to proceed notwithstanding condition 15.

Motion refused. Costs to plaintiff in the cause.

BRITTON, J. NOVEMBER 29TH, 1902.

WEEKLY COURT.

LACHANCE v. LACHANCE.

Dower—Reference—Report—Reference back — Judgment—Costs—Sale of Land.

Motion by plaintiff for judgment on report of local Master at Windsor in action for dower, and cross-motion by defendant for a reference back to the Master to take further evidence.

F. C. Cooke, for plaintiff.

R. U. McPherson, for defendant.

BRITTON, J., held, that, considering the small amount involved and the very large expense already incurred, no useful purpose would be served by a reference back to the Master. Defendant's motion dismissed without costs, and judgment for plaintiff for amount found due by the report, increased by the costs of the action, of the reference, and of this motion; the costs of this motion to be taxed as if it had been unopposed; and for sale of the lands on default for one month in payment of amount so ascertained.

FALCONBRIDGE, C.J. DECEMBER 1ST, 1902.

WEEKLY COURT.

RE CO-OPERATIVE CYCLE AND MOTOR CO.

Company—Winding-up — Contributories — Subscription for Shares—Extrinsic Evidence—Placing Shares—Commission—Payment for Shares—Contract—Consideration—Transfer of Assets.

Appeal by liquidator from report of Neil McLean, official referee, in the matter of the winding-up of the company, refusing to place McPherson, Nott, and Coulter on the list of contributories.

E. B. Ryckman and A. T. Kirkpatrick, for the liquidator.

C. H. Ritchie, K.C., for McPherson.

G. H. Watson, K.C., for Nott.

J. D. Falconbridge, for Coulter.

FALCONBRIDGE, C.J.: — In McPherson's case I accept the findings of the referee, which are based on almost

uncontradicted testimony. The extrinsic evidence is not within the mischief of the general rule as tending to vary the written contract. The use of the word "commission" in the letter of 30th March, 1901, shews that the transaction is not an ordinary subscription for shares, and the real transaction could be explained by parol evidence. See per Lord Davey in Bank of New Zealand v. Simpson, [1900] A. C. at p. 188. The case is not one of the illegal issue below par of shares in the capital stock of a company, as in North-West Electric Co. v. Walsh, 29 S. C. R. 33, but it is an agreement to place shares, which is not equivalent to "take shares:" Re Monarch Ins. Co., Gorrieson's Case, L. R. 8 Ch. 507. The payment by a limited company of a reasonable amount to brokers by way of commission or brokerage for placing shares is not an act ultra vires of the company: Metropolitan Coal Commissioners Assn. v. Scrimgeour, [1895] 2 Q. B. 604. What is a reasonable amount depends on the circumstances, and the amount stipulated for here was, the president of the company swears, not unreasonable. This appeal is dismissed with costs.

In Nott's case and Coulter's case, the findings of the referee are in entire accordance with the evidence. Section 25 of the English Companies Act, 1867, made especial provision for the filing of a contract respecting payment of shares in anything but cash, and the English Companies Act, 1900, sec. 331, while repealing sec. 25, makes provision for filing certain returns as to allotments of shares issued for a consideration other than cash. But there seems to be no corresponding section in the Ontario Companies Act. The transaction which the liquidator seeks to impeach was one connected, complete, and integral transaction before the incorporation of the company. There was bona fide consideration for having the shares paid up, and the question of value is not capable of being raised here. And there is no doubt about the identity of the smaller number of shares as being part of the greater. One or more of these elements will be found sufficient to distinguish the present case from cases like Dent's Case, L. R. 8 Ch. 768; Fothergill's Case, ib. 270; Migotti's Case, L. R. 4 Eq. 238. Nott's and Coulter's contracts were fully performed by the transfer of assets. The transactions seem to be perfectly straight. Possible creditors cannot be prejudiced, and it would be an extreme hardship if these persons should now be held liable as contributories. Appeals dismissed with costs.

DECEMBER 1ST, 1902.

C. A.

REX v. MOYER.

Criminal Law—Obstruction of Highway—Conviction for—Weight of Evidence—New Trial—Direction to Jury—Proof of Original Survey—Onus.

