The

Ontario Weekly Notes

Vol. XV. TORONTO, OCTOBER 25, 1918. No. 7

APPELLATE DIVISION.

Second Divisional Court. October 15th, 1918.

SELLERS v. SULLIVAN.

Will—Testamentary Capacity—Undue Influence—Circumstances Surrounding Preparation and Execution of Document Propounded as Will—Suspicion—Evidence—Onus—New Trial.

Appeal by the defendants Maria Sullivan and George Garniss from the judgment of Masten, J., 12 O.W.N. 365, in favour of the plaintiffs, in an action to establish a certain testamentary writing as the last will and testament of Thomas Garniss, deceased.

The appeal was heard by Mulock, C. J. Ex., Clute, Riddell, Sutherland, and Kelly, JJ.

Hugh Guthrie, K.C., S.-G. Can., for the appellants.

William Proudfoot, K.C., for the defendant Joseph J. Sellers, respondent.

R. Vanstone, for the plaintiffs, respondents.

Mulock, C.J. Ex., read a judgment in which he said that the document propounded by the executors was dated the 10th August, 1916; by it the testator purported to give Joseph J. Sellers, one of the executors, plaintiffs, and in his individual capacity a defendant, $6,000, to his niece Elizabeth Brewer $100, and the remainder of his estate to his brother George Garniss and his sister Maria Sullivan in equal shares. Sellers was married to a niece of the testator, who was a bachelor. He died on the 13th August, 1916, at the age of 85. His estate was of the value of between $10,000 and $12,000. The testator had made two wills of earlier dates than the one propounded. By the later of the two he bequeathed his whole estate to his brother and

sister in equal shares. The brother and sister, the now appellants, alleged that the will was not duly executed; that the testator was, on the 10th August, 1916—three days before his death—incompetent to make a will; and that the execution of the document was procured by the fraud and undue influence of Joseph J. Sellers.

The learned Chief Justice reviewed the evidence with great care, and referred to and quoted from the leading authorities.

He then said that the evidence shewed that the alleged will was prepared in circumstances which raised a well-grounded suspicion that it did not express the mind of the deceased. The onus was on the plaintiffs to remove that suspicion by satisfying the Court that the document propounded was an expression of the free will of a competent testator. That suspicion not having been removed, the onus had not been discharged, and those opposing probate were not bound to establish fraud.

The judgment below dealt with the issue of fraud only. There might be an absence of fraud, but there were such suspicious circumstances that the conscience of the Court was not satisfied that the paper propounded was a correct expression of the testator's intentions.

The judgment should be set aside, and there should be a new trial if desired by the plaintiffs or either of them or by Elizabeth Brewer; otherwise the appeal should be allowed and the action be dismissed without costs, except those of the executors, which should be paid out of the estate.

Clute, J., agreed with Mulock, C.J. Ex.

Sutherland, J., agreed in the result stated by Mulock, C.J. Ex.

Riddell, J., was of opinion, for reasons briefly stated in writing, that the judgment should not be reversed, but that there should be a new trial, and that the costs of the appeal and of the former trial should be costs in the cause.

Kelly, J., also read a judgment. He was of opinion that there should be a new trial; he did not deal with the question of costs.

Order for a new trial in the terms stated by the Chief Justice.

SECOND DIVISIONAL COURT. OCTOBER 15TH, 1918.

SHERWOOD v. SHEEHY.

Contract—Agreement to Lend Money—Mortgage of Land—Building Loan—Terms of Arrangement—Money not to be Advanced until Building Commenced and Progress Made.

Appeal by the plaintiff from the judgment of the Judge of the County Court of the County of Peterborough.

The action was for damages for breach of a contract to lend money.

The County Court Judge gave judgment for the plaintiff for $25 without costs.

By the appeal the plaintiff sought to increase the amount and to be awarded costs.

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

J. G. Guise-Bagley, for the appellant.

Daniel O'Connell and J. R. Corkery, for the defendant, respondent.

The judgment of the Court was read by MULOCK, C.J.Ex., who said that the plaintiff alleged that the defendant agreed to lend him $2,000 on the security of a mortgage of land, for the purpose of enabling the plaintiff to erect houses thereon; that the plaintiff executed a mortgage in favour of the defendant securing payment of $2,000 and interest, whereupon the defendant advanced $200, but refused to advance the balance; that, relying upon the agreement, the plaintiff purchased a portion of the material to be used in the erection of the houses, but before the commencement of building operations the defendant refused to advance any more money, and, in consequence of such refusal, the plaintiff was unable to utilise the material or proceed to build; that the material purchased and lying unused had deteriorated in value and the cost of building had increased; and that the plaintiff had thus been damnified.

