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APPELLATE DIVISION.

FIRST DIVISIONAL COURT. DECEMBER 26TH, 1917.

*TAYLOR v. DAVIES.

Assignments and Preferences—Assignment for Benefit of Creditors—Land of Insolvents—Release of Equity of Redemption by Assignee to Mortgagee—Inspector of Insolvent Estate—Fiduciary Position — Trustee — Constructive Trustee — Limitations Act—Application to Constructive Trust—Secs. 2 (a), 5, 32, 47 (2)—Bar to Action—Release Construed as Assent by Assignee to Retention by Creditor of his Security —Assignments and Preferences Act, R.S.O. 1897 ch. 147, sec. 20 (4).

Appeals by the defendants from the judgment of LENNOX, J., 39 O.L.R. 205, 12 O.W.N 83.

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

I. F. Hellmuth, K.C., for the appellants the executors of Robert Davies.

W. N. Tilley, K.C., and R. H. Parmenter, for the appellant Clarkson.

Wallace Nesbitt, K.C., and Christopher C. Robinson, for the plaintiff, respondent.

MEREDITH, C.J.O., read a judgment in which he said that the judgment of the trial Judge was based upon the proposition that Robert Davies was an express trustee, or at all events, owing to

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

his fiduciary position as one of the inspectors of the estate of the assignors, under and subject to the same obligations, liabilities, and disabilities as an express trustee; and, if this proposition could not be supported, the main ground upon which the judgment proceeded disappeared.

In the opinion of the Chief Justice, Davies was neither an express trustee nor did he stand in the same position as an express trustee, but, if a trustee at all as to the matters in question, he was a constructive trustee.

Reference to authorities: Soar v. Ashwell, [1893] 2 Q.B. 390, specially referred to.

Assuming that Davies was an inspector when the conveyance of the equity of redemption was made to him, there was no intention, on the part of any of the parties to the transaction which led to the making of the conveyance, that he should be a trustee of the land conveyed; and, if the taking of the conveyance was in effect taking possession of the trust property, he did not take possession in his capacity of fiduciary agent of the creditors, nor was he entrusted with it in that capacity. He took possession of it in his own right and as owner of it; and, if, owing to his fiduciary position as inspector, he could not, in the circumstances, hold it except subject to the trusts of the assignment, his position was that of a constructive trustee, by reason of the equitable rule which did not permit him, in those circumstances, to hold the property for himself discharged of the trust.

That the Limitations Act applies to a constructive trust and may be invoked by a constructive trustee, in answer to a claim for the recovery of the property upon which the trust is in equity impressed, is beyond doubt: Halsbury's Laws of England, vol. 19, p. 274; Soar v. Ashwell, supra, at p. 395.

The Limitations Act, 10 Edw. VII. ch. 34, now R.S.O. 1914 ch. 75, applies not only to what before the Judicature Act were actions at law, but also to what were then suits in equity; for, by sec. 2 (*a*), "action" includes "any civil proceeding." Section 5 prescribes 10 years as the time within which an action to recover any land must be brought, and the 10 years are to be reckoned from the time at which the right to bring the action first accrued to some person through whom the person bringing the action claims, or at which the right to bring the action first accrued to the person bringing it If this were all, the respondent's right to bring this action was barred before it was begun. It is an action to recover land within the meaning of sec. 5, and the right to bring it first accrued after the making of the impeached conveyance.

The statute, however, contains a provision—sec. 32—as to cases of concealed fraud. The section refers to designed fraud: Petre v. Petre (1853), 1 Drew. 371, 398; and Davies was not chargeable with that kind of fraud. Even assuming that his conduct was fraudulent, there was nothing to warrant the conclusion that the fraud was concealed. If it was concealed, the respondent had failed to satisfy the onus which rested upon her of establishing that the fraud could not have been discovered by the exercise of reasonable diligence on her part.

The finding of the trial Judge that the plaintiff's husband always believed that Davies was in possession as mortgagee should be reversed. At the time of the assignment, the assignors, Taylor Brothers, were hopelessly insolvent, and every one concerned recognised that such was their financial condition. The plaintiff's husband was one of the assignors.

It was argued that the effect of sec. 47 (2) of the Limitations Act was to exclude from the operation of the Act the excepted claims mentioned in it in the case of all trusts, including a constructive trust; but the Chief Justice was not of that opinion.

The Limitations Act was, therefore, a bar to the action of the respondent.

Again, Davies did not at any time, though an inspector, occupy a fiduciary position towards the assignee or the creditors as to the property in question; and, with regard to the proof of his claim, the valuation of his security, and the proceedings consequent upon the filing of his claim, he was entitled to deal and act as he might have done had he not been an inspector. What was done, including the giving of the release of the equity of redemption, was understood by every one concerned as being done under sec. 20 (4) of the Assignments and Preferences Act, R.S.O. 1897 ch. 147.

