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HON. MR. JUSTICE LENNOX. DECEMBER 22ND, 1913.

MAHER v. ROBERTS.

5 O. W. N. 603.

Assignments and Preferences — Chattel Mortgage—Attack on—Loan to Enable Creditor to be Repaid—Lack of Knowledge of Insolvency—Bona Fides—Evidence — Action by Assignee for Benefit of Creditors—Dismissal of.

LENNOX, J., *held*, that a chattel mortgage taken to secure a loan made at the instigation of a bank manager to an insolvent firm to enable them to repay a loan to the bank which the bank would not have sanctioned, was unimpeachable by the assignee for the benefit of creditors where the loan was made in good faith and without knowledge or suspicion of insolvency.

Burns v. *Wilson*, 28 S. C. R. 207, and *Allan* v. *McLean*, 8 O. W. R. 223, 761, distinguished.

Action by the assignee for the benefit of creditors of Chisholm and Morley to set aside a chattel mortgage made by the firm to the defendant as preferential and void.

F. M. Field, K.C., and J. B. McColl, for plaintiff.

E. E. A. DuVernet, K.C., and W. F. Kerr, for defendant.

HON. MR. JUSTICE LENNOX:—Was this mortgage, so far as the defendant is concerned, taken by way of security for "a present actual *bona fide* advance in money"? I think it was. Of course, I can properly reach this conclusion only if the facts in this case are clearly distinguishable in substance and effect from the facts founding the judgments in *Burns* v. *Wilson* (1897), 28 S. C. R. 207, and *Allan* v. *McLean* (1906), 8 O. W. R. 223—in appeal at p. 761—and I think they are.

Mr. Hargraft, the bank manager, gave his evidence in a frank, unhesitating way and I accept his account and statements as trustworthy. I am satisfied that when he placed

the $2,500 to the credit of Chisholm and Morley, he did so upon the understanding—whether Morley actually said so or not—that Morley had ascertained that the Dominion Construction Co. would accept and recognise the assignment then being made by Chisholm and Morley to the bank. Without this recognition or acceptance the transaction was irregular, and when it was discovered, after the lapse of a good deal of time, that the construction company would do nothing, Mr. Hargraft was in trouble; not because of any idea that the borrowers were insolvent, or that the loan was insecure, but because the loan, whether good or bad, was made in a way that he could not justify to the bank. Although it is true, then, that Mr. Hargraft was very active in procuring this loan, and although, as a result, the bank was repaid, it cannot in this instance be fairly said that the "transaction was carried through at the instance and for the benefit of the bank." The bank never knew of the irregularity, made no complaint and took no action. The anxiety of the manager was for his own safety—he had to get the assignment out of the way or perhaps lose his position. He was willing to use his own money for the purpose, and I believe him when he recounts the satisfactory shewing made by Mr. Morley, and when he says he believed what Morley told him, and that although he knew the firm owed money he had no thought that they were insolvent. He had a right to insist, as he did, upon Chisholm and Morley getting this transaction off the bank books, and believing, as I find he did, that the firm was financially sound, I see no reason why he could not have made a direct loan out of his own funds to Chisholm and Morley upon the security of their chattels for the express purpose of straightening out the bank account; except that a chattel mortgage to their manager from customers of the bank might attract the attention of the head office and lead to enquiries and disclosures, with consequent loss of confidence in Mr. Hargraft as a manager. *Johnston* v. *Hope*, 17 A. R. 10.

I come now to the position of the defendant. He was approached by Mr. Armstrong, a friend of Mr. Hargraft, but not the bank solicitor, as was attempted to be shewn. Armstrong was instructed by Morley, and Hargraft had conversations with him as well. The defendant was in the habit of loaning money on chattel mortgages and to do this borrowed money from the Bank of Toronto, through Hargraft as manager, at 6 per cent., and made something on

the transactions by exacting a higher rate of interest than he paid. This no doubt led to the offer of Hargraft to lend him money which he could loan out at a higher rate. In his anxiety to relieve Hargraft I have no doubt that Morley would have paid more, but Armstrong, acting in the interest of the firm, succeeded in keeping the interest down to 7 per cent.

About the money being furnished by Hargraft out of his own means, without reference to the bank, on contingent claim against the bank, of any kind, there is no question whatever.

But this leads to another enquiry, namely, was this a loan by Roberts at all, or was it a loan by Hargraft with Roberts as a mere figurehead? I have already indicated that in my view there was no legal obstacle in the way of a loan from Hargraft directly to the mortgagors, and it may be, if no indebtedness arose in favour of Hargraft, that the defendant could be treated as a trustee for him, but my judgment in no way hinges upon either of these views. The evidence satisfies me that there was in fact and in law an actual *bona fide* loan of $2,500 from Hargraft to the defendant, with all its ordinary legal incidents, without any string upon it, and without any secret reservations, conditions or qualifications of any kind. I find, too, that the defendant relied upon what Armstrong told him as to the value and sufficiency of the security and that he loaned this money as his own money, and in good faith, and without knowledge or suspicion that the mortgagors were insolvent or financially embarrassed. Further, it is a fact that up to the time when he decided to go into the transaction and had said so he had not even heard that the bank had a claim, and he went into it as a business transaction, although it is not improbable that he felt the flattery of becoming the mortgagee in a large transaction and appreciated the evident confidence of his banker. It is certainly to be remarked that as it turned out there was nothing very big in it for the defendant, but it probably compared favourably with his other mortgage deals, and as he says, making the mortgage payable on demand, was Mr. Armstrong's idea, not his.

Now as to the mortgagors; although their motives may not be very important except as a link, or break, in the chain of good faith. First, then as to insolvency. There was evidence of debts, but I cannot recall any evidence to

shew that on the 14th of November, 1912, the mortgagors were unable to pay their debts generally as they became due. Again, offsetting the assets of the firm at that time as a going concern—with the most profitable part of their contract yet to be worked out and drawn upon— against the debts then outstanding, I find it difficult, if not impossible, even now, and certainly I would have found it quite impossible on the 14th of November, 1912, to pronounce this firm as then being in insolvent circumstances. I am pretty strongly of opinion that if the firm had been nursed and enabled to complete their contract instead of being cut off as they were, even with the bad weather to be reckoned with, they might have made good in the end. This, however, is, as much as anything, for the purpose of following up the question of good faith, and ascertaining the real meaning and purpose of what was done on the 14th of November. I am satisfied that when Morley, at about this time, gave the bank manager a summary of the firm's financial position, shewing a substantial surplus, that he acted in good faith, believing what he stated to be true; and that the mortgage was not executed with an actual intent of preferring or benefiting the bank, but solely for the purpose of extracting Mr. Hargraft from an awkward predicament for which Morley, very properly, felt himself responsible. The result is that the bank neither stands to win nor lose by the decision in this case. Its money was let out without its consent, it was repaid without effort or action upon its part. If the mortgage is void the loss falls upon the mortgagee if he is worth it, if he is not the loss, of necessity, falls upon his creditor. The sole purpose of Mr. Hargraft was to avert personal disaster. Was his action, and the acts of those whom he set in motion, justifiable and legal as against the creditors of Chisholm and Morley? I think what was done was lawful and right. I refused at the trial to add the bank as a party unless an opportunity was given them to defend. The application was renewed upon the argument. I adhered to the view I first expressed and in addition, upon the evidence, can see no purpose in bringing them in.

There will be judgment dismissing the action with costs. *Gibbons* v. *Wilson*, 17 A. R. 1; *Ashley* v. *Brown*, 17 A. R. 500; *Davies* v. *Gillard*, 21 O. R. 431; *Molsons Bank* v. *Halter*, 18 S. C. R. 88; and *Campbell* v. *Patterson*, 21 S. C. R. 645, may be referred to.

SUPREME COURT OF ONTARIO

SECOND APPELLATE DIVISION. DECEMBER 23RD, 1913.

LESLIE v. CANADIAN BIRKBECK CO.

5 O. W. N. 558.

Company—Loan Company — Action by Shareholder for Account—Prepaid Shares—Special By-laws of Company—Construction of —Meaning of "Entire Profits" — Right of Prepaid Shares to Share in Gross Earnings — Discretion of Directors as to Dividends—Transfer of Assets to New Company—Reconstitution of Shares—Acquiescence in by Plaintiff — Estoppel—Formation of Reserve Fund—Mere Bookkeeping—Appeal.

Action by a stockholder for an accounting of the profits of a company. Plaintiff was the holder of a certain class of stock called prepaid stock upon which $50 a share had been prepaid. This stock was to receive 6 per cent. per annum upon the amount paid in, and any surplus profits were to be added to the prepayment until the total reached $100 a share, when the stock was to rank as fully paid-up stock and to receive dividends accordingly. Plaintiff claimed that under the by-laws this prepaid stock was to receive a certain amount of the gross profits of the company for division among the holders of such stock and asked for an accounting upon this basis.

BRITTON, J. (24 O. W. R. 407) *held*, that the prepaid stock could only share in net earnings and that the directors of the company could determine how much they should distribute each year in earnings and that therefore the action must be dismissed.

SUP. CT. ONT. (2nd App. Div.) *held*, that the phrase "entire profits" did not necessarily mean more than "net profits."

That there was nothing to prevent the directors from transferring the surplus profits credited each share to a reserve fund as the shareholders were entitled to no dividends thereon until the amount reached $50 per share and consequently it was a mere matter of bookkeeping.

Appeal dismissed without costs.

An appeal by the plaintiff from a judgment of HON. MR. JUSTICE BRITTON, 24 O. W. R. 407, dismissing plaintiff's action.

The appeal to the Supreme Court of Ontario (Second Appellate Division) was heard by HON. SIR WM. MULOCK, C.J.EX., HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE LEITCH.

J. R. Roaf, for plaintiff.

Hon. Wallace Nesbitt, K.C. and H. S. Osler, K.C., contra.

HON. MR. JUSTICE RIDDELL:—The facts are accurately and with a trifling exception fully stated in the reasons for judgment.

The objections taken before us by the appellant are two in number—one a matter of principle and of great im-

portance, the other rather a matter of bookkeeping. They are as follows:—

1. It is claimed that the plaintiff and those in like case with her should not have their dividend diminished by the payment of any expenses, etc., beyond the "expense fund."

2. The new "reserve fund" should not have been formed and the stock of the plaintiff and others in like case should have been credited year by year with such dividend as they were entitled to out of the profits actually received.

1. The plaintiff contends that her stock cannot be affected by expense, etc., beyond the amount of the expense fund; but that if and when the expenses are in excess of the amount provided by that fund, the general shareholders must suffer the loss.

This is based upon the wording of the documents: it is pointed out that "this stock is entitled to receive in addition (to 6 per cent. per annum), its proportion of the entire profits of the company:" this it is argued, means something more than the net profits. The argument has no force—"entire profits" means nothing more than or different from "all the profits"—and that is the same as "the profits," and may mean net profits or gross profits according to the contract, &c., in which the phrase appears.

In *Guthrie* v. *Wheeler* (1883), 51 Conn. 207, the expression: "the entire rents and profits of the estate" came up for interpretation. The Court said, p. 213: "The testator doubtless meant by the expression 'the entire rents and profits' all the rents and profits: and it is as applicable to the net income as to the gross income. We think the better view is that . . . as in ordinary cases the income shall bear the expenses." Such an "expression must in a business document receive a business interpretation." *Whicher* v. *National Trust Co.* (1909), 19 O. L. R. 605, at p. 612, [1912] A. C. 377, and in a business sense as applied to a stock company's profits out of which a dividend should be declared it means the excess of receipts over expenses properly chargeable to revenue account with care taken as a rule to properly write down bad debts. The cases on this are very numerous, many of them are to be found in Stroud sub voc. "Profits," pp. 1571, 1572. Lost capital may be made good before estimating these profits and it is well recognised that "it may be safely said that what losses can be properly charged to capital and what to income is a

matter for business men to determine, and it is often a matter on which the opinions of honest and competent men will differ." *Re National Bank of Wales,* [1899] 2 Ch. 629, at p. 671, per Lindley, M.R., giving the judgment of the Court composed of Lindley, M.R., Sir F. H. Jeune, and Romer, L.J.