The defence was, that the land was a vacant lot and not adequate security for $2,000; that the plaintiff, a builder and contractor, contemplated erecting houses on the land; that it was agreed between the parties that the defendant should advance $200, part of the $2,000, forthwith upon the execution of the mortgage, but that the balance was to be advanced only in such

sums from time to time as the defendant should deem proper, having regard to the progress of the work, its value, and the cost of completing the houses; that the plaintiff made default in building the houses, not having even commenced their erection; and that, therefore, no further money ever became payable.

The County Court Judge found that the mortgage was intended to be a building mortgage, though it was absolute in form, and that the mortgage-moneys should be advanced as the building progressed, to the extent of $2,000.

The learned Chief Justice said that this finding negatived the plaintiff's contention that the payment of the money was to precede the work of construction; and he construed it as meaning that the actual work of construction must have been commenced and some progress made before any money became payable by the defendant. The work not having been commenced, no money became payable.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. OCTOBER 15TH, 1918.

*MORRAN v. RAILWAY PASSENGERS ASSURANCE CO. OF LONDON ENGLAND.

Insurance (Accident)—Total Disability Claim—Cause of Injury—Assault—"External Force"—Voluntary or Unnecessary Exposure—Change of Occupation—Immateriality in Regard to Risk—Question of Fact—Finding of Trial Judge—Insurance Act, sec. 156(6)—Renewal of Policy.

Appeal by the defendants from the judgment of LENNOX, J., 13 O.W.N. 358.

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

Wallace Nesbitt, K.C., for the appellants.

T. N. Phelan, for the plaintiff, respondent.

SUTHERLAND, J., in a written judgment, said, after setting out the facts, that the trial Judge had come to the definite conclusion, upon conflicting evidence, that the disability from which the plaintiff suffered began on the 15th October, 1915, and that pre-

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

viously he had enjoyed good health, and was a sound and capable man.

The learned Judge sitting in appeal was quite unable, after a careful perusal of the evidence, to arrive at the conclusion that the finding was erroneous; but, even if the plaintiff's heart had been affected by some trouble before the assault upon him by one Atkinson, which was the "accident" causing disability, the plaintiff, being ignorant of the heart affection, was still in a position to maintain that his disablement resulted "directly, independently, and exclusively of all other causes" from the assault (accident): Fidelity and Casualty Co. of New York v. Mitchell, [1917] A.C. 592.

It was also contended on behalf of the defendant that the injury sustained by the plaintiff was not the result of accident at all, but that he voluntarily entered into a fight with Atkinson or voluntarily continued it after it had temporarily ceased. Upon this point the finding of the trial Judge in favour of the plaintiff was fully warranted by the evidence.

Again, it was urged on behalf of the defendants that there was a warranty as to the occupation of the plaintiff, and, as he had changed from a less to a more hazardous one, this avoided the policy. By the terms of clause 11 of the warranties, however, a change of occupation was contemplated by the parties to the contract, and a provision made for the recovery of a different amount by way of compensation, in case of injury received in any occupation or exposure classed by the defendants as more hazardous. It was clear that the accident to the plaintiff did not occur while he was engaged in the occupation of drover; and, in these circumstances, the effect contended for could not be given to the warranty.

As to the question of the materiality of the change in occupation, sec. 156, sub-sec. 6, of the Ontario Insurance Act, R.S.O. 1914 ch. 183, applied. The question of materiality was for the trial Judge, who had found that the interim change of occupation or the failure to declare it at the date of the renewal was not a circumstance material to the defendants or affecting the extent of the risk they undertook: Strong v. Crown Fire Insurance Co. (1913), 29 O.L.R. 33, at pp. 55 et seq.

The appeal failed on all grounds, and should be dismissed.

MULOCK, C.J.Ex., agreed with SUTHERLAND, J.

CLUTE and KELLY, JJ., agreed in the result, for reasons stated by each in writing.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. OCTOBER 16TH, 1918.

GOUINLOCK v. MACLEAN.

Architect—Work and Services in Erection of Building—Contract—Remuneration—Work Taken out of Architect's Hands during Progress of Work—Recovery on Quantum Meruit Basis—Negligence and Incompetence—Counterclaim—Appeal—Costs.