It was, however, contended that, being an inspector, Davies was disqualified from entering into the arrangement that was made between him and the assignee, even if the transaction was to be treated as the carrying out of the provisions of sec. 20 (4); that, because of Davies' position as inspector, the assignee could not deal with him even for the purposes of sec. 20 (4). To this contention effect could not be given.

The principle of the decision in Bell v. Ross (1885), 11 A.R. 458, is applicable to a case arising under sec. 20 (4).

In all the circumstances, the proper inference was, that the assignee's assent to the retention by Davies of his security was given under the authority of the creditors within the meaning of sec. 20 (4).

The appeal should be allowed with costs and the action dismissed with costs.

HODGINS and FERGUSON, JJ.A., each read a judgment. They agreed that the appeal should be allowed.

MACLAREN and MAGEE, JJ.A., also agreed that the appeal should be allowed.

Appeal allowed.

FIRST DIVISIONAL COURT. DECEMBER 26TH, 1917.

*CURRIE v. HARRIS LITHOGRAPHING CO. LIMITED.

*ATTORNEY-GENERAL FOR ONTARIO v. HARRIS LITHOGRAPHING CO. LIMITED.

Constitutional Law—Extra-Provincial Corporations Act, R.S.O. 1914 ch. 179—Intra Vires—Company Incorporated by Dominion Authority—Power of Province to Require License—Power to Impose Penalties—Right of Dominion Company to Hold Land in Province—Mortmain and Charitable Uses Act, R.S.O. 1914 ch. 103.

Appeals by the plaintiff Currie and the Attorney-General for Ontario from the judgment of MASTEN, J., ante 6, in so far as adverse to them; and appeal by the defendant company from the same judgment in so far as it was adverse to the company; the Attorney-General for Canada supported the latter appeal.

The appeals were heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, JJ.A.

Wallace Nesbitt, K.C., for the Attorney-General for Ontario.

C. E. H. Freeman, for the plaintiff Currie.

F. W. Wegenast, for the defendant company.

Christopher C. Robinson, for the Attorney-General for Canada.

MEREDITH, C.J.O., read a judgment in which he stated the facts and considered the statute in question and the authorities.

He was of opinion:—

(1) That the provisions of the Extra-Provincial Corporations Act, R.S.O. 1914 ch. 179, except the latter part of sec. 16, in so

far as they purported to apply to the defendant company (a company incorporated by letters patent issued under the authority of the Companies Act, R.S.C. 1906 ch. 79, for trading purposes), were valid and intra vires of the Legislature of the Province of Ontario.

(2) That the defendant company was precluded from carrying out its objects and undertakings in Ontario unless and until licensed under the Extra-Provincial Corporations Act.

(3) That the defendant company was subject to the penalties prescribed by that Act for carrying on business without being licensed.

(4) That the defendant company was incapacitated or prohibited, by reason of not being licensed as required by that Act, from acquiring and holding lands for the purpose of its business in the Province of Ontario.

Looking at the Act as a whole, it is not in its "pith and substance" an Act designed to restrict Dominion companies in the exercise of the powers conferred upon them by Dominion authority, but an Act lawfully passed for purposes as to which the Legislature by which it was enacted had authority to legislate. The latter part of sec. 16, providing that so long as a company is unlicensed it shall not be capable of maintaining any action or proceeding in any Court of Ontario in respect of any contract made in whole or in part within Ontario in the course of or in connection with business carried on contrary to the provisions of sec. 7, is objectionable and ultra vires.

On the fourth point the judgment of Masten, J., is affirmed.

The basic principle of the British North America Act was intended to be that each Province should be autonomous and "master of its own house." This principle has not always been applied to the determination of questions that have arisen under the Act, partly, perhaps, because it has been thought that, having regard to the language used in the Act with respect to the question under consideration, the principle could not be applied, and sometimes because the principle was not kept clearly in view.

MACLAREN and MAGEE, JJ.A., agreed with the Chief Justice.

HODGINS, J.A., in a short written judgment, agreed that the questions should be answered as stated by the Chief Justice.

FERGUSON, J.A., reached the same conclusion, for reasons briefly stated in writing.

Appeals of the plaintiffs allowed as to three questions with costs and dismissed as to one with costs.

FIRST DIVISIONAL COURT. DECEMBER 26TH, 1917.

*DONER v. WESTERN CANADA FLOUR MILLS CO. LIMITED.

Sale of Goods—Credit-sale—Contract—Construction—Non-delivery—Action for Damages for—Monthly Instalment Deliveries—Failure to Take Stipulated Quantities—Default—Payment, when Due—Waiver—Counterclaim—Set-off—Attempted Justification of Refusal to Ship—Default in Payment on Previous Shipment—Neglect to Draw for Amount—Terms of Sale—Damages.