I can see no reason why the "entire profits" in the contract are not simply the "profits out of which a dividend may be declared."

2. The second contention is under the circumstances of this case equally untenable.

The scheme as to such stock as that of the plaintiff is properly explained by the learned trial Judge. The sum of $50 per share is paid in by the subscriber; he receives $3 per annum on this payable semi-annually in cash by way of dividend—the remainder, if any, of the "profits earned," i.e., of the dividend properly declared, is retained by the company—when and not till when the sum of the amounts so retained amounts to $50, the stock becomes paid-up stock, and thereafter the dividend is not upon $50 per share but upon $100 per share. It is plain that the shareholder in this plan does not realise a dividend upon his interest in the company once there is some "balance of the earnings" to be "credited to the stock until the amount of the several balances" is $50—his dividend in the meantime is only upon the $50 originally paid in. He may have in addition to the $50 originally paid on a share, surplus earnings or dividends to the amount of $49.99 applied upon his share making his interest in the company $99.99, and yet receive a dividend only upon $50. It is obvious that the best of good faith is called for on the part of the directors who have it in their power to enable a shareholder to double his income.

In the present case there is no doubt of the *uberrima fides* of the directors or of their competency as business men—and the reserve fund composed of all the surplus money of the company which could be at all considered applicable to a dividend falls far short of sufficient to pay $50 on each share like those of the plaintiff. (This is the only fact which the learned trial Judge does not mention, which I think can be material). Even supposing the formation of the reserve fund was improper (and I do not say that it was) it is at the most and at the worst but a piece of bad bookkeeping by which the plaintiff is not, as yet at least,

injured. No money has been or is intended to be paid out of the company by reason of the formation of this fund and no money is lost—it is but a matter of internal regulation and management.

The gist of the complaint is, of course, that the company has not, year by year, applied on their books to the plaintiff's stock any dividend, but they have, on the contrary, transferred to the reserve fund the sum of $36.43 previously credited upon her stock. This is mere bookkeeping and has not in fact deprived her of anything; but she says she was entitled to have the credit remain and that year by year her stock should receive a credit on the books of the company so that she might know at any time the amount of her investment in the company.

I can find nothing expressly binding the company to credit balances on the stock yearly or half-yearly: the dividends of cash are to be semi-annual, but it is not stated when the "balance of the earnings" are to be "credited to the stock." So long as the balances are credited to the stock when such a crediting will be of advantage, i.e., when the stock is thereby made paid-up, I think the undertaking of the company is implemented. The transfer of the $36.43 to the reserve fund in the books was not intended to deprive the plaintiff of so much dividend—if it were intended to take away from her a dividend already declared and apply that to pay expenses or make up a deficiency of capital, another question would arise—but nothing of the kind is intended or suggested.

And since the cessation of adding dividends to the stock, the directors have in the exercise of an honest judgment considered that there are no surplus earnings.

We were invited to express an opinion as to what the directors should do in respect of the entries against such stock—and accordingly, while I think they are within their contract, speaking for myself I can see great advantages in the plan previously pursued of entering against such stock as the plaintiff's, the accrued balance of profits from time to time.

I think the appeal should be dismissed, but without costs.

HON. SIR WM. MULOCK, C.J.EX., HON. MR. JUSTICE SUTHERLAND and HON. MR. JUSTICE LEITCH, agreed.

HON. MR. JUSTICE MIDDLETON. DECEMBER 20TH, 1913.

TINSLEY v. SCHACHT MOTOR CAR CO. OF CANADA LIMITED ET AL.

5 O. W. N. 547.

Contract—Specific Performance — Exchange of Shares of one Company for Another—Settlement of Former Action—Shares of Both Companies Worthless—Nominal Damages—Costs.

In an action for specific performance of an agreement to exchange the shares of one company for those of another to be formed, where the latter company had never been formed and the shares of the former company were worthless,

MIDDLETON, J., refused specific performance as manifestly impossible and dismissed the action without costs, holding that the plaintiff had suffered no damage.

Action for specific performance of an agreement or for damages, tried at Hamilton 28th October, 1913.

G. Lynch-Staunton, K.C., for plaintiff.

W. N. Tilley, for defendants.

HON. MR. JUSTICE MIDDLETON:—In a former action, wherein the plaintiff was plaintiff, the Schacht company and the National Credit Clearing Co. Ltd., were defendants, the plaintiff charged that a subscription by him for stock in the Schacht company, for the face amount of $5,000, and upon which $3,500 had been paid, was obtained by fraud, and sought to recover the $3,500 paid and to cancel his subscription. The defendant Muntz was much interested in the two companies in question.

After the action was at issue, Muntz undertook to negotiate a settlement of the plaintiff's claim. Negotiations were at this time on foot for the sale of the assets of the Schacht company to the Monarch Motor Truck Co. Ltd.; the Monarch company undertaking all liabilities of the Schacht company and agreeing to issue to the shareholders of the Schacht company shares of its stock, share for share.

A memorandum was drawn up embodying the terms of the settlement arrived at. This document, although prepared by the plaintiff's solicitor, was in the form of an offer coming from the defendants, and was marked "accepted" and signed by the plaintiff's solicitor. Put shortly, it provided that the balance of the unpaid subscription on the

Schacht stock, $1.500, should be cancelled; that the defendants should give to the plaintiff $3,500 fully paid preference shares in the Schacht company, in addition to the $3,500 stock already paid for, and to exchange the whole $7,000 for an equal amount of the Monarch stock. The plaintiff's solicitor added to the memorandum the further term that the costs of the action, $300, should be paid. This term was possibly not any part of the oral agreement, although the solicitors may well have understood that it was intended.

Mr. Muntz returned the memorandum of settlement with the clause providing for the payment of costs deleted, and with the following clause added:—

"I herewith personally undertake and guarantee on behalf of the Schacht Motor Car Company of Canada Limited and the National Credit Clearing Company Limited to carry out the above settlement." Gerrard Muntz.

The solicitors insisted on payment of costs, and wired "Settlement off unless costs paid." Mr. Muntz replied that at a meeting of the Credit Clearing Company they agreed to the payment of costs. This letter was acknowledged, and new stock was asked for, both parties assuming that the litigation was then entirely at an end.

On the 14th February Mr. Muntz wrote with reference to the stock, stating that the British Colonial Company was acting as transfer agents, that notices were being sent out to all shareholders, and that as soon as the Monarch shares were issued they would be made out in Mr. Tinsley's name and sent forward. A circular letter was sent forward about the same time and in response to this Mr. Tinsley signed in February 17th the necessary documents to secure the transfer of the motor truck stock.

The costs were not actually paid until March 14th, although some correspondence took place with reference to the stock, which does not appear to be of much importance until the letter of June 6th, 1913, when Mr. Muntz informed the plaintiff's solicitors that by reason of the Schacht company's shareholders failing to fall into line and to send in their shares for transfer, the situation had become difficult, as the Monarch people would not do anything until all the Schacht shares were ready to be transferred. He then offered to turn over to the plaintiff the whole 7,000 Schacht shares. The plaintiff's solicitors

declined to accept these as a settlement, and wrote in reply on the 11th June: "If the settlement cannot be carried out as guaranteed by you, our client wants his money." The writ in this action was then issued.

At the hearing it appeared that the Monarch company was still-born. It has never issued any shares, has no assets, and the whole contemplated transaction between the Schacht company and the Monarch company is at an end. The plaintiff claims specific performance of the agreement, and, in the alternative, damages.

The companies deny that the settlement created any obligation upon them. They state their readiness to give the stock in the Schacht company and that the agreement cannot be carried out unless and until the exchange of shares between the Schacht company and the Monarch company can be completed, and that the defendants are not responsible for the failure of the completion of the contemplated exchange. Muntz denies liability upon his so-called guarantee, and substantially repeats the same allegation as set up by the company.

At the hearing both counsel insisted that the litigation had been settled. Although the Schacht stock had not been handed over, it is available to the plaintiff. His real grievance is that he has not obtained and manifestly cannot obtain the stock in the Monarch company. The Schacht company is worth nothing, and the Monarch company stock is, if possible, worth less. Specific performance is out of the question, and damages can be nothing more than nominal, as the plaintiff is not injured by failure to receive one worthless thing in exchange for another of no value.

This view of the case renders it unnecessary to determine whether there ever was any obligation on the part of the company or on the part of Muntz. The proper solution of the difficulty appears to me to be to dismiss the action without costs. If I should award nominal damages I would not give costs; so that the precise form of judgment is not material.

HON. MR. JUSTICE MIDDLETON. DECEMBER 22ND, 1913.

TILL v. OAKVILLE.

HARKER v. OAKVILLE.

5 O. W. N. 601.

Appeal—Leave Refused—No Doubt as to Correctness of Judgment.

MIDDLETON, J., refused the Bell Telephone Co. leave to appeal to Appellate Division of Ont. Sup. Ct. from order in Chambers, of LENNOX, J., 25 O. W. R. 476, 507, expressing the opinion that that judgment was correct.

Motion, by the defendants the Bell Telephone Co., in the first action and third parties in the second action, for leave to appeal from the order of HON. MR. JUSTICE LENNOX, (25 O. W. R. 476, 507), dismissing an appeal from the order of the Master-in-Ordinary, acting as Master-in-Chambers, refusing to strike out the telephone company as party defendant in the first action and refusing to set aside the third party notice in the second action. The motion was heard on 19th December, 1913.

A. W. Anglin, K. C., for the Bell Telephone Co.

D. I. Grant, for Oakville.

M. H. Ludwig, for Till.

No one appeared for Harker.

HON. MR. JUSTICE MIDDLETON:—The facts are sufficiently set forth in the judgments below. Shortly, they are that the municipal corporation has erected for the purpose of supplying lighting current to its customers, high tension and low tension wires on the streets. In some way the high tension electricity was discharged through the low tension wires; and on the 11th April, Till, represented by the plaintiffs in the first action, was electrocuted, and on the 13th, Harker, represented by the plaintiffs in the second action, was also electrocuted. The way in which this discharge of the dangerous current was brought about is difficult of ascertainment and perhaps not yet known. It is suggested that the Bell Telephone Co. or its employees brought about a condition of affairs resulting in the escape of the electricity and the consequent deaths of these two men.

In the Till action the plaintiffs have joined as defendants both the municipality and the telephone company, relying upon the provisions of Rule 67, saying that they are "in doubt as to the person from whom they are entitled to redress" and are therefore justified in joining as defendants all persons against whom they claim any right to relief, whether jointly, severally or in the alternative.

This is precisely the kind of case which this rule was intended to meet. It relieves a plaintiff from a difficulty which he ought not to be called upon to face, and it imposes no unfair burden upon the defendants. Apart from this rule, if the plaintiff has any doubt as to which of two persons actually inflicted the wrong complained of, there is nothing to prevent two suits being brought, one against each defendant. If these cases are tried separately, then discordant findings may follow. It is true a recovery in the action first tried would prevent a recovery in the second action; but a failure to recover in one would not necessarily mean success in the second, even if it should be plain that one or other of the defendants was at fault.

To avoid this travesty of justice and to enable the whole matter to be litigated at once and the responsibility, if any, to be laid upon the proper shoulders at the trial, is the express object of this enactment. The whole scheme of the legislation would be defeated if the plaintiff could be compelled to elect upon a Chamber motion.