Appeal by the defendant from the judgment of BRITTON, J., 14 O.W.N. 142.

The appeal was heard by MULOCK, C.J. Ex., RIDDELL, SUTHERLAND, and KELLY, JJ.

A. McLean Macdonell, K.C., and J. S. Duggan, for the appellant.

R. S. Robertson, for the plaintiff, respondent.

THE COURT varied the judgment below by allowing the defendant $101.07 on his counterclaim in respect of a sum paid by the defendant to the municipal authorities for damage to a water-pipe; this sum to be deducted from the sum awarded to the plaintiff by the judgment below. All the other items of the counterclaim disallowed, and, with this exception, the appeal dismissed with costs to the plaintiff, but from the plaintiff's costs $50 to be deducted, success being divided.

SECOND DIVISIONAL COURT. OCTOBER 18TH, 1918.

*RYAN v. WILLS.

Company—Directors—Personal Liability to "Labourers, Servants, and Apprentices"—Companies Act, R.S.O. 1914 ch. 178, sec. 98—Actress Employed by Theatrical Company.

An appeal by the plaintiff from the judgment of DENTON, Jun. Co. C.J., dismissing an action brought in the County Court of the County of York by an actress who was employed by the Canadian National Features Limited, an Ontario company, to recover from the defendants, as directors of the company, the amount of a judgment obtained by her against the company for wages: sec. 98 of the Ontario Companies Act.

The appeal was heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and KELLY, JJ.

R. T. Harding, for the appellant.

M. H. Ludwig, K.C., B. W. Essery, T. R. Ferguson, F. E. O'Flynn, and Gideon Grant, for several of the defendants, respondents.

THE COURT dismissed the appeal with costs, being of opinion that the case was not distinguishable from Welch v. Ellis (1895), 22 A.R. 255.

HIGH COURT DIVISION.

FALCONBRIDGE, C.J.K.B., IN CHAMBERS. OCTOBER 15TH, 1918.

REX v. CONDOLA.

Ontario Temperance Act—Magistrate's Conviction for Offence against sec. 41—Having Intoxicating Liquor in Place other than "Private Dwelling-house"—"Occupant"—Husband and Wife.

Motion to quash the conviction of John Condola by the Police Magistrate for the Town of Sudbury for unlawfully having intoxicating liquor in a place other than his private dwelling-house: sec. 41 of the Ontario Temperance Act, 6 Geo. V. ch. 50.

T. M. Mulligan, for the applicant.

Edward Bayly, K.C., for the Attorney-General.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that he was unable to agree with the magistrate's view that the defendant's wife was to be held to be *the* occupant of the house.

Reference to Rex v. Irish (1909), 18 O.L.R. 351; Kavanagh v. Barber (1891), 12 N.Y. Suppl. 603; Hamilton v. City of Fond du Lac (1870), 25 Wis. 496.

The occupant is the one who has actual use or possession of a thing—the husband is the owner and has actual use and possession.

The conviction should be quashed without costs, and with the usual order protecting the magistrate.

ROSE, J. OCTOBER 15TH, 1918.

*RE HUGHES.

Trusts and Trustees—Reference to Fix Compensation of Trustees for Care, Pains, Trouble, and Time Expended in Respect of Part of Trust Estate—Trustee Act, sec. 67—Scope of Reference—Scale of Allowance Fixed by Surrogate Court with Regard to other Parts of Estate—Quantum of Allowance—Percentage—Reasonable Sum.

Appeal by the Toronto General Trusts Corporation from the report of the Master in Ordinary upon a reference directed by MIDDLETON, J. (Re Hughes (1918), 42 O.L.R. 345), to fix the compensation to be allowed to the corporation "for its care, pains, trouble, and time expended in and about realising, managing, administering, disposing of, and settling the affairs of the trust in so far as the same relates to the portion of the trust represented in" the mortgage dealt with in the order, "including the transfer of the said mortgage to the Accountant of this Court, for which the said trustee has not been compensated." The report fixed the compensation at $1,000.

The appeal was heard in the Weekly Court, Toronto.
W. N. Tilley, K.C., for the appellants.
F. W. Harcourt, K.C., for the infant cestuis que trust.
M. H. Ludwig, K.C., for the adult cestuis que trust.