Appeal by the plaintiffs from the judgment of ROSE, J., 12 O.W.N. 301.

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

D. L. McCarthy, K.C., for the appellants.

J. A. Paterson, K.C., and W. N. Tilley, K.C., for the defendants, respondents.

MEREDITH, C.J.O., in a written judgment, said that the action was brought to recover damages for the non-delivery of a quantity of flour which the defendant company (sellers) contracted to deliver to the firm of William Reynolds & Son (buyers), the action being brought by Doner, the administrator of the estate of William Reynolds, who died after the making of the contract, and John Reynolds, the son of William.

The Chief Justice, after stating the facts, said that the sellers set up by way of counterclaim that the buyers were indebted to them in the sum of $18.33 for flour supplied on the buyers' order and not paid for, and asked payment of that sum. That the sellers were entitled to the $18.33 was not disputed, but the appellants said that, as the sellers had not drawn on the buyers for it, the sellers had no right, because of its not having been paid, to exercise the right of suspending deliveries or to refuse to make further deliveries under the contract. The appellants also alleged that the buyers had a claim against the sellers for $21 for overcharges on two of the shipments that were made, which they were entitled to set off against the $18.33.

There was no doubt that these overcharges were made, and that they were not justified by a suggested custom of the trade to make an additional charge when flour is shipped in small lots.

The trial Judge was of opinion that the $18.33 was due when payment of it was demanded, and that, being due when the order for the flour that was not delivered was received, it was open to the sellers to refuse to make further shipments; and on that ground the action was dismissed.

It appeared to have been overlooked at the trial that no such defence as had been given effect to was raised by the sellers in their pleadings—that the fact that the $18.33 had not been paid was set up only as ground for recovery of that sum upon the counterclaim.

The appellants were right also as to the set-off; this escaped the attention of counsel at the trial, and was not brought to the notice of the Judge.

The appellants were right also in their contention that, even if there had been no set-off, as the sellers had not drawn on the buyers for the $18.33, they were not in default as to it; that was in accordance with the contract and the terms of it.

The contract was for different quantities at different prices of three descriptions of flour, and it followed from this that, before the obligation of the sellers to ship arose, there must be an order or request from the buyers for what they required. It could scarcely have been intended that the sellers should have the option of sending the monthly quota made up of such quantities of each description of flour as they might choose, regardless of the buyers' requirements, especially as it was required, primarily at least, for use in the buyers' baking business. The wording of the contract supported this view: it was, not that the flour was to be delivered in equal monthly quantities, but that it was to be taken, by the buyers, in those quantities. The course of dealing was in accordance with that view.

If the buyers had a right to select the description of flour they wished to take in any month, the principle of the decisions in such cases as Brown v. Great Eastern R.W. Co. (1877), 2 Q.B.D. 406, 409, applied.

The contract, being for delivery by instalments and for payment for each instalment separately, was to be treated as practically a separate contract as to each instalment; and "the contract, so far as it applies to any particular instalment of the goods, is discharged where default has been made in the delivery or acceptance of the instalment. Accordingly the seller cannot afterwards claim to deliver the instalment, nor can the buyer demand it:" Halsbury's Laws of England, vol. 25, para. 377. But this is qualified: "The fact that the parties have silently omitted to enforce and to require the delivery of any instalment of the goods, or have by mutual consent forborne its delivery at the contract

time, is relevant, but not conclusive, to shew a mutual agreement to rescind the contract, so far as it applies to the instalment undelivered:" ib. If this was a correct view of the law, the buyers lost their right to require delivery to be made of the instalments which they failed to order in due time, unless from the dealings between the parties it could be properly inferred that there was either an agreement to postpone these deliveries or a waiver by the sellers of their rights under the contract; and there was nothing in the course of the dealings to warrant the drawing of either of these inferences—a perusal of the correspondence led to a contrary conclusion.

The first part of the qualifying proposition quoted from the Laws of England is not supported by the two cases cited: Higgin v. Pumpherston Oil Co. (1893), 20 R. (Ct. of Sess.) 532; Tyers v. Rosedale and Ferryhill Iron Co. (1875), L.R. 10 Ex. 195.

Apart from the question of there having been no proper demand for the delivery of the undelivered flour, the buyers were not entitled to call for delivery in a subsequent month of any instalment or part of an instalment in respect of which no order to ship was given in due time.