In the other case the plaintiff is content to seek relief against the town. The town claims that it has a right of relief over against the telephone company. I think it has as much right to have this claim tried by this procedure as it would have to bring an independent action claiming indemnity and to have it tried. The third party summons is practically the institution of a new action by the defendant against the third party. For convenience this summons is issued in the old action and culminates in a trial either at the same time as the trial of the plaintiff's claim or at some other time as may be directed; but the fundamental object is to have the issues in relation to the plaintiff's claim determined in a way that will be binding upon the third party as well as the defendant. It is not intended that questions of law or fact should be determined upon a Chamber motion. The Court has no doubt power to set aside third party proceedings when the case is one clearly beyond

what is contemplated by the rules; but here the claim is made in good faith, and is far from being frivolous or vexatious. This is only an example of the principle which has been slowly evolved as the result of experience that all interlocutory and preliminary proceedings are only of value when they lead up to the trial and are pernicious where they are in any way made to pre-judge matters that can be better determined then. We have learned that it is better to ascertain the facts and apply the law to them than to have any interlocutory rulings on legal points upon an assumed state of facts.

I do not think I should give leave to appeal in either case, as the judgments in review seem to me, if I may say so with deference, clearly right.

The motions will be refused, and the costs will be payable by the telephone company in any event of the litigation.

HON. MR. JUSTICE MIDDLETON. DECEMBER 22ND, 1913.

REX v. GAMBLE-ROBINSON FRUIT CO.

5 O. W. N. 598.

Aliens and Immigration—Alien Labour Act, R. S. C. 1906, c. 97—Similar Law in Force in United States—Proof of—"Contract Labourers"—Evidence—Subsidiary Company—Motion to Quash Conviction Dismissed—Costs.

MIDDLETON, J., *held*, that the Alien Labour Act of the United States is "of a character similar to the Canadian Act inasmuch as it prohibits the importation of contract labourers.

That a letter received by an American in Minneapolis from an Ontario Company appointing him manager thereof was sufficient evidence of a breach of the Alien Labour Act to warrant a conviction thereunder.

Motion to quash a conviction made by J. T. Mackay, Police Magistrate at St. Mary's on the 24th of November, 1913. for that the accused did knowingly encourage or solicit the immigration or importation of one Carl J. Sanders, then being an alien, to perform labour or services in Canada for the accused under a contract or agreement made between the accused and the said Sanders previous to his becoming a citizen of Canada. Heard in Chambers on the 19th December, 1913.

H. S. White, for the accused.

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

C. A. Batson, for the prosecutor.

HON. MR. JUSTICE MIDDLETON:—Two questions of importance were argued. A number of minor objections were taken which either have no foundation or are correctible by amendment.

It is argued that inasmuch as the Alien Labour Act, R. S. C. ch. 97, under which this prosecution took place, provides that the Act shall apply only to immigration from such foreign countries as have in force a law applying to Canada "of a character similar to this Act," it must be shewn that in the United States there is in force a law of a character similar to this Act.

The law in force in the United States was proved at the trial. That Act is not in all respects similar to the Alien Labour Act, but it is of a character similar to the Act in question, because it prohibits, in almost precisely the same terms as our statute, the immigration or importation in the United States of "contract labourers."

"Contract labourers" by an earlier section, are those who have been induced or solicited to immigrate to the United States by offers or promises of employment, or in consequence of agreements, oral, written, or printed, express or implied, to perform labour in that country of any kind skilled or unskilled.

The point most strongly argued was that under the circumstances what was done was not an offence against the statute. The accused is a subsidiary organisation, subordinate to the Gamble-Robinson Commission Company, an organisation carrying on business at Minneapolis. The accused company is incorporated under Ontario law, but appears to be really operated from Minneapolis. Negotiations took place in Minneapolis between Sanders, who is an American, and the officers of the commission company, looking to the employment of Sanders as manager of the business of the Ontario company, in place of Duncan, who was retiring from that position. Duncan was a stockholder, and it was understood that Sanders should take over his stock. Before Sanders left Minneapolis he received a letter from the Ontario company, signed by Mr. Ross A. Gamble, its president, to the manager of the Royal Bank at the Soo, introducing

him as "Mr. Carl J. Sanders, who is to succeed Mr. E. C. Duncan as manager of the Gamble-Robinson Fruit Co. Ltd., in your city. Mr. Sanders will have full charge as soon as the audit has been made and everything is turned over by Mr. Duncan." This is followed by a direction to the bank to honour the cheques of the company signed by Mr. Sanders.

In view of this, it is impossible to say that there was no evidence upon which the magistrate could find that there was a contract or agreement between the company and Sanders for his employment, previous to his becoming resident in Canada.

The motion fails, and I dismiss it with costs, to be paid to the magistrate, which I fix at $25. I make no order as to the informant's costs.

HON. MR. JUSTICE MIDDLETON. DECEMBER 22ND, 1913.

JOLICOUR v. CORNWALL.

5 O. W. N. 597.

Costs—Conflict between Rules and Statute—Supremacy of Former—Witness Fees—Surveyors—Rules of 1913—Taxation—Estoppel—Appeal.

MIDDLETON, J., *held*, that where there was a conflict as to the quantum of witness fees between the Rules and a statute, the former governed.

That where a party submitted a bill of costs based on the new tariff and had the same taxed, he could not afterwards seek to have the taxation reopened and all the items prior to Sept. 1st, 1913, taxed upon the old scale.

Appeal from taxation of the local officer at Cornwall.

F. Aylesworth, for the plaintiff.

H. S. White, for the defendant.

HON. MR. JUSTICE MIDDLETON:—Two questions are directed: first, it is said that part of the work was done before the Rules came into force, yet the taxation has been upon the tariff appended to those Rules.

The plaintiff brought in for taxation a bill framed upon the present tariff, and the respondent did not object to taxation upon that tariff. The plaintiff now seeks to withdraw the bill which he has taxed and substitute for it a bill

based upon the old tariff for all the work done up to the 1st of September; contending that notwithstanding the foot-note to the tariff it does not apply to that work. I do not think it necessary to determine this question, as I think the appellant is estopped by his conduct. I have little regret in arriving at this conclusion, as, having run over the bill, it appears to me that fully as much has been allowed as will be taxable if what is sought is permitted.

The other matter argued was a conflict between the rules and the statute with reference to witness fees taxed. The Rules provide for payment of professional fees of surveyors at $4 per day; the statute entitles the surveyor to charge $5. The surveyors were paid the statutory fee, but the allowance between party and party has been in accordance with the tariff. If there is any conflict, the Rules, having statutory effect, must govern, and the taxation must stand.

The appeal will be dismissed, but, under the circumstances, without costs.

HON. MR. JUSTICE MIDDLETON. DECEMBER 22ND, 1913.

RE AMERICAN STANDARD JEWELLERY CO. v. GORTH.

5 O. W. N. 600.

Division Court—Jurisdiction — Division Courts Act, 10 Edw. VII. c. 32, s. 77—Action on Drafts—Interest Added by Way of Damages and not Debt—Amount of Claim—Place of Payment—Place of Acceptance—Prohibition—Costs.

MIDDLETON, J., *held*, that sec. 7 of the Division Courts Act, 10 Edw. VII. c. 32, does not confer jurisdiction upon the Court of the place of payment where the principal amount does not exceed $100, merely because interest may be allowed by way of damages upon the overdue payment.

Brazill v. *Johns*, 24 O. R. 209, followed.

Re McCallum v. *Gracey*, 10 P. R. 514, distinguished.

Motion for prohibition to the 7th Division Court in the county of Essex. Argued on the 19th December, in Chambers.

H. S. White, for the defendant.

R. W. Hart, for the plaintiff.

HON. MR. JUSTICE MIDDLETON:—The defendant resides at Galt, and must be sued there unless the case falls within the provision of sec. 77 of 10 Edw. VII. ch. 32, as the whole cause of action did not arise in the limits of the Essex Division Court, the drafts sued on having been accepted at Galt.

The action is brought upon 5 drafts drawn upon and accepted by the defendant, payable at Windsor. Each draft is for $20, and does not bear interest. Interest after maturity is sought in the claim as damages payable under the statute.

The section in question provides that where the debt or money demand payable exceeds $100, and is made payable by the contract of the parties at a place therein named, the action may be brought in the Court of the Division of the place of payment.

Brazill v. *Johns*, 24 O. R. 209, has determined that this section does not confer jurisdiction where the principal amount does not exceed $100, merely because interest may be allowed by way of damages upon the overdue payment. *Re McCallum* v. *Gracey*, 10 P. R. 514, is not in any way in conflict with this, as there the note itself stipulated for payment of interest, so it was payable by way of debt and not damages.

The prohibition must, therefore, be granted, and I can see no reason why costs should not follow.

HON. MR. JUSTICE MIDDLETON. DECEMBER 20TH, 1913.

HAYNES v. VANSICKLE.

5 O. W. N. 553.

Discovery—Examination of Defendant—Action to Establish Partnership—Refusal to Answer—Motion to Commit—Postponement of Discovery until Right to Participate in an Undertaking Established.

Beddell v. *Ryckman*, 5 O. L. R. 670, followed.

Appeal by plaintiff from an order of HOLMESTED, Senior Registrar-in-Chambers, dismissing an application to strike out the defence of the defendant Van Sickle for refusal to answer certain questions upon examination for discovery.

J. M. Langstaff, for plaintiff.

E. F. Lazier, for defendant Van Sickle.

HON. MR. JUSTICE MIDDLETON:—I think this case falls within the principle of *Bedell* v. *Ryckman*, 5 O. L. R. 670, and that further discovery should not be granted until the right to participate in the Buffalo undertaking is established.

Appeal dismissed. Costs to defendant in any event.

HON. MR. JUSTICE LATCHFORD. DECEMBER 24TH, 1913.

LABINE v. LABINE.

5 O. W. N 609.

Partnership—Mining Claim—Action to Establish — Evidence—Findings of Fact—Counterclaim—Promissory Notes—Costs.

LATCHFORD, J., dismissed plaintiffs' action for a declaration of partnership as to a mining claim, holding that the evidence did not support their claim, and gave judgment for the defendant upon his counterclaim for certain promissory notes given by plaintiffs to defendant.

Action by plaintiffs to establish a partnership in regard to a mining claim in the Night-Hawk Lake district in which the defendant had a share and which he sold for $75,000.

T. W. McGarry, K.C., and J. Lorn McDougall, for plaintiff.

R. McKay, K.C., and A. G. Slaght, for defendants.

HON. MR. JUSTICE LATCHFORD:—The plaintiffs, brothers, and cousins of the defendant, say that in 1907 they entered into a partnership agreement with the defendant for the purpose of mining and prospecting, each party having an equal share in the partnership and in any claims that any one of them might acquire; and that from 1907 until the fall of 1909 the three parties staked various claims and worked them on the basis of equal shares. They say that towards the end of August, 1909, when they were leaving for Gowganda to earn money for the development of the claims of the three parties in Lorrain, it was arranged that the defendant should remain to do the necessary work on the claims in Lorrain, and also that he should, with funds which the plaintiffs provided, "get interests" in the Night-Hawk Lake District. The funds were on deposit in a bank

at Haileybury to the credit of the plaintiff Gilbert Labine and amounted to about $150. Gilbert signed two or three cheques, leaving the blanks for amount unfilled, and handed them to the defendant for, as he swears, the purpose stated and no other.

The plaintiffs contend that with these funds the defendant acquired for the common benefit of the three parties an interest in certain mining claims near Night-Hawk Lake, which were subsequently sold for $300,000. The defendant had a one quarter interest in the claims and received for his share $75,000. John McMahon, a brother-in-law of defendant, had another quarter interest, and Benjamin Hollinger who staked the claim on his own and McMahon's licenses, the remaining half.

If the plaintiffs' contention is right, each of them is entitled to $25,000, with interest computed from the date or dates when the defendant received his share of the purchase-money.

The defendant denies that there was a general partnership existing at any time between himself and the plaintiffs. He denies that there was any agreement made at any time that he should acquire interests for the plaintiffs or either of them in the district near Night-Hawk Lake. He denies also that the funds left with him in August 1909 were left with him for any purpose but for the performance of work on a group of claims in which the three were jointly interested, known as the "Big Charlie."