ROSE, J., in a written judgment, said that the first ground of appeal was that the Master exceeded his powers in that he inquired into matters antecedent to the transfer of the mortgage to the Accountant. Effect could not be given to this ground of appeal without doing violence to the language of the order of reference.

The second ground was, that the Judges of the Surrogate Court had already decided that the remuneration ought to be upon a certain scale applied by them in passing the accounts of the trustees' dealings with the other portions of the estate; and that, if the matter was not res judicata, there was at least the opinion of a competent Court, which ought to be followed. This ground failed upon the facts.

The third ground was that the compensation was inadequate. The learned Judge said, after reviewing the evidence, that the compensation ought to be allowed upon the footing of what an ordinarily careful and competent trustee was entitled to receive.

Reference to Re Berkeley's Trusts (1879), 8 P.R. 193; Re Farmers Loan and Savings Co. (1904), 3 O.W.R. 837; Re McIntyre, McIntyre v. London and Western Trusts Co. (1904), 7 O.L.R. 548; Re Griffin (1912), 3 O.W.N. 759, 1049, 3 D.L.R. 165; Re Smith (1916), 38 O.L.R. 67; Re Fleming (1886), 11 P.R. 272; Re Toronto General Trusts Corporation and Central Ontario R.W. Co. (1905), 6 O.W.R. 350.

What was being dealt with in this matter was an estate of considerable size, handled by the trustees with all due care and skill. They had been allowed compensation—the proper compensation, it must be assumed—for their care, pains, trouble, and time (see the Trustee Act, R.S.O. 1914 ch. 121, sec. 67) down to a certain period, but in respect of a part only of the estate, or, it might be said, upon the basis of the estate being less by $260,000 (the amount of the mortgage) than it really was; and the question for determination was: how much more should be allowed in respect of the parts of the estate and of the services that were left out of consideration in the Surrogate Court.

It was strongly urged upon the argument that the orders of the Surrogate Judges established a precedent which ought to be followed, and that 3 per cent. should be allowed upon the $260,000 and 5 per cent. upon the interest collected and disbursed, and perhaps also an annual fee. But that, having regard to all the circumstances, would be an unreasonable amount. The fixing of any sum is more or less arbitrary—it must necessarily be so, even if what is done is merely to fix the rate of "commission" which should be allowed. The learned Judge said that he had tried to fix upon a sum which, added to what was allowed in the Surrogate Court, would, on the one hand, serve as a recognition of the faithful administration of a trust of considerable magnitude, but of comparative simplicity, and, on the other hand, would not be more than reasonable cestuis que trust ought to be content to pay. On that basis, $4,000 would be a proper allowance.

The appeal should be allowed and the amount allowed to the appellants as compensation should be increased to $4,000. Costs of the trustees and of the Official Guardian should come out of the trust estate.

LENNOX, J. OCTOBER 15TH, 1918.

*RANDALL v. SAWYER-MASSEY CO. LIMITED.

Sale of Goods—Contract for Sale of Motor-truck—Knowledge of Vendor of Purpose of Purchaser—Article Delivered not Reasonably Fit for Purpose—Finding of Trial Judge on Evidence—Truck Sold by Manufacturer not of his own Manufacture—Implied Warranty—Property in Truck not Passing to Purchaser until Payment in Full—Right of Purchaser to Rescind—Return of Money Paid and Promissory Notes—Interest.

Action for the rescission of a contract for the purchase by the plaintiffs and sale by the defendants of a motor-truck, for the return of moneys paid by the plaintiffs, and for damages.

The defendants counterclaimed for the amounts due upon promissory notes made by the plaintiffs and for repairs.

The action and counterclaim were tried, without a jury, in Toronto.

R. McKay, K.C., and H. Howard Shaver, for the plaintiffs.

S. F. Washington, K.C., and Kirwan Martin, for the defendants.

LENNOX, J., in a written judgment, said that the plaintiffs were under contract to carry liquid air from Toronto to Hamilton, and required a 5-ton motor-truck to be used in their business as carriers. The defendants were informed of the purposes for which the truck was required and the character of the work it would be put to, and must be taken to have been aware of the character of the highways in 1917. On the 12th April, 1917, the plaintiffs and defendants signed an agreement for the purchase of a truck by the plaintiffs from the defendants for $5,600. The truck was delivered and put into operation on the 18th April, and was constantly used thereafter, except when it was being repaired, until it was returned to the defendants on the 2nd November, 1917, and in that time it had travelled about 11,000 miles. The plaintiffs complained that the truck was not reasonably fit for the purpose for which both parties intended it to be used; and whether it was so or not was the issue presented.