The buyers were entitled to the delivery of the 410 bags of flour for which the order of the 28th February, 1916, was given; and the onus was upon the sellers to shew that that right had been lost or waived by the buyers; but there was nothing in the evidence which would justify that conclusion. The fact that the order had been given and that the flour had not been shipped seemed to have been lost sight of by both parties; but that could not affect the buyers' right to damages for non-delivery; and the appellants were entitled to recover the difference between the contract-prices and the market-prices of the 410 bags which were ordered. The time for delivery having been by mutual consent extended until the 4th April, 1916—the date at which the damages should be ascertained was the 6th day of that month. The evidence did not shew what the market-prices were on that day.

The appeal should be allowed, and judgment should be entered for the appellants for damages for non-delivery of the 410 bags—the damages to be ascertained by a reference unless the parties should agree upon a sum.

The appellants having failed in their main contention, there should be no costs to or against them of the litigation throughout.

MACLAREN, MAGEE, and FERGUSON, JJ.A., agreed with the Chief Justice.

HODGINS, J.A., read a short judgment. He agreed in the result, but not in all the reasons of the Chief Justice.

Appeal allowed.

FIRST DIVISIONAL COURT. DECEMBER 26TH, 1917.

*COUNTY OF WENTWORTH v. HAMILTON RADIAL ELECTRIC R.W. CO.

Street Railway—Agreement with City Corporation—Privileges—Annual Payments to Corporation—By-law—Construction—Judgment in Former Action—Res Adjudicata—Question in Issue in this Action not Decided in Former—Discontinuance of Operation of Part of Line—Mileage Rate, whether Payable on Part not Operated—Obligation for Continuous Operation of whole Railway Deducible from Provisions of By-law—Damages for Breach of Obligation.

Appeal by the defendant company from the judgment of SUTHERLAND, J., 12 O.W.N. 379.

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

D. L. McCarthy, K.C., and A. H. Gibson, for the appellant company.

J. L. Counsell, for the plaintiff county corporation, respondent.

MEREDITH, C.J.O., reading the judgment of the Court, said that the action was brought to recover the amount of the annual instalments which the respondent corporation alleged were due to it under the terms of an agreement between the parties, dated the 19th June, 1905—the instalments sued for being those payable on the 1st January, 1915, 1916, and 1917.

By a by-law of the council of the respondent corporation, passed on the 10th June, 1905, the right, under certain conditions and subject to certain terms mentioned in the by-law, to construct, maintain, and operate a single-track electric railway on the Main street road from Sherman avenue to the Delta and on the King street road from the Delta easterly through Bartonville to the Saltfleet town-line, was granted to the appellant company; and by the agreement the appellant company covenanted to "perform, observe, and comply with all the agreements, obligations, terms, and conditions" contained in the by-law.

The compensation which the respondent corporation was to receive for the grant of the rights and privileges which it granted was provided for by para. 24 of the by-law, in sums of money to be paid according to mileage "of railway operated on the said county roads under this by-law."

The whole railway was constructed and operated until August, 1913, when the appellant company tore up its tracks from the Delta westerly to Sherman avenue, and it had since had no line between these points, but had continued to operate the remainder of its railway.

The appellant company had paid into Court the amount to which the respondent corporation was entitled for that part of the railway which was still in existence and operated by it. The contest was as to the obligation of the appellant company to pay for the whole distance covered by the grant made to it under the by-law.

The contention of the appellant company, so far as it depended on the meaning of para. 24 of the by-law, was well-founded.

What the appellant company obligated itself to pay was the agreed rate for every mile or pro rata for a portion of a mile of railway operated on the county roads under the by-law. The respondent corporation's contention would require that para. 24 should be read as providing for the payment for every mile or portion of a mile of the railway which the by-law gave authority to operate. According to the terms of the agreement, the appellant company was liable to pay the mileage rate only for the railway which it actually operated.

The appellant company was not estopped by the judgment in a former action between the parties from contesting its liability to pay for the whole mileage of the railway as constructed: County of Wentworth v. Hamilton Radial Electric R.W. Co. and City of Hamilton (1914-16), 31 O.L.R. 659, 25 O.L.R. 434, 54 S.C.R. 178. The question raised in this action was not in issue and was not raised or decided in the former action.

Reference to Howlett v. Tarte (1861), 10 C.B.N.S. 813, 827; Humphries v. Humphries, [1910] 1 K.B. 796, [1910] 2 K.B. 531, distinguishing it; Cooke v. Rickman, [1912] 2 K.B. 1125.

If, however, there was to be found in the by-law any provision the effect of which was to obligate the appellant company to operate the railway on the Main street road from Sherman avenue to the Delta and on King street from the Delta easterly to the Saltfleet town-line, the respondent corporation would be entitled to recover an equal sum as damages for the breach of that obligation.