The issues then are whether there was a general partnership existing between the parties, and whether there was an agreement between them that the defendant should for the plaintiffs' benefit, as well as his own, acquire interests in the district mentioned.

I find that there was no general partnership at any time between the parties to this action. This was in effect admitted at the trial. It was established by the evidence of Gilbert Labine himself. The usual course adopted, after as well as before the defendant became interested with McMahon and Hollinger, was to make an agreement regarding each expedition. In some of the many claims staked, all three had equal shares; in others, but one or two of the parties had any interest; and in certain claims, one or two of the parties were co-owners with other prospectors. The parties to this action were partners in or co-

owners of any claim or group of claims only when they worked together in staking, or when they made a special agreement constituting themselves partners or co-owners in particular claims. From time to time at varying intervals, they had settlements or adjustments regarding any properties in which they were jointly interested, and one such settlement regarding claims in Lorrain was made towards the end of August 1909.

The plaintiffs then have no claim against the defendant on the ground that there was a general partnership existing between them and him.

Their only right to share in the $75,000 depends upon their establishing the agreement which they set up, that the defendant was to buy interests near Night-Hawk Lake for the three parties.

I am satisfied that no such agreement was in fact made. The plaintiffs both swear to it, and it is denied only by the defendant.

There is nothing of moment in the evidence to support the testimony of the plaintiffs that they had or were to have any interest in the claims which Hollinger staked on the 7th and 9th October. Hector Montgomery's evidence is of little or no importance. Maxime Bellac deposes to a conversation had with the defendant at a time when he was considering the proposition made to him by McMahon that he should purchase half of McMahon's original half interest with Hollinger. Assuming that Bellac remembers the precise words used, which I do not, and is not disposed to colour them in the interests of the plaintiffs, his brothers-in-law, which I doubt not, all they mean is that the defendant said he was thinking over McMahon's proposition and did not know whether Gilbert and Charlie—meaning the plaintiffs—would be satisfied with it and implying that the plaintiffs would possibly have an interest if he accepted McMahon's proposition. The defendant denied making any such admission. Hollinger's evidence is not helpful. He agreed to give McMahon a half interest in the claims he might stake in the new district. McMahon on his part was to pay $35 and the cost of filing the claim papers. He knew no one to be interested with him except McMahon in the first instance, and the defendant afterward. The plaintiffs saw Hollinger frequently after his discovery, and it is

significant that they never stated to him they shared in any way in his good fortune.

The defendant acquired his interest from his brother-in-law McMahon for $50, about the 12th October. McMahon thus got back the $35 which he had paid Hollinger, with, in addition, what would go far towards covering the cost of recording the claims, and he still retained a one-quarter interest in them. The Night-Hawk Lake Company was not then regarded with favour; and McMahon, an experienced and successful prospector, thought he was making a good bargain with the defendant. A few days before the date of the transaction, the claims, six in number, had been staked by Hollinger but knowledge of the fact did not come to McMahon or the defendant at Haileybury until the 18th or 20th October. The defendant went up accompanied by a man acting for McMahon, and the two assisted Hollinger in doing the work necessary under sec. 78 of the Mines Act. 8 Edw. VII., ch. 21. The richness of the claims was almost immediately established. On the 7th December the Timmins Brothers agreed to purchase them for $300,000. The good fortune that had fallen to the lot of Hollinger, McMahon, and James Labine was soon known throughout the whole district. Thomas Montgomery, in 1910, asked the plaintiff Gilbert Labine if he was the "lucky Labine" or the "lucky man" and Gilbert answered "no." This statement Gilbert did not deny when giving evidence in reply. To Williard Beatty, the manager of the Colonial Lumber Co., a disinterested and credible witness, Gilbert expressed his regret that instead of working for Mr. Beatty's company, as he had in the fall of 1909, he had not gone into the Night-Hawk Lake district. At the time when this latter conversation took place, as well as when he spoke to Thos. Montgomery, Gilbert was aware of his cousin's good fortune. Upon the case made by the plaintiffs, if Gilbert had no share in the defendant's success, Charles had none. There was no concealment of the facts from the plaintiffs, and there was a plain statement that the defendant had arranged to have other necessary work done on a claim in which the parties were interested. On October 20th the defendant wrote to Gilbert to say that he had "gone in" with McMahon in his "grub-staking" of Hollinger who had "struck it rich in gold," that he was going up to do the work, and that John A. (meaning a brother of the defendant), was doing the work on the "Big Charlie."

Both Gilbert and Charlie swear that in January, 1910, when they were passing through the Hollinger camp, they reproached the defendant, who was at the time assisting in developing the claims, with having misapplied the funds left with him, spending them on the "Big Charlie" instead of in getting interests at Night-Hawk Lake. Charles swears to the same incident. That the three parties met and talked on January 1st, 1910, on the Hollinger claims is beyond question; but that they accused the defendant of having misused the cheques they had left with him is positively denied. It may be that they conversed with him outside the camp door after supper on New Year's night, though this is denied by the defendant. I regard the defendant as entitled to credit rather than the two plaintiffs. True, he perjured himself when he swore to work done on other claims in which he and Gilbert, if not Charles as well, were interested; but it was elicted from him that these affidavits were devised as a scheme by the plaintiff Gilbert, who, when giving evidence, in reply made no denial. When I commented upon this fact during the argument following the close of the evidence, Gilbert expressed, through one of his counsel, his willingness to re-enter the witness box and deny that the scheme was his; but I declined to allow him to do so. I have no doubt, however, that upon this point, as upon others, he would have contradicted the defendant.

Other conversations in which, according to Gilbert and Charles, the defendant in effect admitted that they had some interest in the claims staked by Hollinger, are sworn to by the plaintiffs and denied by the defendant. An example of such admissions is in the evidence of Charles, where he deposes that in June, 1910, when funds were being collected for an expedition into Ungava, the defendant said to him, "$75,000 is not much among three; if we each had that much we might do something." All these admissions were denied by the defendant. The evidence of Bellac and Hector Montgomery fall for short of corroboration of the testimony of the plaintiffs. To Bellac, the defendant, when congratulated on his good luck, doubtless did say he was not alone but had partners—as was in fact the case; but I am satisfied that the defendant never made any admission that the plaintiffs were his partners in the Hollinger and Pearl Lake properties.

The meeting of the parties at the Hollinger camp was accidental. The plaintiffs were, on both occasions, on their way to or from other points, and when at the Hollinger, though aware at the time of the defendant's interest, they did not go to look at the Pearl Lake claims near by. Their conduct for two years after they knew how enormously valuable was the interest the defendants had acquired from McMahon is consistently inconsistent with the claim which they now assert, and apart altogether from the credit which I give to the defendant's evidence, weighed against the evidence of the plaintiffs, leads me to the conclusion that their present claim is without foundation. They have, I think, based it upon the cheques handed to the defendant; but these were, I find, intended by the parties to cover the cost of assessment work on the "Big Charlie." The abandonment of this claim may have been discussed, but the ultimate decision was that it should be held, and to hold it work had to be done upon it under the Mines Act. The memory of the defendant may be at fault as to the sums for which he or John A. Labine filled in the cheques, whether two or three were issued, the order in which they were drawn, and the amount of an overdraft; but it is beyond doubt that he issued them in payment for work done on the "Big Charlie" and not in payment of the $50 to McMahon. The defendant had in hand at the end of August ample funds of his own, at least the amount he had just previously received from the plaintiffs upon one of the periodic settlements they made with him.

Repeatedly after the plaintiffs knew of the sale of the Hollinger properties, they made other settlements with the defendant regarding other properties in which the three had some interest. One such settlement does not rest on oral evidence alone. It is established by the cheque for $217.78 given by Gilbert Labine to the defendant on September 1st, 1911. They borrowed money from him, and gave interest-bearing notes to him for the amounts so borrowed. While these financial transactions were being carried on, during a period of two years, no claim whatever to any part of the $75,000 known to have been received by James was asserted by either of the plaintiffs.

No explanation of this course is suggested, except that Gilbert was young and looked upon his cousin as a father. Gilbert is in fact much younger than the defendant; but

his defect in age is, in my opinion, amply supplemented in other respects. I am convinced that had he considered he or his co-plaintiff had any right to any part of the $75,000, he would have asserted his claim promptly, declined to pay anything to the defendant upon the settlements had subsequent to the sale, and refused to give promissory notes for moneys which were but a fraction of what he was entitled to under the claim set up in this action. Charles Labine also, while less alert in mind, does not appear to be a man who would sleep upon his rights.

Having regard both to the conduct of the plaintiffs and to the greater credit due to the defendant, I find that there existed between the parties no special partnership in the interest of the defendant in the Hollinger claims.

The action fails and is dismissed with costs.

The defendant counterclaims upon five promissory notes. Three were made by Gilbert: $1,000 June 18th, 1910; $100 November 14th, 1910; and $100 with interest at 8%, February 9th, 1912. Two were made by Charles: $100 with interest at 6%, January 20th, 1912; and $100 "with interest at 8% as well after as before maturity," October 7th, 1912.

It was agreed when the note for $1,000 was given that payment of it was not to be made until Gilbert had made a "pull." If effect could be given to this agreement, I would dismiss the counterclaim so far as it relates to the claim upon the $1,000 note; but the contract expressed upon the face of the note must as a matter of law be given effect to. *Abrey* v. *Crux* (1869), L. R. 5 C. P. 37. There will, therefore, be judgment against the plaintiff Gilbert Labine for $1,200 represented by the three notes made by him, with interest; and against the plaintiff Charles Labine for $200 with interest. The defendant is also entitled to the costs of defence and counterclaim. In view, however, of the success which attended his venture with McMahon, I cannot but express the hope that he will not exact from the plaintiffs, either in counterclaim or costs, what I am constrained to award against them.

Stay of thirty days.

HON. MR. JUSTICE LATCHFORD. DECEMBER 24TH, 1913.

CONNELL v. BUCKNALL.

5 O. W. N. 610.

Principal and Agent—Action for Commission—Sale of Mining Lands —Evidence—Findings of Trial Judge—Dismissal of Action.

LATCHFORD, J., dismissed an action for commission upon the sale of certain mining lands, holding that plaintiff had already received all the commission to which he was entitled under the agreement between himself and the defendants.

Robert McKay and J. M. Hall, Haileybury, for plaintiff.

S. A. Jones, Cochrane, for defendants.

Action by plaintiff, a mining engineer, against the defendants for the balance of a commission, which he claimed was payable under an agreement made in August, 1906, whereby he was to receive a commission of ten per cent. upon the sale for $100,000 of a certain mining claim, owned by the defendant in the township of Casey.

HON. MR. JUSTICE LATCHFORD:—The agreement was in writing. Connell states that a day or two after it was made he took it to the office of McMurrich & Hunter, a firm of solicitors at that time practising in Haileybury, and after consulting with a member of the firm, with Mr. McMurrich, he is "fairly sure" he left the agreement in the solicitor's possession. There was a fire in Haileybury a few days later, and it is suggested (though not proved) that the agreement was then destroyed or that it was lost if among the papers which were saved from the fire. Mr. McMurrich, who was examined under a commission, has no recollection whatever either of the agreement or of any consultation which the plaintiff had with him regarding it. Mr. Hunter was not called as a witness.

The existence of an agreement is not denied by the two defendants served with the writ, and represented at the trial. The third defendant, Isaac Bucknall, left the country some years ago for South America, and has not since been heard of. He was not served with the writ, and although the statement of defence is not limited to John and David Bucknall, the case was tried before me as against these defendants only

and no claim was made in it against Isaac Bucknall, whose name accordingly was struck from the record.

The dispute between the parties represented before me at the trial is whether the amount of the commission was five or ten per cent.

The defendants, John Bucknall and David Bucknall admit that they agreed to pay the smaller percentage. They deny that the agreement was for more than five per cent., and say that they and Isaac Bucknall in 1907, paid the plaintiff the full amount of the commission which they had agreed to pay him and obtained his receipt therefor.