Reference to Bristol Tramways etc. Carriage Co. v. Fiat Motors Limited, [1910] 2 K.B. 831; Canadian Gas Power and Launches Limited v. Orr Brothers Limited (1911), 23 O.L.R. 616, 621; Albastine Co. of Paris Limited v. Canada Producer and Gas Engine Co. Limited (1914), 30 O.L.R. 394.

Aside altogether from the question whether what the defendants

delivered could be properly described as a 5-ton truck—as to which the learned Judge had not been able to come to a definite conclusion—he was of opinion, upon a review of the evidence, that, taking into account the character and requirements of the plaintiffs' business, the specific daily journey to be made, the time reasonably available for making it, and generally the surrounding circumstances, including the object of the purchase, the truck, with careful supervision and efficient operation, was not, at the time of delivery or afterwards at any time, reasonably fit for the purpose for which it was intended.

The contract was for a "Sawyer-Massey" truck, and it appeared, towards the end of the trial, that the truck delivered was a Stegeman truck, built for the defendants by the Stegeman Company, and sold under the defendants' name. Every word of the written contract was in conflict with the proposition that the plaintiffs agreed to purchase the product of a foreign manufacturer. In the absence of specific words in the contract to the contrary, there is an implied warranty, in the nature of a condition or undertaking, where the vendor is a manufacturer, that the goods are of his manufacture: Johnson v. Raylton (1881), 7 Q.B.D. 438.

There had been no change of ownership, the property in the truck had not passed; of the 12 promissory notes given by the plaintiffs on account of the price, 8 were unpaid.

There should be judgment for the plaintiffs declaring that the plaintiffs were entitled to rescind the contract, and for recovery of the several sums of money, both principal and interest, paid by the plaintiffs, with interest on the total of each payment from the date of payment, and for delivery up of the promissory notes in the defendants' hands for cancellation, with the costs of the action, and dismissing the counterclaim with costs.

LENNOX, J. OCTOBER 15TH, 1918.

HEIGHINGTON v. CITY OF TORONTO.

Assessment and Taxes—Sale of Land for Arrears of Taxes—Assessment Act, R.S.O. 1914 ch. 195, sec. 22—Ownership of Land—Illegal Assessment—Duty of Assessor—Inquiry—Knowledge of City Council—Necessity for Substantial Compliance with Statutory Provisions—Sale Set aside.

Action for a declaration that an alleged sale of parts of certain lands of the plaintiffs for taxes was illegal, and to restrain the defendants, the Corporation of the City of Toronto, from carrying it out by conveyance.

The action was tried without a jury at a Toronto sittings.
A J. Russell Snow, K.C., for the plaintiffs.
Irving S. Fairty, for the defendants.

LENNOX, J., in a written judgment, said that he was of opinion that the land was not legally assessed under the provisions—particularly as to ownership—of sec. 22 of the Assessment Act, R.S.O. 1914 ch. 195. It was not a question whether the assessor made "diligent inquiry" and assessed the property "according to the best information to be had;" it was not pretended that he made any inquiry; nor was further inquiry necessary, for the municipal council had the fullest information as to the title; it was fully registered; and knowledge of the ownership of these lots was directly brought home to the defendants by expropriation proceedings by which the defendants acquired 20 feet of each lot.

Statutes confering rights must be strictly construed, and there must be substantial if not rigid compliance by the parties benefited by them.

The taxes for 1913 were paid on the 15th June, 1917; payment was accepted and was recognised and acted on at the sale and otherwise. A municipal treasurer cannot legally accept taxes after the lands have been advertised for sale; and, as a matter of construction and law, the payment was made before the lands were "advertised" within the meaning of the statute. Assuming that to be so, it did not go to the root of the matter. The substantial question was, whether there were taxes three years in arrear at the time of sale, and it appeared that the taxes for 1914 were so in arrear.

There should be judgment for the plaintiffs as claimed, with costs.

MASTEN, J. OCTOBER 16TH, 1918.

*WADE v. JAMES.

Assignments and Preferences—Assignment for Benefit of Creditors—Sale of Goods Belonging to Insolvent Estate by Assignee to Creditor—Inspector of Estate—Constructive Trustee—Resale at Profit—Right of Assignee to Account of Profits—Proof that Goods Sold and Delivered and Purchasers Solvent—Defence in Law—Inability of Creditor-inspector to Recover from Purchasers.