Although there was in the by-law, in terms, no provision that the whole railway should be operated, the by-law did provide (para. 9), that the railway between the termini mentioned in the by-law should be constructed and operated before the 15th November, 1905; and (para. 13) that the company should place

and continue on the railway within the township of Barton, and from the township of Barton to the terminus of the railway in Hamilton, cars with all the modern improvements for the convenience of passengers and should run cars at certain times and intervals. "Terminus," as used in para. 13, meant the terminus for which the by-law provided, not any point which the appellant company might choose to make the terminus of its railway.

These provisions were, in substance and effect, provisions for the continuous operation of the whole railway, and the appellant company by its covenant became bound to operate it.

The appeal should be dismissed with costs, and the respondent corporation should have leave to amend by alleging as an alternative claim the cause of action in respect of which it was now held entitled to recover.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. DECEMBER 26TH, 1917.

*BRENNER v. CONSUMERS METAL CO.

Contract—Formation—Correspondence—Sale of Goods—Offer—Acceptance—Terms and Conditions—Shipment of Part of Goods—Impossibility of Shipping Remainder—Car-shortage—Repudiation by Vendor of Liability to Make Further Deliveries—Reasonable Time—Damages—Measure of—Difference between Contract-price and Market-price at Time of Breach and at Place of Delivery—Failure to Prove Damages—Nominal Damages—Costs.

Appeal by the plaintiffs from the judgment of DENTON, Jun. Co. C.J., dismissing an action brought in the County Court of the County of York, and tried without a jury, in which the plaintiffs sought to recover damages for the non-delivery of four car-loads of shrapnel turnings, in breach of an alleged contract for the sale by the defendant company, which carried on business in Montreal, to the plaintiffs, who carried on business in Toronto, of five car-loads of that commodity.

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

H. H. Shaver, for the appellants.

Gideon Grant, for the defendant company, respondent.

The judgment of the Court was read by MEREDITH, C.J.O., who said that, according to the statement of claim, the contract was formed by a letter of the 8th February, 1917, from the respondent company to the appellants, and an order from the appellants to the respondent company, dated the 9th February, 1917. The letter was: "We have five car-loads of shrapnel turnings which will be loaded in the course of the next two weeks. We can accept your order on these cars at $10 per gross ton Montreal." The order was: "No. 1650. We have purchased from Consumers Metal Company of Montreal, Quebec, the following: five carloads of shell steel turnings (this order is for shipment to the United States) $10 G.T. Montreal on railroads taking G.T.R. rates to Cincinnati. Terms 30 days' draft. Shipment to be made as follows: during the next two weeks load this material in open car equipment and consign same to N. Brenner & Company, Cincinnati, Ohio, routing Erie delivery. N. Brenner & Company."

It was clear that the letter and order did not constitute a contract. Apart from the question whether the letter was an offer which the appellants might have accepted—and that might be doubted—the parties were not ad idem, because the order embodied terms other than and different from those of the letter. At the trial, the plaintiffs (appellants) attempted to prove an oral acceptance of the terms proposed in the order; but, according to the view of the trial Judge, which counsel for the appellants failed to satisfy the Court was erroneous, that was not proved.

On the 13th February, 1917, the appellants telegraphed the respondent company: "Wire quick to-day whether or not you are shipping material per our order and letter 9th instant." The respondent company answered by telegram on the same day: "Will ship turnings, cars scarce and will depend on railroad." This telegram was followed by a letter of the same date, in which the telegram was quoted, and the respondent company said: "You understand the railroad conditions here are such that we are uncertain whether cars can be secured for loading for export but we will let you have the cars as fast as we can load same." To this the appellants assented.

A firm contract for the sale of the five cars of turnings, deliveries to be made as quickly as cars could be secured for the shipment of them from Montreal, consigned as the order provided for, was then concluded.

One car-load only was shipped; and, upon the evidence, the reason why the remaining four were not shipped was, that it was impossible to ship them from Montreal to the United States, as the contract required. It was also shewn that the respondent

company made honest efforts to get the railway companies to accept shipments in accordance with the terms of the contract, but was unable to induce them to do so.

In April, the appellants made demands for the immediate shipment of the undelivered turnings, and notified the respondent company that they would buy the turnings elsewhere if delivery were not made, and finally notified the respondent company, on the 18th April, that they had bought in four car-loads of turnings which they were applying on the contract, and charging the respondent company with the difference between the contract-price and the price they had paid.

But at this time the respondent company was not in default, for the car-shortage then still existed; and, but for the letters of the respondent company of the 16th and 20th April, denying any obligation to make further deliveries, this action must be considered to have been prematurely brought.

The trial Judge was of opinion that it was an implied term of the contract that unless the necessary shipping facilities should be available within a reasonable time, the obligation of the respondent company to deliver should be at an end. That view was supported by De Oleaga v. West Cumberland Iron and Steel Co. (1879), 4 Q.B.D. 472.