The plaintiff calls in support of his statement a mining engineer named Murray, who says that on several occasions towards the end of August or the beginning of September in conversations with the Bucknalls they stated that Connell was to have ten per cent. This the Bucknalls, father, mother and sons, deny. Murray never saw the agreement. Apart from the onus resting upon the plaintiff to establish such an agreement as he alleges, and the question as to whether credit should be given to Connell and Murray on the one hand, or the three Bucknalls, who gave evidence on the other, the circumstances, especially the conduct of the plaintiff subsequently, in my opinion warrant the conclusion that the agreement was for the payment of five per cent and not ten. There is a discrepancy in the evidence as to the succession in which the events leading up to and following upon the sale occurred; and on this point only is the recollection of Connell better, possibly, than that of the Bucknalls.

Owing to an introduction brought about by Connell, a sale of the property was made to one Mitchell in September, 1906. The amount of the purchase price was nominally $120,000—$60,000 in cash and $60,000 in shares in a company with a capital of $1,000,000. John Bucknall states that the agreement with Connell was made after the sale; Connell states the agreement was made before the sale. I am inclined to the opinion that the agreement was made prior to the sale; and that after the sale was made Connell recognized that less than the equivalent of $100,000 had been received for the property. Mitchell, it may be said, paid $900 on account of the purchase about December, 1906, and the same time or a little later, Isaac Bucknall paid plaintiff $100.

In June, 1907, after one or more extensions of the time for making the second payment, Mitchell made a new ar-

rangement with the Bucknalls by which they received, not $60,000 cash and $60,000 in shares, but $30,000 in cash, $10,000 in shares in the Airgiod Mining Co., and $70,000 in shares in the Casey Cobalt Mining Co.; a discount of $10,000 was made because the payments as fixed by the agreement with Mitchell were anticipated. All the shares had at the time little or no value; and the Casey Company's shares were under a pooling agreement to be held for some time; but the property sold was a mere prospect in a new and unimproved district, and the nominal price enormous even in the wild days of 1906. The cash and shares were regarded by the Bucknalls and by the plaintiff also as equivalent to not more than $100,000.

On June 21st, while at Haileybury, where he sought the plaintiff in his office and failed to find him, David Bucknall wrote a letter to the plaintiff, suggesting that as the sale was closed the plaintiff should see the writer's father and brother —John and Isaac Bucknall—and "figure out" what was due to Connell. Then, the writer adds, "I can send you a cheque for what I owe you."

On June 25th, two at least of the Bucknalls met the plaintiff at Haileybury and wished him to take half his commission in the stock which they were receiving. Connell, who was in close touch with Mitchell and familiar with the final terms of the sale, refused to accept any stock. What Isaac and David and their father owed to the plaintiff was figured out at $5,000 as 5 per cent. on $100,000 was paid to Connell; $3,333.25 by cheque of Isaac and David, and $1,666.75 by cheque of John. The father paid $1,666 by a cheque which Connell insisted upon having marked "accepted" the balance of 75 cents was paid in silver. I mention this latter circumstance as indicating that plaintiff was particular as to even small sums in a large transaction, and not a person who would sleep upon his rights.

No mention was made of $100 which Connell had previously received. It is not improbable that the Bucknalls forgot it in their natural elation at their good fortune. They had up to this time been struggling farmers in the wilderness of Temiskaming.

The plaintiff does not pretend that from June, 1907, until late in 1912, he made any claim, verbal or written, upon John Bucknall for additional commission. He says he does not believe he met John Bucknall during that time. John

Bucknall swears he frequently met Connell. I credit the farmer the possibilities of their meeting are many, and John Bucknall's evidence on the point was clear and convincing.

The claim made against David Bucknall was, according to Connell, first asserted in 1908. He says he must have seen David a dozen times during three or four years and, after particularizing the occasion in 1908, says that every time he met David he would ask when he was going to give up the stock to which Connell was entitled, and David replied that "he would send away some of his own stock and have 300 shares transferred to me at once and would speak to his father about the balance, 400 shares."

"When was that?" plaintiff was asked by his own counsel. He answered "Shortly after early part of 1908 . . . after I got the 500 shares from Isaac."

No letter was written to David asserting any claim until April, 1912. There was on March 31st, of that year a telephonic conversation between the plaintiff and David, who, at the time, was at Preston Springs. David admits being called up by Connell, but contradicts Connell as to the purport of the conversation. Connell's memorandum, made at the time is not in accord with what he swears David said. Here again, as against Connell, I accept the contradicting evidence, and find that the plaintiff asserted no claim whatever against David until March, 31st, 1912, and that upon that occasion David made no admission of any liability to the plaintiff, or that Isaac had authority to make any transfer of shares on his account.

The transactions between the plaintiff and Isaac Bucknall rest upon the evidence of the plaintiff and a receipt stub of December 11th, 1906, when the $100 was paid plaintiff. The stub is all in plaintiff's handwriting except a signature "Isaac Bucknall" said to be written by Isaac Bucknall himself. In this respect the stub is different from the other used stubs in the book. It differs also in having a memorandum which it is contended throws light on the purpose for which the money was paid—"1/10 x 1000 W. Mitchell 100.00." This memorandum is in much paler ink than any other words on the stub, and was, I think, written at a different time, and manifestly for the purpose of supporting the contention now put forward by Mr. Connell. It may well be that Isaac's signature was procured to verify the memorandum as correct, but even regarded in that way the writing on the

stub is not evidence against John and David Bucknall. Connell appears to have afterward received from Isaac Bucknall 500-share certificate in the Casey Cobalt Mining Co. To the extent of 400 shares this was, he says, in payment of the balance of Isaac's liability on 10 per cent. commission the extra 100 were to be on account of what was due by David. This certificate was afterward for some reason delivered back to Isaac Bucknall. The latter is not available either to confirm or deny what Connell said in regard to the payment of the $100, the writing upon the receipt stub, or the transactions regarding the 500-share certificate which, it may be observed, are not evidenced by any writing. David Bucknall's denial is specific that Isaac had no authority to transfer to plaintiff on his account the 100 shares or any shares. No admission was made by David at any time that the plaintiff's commission was to be ten per cent. The plaintiff does not say that he sought such admission until March of 1912, when he telephoned to David at Preston Springs.

The Bucknalls who gave evidence, father, mother and son, impressed me with their honesty and truthfulness. I unhesitatingly accept their evidence on the material points in dispute in this case in preference to the evidence of the plaintiff or Mr. Murray. The plaintiff has, he admits, not a very good memory but, apart from any imperfection in recollection—an imperfection not unnaturally common to both sides, after so many years—I was not favourably impressed by the manner in which he or his witness gave their evidence.

I find that the agreement of August, 1906, was for the payment of five per cent. commission and not ten and that the $5,000 received by the plaintiff from John, Isaac and David Bucknall on the 25th June, 1907, was accepted by plaintiff in full payment of all commission payable under the lost agreement. The action fails, and is dismissed with costs.

Stay of thirty days.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. DECEMBER 23RD, 1913.

ELLIS v. ELLIS.

5 O. W. N. 561.

Husband and Wife — Action to Recover Wife's Separate Estate— Presumption as to Corpus—Different Presumption as to Income —Evidence—Alleged Gift — Mental Condition of Wife—Prior Consent—Estoppel — Laches—Statute of Limitations—Express Trust—Alimony—Quantum of—Refusal to Re-open—Chattels— Judgment for Delivery of—Costs.

BOYD, C., *held*, that as to the corpus of the wife's separate estate received by the husband during coverture the presumption is against a gift to him, but as to the income the presumption is that it was expended for their joint purposes and the husband therefore is not accountable for the same.

Rice v. *Rice*, 31 O. R. 59; 27 A. R. 121, followed.

SUP. CT. ONT. (2nd App. Div.) dismissed appeal and cross-appeal with costs.

Alexander v. *Barnhill*, 21 L. R. Irish 515, approved.

Appeal by the defendant, and cross-appeal by the plaintiff, from a judgment of HON. SIR JOHN BOYD, C. The facts are fully stated in judgment reported in 24 O. W. R. 846.

The appeal to the Supreme Court of Ontario (Second Appellate Division), was heard by HON. SIR WM. MULOCK, C.J.Ex., HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE LEITCH.

W. M. Douglas, K.C., for defendant.

J. Rowe, for plaintiff.

HON. SIR WM. MULOCK, C.J.Ex.:—The defendant appeals from that portion of the judgment directing payment to the plaintiff of $2,288, with interest from October, 1910, and the plaintiff appeals because of the disallowance of her claim for $500 received by the defendant being part of the purchase money of her house which had been sold through her husband's agency; and she also appeals because of the disallowance of interest prior to October, 1910, on certain moneys of hers in the defendants hands.

The plaintiff and defendant were married in Scotland in the year 1888, and came to Canada shortly thereafter, residing first in Toronto until the year 1892, when they

moved to the village of Norwich, where they have ever since lived. There are three children issue of the marriage.

The plaintiff testified that whilst living in Norwich with her husband she received from her father's and mother's estates various sums of money, which she entrusted to her husband to invest for her. At first these moneys were deposited in the Molson's Bank at Norwich to the plaintiff's credit, she receiving deposit receipts therefor.

From time to time the accrued interest was added to the amounts on deposit, she endorsing the receipts and entrusting them to her husband to deliver to the bank and obtain for her new receipts for the increased amounts. Out of these moneys she entrusted to him for investment for her on the 15th of May, 1896, the sum of $650, and on the 6th October, 1896, the sum of $500.

For some time the plaintiff had been in failing health, suffering from some nervous trouble, and it was arranged between the parties that she should go upon a visit to England, and accordingly she left home for that purpose on the 12th January, 1897. At this time the amounts on deposit to her credit were $587 and $1,721, and on the morning of her departure, shortly before leaving the house, her husband without previous warning, unexpectedly on her part, produced the two deposit receipts for these moneys and induced her to sign them. Shortly after she left for England, returning home in December, 1897, and continuing to reside with her husband until the month of October, 1910, when they separated owing to misconduct on his part, when she instituted an action against him to recover certain moneys received by him, being part of the proceeds of the sale of her house (but not including any moneys in question in this action) and also for alimony.

On the 21st November, 1910, the parties entered into a written agreement, under seal, wherein it was, amongst other things, agreed that they should live apart from each other, that all property of the plaintiff whether in possession, reversion or otherwise, should belong to her for her separate use; that the defendant should sign a consent to judgment in said action for the payment to the plaintiff of the annual sum of $400 as alimony as long as they lived apart, and that the defendant would pay to her out of the proceeds of the sale of certain lands in Norwich one-third thereof, and that upon such payment she should release her dower therein.

On the 8th day of December, 1910, consent judgment was entered ordering the defendant to pay to the plaintiff the sum of $400 a year in quarterly payments as alimony whilst the parties lived apart.

Upon the defendant obtaining from the plaintiff, on the 12th January, 1897, the two deposit receipts for $587 and $1,721 respectively, he transferred the amounts from his wife's to his own credit in the bank. The wife, apparently supposing the money to be in her name, went to the bank in the year 1898, to draw some money and then learned it was in her husband's name, whereupon she asked him for it. Without at first refusing, he put her off and from time to time she renewed her request for him to transfer the moneys to her, but he continued to "jolly" her until finally one evening in the year 1899, he told her he would not give it to her.

In the year 1900, they discussed the question of a purchase of a house at Norwich, when it was finally agreed between the two parties that the house was to be bought for her and paid for out of her moneys in his hands, and this was done, Dr. Ellis arranging the business and paying the purchase money, $1,250. This house was their home for nine or ten years and was then sold for $1,750. The defendant negotiated the sale and obtained two cheques for the purchase money, payable to the plaintiff's order, one for $1,200 and the other for $550, and by violent demeanour and other pressure induced her to endorse both cheques, but he deposited to her credit the cheque for $1,170, keeping the other cheque for $550, as he explained, to recoup him in respect of certain expenditures by him on the house.