Appeal by defendant, pursuant to leave, from his conviction by the Court of General Sessions for the County of Lincoln upon an indictment for that on or before the 1st day of June, 1901, in the township of Clinton, he did erect and build or cause to be erected upon the highway, a fence which encroached upon the highway. The case was tried with a jury.

E. E. A. DuVernet and J. H. Ingersoll, St. Catharines, for defendant, contended that the chairman's charge to the jury had the effect of wrongly influencing them, because he said that if defendant was found guilty he could not be severely punished; that evidence was improperly admitted; that the documentary evidence shewed that no road had ever been laid out by survey, and the proper inference to be drawn was that the land occupied by defendant and his predecessors in title from time immemorial had been fenced with reference to a roadway established by use and not survey.

W. M. German, K.C., for private prosecutor.

THE COURT (ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, GARROW, JJ.A.) on the 24th November gave judgment directing a new trial.

On the 1st December the following reasons were given by

OSLER, J.A.:—The verdict appears to me . . . to be against the weight of the evidence. Leave to appeal was granted by the learned Chairman of the General Sessions on this ground, and he would, I think, have been warranted in reserving a case for our consideration under sec. 743 of the Code, on which we might have been able finally to dispose of this particular indictment.

In more than one respect the case was submitted to the jury on rather narrow grounds. In cases of this kind, where an attempt is being made to straighten or widen an old and long established road by proof of an original survey, upwards of one hundred years old, by which the allowance is supposed to have been established, but in exact conformity with which the road has never been opened, laid out, or travelled, a jury should, as I have more than once had occasion to say,

be distinctly advised that the onus of proof of the survey and of the exact location of the road rests entirely on the Crown or the private prosecutor, and long and undisturbed possession ought not easily to be interfered with, except upon very clear proof of an encroachment upon the public highway. If a reasonable doubt exists, it is much better that the public, represented by the municipal authority, should, if it is desirable to widen or straighten the road, expropriate from the adjoining owners so much land as may be necessary for the purpose, than put the owners and the public to the expense of a harassing and generally costly litigation to enforce what is too often, in the absence of the original measurements, a modern surveyor's theory or assumption of where, or on which side of a line, the road ought to be.

In the case before us, we see that so long ago as the year 1832 the exact location of the line was in doubt, and that the action of the commissioners, though it was not their province to lay it out or establish it, was not in conformity with what is now contended for. The case should have been left to the jury much more favourably to the defendant than it was, instead of practically directing a verdict against him.

DECEMBER 2ND, 1902.

DIVISIONAL COURT.

DAWDY v. HAMILTON, GRIMSBY, AND BEAMSVILLE ELECTRIC R. W. CO.

Street Railway—Accident to Passenger—Conductor Attempting to Pull Passenger on Moving Car—Scope of Authority of Conductor—Question for Jury—New Trial.

Appeal by plaintiff from judgment of STREET, J., ante 364, dismissing the action, which was brought for damages for injuries sustained by plaintiff by being dragged along behind one of defendants' cars.

The appeal was heard by BOYD, C., and MEREDITH, J.

W. M. German, K.C., for plaintiff.

E. E. A. DuVernet, for defendants.

The judgment of the Court was delivered by

BOYD, C.:—It does not seem to me that the case has been fully tried by the jury. The question as to the scope of the conductor's authority is one of evidence, upon which the jury should pass if there is any evidence upon the matter. I think there is, and that the effect of it was for them to consider.

. . . It is proved that plaintiff came to the platform station and signalled the car with the intention of taking passage thereon. There was a response made to this signal by the slowing down of the car as it neared the platform. The plaintiff made up her mind that the speed was yet too great for her to attempt to board the car, but it may be fairly inferred that the conductor thought otherwise, so that he made an effort to help plaintiff by seizing her hand as the car was going past; at the same time he rang the bell, which appears to have accelerated the speed of the car, and the plaintiff was thus dragged along and hurt. . . . . It is the duty of the conductor to assist people in getting on and off the car, and it may be within the line of his duty to assist those who are apparently about to get on a car while it is slowing up. It would be for the jury to pass upon the circumstances of this case as to the scope of the conductor's authority. . . . Unless the defendants are content with the present findings, and are willing to pay the damages, the action should go for a new trial; costs to abide the result.