But a reasonable time had not elapsed when the respondent company repudiated liability to make further deliveries; and the respondent company was liable for the damages, if any, which resulted from its breach of the contract. The measure was the difference between the contract-price and the market-price of the turnings at the time the breach occurred, at Montreal, the place of delivery: Halsbury's Laws of England, vol. 25, para, 472, note (*i*).

The appellants gave no evidence as to the market-price at Montreal, but claimed to recover on the basis of the market-price at Toronto. There was no evidence as to the market-price at Montreal at the time the breach of the contract occurred, but it was shewn that the market-price there was lower than that at Toronto, and that it ranged from $8 to $11 a ton—the difference being due, no doubt, to the fact that the railway embargo existed at Montreal, but not at Toronto.

The appellants had failed to prove that they sustained any damages by reason of the respondent company's breach of its contract, and were entitled to nominal damages only: Valpy v. Oakeley (1851), 16 Q.B. 941; Griffiths v. Perry (1859), 1 E. & E. 680; Erie County Natural Gas and Fuel Co. v. Carroll, [1911] A.C. 105, 117, 118; Benjamin on Sale, 5th ed., p. 989.

The appeal should be allowed and judgment should be entered

for the plaintiffs for $1, and costs throughout on the Division Court scale, with the right to the respondent company to set off the difference between the costs on that scale and on the County Court scale, and to recover from the appellants the excess, less the costs to which they were entitled.

Order accordingly.

FIRST DIVISIONAL COURT. DECEMBER 26TH, 1917.

SANDWICH WINDSOR AND AMHERSTBURG RAILWAY v. CITY OF WINDSOR.

Company—Delegation of Powers Given by Charter—Company for Supplying Electricity—R.S.O. 1887 ch. 165—Conveyance of Property and Rights to Electric Street Railway Company—Limited Powers of latter Company—56 Vict. ch. 97, sec. 9—Sale or Lease of Surplus Electricity—Municipal Corporation—By-laws—Effect of—Extent of Rights and Powers of Street Railway Company—Right to Place Poles and Wires on Highways—Insufficient Evidence—New Trial.

An appeal by the Corporation of the City of Windsor, defendant, from the judgment of FALCONBRIDGE, C.J.K.B., at the trial, in favour of the plaintiff railway company.

Since the trial the parties had agreed upon a statement of facts, and upon the facts stated in it the appeal was to be determined.

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

E. D. Armour, K.C., for the appellant corporation.

A. R. Bartlet, for the plaintiff railway company, respondent.

MEREDITH, C.J.O., read the judgment of the Court. The respondent company, he said, was incorporated by an Act of the Legislature of Ontario; and by sec. 9 of a subsequent Act, 56 Vict. ch. 97, the company was empowered to construct, maintain, and operate works for the production of electricity for the motive power of the railway and for lighting and heating the cars, and to sell or lease any such electricity not required for the purposes named, to any person or corporation, and in that behalf should possess the powers, rights, and privileges conferred upon companies incorporated under the Act respecting Companies for Supplying

Electricity, R.S.O. 1887 ch. 165, and might acquire and hold any property necessary for the purposes mentioned.

On the 4th March, 1893, the People's Electric Company of Windsor Limited was incorporated under R.S.O. 1887 ch. 165, with the powers set forth in the Act. On the 28th November, 1892, a by-law, No. 764, was passed by the municipal council of the appellant corporation granting to the People's Electric Company, its successors and assigns, permission to erect and operate an electrical plant and system in the city of Windsor. On the 30th December, 1893, the respondent company obtained from the People's Electric Company a conveyance of the works and plant of that company, all its effects and assets, and the benefit of all agreements with the appellant corporation or any other municipality.

On the 27th June, 1896, a by-law was passed by the municipal council of the appellant corporation approving of the acquisition by the respondent company of the powers and privileges granted by by-law No. 764.

Acting under the authority of 56 Vict. ch. 97, sec. 9, and of this last by-law, as well as of the conveyance from the People's Electric Company, the respondent company had, ever since the by-law was passed, carried on the business of producing, selling, and distributing electricity for power and lighting purposes, and until shortly before the commencement of this action, which was begun on the 10th February, 1916, no question as to the right of the respondent company had been raised.

It was now contended by the appellant corporation that the conveyance by the People's Electric Company was ineffectual to vest in the respondent company the statutory powers which the People's company possessed. Subject to the question as to the effect of the by-law of the 27th June, 1896, this contention was well-founded. Powers given to a corporation by charter cannot be delegated or transmitted by the corporation: In re Woking Urban Council (Basingstoke Canal) Act 1911, [1914] 1 Ch. 300, 307, 317; Gardner v. London Chatham and Dover R.W. Co. (1867), L.R. 2 Ch. 201, 212.