Whilst they were living together in this house other improvements were made upon it by arrangement between the two parties, it being agreed that the cost was to be defrayed out of her moneys in the defendant's hands and this was done.

According to the plaintiff's evidence the defendant received in all from her for investment, the total sum of $3,458 and deducting therefrom the sum of $1,170, paid her on the sale of her house, there remains a balance of $2,288 principal money which she claims from the defendant.

The defendant resists the plaintiff's claim on the following grounds: that the moneys, or a large part of the moneys

deposited in her name, were the defendant's; that if she transferred any of her moneys to him, they were a gift to him and that any claim she may make is barred by the Statute of Limitations. He urged at the trial that he had added portions of his own moneys to hers in the bank. Even if he did, he has not shewn what portion was his. Assuming his story to be true, it was his duty to have kept his wife's moneys separate from his own, and if he has mixed his own with hers, he, failing to shew the portion that is his, the whole belongs to her.

The learned Chancellor before whom the parties appeared personally at the trial in giving their evidence accepted the plaintiff's version of the transaction and a perusal of the evidence satisfies me that he was correct in holding that the plaintiff had established her contention that she had entrusted to her husband the money in question for investment for her. The onus was on the defendant to prove a gift of the principal moneys; this he has failed to do.

As to the contention that the claim is barred by the statute or by acquiescence, the Statute of Limitations cannot here apply, inasmuch as it is a case of express trust.

It was, however, argued that the plaintiff was barred by her laches; that in 1899 the defendant had repudiated her claim and that she slept on her rights until the commencement of this action. There appears to be no doubt that in the year 1899 the defendant did refuse to recognise the plaintiff's claim for a return of her money, but according to the plaintiff's evidence he receded from that position in the year 1900, when he agreed with her to purchase a house for her, out of her moneys then in his hands. This agreement was followed up by his making the purchase and also by his accounting to her for $1,170, part of the money realised from the sale of this house when sold some nine years later.

Further, whilst they lived in this house, the husband, by arrangement with his wife, from time to time caused improvements to be made upon it out of her moneys in his hands. These transactions in respect of the house are a recognition of the existence of the trust and were a fair intimation to the plaintiff that the defendant had abandoned his attitude of 1899 when he refused to pay over the money to her.

It was argued that when he so refused the plaintiff should then have brought her action, but it is to be borne in

mind that the parties were husband and wife and living together. For the wife to have instituted an action against her husband in 1899 to recover this fund would, in all probability, have resulted in separation.

There is no equitable doctrine that in a case like this a married woman is chargeable with laches because during the continuance of marital relations she forbears instituting an action against her husband for the recovery of her moneys in his hands.

Further, the defendant has in no way been prejudiced by his wife's forbearance.

For these reasons I think the Chancellor was right in awarding judgment for the plaintiff for $2,288.

The action for alimony did not call into question this money and it is therefore no bar to the plaintiff's claim and the defendant's appeal fails and should be dismissed with costs.

As to the plaintiff's cross-appeal, for $500, I agree with the learned Chancellor's reasons for disallowing that claim.

The plaintiff's claim for interest must also fail. The rule applicable to such a case is thus stated in *Alexander* v. *Barnhill*, 21 L. R. Irish, p. 515: "There is a great difference between the receipt of the income of a wife's separate property by her husband and of the corpus. In the latter case the onus of proof of a gift by the wife to the husband lies upon him and must be clearly established or else the husband will be held to be a trustee for his wife. In the former the onus lies on the wife save perhaps as to the last year's income and she must establish clearly and conclusively that her husband received her income by way of a loan."

It is not possible, I think, with certainty to say that the evidence proves a mere loan of the interest to the husband. Thus the plaintiff's cross-appeal fails.

As to the costs of the cross-appeal, it seems that but for the defendant's appeal there would have been no cross-appeal, the one provoking the other; nevertheless the plaintiff's appeal in no way increased the costs, and I therefore think there should be no costs to either party in respect of the cross-appeal.

HON. MR. JUSTICE SUTHERLAND and HON. MR. JUSTICE LEITCH agreed.

HON. MR. JUSTICE RIDDELL:—I agree in the result.

HON. MR. JUSTICE MIDDLETON. DECEMBER 10TH, 1913.

RE. FARRELL.

5 O. W. N. 455.

Infant—Appeal to Privy Council—Infant Respondent—Expenses of Appeal—Resort to Suitors' Fee Fund — Practice — Guardian ad litem.

MIDDLETON, J., *held*, that the costs of an infant respondent on an appeal to the Judicial Committee of the Privy Council could not properly be taken from the Suitors' Fee Fund.

Motion by the guardian *ad litem* of the infant, upon consent of the other parties interested, for an order sanctioning an advance of $2,000 or such smaller sum as shall prove sufficient to enable counsel to be retained and the infant to be duly represented upon a pending appeal to the Judicial Committee of the Privy Council.

It was proposed to have the advance made out of the funds of the estate in the first instance, but the proviso was made that if the appeal were successful then the amount of advance made should be reimbursed to the trust company from the suitors' fee fund.

J. R. Meredith, for the applicant.

HON MR. JUSTICE MIDDLETON:—My own view being that this order would not be a proper one, I have consulted some of my brethren, and we all agree. Where in litigation, an infant is in the position of a defendant or respondent, according to the well settled practice of our Court the adverse litigant, no matter what the result, must in the first instance pay the costs of the guardian *ad litem* of the infant. He may, if the case is proper, be allowed to add them to his own and so recover them over; but they are in the first instance treated as a necessary part of the disbursements of the successful litigant. The effect of the order sought would be in an indirect way to relieve the present appellant from this obligation.

The suitors' fee fund is established for the purpose of affording a fund which may be resorted to if necessary for the protection of infants or lunatics, or their property; but it is not intended that it should be used in ease of adverse litigants, nor is the fund established to meet the ordinary

expenses incident to securing the due representation of infants in litigation.

If in this case it is necessary for an advance to be made to retain counsel, so that the infant's interest may be adequately represented upon the appeal, it may well be proper for an advance to be made in the first instance from this fund to enable the guardian appointed by the Court to properly discharge his duty; but this must be regarded as an advance, to be refunded if and when the amount is recovered in the ordinary course of litigation. To sanction the order now sought would create a precedent resulting in the speedy depletion of the fund in question, and so frustrate the real object aimed at in its establishment.

SUPREME COURT OF ONTARIO.

SECOND APPELLATE DIVISION. DECEMBER 24TH, 1913.

BRANTFORD v. GRAND VALLEY RW. CO.

5 O. W. N. 583.

Railway—Street Railway—Breach of Contract — Notice—Forfeiture of Franchise Rights—Jurisdiction of Dominion Railway Board —Jurisdiction of Supreme Court of Ontario—Dominion Railway Act—R. S. C. 1906, c. 37, s. 26a—B. N. A. Act, s. 92 (13) (14); s. 101—Appeal.

MEREDITH, C.J.C.P., *held*, in an action brought by the city of Brantford, that certain street railway companies operating therein had forfeited their franchises by reason of breaches of their agreement with the city and failure to remedy the same after due notice.

SUP. CT. ONT. (2nd App. Div.) *held*, that the jurisdiction conferred upon the Dom. Rw. Board by R. S. C. (1906) c. 37, s. 26 (a) to interpret agreements did not oust the jurisdiction of the civil Courts.

Appeal dismissed with costs.

Appeal by defendants other than the National Trust Company from the judgment of HON. R. M. MEREDITH, C.J.C.P., at the trial on September 17th, 1913.

The appeal to the Supreme Court of Ontario (Second Appellate Division) was heard by HON. SIR WM. MULOCK, C.J.EX., HON. MR. JUSTICE LATCHFORD, HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE LEITCH.

G. H. Watson, K.C., and J. G. Smith, for appellants (defendants), other than the National Trust Co.

W. T. Henderson, for respondents, (plaintiffs), the city of Brantford.

J. A. Paterson, K.C., for the National Trust Co.

HON. MR. JUSTICE LEITCH:—This action was brought to have it declared that the defendants the Brantford Street Rw. Co., and the Grand Valley Rw. Co., have forfeited all the privileges and rights held by them under the terms of the various agreements set forth in the pleadings, and that they be enjoined from further operating said street railway system upon the streets of the city of Brantford; and to have it declared that the railway and ties upon the streets of the city of Brantford, are, in the exercise of the city of Brantford's option, vested in the city, and that the city is at liberty to grant a franchise to another company.

The action came on for trial before the Hon. Mr. Justice R. M. Meredith at Brantford, on the 17th day of September, last. The learned trial Judge in his written reasons for judgment, stated that each of the parties was a corporation and was quite competent to contract; that it was his duty to determine what the bargain was, and to see that each of the parties performed it upon its part.

He found that the companies did not perform the agreement on their part, that they made various substantial defaults, and that by the terms of the agreements it was provided that if there were defaults after notice the companies would forfeit all their rights. He found that such notice was given, not only to the Grand Valley Rw. Co., but also to the Brantford Street Rw. Co., and that they made default in the following matters: "In the reconstruction of the line as required. In not providing coloured signal lights at night for the cars. In the payment for the portion of the pavement of the streets which the company agreed to pay. In their agreement to place and continue on the railway good cars with all modern improvements. He held that there was a serious breach of the agreement in that respect, and that the defendants had forfeited all their rights under the agreements. He found that after notice of the different defaults was given both to the Grand Valley Rw. Co., and to the Brantford Street Rw. Co, nothing was done by the companys to cure the defaults or to avoid the forfeiture.

Even at this late date the learned trial Judge gave the defendants an opportunity to relieve themselves from the forfeiture by fulfilling the terms set forth in paragraph 2 of the formal judgment—these terms may be shortly described as the terms which they were required to carry out and perform by the agreements—The companies were to elect to accept the terms and thereby save the forfeiture on or before the 14th November, 1913. They have not elected to take the relief provided in the judgment.

In the list handed to us on the argument, of what Mr. Watson called acts of waiver and acquiescence, we cannot find in the evidence anything more than mere forbearance. There has been no waiver of any of these rights by the plaintiffs the city of Brantford. They have been patient and long-suffering, but they never acquiesced in any of the defaults that were made or wrongs that were done to them by the companies.

It was strongly urged in argument that the jurisdiction conferred upon the Dominion Board of Railway Commissioners by the Railway Act of Canada, and amendments, ousted the jurisdiction of the Supreme Court of Ontario, and that that Court had no power to decree a forfeiture in this case. We cannot subscribe to that argument.

It was urged that sec. 26A of the Dominion Act, R. S. C. ch. 37, as amended by 8 & 9 Edw. VII. ch. 32, conferred such powers upon the the Board as to make them the only tribunal competent to adjudicate in this matter. The following language in the Act was relied upon in support of this contention:—

"The Board shall hear all matters relating to such alleged violation or breach, and shall make such order which to the Board may seem, having regard to all the circumstances of the case, reasonable and expedient, and any such order may, in its discretion, direct the company, or such corporation or person, to do such things as are necessary for the proper fulfillment of such agreement, or to refrain from such acts as constitute a violation or a breach thereof." The Dominion Railway Board was not created for the purpose of adjudicating upon all claims against or disputes with the railway company. The Board is purely a creature of the Statutes. The general principle applicable to such a body is that its jurisdiction is only such as the statute gives in express terms or by the implication therefrom rendered

necessary in order to carry out the operation of the Railway Act.

The British North America Act (1867), sec. 92, sub-secs. 13 and 14, assigns to the provincial Legislature the subjects of "property and civil rights in the province;" and "the administration of justice in the province, including the constitution, maintenance and organisation of provincial Courts both of civil and criminal jurisdiction and including the procedure in civil matters in those Courts.

Corporations created by the Parliament of Canada are ordinarily subject to the provincial laws relating to property and civil rights, and *prima facie*, civil claims against them should be prosecuted in the provincial Courts. The Parliament of Canada is empowered to provide "for the establishment of any additional Courts for the better administration of the laws of Canada." (B. N. A. Act 1867, sec. 101.)