Appeal by the defendants from a report of the Master in Ordinary.

The action was brought by the assignee for the benefit of creditors of Krieger Brothers, insolvents, for an account.

The defendant Philip James was a member of a partnership known as the Toronto Clothing Manufacturing Company, creditors of the insolvent, and was an inspector of the estate of the insolvents. He bought from the plaintiff the stock of goods of the insolvent estate for $3,587, and, contemporaneously, sold it to the wives of the insolvents for $5,500—$1,500 cash and $4,000 secured by promissory notes from the purchasers.

By the judgment in the action the defendants were directed to account for the profit made or to be made by the defendants out of the transaction.

The Master found that the defendants' profit amounted to $1,739.25; and the appeal was from that finding.

The appeal was heard in the Weekly Court, Toronto.

I. F. Hellmuth, K.C., for the defendants.

A. C. McMaster, for the plaintiff.

MASTEN, J., in a written judgment, said that the defendants contended that no profit was made or to be made, because no recovery was possible by the defendants against the purchasers, citing Hochberger v. Rittenberg (1916), 36 D.L.R. 450, 452, and Grant v. Gold Exploration and Development Syndicate Limited, [1900] 1 Q.B. 233.

The plaintiff referred to Day v. Day (1889), 17 A.R. 157; Shaw v. Jeffery (1860), 13 Moore P.C. 432, 455.

When Philip James, being an inspector, received the stock of goods of the insolvent estate, he became a constructive trustee, but that did not prevent him from selling the goods, and he did sell and deliver them, and his action against the purchasers would be for the price of goods sold and delivered. The goods had been

actually received and disposed of by the purchasers, and the purchasers would be unable to set up any defect in the title of their vendor.

The learned Judge said that he could not see how the purchasers could, as a matter of law, successfully defend an action for the recovery of the price they agreed to pay. But there was no evidence in fact to meet the plaintiff's prima facie case. The plaintiff proved that the goods were sold and delivered and that the purchasers were solvent. That was sufficient to render the defendants prima facie liable to account for the profit which they, as constructive trustees, made in the transaction. The dismissal of the defendants' action on the notes made by the purchasers established nothing. They did not prove that, as a term of the consent given by them to the dismissal of their action, they were not contemporaneously paid in full, or that arrangements were not made by which they would thereafter be paid in full. The plaintiff's prima facie case compelled the defendants to negative these suggestions.

Appeal dismissed with costs.

MASTEN, J. OCTOBER 16TH, 1918.

*HENDERSON v. STRANG.

Company—Action by one Shareholder to Set aside Transactions between Company and Principal Shareholder—Style of Cause—Amendment—Plaintiff Suing in Representative Capacity—Status of Plaintiff—Complaint that Shares of Principal Shareholder not Paid-up—Agreement Made between Company and Principal Shareholder—Improvidence—Consideration—Cheque—Election of Directors—Board Remaining in Office—Loan of Money by Company to Shareholder—Ultra Vires—Companies Act, R.S.C. 1906 ch. 79, sec. 29, sub-sec. 2—Ownership of Shares—Share-register—Partnership not a Separate Entity—Restoration of Money to Company—Notice of Meeting of Shareholders—Plaintiff Represented by Proxy—Ratification of Agreement—Costs.

Action by Mary H. Henderson against William Strang, William Strang & Son, and J. B. Henderson & Company Limited, for relief in respect of transactions between the defendants the Strangs and the defendant company in which the plaintiff was a shareholder.

The action was tried without a jury at a Toronto sittings.

I. F. Hellmuth, K.C., and Grayson Smith, for the plaintiff.

D. L. McCarthy, K.C., and A. W. Langmuir, for the defendants.

Masten, J., in a written judgment, said that the plaintiff sued as a shareholder of J. B. Henderson & Company Limited—a company incorporated under the laws of Ontario. She was the holder of 10 shares of stock of the nominal value of $1,000, fully paid. According to the style of cause, the plaintiff sued individually, and not on behalf of other shareholders. The plaintiff should be at liberty, if she so desired, to amend and claim in a representative capacity.

There were 6 distinct claims made in the action:—

(1) That 510 shares of the capital stock of the defendant company, duly applied for and allotted to the defendant William Strang, had not been paid-up, though calls of $100 per share had been duly made thereon.