Even assuming that the by-law operated as a re-grant of the rights and privileges that had been granted to the People's company, there remained the insuperable difficulty that the respondent company had not, by reason of the limitation imposed by sec. 9 of 56 Vict. ch. 97, i.e., the limitation of the disposal of the electricity to such as was not required for the motive power of the railway and for lighting and heating the cars, capacity or power to exercise those rights and privileges.

It was impossible, upon the material before the Court, to determine the extent of the rights of the respondent company to exercise the powers of a company incorporated under R.S.O. 1887 ch. 165. There was nothing to shew to what extent or in what circumstances surplus electricity was produced; nor was there anything to shew the nature or extent of the operations of the respondent company in selling or leasing its surplus power, nor anything which would enable the Court to determine whether the respondent company had the right to erect the poles which it was erecting on Janette and Bruce avenues when the action was begun; and it was undesirable, in the absence of evidence as to these matters, to express any opinion as to the extent of the rights of the respondent company to sell or lease electricity. Again, there was no evidence as to any authority to the company to use the highways of Windsor for the erection of poles and the stringing of wires.

For these reasons, no judgment ought now to be pronounced, but there must be a further trial in order to ascertain the facts.

SECOND DIVISIONAL COURT. DECEMBER 28TH, 1917.

*REX v. BAINBRIDGE.

Criminal Law—Indictment Found by Grand Jury for Seditious Libel—Demurrer—Motion to Quash—Amendment without Privity of Grand Jury—Defect in Proceedings—Verdict of Jury—Conviction—Refusal of Trial Judge to Reserve Case—Leave to Appeal Granted by Appellate Court—Direction to Judge to State Case.

Motion by the defendant for leave to appeal from a conviction for a seditious libel, and for a direction to the trial Judge, HODGINS, J.A., to state a case, which he had declined to do: see ante 218.

The motion was heard by MEREDITH, C.J.C.P., RIDDELL, SUTHERLAND, LENNOX, and ROSE, JJ.

R. T. Harding, for the defendant.

The Crown was not represented.

MEREDITH, C.J.C.P., in a written memorandum, said that the members of the Court (RIDDELL, J., dissenting) were of opinion

that leave to appeal should be granted; and that a case should be stated involving such questions as these:—

Should the demurrer to the indictment, or the motion to quash it, have been allowed?

If so, does the verdict make it good?

Could the amendments of the indictment which were made at the trial rightly have been made without the privity of the grand jury?

Should they have been made in any case?

Was there any such impropriety, or defect, in the proceedings at the trial, in any of these respects, that the prisoner should have been, or should be, discharged, notwithstanding the verdict?

HIGH COURT DIVISION.

MULOCK, C.J. EX. DECEMBER 24TH, 1917.

*NOBLE v. TOWNSHIP OF ESQUESING.

Municipal Corporations—Claim against Corporation for Loss of Sheep—Dog Tax and Sheep Protection Act, R.S.O. 1914 ch. 246, secs. 17, 18—Action under—Pleading—Statement of Claim—Cause of Action—Mandamus to Council.

Motion by the defendants to strike out the statement of claim, on the ground that it disclosed no cause of action.

The action was brought under the Dog Tax and Sheep Protection Act, R.S.O. 1914 ch. 246, as amended by 6 Geo. V. ch. 56, to recover the value of sheep killed by dogs.

The motion was heard in the Weekly Court, Toronto.

H. S. White, for the defendants.

J. M. Bullen, for the plaintiff.

MULOCK, C.J. EX., in a written judgment, said that in the claim for relief the plaintiff asked for payment of $835 damages or for a mandamus directing the defendants' council to award and pay to him the amount of his damages, as found by valuers, or for a mandamus directing the defendants to award and pay to the plaintiff the amount of damages sustained by him, as provided by sec. 18 (as amended), or for a mandamus requiring the defendants to carry out the provisions of the Act.

The question was, whether the allegations contained in the statement of claim shewed the plaintiff to be entitled to the relief claimed or any part of it. The plaintiff had no cause of action except such as the Act gave him.

Reference to sec. 17 and sec. 18 (as amended).

The defendants, relying on Re Hogan v. Township of Tudor (1915), 34 O L.R. 571, contended that the plaintiff had no cause of action. It was decided in that case merely that the amount of damages must be determined in manner provided by the Act, and not by the Court.

The plaintiff alleged in the statement of claim that, within the time mentioned in sec. 18, he applied to the council for compensation, and satisfied the council that he had made diligent search and inquiry to ascertain the owner or keeper of the dog or dogs, "without result." Having regard to the context, the words "without result" should be interpreted as meaning that "the owner or keeper . . . cannot be found" (sec. 18). It would be better pleading if the plaintiff followed the words of the statute, and he should have leave to amend, if he desired it.