DECEMBER 2ND, 1902.

DIVISIONAL COURT.

HULL v. ALLEN.

Trusts and Trustees—Parol Evidence to Establish Trust — Insufficiency of—Costs.

Appeal by plaintiff from judgment of FERGUSON, J., ante 151, in so far as it was against plaintiff.

The action was brought to have it declared that defendant was a trustee for plaintiff in respect of the proceeds of the sale of a timber limit and a brickyard (alleged by plaintiff to have been transferred by him to defendant as trustee for certain purposes), and of a lot containing 141 acres (alleged to have been bought by defendant for plaintiff), and in respect of other matters.

The trial Judge found in favour of plaintiff as to the timber limit and brickyard, and this appeal was taken by him as to the 141 acres, on the ground that the evidence on this point clearly established the trusteeship.

The appeal was heard by BOYD, C., and MEREDITH, J.

Wallace Nesbitt, K.C., for plaintiff.

J. P. Mabee, K.C., for defendant.

BOYD, C.:—The trial Judge was of opinion that the parol evidence was insufficient to establish a case of trust in the acquisition of the land held by the defendant, so as to give relief to plaintiff notwithstanding the Statute of Frauds. Doubtless the law set forth in James v. Smith, [1891] 1 Ch. 388, is modified and perhaps changed entirely by Rochefoucauld v. Bertram, [1897] 1 Ch. 207; but it is essential that the evidence of such alleged trust be clear and complete to the satisfaction of the Court. That element is here lacking, and the judgment should be affirmed. It is not a case for costs of appeal.

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

DECEMBER 3RD, 1902.

DIVISIONAL COURT.

STANDARD TRADING CO. v. SEYBOLD.

Security for Costs—Præcipe Order for—Application for Increased Amount—Election—Costs.

Appeal by plaintiffs from order of MACMAHON, J., ante 724, reversing order of local Master at Ottawa refusing defendants' application for increased security for costs, and requiring plaintiffs to give additional security by bond in $600 or by payment into Court of $300.

J. H. Moss, for plaintiffs.

D. L. McCarthy, for defendants.

THE COURT (BOYD, C., MEREDITH, J.) held that the Master was not bound by the decisions to limit the defendants to the amount of security provided for by the præcipe order obtained by them, and the Judge having on appeal exercised a discretion, it would not now be interfered with. In the cases relied on by the Master, Bell v. Landon, 9 P. R. 100, had been strained beyond its fair application.

Appeal dismissed, but order of MACMAHON, J., varied by directing that the costs of the motion before the Master and of the first appeal should be costs in the cause. Costs of this appeal also to be costs in the cause.

DECEMBER 3RD, 1902.

DIVISIONAL COURT.

BAIN v. COPP.

Insurance—Life—Policy on Life of One Person for Benefit of Another—Assignment—Death of Assured—Claim by Administrator.

Appeal by plaintiff from judgment of MACMAHON, J., ante 707, in favour of defendants in an interpleader issue.

S. W. McKeown and J. W. McCullough, for plaintiff.

W. N. Tilley, for defendants.

THE COURT (BOYD, C., MEREDITH, J.) dismissed the appeal without costs.

DECEMBER 3RD, 1902.

DIVISIONAL COURT.

McDONALD v. SULLIVAN.

Attachment of Debts—Rent—To Whom Due—Heirs of Deceased Landlord—Executors—Devolution of Estates Act.

Appeal by judgment creditor from order of STREET, J., ante 723, sub nom. Reilly v. McDonald, allowing appeal from order of Master in Chambers, ante 721, and discharging a garnishing summons, under the circumstances mentioned ante 721.

The appeal was heard by BOYD, C., and MEREDITH, J.