These shares were paid-up in full, though not in cash: the cheque of William Strang was legally accepted in payment of the shares. And, besides, the plaintiff could not maintain an action for recovery of a balance due from a shareholder to the company in respect of his shares—the company would be the only proper plaintiff: Burland v. Earle, [1902] A.C. 83; Allen v. Hyatt (1914), 17 D.L.R. 7 (P.C.); Bennett v. Havelock Electric Light Co. (1911), 25 O.L.R. 200.

(2) That a certain agreement of the 24th August, 1910, made between the defendant company and the Strangs was ultra vires of the company because improvident.

The evidence as to improvidence was conflicting; and, in any case, improvidence is not a ground upon which such an agreement can be attacked by a shareholder; the attack can be upon the ground only that the agreement is fraudulent and a fraud upon the shareholder, and no such case was made out here.

(3) That there was no consideration to the company for the agreement.

As a fact there was consideration: the cheque of William Strang, when transmitted to William Strang & Co., was used to the advantage of the company and constituted a consideration.

(4) That, since the 24th August, 1910, there had been no proper board of directors to manage the affairs of the defendant company; and its acts since that date were illegal.

The board of directors was properly elected on the 24th August, 1910, and there continued to be a proper board from that time on: the directors then elected remained effectively in office.

(5) That the agreement of the 24th August, 1910, was ultra vires by reason of the fact that it constituted a loan of money by the company to one of its shareholders, in contravention of sec. 29, sub-sec. 2, of the Companies Act, R.S.C. 1906 ch. 79.

The learned Judge agreed with this contention: he did not agree with what was urged by the defendants, that the 510 shares were in reality the property of William Strang & Son, not of William Strang. The share-register of the company must govern. But in any case the partnership was not an entity; it was not a corporation; the name "William Strang & Son" was the short name of William Strang and others carrying on business in partnership. In English law, a firm is not a person: Rex v. Holden, [1912] 1 K.B. 483, 487; Sadler v. Whiteman, [1910] 1 K.B. 868, 889. When the loan was made to "William Strang & Son" it was made to William Strang along with his partners, and came within the prohibition of sec. 29, sub-sec. 2. Further, the deposit of the money with William Strang & Son constituted a lending of the money to the firm. The plaintiff was in a position to maintain the action upon this ground, and to ask for a decree directing the restoration to the company of its property disposed of under an agreement which was ultra vires: Russell v. Wakefield Waterworks Co. (1875), L.R. 20 Eq. 474, at p. 481.

(6) That the agreement never became binding because the plaintiff received no adequate notice of the meeting of shareholders of the 24th August, 1910, at which it was approved.

The minutes of the meeting shewed that the plaintiff was present by proxy at that meeting and approved of the ratification of the agreement.

There should be judgment declaring that the loan of $51,000 made by the defendant company to William Strang & Son was illegal, restraining the company from acting further under the agreement of the 24th August, 1910, and directing the defendants William Strang & Son to repay to the company the $51,000 with interest at 5 per cent from the date when it was received and with the general costs of the action; the defendants to have the costs of the issues upon which they succeeded, to be set off against the plaintiff's costs.

MEREDITH, C.J.C.P. OCTOBER 19TH, 1918.

*RE HOMAN AND CITY OF TORONTO.

Municipal Corporations—Gift of Money to "Catholic Army Huts" —Resolution of City Council—Ultra Vires—Resolution Passed in 1918—Money Payable in 1919—Statutory Powers of Councils—"Aid to any Charitable Institution"—Municipal Act, sec. 398 (5).

Motion by Albert William Homan for an order quashing a resolution of the Council of the City of Toronto, authorising payment out of the municipal funds of the city of a sum of $15,000 to a company incorporated under the Canada Companies Act under the name of "Catholic Army Huts," for the purpose of erecting, equipping, and conducting "Catholic Army Huts for Canadian soldiers, which shall serve the twofold purpose of chapels for Catholic soldiers and recreation huts for all soldiers, irrespective of creed, and to supply Catholic chaplains in the Canadian Overseas Forces and in the Canadian Militia with rosaries, medals, prayer-books, and similar devotional aids for distribution to Catholic soldiers."

The motion was heard in the Weekly Court, Toronto.
T. R. Ferguson, for the applicant.
Irving S. Fairty, for the city corporation.