In the exercise of its powers to legislate on certain subjects, the Parliament of Canada may, incidentally, trespass upon the field of provincial legislation. Such encroachments, however, are not to be presumed but must be clearly indicated, and be limited to the extent necessary for the giving effect to the enactments of the Parliament of Canada upon subjects within its powers. It was for the purpose of enforcing and carrying out the railway legislation of the Parliament of Canada, that the Board was given the jurisdiction conferred by the Railway Act. It was not created for the purpose of enforcing the rights or duties imposed on the provincial Courts. To enable the Board to adjudicate upon a matter, that matter must be one as to which the Board is expressly empowered or directed to act; or it must relate to some violation of the Railway Act, or the Special Act, or some regulation, order or direction made thereunder. MacMurchy and Denison, Canadian Railway Law, 304. The Board is not a Court. It is an administrative and an executive tribunal. It has power to construe agreements, which in carrying out the Railway Act it may be called upon to enforce, but it has no power such as the Supreme Court of Ontario possesses of adjudicating upon questions of construction in the abstract, or decreeing forfeiture, or of relieving therefrom.

It was stated in a memo. handed to the Court after the argument that *Waterloo* v. *Berlin*, 23 O. W. R. 337, and *Waterloo* v. *Berlin*, 28 O. L. R. 260, are authorities for the proposition that the jurisdiction of the Courts is ousted by

the Ontario Railway and Municipal Board under a statutory provision in almost identically the same words as the Dominion Act conferring power on the Dominion Board. From an examination of these cases, it is clear that the questions involved arose under orders made by that Board.

It was simply held that the Board having laid rold of a matter within their jurisdiction, it was the Board to interpret and give effect to its own orders, and to deal with differences arising out of their orders.

It was held by the Ontario Railway and Municipal Board in an action by the city of Hamilton to recover from the Hamilton Street Railway, a large amount for repairs of the asphalt pavement on certain streets which the company under an agreement with, and under the by-laws of the city, were obliged to make, that the action was within the jurisdiction of the Courts, and that the Board were not bound to try an action for damages. Report of the Ontario Railway and Municipal Board of 1910, p. 36.

I am of opinion that the Courts have jurisdiction to try this action and to give the relief adjudged.

The appeal should be dismissed with costs.

HON. SIR WM. MULOCK, C.J.EX., HON. MR. JUSTICE LATCHFORD, and HON. MR. JUSTICE SUTHERLAND approved.

HON. MR. JUSTICE KELLY. DECEMBER 30TH, 1913.

MATSON v. MOND NICKEL CO. LTD.

5 O. W. N. 652.

Negligence—Master and Servant—Driller in Mine—Stone Falling from Above—Lack of Proper "Scaling"—Damages—Quantum of—Retardation of Recovery by Disobedience to Physician's Orders.

KELLY, J., in an action for damages sustained to a workman while drilling in defendant's mine by reason of a stone falling from the roof and striking him, *held*, that the evidence established that the accident was due to the negligence of the defendants in not properly scaling the roof and awarded plaintiff $750 damages and costs.

Non-jury action tried at Sudbury to recover damages for injuries sustained by plaintiff while working as a miner in the employ of defendants in a mine operated by them. While engaged in drilling at the bottom of the mine a

stone or piece of rock fell from the under side of the pentice, several feet above him, and caused the injuries for which he claimed. The pentice was formed of solid rock from twelve to sixteen feet in perpendicular thickness, which was left by the defendants between the lowest level of the mine and the bottom of the shaft, where plaintiff and others were working. The object of this pentice was to afford protection to the workmen at the bottom of the shaft against the danger of objects falling upon them from the higher levels. At the time of the occurrence—April 22nd, 1913—plaintiff and another driller, Hankali, and two helpers were at work. The injuries he sustained were two cuts in the head and a broken arm. The foreman of shaft No. 1 in which plaintiff was working, was Ballantyne, while Mumford was superintendent or foreman over the night shift, or night gang, which worked on the night preceeding the day of the accident.

J. S. McKessock for the plaintiff contended that defendants were negligent in not having the walls of the shaft and the underside of the pentice properly scaled so as to protect the workmen against danger of stone or pieces of rock falling, and he set up that plaintiff was carrying on the work he was then engaged at under the immediate direction and instruction of Ballantyne.

J. A. Mulligan for the defendants on the other hand urged that it was the workmen's duty to see to the safety of their surroundings and to do the necessary scaling, which, it was said, was the only practical means of ensuring safety.

HON. MR. JUSTICE KELLY:—Both plaintiff and Hankali swore in effect that the foreman only (the "boss" as they call him) gives orders to do the scaling, but that sometimes the men would ask the foreman if they might do it. This, I think, would happen when the men thought the walls or roof were in a dangerous condition and in need of being scaled so as to remove danger. The reasonable view of the evidence is that the scaling was done at and under the foreman's direction.

What happened leading up to the time of the accident is important. Plaintiff and Hankali went on duty in the morning of April 23rd. The night gang, working under Mumford, had been engaged doing scaling during part of the night of the 21st. Plaintiff and Hankali both say that

when they were about to commence work on the morning of the 22nd, Ballantyne told them to set up their machines (the drilling machines), and go to work with them—that the scaling had been done during the night. Ballantyne, who admits that it was his duty to warn the men, denies telling them the scaling had been done; his story being that he told these two men to look at the walls and if they found them "all right" to set up the machines. Mumford's evidence on this point, which is material, is this: (referring to the scaling done on the night of the 21st):—

"Q. Had they scaled the roof? A. We had scaled the roof, yes.

Q. On that shift? A. Yes.

His Lordship. Is that the night before the accident? A. Yes.

Mr. McKessock. You told Mr. Ballantyne you had done so? A. Yes, made the report.

Q. When you reported to him after your shift? A. Yes.

Q. That you had scaled this roof? A. Yes, but not finished.

Q. What did you tell him? A. I didn't report it safe.

Q. What did you tell him? A. I said, 'Scaling pentice in shaft, but not finished.'

Q. Did you tell him then it was partly scaled and not safe? A. Not finished, I said.

Q. Would that mean that his directions should be to the next shift that they would complete it? A. Yes."

I see no reason for accepting the evidence of Ballantyne as against that of plaintiff and Hankali on what took place between them on the morning of the 22nd. On defendants' own shewing conditions were such as to make it desirable and necessary that scaling should be done during the previous night; and it was done in part, but not completed. Moreover, Ballantyne was notified by Mumford that it was not completed. He did not report this to the plaintiff, for he himself goes no further than to say he told them to look at the walls and if they found them all right to set up their machines. I find he told plaintiff and Hankali that the scaling was done and for them to set up the machines. They believed that the scaling had been done and had no reason to fear any special danger, and, following the directions of the foreman, plaintiff proceeded with the other

work. Between three and four o'clock in the afternoon he was injured, and the next work done by the workmen at the place of the accident was to scale the walls and roof, at which they were engaged from ten to thirteen hours. Under these circumstances defendants cannot escape liability.

The question is also raised as to the general condition of the premises and as to whether defendants had seen to it that the works were suitable for the work that was to be carried on therein, particularly with reference to the means adopted to prevent the falling of objects upon workmen; and plaintiff points to the fact that after the accident defendants resorted to the expedient of putting in timber, or lagging, beneath the pentice with the object of getting rid of or reducing the danger from falling objects. The evidence is conflicting as to whether this was done before the shaft had been sunk to a greater depth. Defendants' evidence is that it was impracticable to put in timbers until the shaft had been sunk several feet lower than it was at the time of the accident, and that this was the course adopted.

In view of what I find to be the facts with respect to the incomplete scaling, and the plaintiff having been directed to proceed with the other work before the scaling was finished, it is unnecessary to deal further with this latter aspect of the case.

Dealing next with the amount of damages to which plaintiff is reasonably entitled; he was taken to the General Hospital at Sudbury immediately following the accident and placed under the care of Dr. Cook. On the 29th May he was removed to St. Joseph's Hospital, still continuing under Dr. Cook's care, and there he remained until June 14th. The doctor considered it necessary for him to remain there after that date, but outsiders, apparently interested in him, insisted on his being removed from the hospital, and contrary to the wishes and advice of the doctor, he went out on June 14th. The injury to the arm was not of an unusual kind, and he had been making satisfactory progress up to the time that he left the hospital. Between that time and September 6th he had seen Dr. Cook four or five times, but he was without that constant care and attention which he would have received had he remained in the hospital, and as a consequence, and notwithstanding that he consulted more than one other doctor in the intervening time, his progress towards recovery was im-

peded, and on September 6th he was induced to return to the hospital and undergo an operation and further treatment. Had he continued in the hospital from June 14th there seems little, if any, doubt that, so far as the doctors have been able to judge, he would have made a good recovery in about six or eight weeks after that time. The expense of his care, treatment and maintenance in the hospital was borne by the defendants, whose desire it was that he should have so continued until his recovery, but he chose to adopt the other course, with unsatisfactory results to himself. At the time of the accident and for about a year prior thereto his earnings were at the rate of somewhat more than $90 per month. Taking all these circumstances into consideration, and not overlooking that it has been stated by some of the doctors that, though they expect a good recovery, his arm may not be in just as good a condition as it was prior to the accident, I think a reasonable sum to allow is $750; and judgment will, therefore, be in his favour for that amount, and costs.

HON. MR. JUSTICE BRITTON. DECEMBER 30TH, 1913.

MOTHERSILL ET AL. v. TORONTO EASTERN RW. CO.

5 O. W. N. 635.

Way—Right of Way—Prescriptive Right Proven—Definite Termini—No Deviation from—Expropriation by Railway Company—Damages.

BRITTON, J., *held*, that the plaintiff had established a right of way by user over certain lands taken by a railway for the purposes of their line and that consequently plaintiffs were entitled to damages for their deprivation of such right of way.

Action by T. B. Mothersill and John Johnston to recover damages for an alleged wrongful entry on and obstruction of a certain private way or strip of land bounding the respective lands of the plaintiffs immediately north thereof.

Tried at Whitby without a jury.

H. H. Dewart, K.C., and G. D. Conant, for plaintiffs.

McGregor Young, K.C., for defendants.

HON. MR. JUSTICE BRITTON: —The wife of the plaintiff Mothersill owns a parcel of land on the north side of the Kingston road, and fronting on that road, 257 feet in width,

by a depth of 5 chains more or less to a lane. This lane extends westerly from a public road, which public road lies to the east of the lands affected, and extends northerly from the Kingston road to a point beyond the lane in question.

The plaintiff Johnston owns a parcel of land to the west of and adjoining the land of Mothersill, having a frontage on Kingston road of 55 feet, by a depth of 330 feet. The lane—over which the plaintiffs claim the right-of-way, extends the whole width of Mothersill's land—but only 35 feet of the land of the plaintiff Johnston.

The plaintiff Mothersill became the owner and went into possession of what he now claims, and of the Johnston parcel as well, on the 27th March, 1896. Johnston purchased his parcel from the plaintiff Mothersill on or about the 19th day of May, 1909. The plaintiffs claim an uninterrupted right-of-way over this lane. The plaintiff Mothersill, in using this right-of-way as a means of egress from and ingress to his land, used it only from a point some distance east from the easterly limit of Johnston's land, on easterly, and out to the public road.

The title to the lands of the plaintiffs seems to be as follows:

The whole of lot 13 was granted by the Crown on 16th May, 1798. On 22nd December, 1855 by conveyance to him, Wm. Henry Gibbs obtained 3 acres, and by conveyance dated 30th July, 1856, he obtained ½ an acre, these two conveyances covering all the land in question south of the land over which the right-of-way is claimed. Gibbs conveyed all the 3½ acres to Joel Thompson Ray on 23rd May, 1862. Ray mortgaged to the Ontario Loan & Savings Co. on the 14th October, 1882, and under this mortgage that company conveyed to Tenneck B. Mothersill, one of the plaintiffs, on the 27th March, 1896. Possession has during all these years been in accordance with the paper title.