W. Proudfoot, K.C., for judgment creditor.

L. V. McBrady, K.C. for judgment debtors.

BOYD, C.— . . . What was decided in McAuley v. Rumball, 19 C. P. 286 (of which the head-note is so insufficient as to be misleading) was that a debt due to one in a representative character cannot be garnished to answer a debt owing by him in a private capacity, but a debt due to a dead judgment debtor may be attached as against his personal representative: Stevens v. Phillips, L. R. 10 Ch. 416; Nash v. Pearce, 47 L. J. Q. B. 766. Here the debt was due by several judgment debtors, and the rent garnished was payable to them as owners of the land under rent. The south half of the land was owned by G. W. Reilly, the father of the judgment debtors, and it had descended to them on his death intestate. The other half was owned by George Reilly, his son, who died pending the action, liable for the costs which form the debt

in question, and his liability was taken up in the action by his executrix, Mary Sullivan. As to her liability the case is plain, and as to the others, the intervention of the administratrix, who assumed to lease part of the land, is not material, for no caution was registered, and no estate is in her, and while she might collect the rent, it is only for the beneficial use of the heirs. There are no creditors of either estate affected by the garnishment, and I think it should work its full effect. Order appealed from reversed and order of Master in Chambers restored. Costs of all the proceedings to judgment creditor out of rent attached.

MEREDITH, J., gave reasons in writing to the same effect.

DECEMBER 5TH, 1902.

C. A.

GRAND HOTEL CO. OF CALEDONIA SPRINGS v. WILSON.

GRAND HOTEL CO. OF CALEDONIA SPRINGS v. TUNE.

Trade Name—Infringement of—"Caledonia Water"—Geographical Designation.

Appeal by defendants from judgment of BOYD, C., 2 O. L. R. 322, in favour of plaintiffs in an action to restrain the defendants from infringing the plaintiffs' trade names and for damages.

The appeal was heard by MOSS, C.J.O., OSLER, MACLENNAN, JJ.A.

W. E. Middleton, for appellants.

F. Arnoldi, K.C., for plaintiffs.

MACLENNAN, J.A.—The injunction granted by the Chancellor restrained the defendants (1) from advertising or selling their water in the Province of Ontario under the name of "Caledonia Water;" (2) or as coming from the springs owned or leased by plaintiffs; (3) or enclosed in any bottles, barrels, or packages having any mark or label contrived to represent their water as coming from the plaintiffs' springs; (4) and particularly from using or applying in Ontario to the defendants' water the words "Caledonia Water," "Water from Caledonia Springs," or "Water from the New Springs at Caledonia;" and (5) from so using and applying in the Province of Ontario any name or title of which the word

"Caledonia" forms a part, in a way calculated to deceive the public into the belief that the water sold by defendants is mineral water from plaintiffs' springs. He also directed a reference as to damages. The first member of the mandatory part of the judgment should stand against the defendants Tune & Son, but not against any of the other defendants. There was no evidence that they, or any of them, sold or desired or intended to sell their water as, or under the name of, "Caledonia Water," or that any of the defendants, Tune & Son included, intended or desired to lead their customers to suppose that they were getting water which came from the plaintiffs' springs. For the same reasons, the 2nd, 3rd, and 4th members of the mandatory part of the decree were objectionable and should be struck out. There was no evidence that any of the defendants, except Tune & Son, as already mentioned, advertised or sold their water as coming from the springs owned or leased by plaintiffs, or enclosed in any bottles, barrels, or packages having any mark or label contrived to represent their water as coming from the plaintiffs' springs, or used or applied in Ontario to the defendants' water the words "Caledonia Water" or "Water from Caledonia Springs." They have used the phrase "Water from the new Springs at Caledonia" as descriptive of their water, and they justify their doing so. The Chancellor thought that it was not correct for defendants to speak of the water sold by them as from "new springs," because it was reached by means of boring and drilling, and rises from an artesian well, while the plaintiffs' water issues naturally from the earth, and is and has long been the spontaneous outflow of mineral springs. But the defendants' wells are flowing wells. The water springs up spontaneously from the earth through the orifices drilled or bored by defendants. The word "springs" is the natural and appropriate word to use to designate the flowing well of defendants, and they do no more than exercise their legal right in designating them as springs. The Chancellor also found fault with the use by defendants of the word "Caledonia." The defendants have an undoubted right to describe their water correctly and truthfully. It is a saline mineral water. It is derived from new springs, and these springs are in the township of Caledonia, and at a place called Caledonia Springs. If defendants' water is likely to be more sought after and more marketable, and if the business of selling it is likely to be more profitable, by reason of the situation of the springs, and their nearness to the famous old springs, the defendants are entitled to the benefit of that. The Chancellor also thought there was inaccuracy in saying