MEREDITH, C.J.C.P., in a written judgment, said that the gift was invalid because it was not within the powers of the city council. It was ultra vires, in the first place, because the council of the year 1918 had no power to require or authorise the raising of the money and payment of it in the year 1919; and, according to the terms of the gift, it could be "raised in the taxes of 1919," and necessarily could be paid out of moneys so raised only.

The gift was invalid also on the ground that no municipal council has power to make such a gift. If such a power exists, it must be conferred by statute. Section 398 of the Municipal Act, R.S.O. 1914 ch. 192, provides that "by-laws may be passed by the councils of all municipalities . . . (5) for granting aid to any charitable institution or out-of-door relief to the resident poor." These words did not cover the gift; and no other statute was referred to, nor could any be found which was applicable.

The resolution should be quashed with costs.

John Hallam Limited v. Bainton—Middleton, J.—Oct. 16.

Sale of Goods—Sale by Sample—Inferior Goods Delivered—Damages—Measure of—Right of Vendor to Take over Goods at Reduced Price.]—Action for damages upon a purchase of about 50,000 lbs. of wool. It was alleged by the plaintiffs, the purchasers, that the sale was by sample, and that the bulk was not equal to the sample. The action was tried without a jury at a Toronto sittings. Middleton, J., in a written judgment, said that the sale was made by a telephone conversation after a sample had been asked for and sent. For the defendants it was alleged that the sale was subject to inspection and acceptance of quality at Blyth, where the defendants did business. The learned Judge found that the transaction was a sale by sample. It was admitted that the goods sent were not in accordance with the sample, but much inferior. The damages should be fixed at 15 cents per lb. or $7,500, estimating this as the difference in value between the thing contracted for and the thing delivered. The defendants should have the right to take over the goods on hand (on paying the amount of the judgment) within a reasonable time, at the reduced price, plus interest at 7 per cent. and a fair allowance for freight, storage, etc. If they elect to do this, and the amount is not agreed upon, the learned Judge may be spoken to. If the matter is not mentioned within 10 days, this will form no part of the judgment. Judgment for the plaintiffs for $7,500 with costs. W. N. Tilley, K.C., and J. P. White, for the plaintiffs. L. E. Dancey, for the defendants.

Benstein v. Jacques—Masten, J.—Oct. 18.

Building Contract—Extras—Variation—Notice by Contractor—Condition Precedent—Architect—Building-owner—Waiver—Independent Piece of Work not Subject to Terms of Contract—Reference—Report—Appeal—Costs.]—An appeal from the report of an Official Referee in an action for moneys due upon a building contract. The appeal was heard in the Weekly Court, Toronto. On the hearing the learned Judge disposed of the appeal except as to two items and the question of costs, which he now dealt with in a written judgment. The first item was "Building and partition in basement $26." This, the learned Judge said, was an independent piece of work, not forming part of the original contract, and the terms of the contract did not apply to it. As to this item the appeal should be dismissed. The second item was

"Building extra width of west wall." This work was a variation or alteration of the construction originally contracted for, to which the terms of the contract and specifications applied; and the owner was entitled, by the terms of the contract, to a definite statement in writing from the contractor that he proposed to charge for the variation as an extra. The architect had no power to waive this condition, and the owner had not done so. The appeal as to this item should be allowed and the item disallowed. As to costs, the appellant substantially succeeded, though some branches of the appeal were abandoned and one was dismissed. The appellant should have the costs of the appeal, fixed at $50. D. L. McCarthy, K.C., for the appellant. E. S. Wigle, K.C., for the respondent.

RULE OF SUPREME COURT OF ONTARIO.

At a meeting of the Judges held on the 15th October, 1918, the following Rule was passed:—

Owing to the increased cost of living and office expenses due to the present War, it is ordered that until further order the total in any bill of costs of the fees prescribed by Tariff "A" (as distinct from payments), shall in respect of business done in any cause or matter in the Supreme Court or any County Court be increased by twenty per cent., and such increase shall be allowed upon any taxation of costs in respect of any such business as well between party and party as between solicitor and client.

(1) This Rule shall not apply to the allowance for commission and disbursements pursuant to Rule 653, nor shall it interfere with the power to allow a fixed sum for costs, nor shall it apply to counsel fees.

(2) This Rule shall apply only to fees for services rendered after this Rule goes into effect.

This Rule shall come into force on the 16th day of October, 1918.