It appeared at the trial that after the sale by Tenneck B. Mothersill to the plaintiff Johnston, he executed a conveyance to his wife Minnie Mothersill, in consideration of natural love and affection, and of the sum of $350.

Upon the application of plaintiffs, and without objection on the part of the defendants, I directed that upon filing the written consent of the wife of plaintiff Mothersill, she should be added as a party plaintiff. That consent no doubt was filed, although I do not find it with the papers. The Mother-

sills and their predecessors in title have had an uninterrupted and undisturbed right-of-way from the point upon the Mothersill land, where there are now a large and small gate, over the whole of the private lane, to the east, to the public road before mentioned. That right-of-way was limited to the use required of it, as access and ingress to and egress from the residence, farm buildings, and farm and premises by persons on foot or with horses, vehicles and cattle, driving loads of meat or other loads—such as usually required, and generally for all purposes connected with the farm premises and buildings and with the work and business carried on there. It is part of the plaintiffs' case, that this strip of land is a private way. They do not set up any claim, either individually or on behalf of the public to the land—as a public road—or for any other purpose, except that it is subject to their right-of-way. This way should have a *terminus a quo* and a *terminus ad quem*. It should be definite enough to be bounded and circumscribed to a place certain. See Gale on Easements, 8th ed., 370. The evidence in this case establishes the eastern terminus at the public road and the western terminus at or very near to where the present opening in the Mothersill fence now is. To establish such a way, it is not necessary to have a definite road—narrower than the lane, somewhere marked out, between the northern and southern limits of the present lane. A number of tracks indifferently, but tending to the same points, will not prevent the right-of-way being acquired. See 1 Ch. D. 262.

There is no doubt about the user of this way by the occupants of the lands now owned by the Mothersills. The land of these plaintiffs, and the land over which the right-of-way is claimed, were not owned by the same person since the ownership by Gibbs. It was stated that one Fewster owned, or occupied, the land now the lane, in 1849, and that he opened this lane in 1853. The circumstances under which that was done were not shewn. It may be that it was intended to be dedicated to the public as a road. It was never assumed by the township, no statute labour was performed upon it, and in short, it is not claimed by the plaintiffs to be a public highway.

I find that the user of this way was continuous. The established Mothersill right-of-way would not permit them to change the western terminus to any point that might from

time to time suit their convenience. They could not change it to, or make an additional opening at the place where the plaintiff Johnston now has his opening, and successfully claim a right-of-way from this new opening to the public road. If the Mothersills, before the sale to Johnston could not, Johnston cannot, so the action by Johnston fails.

The owner of the land, of this private lane, is not a party to this action, and he is not complaining of any assertion of a right-of-way by either plaintiff.

The defendants, without claiming under the owners, but by an alleged paramount right under their charter, proceeded to expropriate a part of this lane for their road.

On the 24th February, 1911, the defendants obtained from the Board of Railway Commissioners for Canada an order approving of the defendants' location of their line through the townships of Whitby and Whitby East, as shewn by the plan and profile as described in file No. 15881.4. No doubt the line as it is laid down upon the lane is, as upon the plan. On the 30th September, 1913, the defendants published in a Whitby newspaper notice of expropriation of part of the lane, and they described this part as "a strip of land used as a road," and further described it by metes and bounds, and "as running along the northerly boundaries of the properties of White, T. B. Mothersill and Johnston." No mention is made of any easement of plaintiffs, nor was any land of the plaintiffs required.

The notice of expropriation stated that a warrant for immediate possession would be applied for. It did not appear that a warrant of possession was actually obtained. That is of no importance as defendants went into possession and constructed their line. No special notice was given to either plaintiffs and no notice to them or to anyone as to interfering with right-of-way. The defendants by notice offered $50—apparently for the strip—but nothing for the right-of-way over the strip, if any existed in favour of one not owner of the strip.

I find that the defendants have interfered with and obstructed the Mothersill right-of-way as set out in the statement of claim. The right-of-way was of very considerable value to the Mothersill property, and I assess their damages occasioned by the interference with their right-of-way, by the defendants' construction of their line of railway, at the sum of $500. This does not include anything for loss or

depreciation in value of land fronting on lane, for building purposes, or for want of any right-of-way, except the loss of the right-of-way from the western terminus as found by me, for the Mothersills in the use of their farm and premises. No damage for any land laid out in lots fronting upon the lane by reason of such lots being rendered of less value owing to the construction of defendants' line of railway.

There will be judgment for the Mothersills for declaration as to expropriation of right-of-way as above stated, and for $500 damages, with costs on the High Court scale.

The claim of Johnston will be disallowed, and action, so far as it is by him, dismissed without costs.

Thirty days' stay.

HON. MR. JUSTICE LATCHFORD. DECEMBER 31ST, 1913.

HOPKINS v. CANADIAN NATIONAL EXHIBITION ASSOCIATION.

5 O. W. N. 639.

Contract—Exhibition "Concession"—Exclusive Right to Sell "Ice Cream Cones"—Dispute as to—Decision of Manager—Clause in Contract Making Manager Sole Interpreter of Same—Binding Force of—Good Faith—Domestic Forum—Action for Damages—Dismissal of.

LATCHFORD, J., *held*, that where by a contract it is provided that all questions of interpretation shall be decided by A, and the latter in so deciding acts reasonably and in good faith, his interpretation will not be reviewed by the Courts.

McRae v. *Marshall*, 19 S. C. R. 10, approved.

Action for damages for breach of contract.

R. U. McPherson, for plaintiff.

G. R. Geary, K.C., for defendant.

HON. MR. JUSTICE LATCHFORD:—By two agreements in writing and under seal, identical in terms, except that one is for one location and the other for another, the defendants granted plaintiff the right to sell Hamburger steak and frozen fruits on the exhibition grounds during the exhibition of 1912. Both contracts expressly except from the concessions any right to sell ice cream or ice cream cones.

There was a special reason for this exception. The plaintiff had in previous years obtained a very profitable con-

cession, giving him the exclusive right of selling ice cream in cones of edible paste, known as the "Ice Cream Cone Concession." He tendered for the same privilege in 1912, but was outbid by the Neilson Company, who paid $2,000 for the privilege—a sum which indicates how valuable was this exclusive right. The clerk in charge of such contracts, fearing a possible attempt by plaintiff to encroach upon the rights of the Neilsons, was careful to stipulate that the right to sell frozen fruits did not empower the plaintiff to infringe upon the concession to the Neilsons.

On the first day of the exhibition the plaintiff sold, in addition to Hamburger steak, edible cones of the same size and general appearance as the cones which, filled with ice cream, the Neilsons had the exclusive right to sell. The cones as sold by plaintiff were filled, not with frozen fruit, but with a mixture of fruit, water and sugar, frozen as ice cream is frozen, in short, a fruit ice.

Complaint was made to Dr. Orr, the defendants' manager, that the plaintiff was infringing upon the Neilson privilege. Dr. Orr went toward one of the plaintiff's booths, and heard as he approached the cry of one of the plaintiff's employees: "Ice Cream Cones." When he came up he saw prominently displayed dishes containing piles of the cones. Hopkins was absent at the time. Dr. Orr told the persons in charge for the plaintiff that they must discontinue selling the cones, and asked to have plaintiff call at his office. The sale was stopped, and the plaintiff called on Dr. Orr, who told him that he must stop selling the cones and the fruit ices with which the cones disposed of were filled. Hopkins appeared to consider that, as Dr. Orr charged, he had infringed upon the Ice Cream Cone Concession, but a day or two later protested against the act of the manager.

There is a conflict of testimony between Dr. Orr on the one side and the plaintiff and several of his employees on the other, as to the signs and cries used to attract the people to the plaintiff's booths. The plaintiff says his sign was "California Frozen Fruits," and his employees corroborate him. A photograph of one of the plaintiff's stands is in evidence, and the sign shewn there is "California Fruit Ices." It is hard to believe that the error of plaintiff and his witnesses on the point can be a mere fault of recollection. I incline strongly to accept the testimony of Dr. Orr where it is in conflict with plaintiff or plaintiff's witnesses.

The plaintiff sold no more fruit ices in cones, and lost profits which he would have made had he been allowed to continue as he had begun. He claims $1,500 damages and the return of the $600 which he had paid for the concessions. His sales of steak were not interfered with; and without regarding carefully his particulars of loss filed, because unnecessary in the view I am taking, I am satisfied that they are far less than the amount claimed.

In considering what Dr. Orr did, the fact must be borne in mind that the plaintiff had no rights on the defendants' property except such as were expressly granted to him. He had not the right to sell ice cream cones even as such, nor to sell fruit ices in such cones.

Upon the evidence it appears clear that to the ear of a hot and thirsty crowd the cry of "ice cream cones" conveys the impression "cones of ice cream." The refreshing delicacy was best known by one of its commonest adjuncts when sold in public places—the cone. The container by a familiar metonomy was taken for the thing contained. The plaintiff as an experienced caterer appreciated this fact I think quite as much as Dr. Orr, who realized that the cry combined with the piles of cones misled the people, as I think it was beyond question intended to mislead them. The plaintiff was bound by his contracts not to allow any representations to be made in regard to the articles sold by him which he did not know to be true, and the defendants' manager was to be the sole judge or authority in determining the propriety or impropriety of the conduct of the plaintiff or his servants acting apparently on his behalf.

Each contract also provided that the manager should in all respects have the right to decide any question of fact that might arise under it, and that he should be the sole interpreter of the contract. There are no restrictions as to the time, place, or manner in which the manager is to exercise the power the plaintiff as a party executing the agreement expressly conferred upon him.

The exhibition lasts but two weeks or three. There are many hundred concessionaires. Difficulties frequently arise which the manager has to settle and settle promptly. This the plaintiff himself had experience of in other years. There is no time for protracted investigation. The manager is bound reasonably to exercise his powers of action and interpretation. It cannot be said that he did not so exercise his

powers in the present case. He knew the terms of the plaintiff's contracts and of the contract with the Neilsons. He had the evidence of his senses that the plaintiff, through a person apparently acting for him, was not only misleading the public, but inducing the public to believe the plaintiff had the privilege in 1912 which he had enjoyed in previous years of selling ice cream in cones. The actual sales of a fruit ice in the cones may not have been upon a strict construction any infringement upon the Neilsons' rights, but the pretence might properly be regarded as such.

It may be pointed out that the question is not what is in fact the true construction of the words "frozen fruits" in the concessions held by the plaintiff, but whether Dr. Orr acted in good faith and after proper investigation in the interpretation which he in the exercise of the discretion vested in him by the plaintiff put upon the words.

I think Dr. Orr was not bound to do anything which he did not do, and that he acted throughout reasonably and in good faith.

The numerous cases cited are not very helpful. There is no attempt to oust the jurisdiction of the Courts. What the parties did was to establish a domestic forum for the settlement of the questions that might arise between them, and that forum having acted with judgment and discretion, in the way the parties agreed it should have power to act, the dispute cannot be litigated.

A case much in point is *McRae* v. *Marshall* (1891), 19 S. C. R. 10, reversing the judgment of the Court of Appeal, 17 A. R. 139, and the Divisional Court, 16 O. R. 495, and restoring the judgment of the trial Judge, the late Mr. Justice Rose. But even in the Courts whose decisions were reversed the ground upon which it was thought the plaintiff was entitled to succeed was that the defendant had acted arbitrarily and not in good faith and without giving the plaintiff an opportunity to be heard. In the present case none of these circumstances exist, and the plaintiff cannot go behind his contract.

See also *Farquhar* v. *Hamilton* (1892), 20 A. R. 86, and *Good* v. *Toronto, Hamilton & Buffalo Rw. Co.* (1898), 26 A. R. 133.

The action fails, and is dismissed with costs.

Stay of thirty days.