"New Springs at Caledonia," instead of "in Caledonia." The defendants might have said with perfect correctness "New Springs at Caledonia Springs," for the phrase "Caledonia Springs" means not only the springs of water, but the place or neighbourhood where they are situate. The defendants' description of their water as water from "The New Springs at Caledonia" is a perfectly true and accurate description, and one which clearly and sufficiently distinguishes it from the plaintiffs' water. It was contended that defendants had no right to use the word "Caledonia" at all in designating their water. But, the defendants' springs being at Caledonia, they have a right to say so, taking care to distinguish them from those of the plaintiffs at the same place. Singer Mfg. Co. v. Loog, 8 App. Cas. 15, 27, 37, 38, 39, referred to.

It was also contended that the make-up of defendants' goods was calculated to deceive the public, because the bottles used were similar. But it was not shewn that plaintiffs' bottles were in any way peculiar in form, size, or colour, or different from bottles in common use for the sale of other waters. It was said that it was common to put such goods on ice, and that the labels then came off, and the customer might be deceived, but it is not shewn that defendants did things of that kind. See observations of Lords Macnaghten and Davey in Payton v. Snelling, [1901] A. C. 308. Therefore, the whole of the 4th member of the injunction was unwarranted. No part of the 5th member can be maintained as against any of the defendants. None of the defendants, except Tune & Son, has been shewn to have done anything here enjoined, and that part of the judgment allowed to stand against Tune & Son is sufficient as against them.

OSLER, J.A., concurred.

MOSS, C.J.O., dissented, being of opinion that the Chancellor's conclusions of facts were well supported by the testimony. He referred to Wotherspoon v. Currie, L. R. 5 H. L. 508; Montgomery v. Thompson, [1891] A. C. 217; Reddaway v. Banham, [1896] A. C. 199; Radde v. Norman, L. R. 14 Eq. 348; Apollinaris Co. v. Morrish, 33 L. T. N. S. 242; Worcester v. Locke, 18 Times L. R. 712; Boston Rubber Shoe Co. v. Boston Rubber Co. of Montreal, 32 S. C. R. 315. He considered that plaintiffs were entitled to an injunction, but that the injunction awarded was not in the proper form. It should be to restrain the defendants, their servants and agents, from selling or offering or exposing or advertising for sale or procuring or enabling to be sold any mineral waters

(not being of the plaintiffs' production) under or in connection with the word "Caledonia," without clearly distinguishing such waters from the plaintiffs' waters.

In the result, the appeal as to all defendants except Tune & Son is allowed with costs and the action dismissed with costs. As to Tune & Son, the appeal is allowed except as to the first clause of the injunction and the reference as to damages. The plaintiffs to have against Tune & Son such costs as they would have incurred in entering up judgment against them by default for so much of the injunction as plaintiffs still retain. Tune & Son to have against plaintiffs the rest of the costs of the action and the costs of appeal. The costs to be set off pro tanto.

WINCHESTER, MASTER. DECEMBER 5TH, 1902.

CHAMBERS.

WHELIHAN v. HUNTER.

Venue—Change of—Speedy Trial—Postponement of Sittings—Second Application by Plaintiffs for Change.