On being thus satisfied, it became the duty of the council to award for compensation to the plaintiff a sum equal to the amount of his damage.

The direction to the council to award compensation is mandatory. The council, not having obeyed the statute, may be required by mandamus to do so, and therefore to that extent the plaintiff is entitled on his pleading to relief.

Motion dismissed with costs.

CLUTE, J. DECEMBER 26TH, 1917.

*MURPHY v. CITY OF TORONTO.

Evidence—Workmen's Compensation Act—Contractor—Assessment—Leave to Adduce Further Evidence after Judgment—Leave to Serve Third Party Notice on Workmen's Compensation Board—Refusal of—Practice—Parties—Board not Amenable to Jurisdiction of Court.

Motion by the defendants for leave to adduce further evidence "that the Workmen's Compensation Board duly made an assessment on the plaintiff, and gave notice of the same to the plaintiff,

and demanded payment from him of the amount of the said assessment, and, in default of payment by the plaintiff, duly required the amount of the said assessment from the defendant; and for an order extending the time for service of the third party notice upon the said Workmen's Compensation Board as third parties in this action, and for stay of judgment and execution in this action until the issues between the defendants and the said Workmen's Compensation Board as third parties shall have been determined.

The motion was heard in the Weekly Court at Toronto.
Irving S. Fairty, for the defendants.
F. J. Hughes, for the plaintiff.

CLUTE, J., in a written judgment, said that judgment was given in this case on the 24th November last, for the plaintiff for $2,230.20, with a stay for one month to enable the parties, with the sanction of the Board, if that could be obtained, to ascertain and adjust the differences between them and the Board: see ante 212, 213.

No adjustment was made; and this motion was now launched on the part of the defendants to open the case and for leave to extend the time for giving notice to the Workmen's Compensation Board as third parties.

As was pointed out in the judgment, the defendants were invited by the learned Judge to produce the evidence now sought to be given, but without effect. In support of the present application, certain copies from the books of the Board were now produced, but the evidence as therein indicated was still incomplete to shew that the requirements of the Act by the Board had been complied with so as to entitle them to recover from the plaintiff the amount said to be due to the Board or to justify the defendants in paying over that amount to the Board as indebtedness of the defendants to the plaintiff.

Nevertheless, it was desirable that the facts of the case should be obtained, if they could be obtained, to shew that a valid assessment was made by the Board upon the plaintiff, and that, in default, the defendants properly paid over the amount due the plaintiff, to the Board. To that extent the motion should be granted; the defendants to pay to the plaintiff the costs of this motion and the costs incident to the taking of such further evidence and further trial of the action, in any event of the cause. Both parties to expedite a further hearing of the case.

With respect to that portion of the motion to extend the time

for service of the third party notice upon the Workmen's Compensation Board as third parties in this action, there was insuperable difficulty in the defendants' way.

The application was too late; the trial had taken place. No case could be found where the defendant had been permitted at this stage of the case to give notice.

The plaintiff did not consent, but there was a still greater difficulty in this, that the Workmen's Compensation Board is in a sense a branch of the Government. Their action within the purview of the statute was not open to review in this Court, nor could they be brought before this Court to answer any claim for anything done under the statute.

Upon both grounds, that part of the defendants' motion should be refused with costs.

CUNNINGHAM v. KELLY—BRITTON, J.—DEC. 24.

Mortgage—Validity—Omission of Date—Another Mortgage Assigned to Mortgagee—Collateral Security—Re-assignment Directed upon Payment of Claim—Counterclaim—Costs.]—Action to recover $1,000 secured by a mortgage of land, and, in default of payment, for foreclosure. The mortgage was given to secure the payment of certain promissory notes upon which moneys had been advanced by the plaintiff to the defendant. The defendant disputed her liability upon the mortgage. The action was tried without a jury at Kingston. BRITTON, J., in a written judgment, said that the mortgage was not invalidated by reason of the day of the month on which it was executed being omitted. It appeared that the plaintiff had brought an action against the defendant upon a mortgage for $1,600, assigned by the defendant to the plaintiff, to which mortgage the mortgage now sought to be enforced was collateral. The question of liability should be determined in favour of the plaintiff; and there should be judgment for the plaintiff, with costs, for the amount of the mortgage sued upon, $1,000, and interest, with a declaration that this mortgage is collateral to the assignment of the John Kelly mortgage, and that, upon payment of the amount due in respect of the mortgage sued upon, the John Kelly mortgage should be re-assigned by the plaintiff to the defendant or her assigns or nominee. The counterclaim of the defendant, except so far as allowed by the above declaration, should be struck out without costs. J. L. Whiting, K.C., for the plaintiff. A. Cohen, for the defendant.