Motion by plaintiffs for order changing venue. The action was brought by two members of the town council of St. Mary's against the remaining members of that council and the municipal corporation of the town for an injunction restraining defendants from making payments on a contract for waterworks extension; and for a declaration that the contract is not in any way binding upon the corporation, on the ground that no by-law was passed authorizing the execution of the contract; and for other relief. The plaintiffs moved for an injunction against the defendants, and upon the motion were directed to go to trial at the Brampton sittings commencing on the 28th October, 1902, but, not being ready to proceed to trial, they moved to change the venue from Brampton to Stratford, the Stratford sittings being at the time set for the 8th December. The application was opposed by defendants, but an order was made changing the place of trial to Stratford. Afterwards the Stratford sittings was postponed until 13th January, 1903. The plaintiffs now moved for a change of venue to Woodstock, where the sittings was to commence on the 15th December. This was opposed by defendants, on the ground that the council must meet on the 15th December, pursuant to statute, and therefore it would be impossible for defendants to attend at Woodstock.

D. L. McCarthy, for plaintiffs.

J. H. Moss and T. Reid, for defendants.

THE MASTER held that there could be no difficulty, the plaintiffs being willing to set the case down at the foot of the list, so that it would not be called on the first day. It was desirable that the action should be tried this year, while the defendants were still members of the council. Order made changing venue to Woodstock. Costs to defendants in the cause.

WINCHESTER, MASTER. DECEMBER 5TH, 1902.

CHAMBERS.

PLUMMER v. SHOLDICE.

Parties—Addition of Plaintiff—Distinct Causes of Action—Election to Proceed with One.

Motion by defendant to set aside the statement of claim, or that plaintiffs be ordered to elect as to which claim will be proceeded with. The action was originally begun by plaintiff Plummer alone, and was brought to compel specific performance of an agreement between him and defendant for the sale and purchase of 50 acres of land near the town of Sault Ste. Marie. Before serving the writ of summons, although defendant had entered an appearance gratis, the plaintiff obtained from the local Judge at Sault Ste. Marie an ex parte order permitting plaintiff to amend by adding Marie Brown as a plaintiff, and by adding to the indorsement of the writ a claim for the specific performance of an agreement made between her and the defendant in respect to the same land, and a claim for partition or sale. The writ was amended pursuant to the order, and a statement of claim was delivered, which was afterwards amended.

H. L. Dunn, for defendant.

D. L. McCarthy, for plaintiffs.

THE MASTER.—Each plaintiff has a distinct cause of action against the defendant, and this is improper under Rule 185. Mooney v. Joyce, 17 P. R. 241, applied, notwithstanding the change in the Rule. The adding of Marie Brown with her new cause of action will embarrass the trial of the action originally instituted. If plaintiff Plummer is desirous of proceeding with the action as originally brought, there can be no objection to his retaining Marie Brown as co-plaintiff. Order made (as in Mooney v. Joyce) that plaintiffs do elect within two weeks which plaintiff's claim will be proceeded with in this action, and do within the same period amend the writ and statement of claim by striking out all parts that refer to the claim of the other plaintiff, save as dealt with above, and that in defeault the action be dismissed. Costs to defendant in any event.

MACMAHON, J. DECEMBER 5TH, 1902.

TRIAL.

ST. JEAN v. DANIS.

Gift—Donatio Mortis Causa—Bank Deposit in Names of Donor and Donee—Survivorship—Evidence.

The plaintiff sued as executor of Elmire Champagne to recover a sum of $385 on deposit in the Ottawa branch of the Merchants Bank of Halifax, to the joint credit of Elmire Champagne and defendant. The defence was that the money had been deposited as the joint money of Elmire Champagne and defendant, and now belonged to the latter as survivor. Elmire Champagne had, in or about 1900, told the manager of the Banque Jacques Cartier, where the money had been on deposit in the same way, until that bank went into liquidation, that at her death it was to be defendant's, and she had made a similar declaration to one Deverin, her grandson, about six days before her death, saying that it was unnecessary to give defendant an order to that effect. Similar statements had been several times made by the deceased to defendant, who had charge of the bank book, the deceased being at the time of the deposit a woman of nearly eighty years of age. Of eight cheques issued against the account, four were signed by deceased and four by defendant. The deceased had in 1898 made a will bequeathing all her moneys to defendant, but this bequest had been omitted from a will made in 1901, because, as defendant alleged, the defendant had been made a joint owner.

F. H. Chrysler, K.C., for plaintiff.

George F. Henderson, Ottawa, and D. J. McDougal, Ottawa, for defendant.

MACMAHON, J.—The bank book being in possession of defendant, and Mrs. Champagne stating that the money was the defendant's, constituted a good donatio mortis causa. It was not necessary that Mrs. Champagne should require her daughter to produce the bank book in order that she might immediately return it to her again in order to make a good donatio mortis causa. See Cain v. Moon, [1896] 2 Q. B. 283; O'Brien v. O'Brien, 4 O. R. 450; Re Weston, [1901] 1 Ch. 680; Re Andrews, [1902] 2 Ch. 394; Re Dillon, 44 Ch. D. 76. However, the defendant's right to retain the money might preferably be placed upon the ground that, on the facts found, the money was the joint property of deceased and the defendant, and that it therefore became the property of the

survivor: Williams on Personal Property, 13th ed., pp. 392-3; Payne v. Marshall, 18 O. R. 499.

Action dismissed with costs, including costs of injunction motion.

DECEMBER 5TH, 1902.

DIVISIONAL COURT.

HUNT v. TOWN OF PALMERSTON.

Municipal Corporations—By-law—Aid to Free Library—Necessity for Submission to Popular Vote — Special Rate — Construction of Statute.

Appeal by defendants the town corporation from order of MACMAHON, J., granting an injunction restraining them from levying by special rate $650 in aid of a free library in the town, on the ground that sec. 18 of the Public Libraries Act required the by-law for this purpose to be submitted to a vote of the electors.

J. J. Drew, Guelph, for the appellants.

J. H. Tennant, for defendants the Palmerston Public Library Board.

J. Montgomery, for plaintiff.

BOYD, C.:—The by-law may be upheld under sec. 591 (4) of the Municipal Act, empowering municipalities to make grants in aid of public libraries. Section 18 of the Public Libraries Act first appears in 1895, while the power of municipalities to make grants to mechanics' institutes or free libraries dates back to 1866. Long established law should not be reduced by ambiguous legislation such as the section referred to, which may have its full and legitimate application by being applied to the raising of ways and means by by-laws under the requisitionary powers intrusted to particular free library boards under secs. 14 and 17 of the Act. Sections 14 and 18 are probably to be read together; so that "special rate" is defined to be the "special annual rate" which is to be levied to provide the amount estimated by a free library board as being required to meet the yearly expenses necessary for carrying the Act into effect. The broad distinction between that and the matter in hand is that in that case the library board can enforce its demands upon the municipal corporation, subject to a popular vote, whereas in this instance the question is purely one of bounty and grace on the part of the municipality. Appeal allowed.

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

BRITTON, J. DECEMBER 6TH, 1902.

WEEKLY COURT.

RE PELOT AND TOWNSHIP OF DOVER.

Municipal Corporations—By-law — Diversion of Road — Interest of Individuals—Contrary to Public Interest.

Motion by Emily Pelot, a ratepayer of the township and an owner of land affected by by-law No. 21 of 1901, for a summary order quashing clauses 1 and 2 of that by-law, which is intituled a by-law to divert part of the Given road in the township, which by-law was passed on the 21st October, 1901, and was confirmed by a by-law of the county council of Kent passed on the 7th June, 1902, as required by sec. 660 of the Municipal Act. The road was used for the purpose of an exit to Big Point road. The by-law provided for the closing up of a piece of the road and the opening up of a piece in substitution for it.

J. H. Moss, for the applicant, contended that the by-law was not passed in the interest of the public at large, but at the instance and for the benefit of Poissant and Gore, two land-owners, and also that the by-law was bad because the notices required by statute were not duly given.

M. Wilson, K.C., for the township corporation.

BRITTON, J. (after setting out the evidence at length) :— After a good deal of consideration and with some hesitation, I have come to the conclusion that this by-law was not passed in the public interest, but in the interest of Gore and Poissant, and therefore improperly passed, and cannot stand. It violates the rule, now so well established, that corporate powers must not be exercised for the benefit of one or two individuals at the cost of others, not necessarily at the pecuniary cost, but must not be so exercised as to put many to unnecessary inconvenience for the manifest advantage of one or two: Pells v. Boswell, 8 O. R. 680; Peck v. Galt, 46 U. C. R. 211; Morton v. St. Thomas, 6 A. R. 323; Hewison v. Pembroke, 6 O. R. 170; Vashon v. East Hawkesbury, 30 C. P. 194; Romney v. Mersea, 11 A. R. 712. The by-law is partial and unjust in its operation as between those of the township interested in the road.

In the view taken, it is not necessary to consider the question of notice and advertisement of the by-law. The evidence establishes that there was a formal adjournment of the consideration of the by-law from the 30th September to the next meeting of the council, which was held on 21st October, 1901.

Order made quashing clauses 1 and 2 of the by-law as asked, with costs against the township corporation.

BRITTON, J. DECEMBER 6TH, 1902.

TRIAL.

SCHIEDELL v. BURROWS.

Fixtures—Machinery in Factory—Rights of Mortgagee—Intention.

Action by plaintiff, a mortgagee, to restrain the removal of certain looms in a carpet factory at Breslau. The plaintiff had been owner of the mortgaged premises, and had used them for a shoddy mill, there being an engine, a boiler, and shafting on the property. The defendant bought the whole, giving back a mortgage in which the engine, boiler, etc., were specifically mentioned, and carried on a carpet manufacturing business, bringing in for the purpose seven looms. These were not in any way attached to the freehold, except by their own weight, but plaintiff contended that they were nevertheless part thereof by reason of their use and from defendant's intention to make them so.

BRITTON, J., held that there was no such intention on the part of defendant that the looms should be used as part of the carpet factory at Breslau as to render it necessary to use them only there. Also, that in these days, when frequent changes take place in the construction of machines, when improvements are constantly made, and at great cost, in machinery of all kinds, the inclination of the Court should be to relax, where possible, in favour of the owner of chattels, rather than carry further, decisions giving to the mortgagee or owner of the freehold machines put in for trade purposes. The result might have been different if defendant had merely purchased the property with the intention of erecting a carpet factory, and without any machinery thereon being specifically referred to.

Action dismissed with costs. Defendant to receive the $400 paid into Court. Defendant's claim for damages by reason of injunction reserved to be tried at some future time.

DECEMBER 6TH, 1902.

DIVISIONAL COURT.

BEAUDRY v. GALLIEN.

Judgment—Reference by Consent to Experts—Misunderstanding of Counsel as to Purpose of Reference—Opening up Judgment.

Appeal by defendants from judgment of local Master at Ottawa in mechanics' lien action, tried before him, finding $1,956 due from defendants to plaintiff. The question involved the examination of a great number of items in the

account between the parties, and when the parties were present, ready to proceed with the trial, it was arranged that there should be a reference to two experts to go over the accounts. The experts did so, finding due from defendants to plaintiff the amount for which judgment was given. When the parties again went before the Master, a difference of opinion arose as to what result the examination by the experts was, under the arrangement, to have had. The plaintiff's counsel said it was to be finally binding: the defendants' that the reference was only to ascertain the amounts payable on each item, if correct, leaving defendants to assert that they were not liable for some or any of them. The arrangement had not, at the time, been reduced to writing by either counsel or by the Master, but the latter's recollection of it corresponded with that of plaintiff's counsel, and he entered judgment for the amount found due by the experts.

What the arrangement was, was the only question on the appeal. The appeal was heard by FALCONBRIDGE, C.J., and STREET, J.

G. F. Henderson, Ottawa, for the appellants.

Owen Ritchie, Ottawa, for the plaintiff.

STREET, J.:—The Court can not, under the circumstances, avoid accepting the statement of defendants' counsel that he never agreed to the arrangement which the Master found to have been the one stated to him by counsel. It must be concluded that the parties were not ad idem: that there was a misunderstanding. See Wilding v. Sanderson, [1897] 2 Ch. 534.

FALCONBRIDGE, C.J.:—I assent with great reluctance. The result is most unfortunate, but is inevitable, unless defendants' counsel is to be held guilty of bad faith.

Judgment set aside and matter referred to local Master for trial unfettered by finding of experts. No costs of appeal.