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HIGH COURT DIVISION.

LENNOX, J., IN CHAMBERS. JANUARY 5TH, 1914.

RE COUNTY COURT JUDGES' INCOME ASSESSMENT.

Assessment and Taxes—Liability to Municipal Income Assessment—Salaries of County Court Judges—British North America Act—Authority of Decided Cases.

Appeal by the Judges of the County Court of the County of Lambton from the judgment of the Court of Revision for the Town of Sarnia confirming an assessment of the appellants' official incomes by the assessor for the town in which they lived.

The appeal was heard by LENNOX, J., who was named by another Judge of the Supreme Court of Ontario, under sec. 16 of the Statute Law Amendment Act, 1910, 10 Edw. VII. ch. 26, as a "disinterested person" to hear the appeal, which in the ordinary course would have come before one or other of the appellants as County Court Judge.

D. L. McCarthy, K.C., for the appellants.
John Cowan, K.C., for the town corporation.

LENNOX, J.:—Of the cases which may be binding upon me, the most recent Canadian case is Abbott v. City of St. John (1908), 40 S.C.R. 597, holding that a civil or other officer of the Government of Canada may be lawfully taxed in respect of his income as such by the municipality in which he resides. If I am at liberty to do so, I am disposed to follow this judgment; for, although I say it with the very greatest respect for the eminent Judges who have expressed opinion to the contrary, I cannot find anything in the British North America Act which, in my opinion, exempts any judicial income in Ontario from municipal taxation.

But it is argued that, inasmuch as an appeal from an assessment of this kind could not be carried beyond our provincial Court of Appeal, I should follow, not the decision of the Supreme Court of Canada—where a case of this kind, it is said, could not be taken—but the decision in Leprohon v. City of Ottawa, 2 A.R. 522, in which it was held that a provincial Legislature has no power to impose a tax upon the official income of an officer of the Dominion Government, or to confer such a power on the municipalities. The argument is not based on fact, to begin with. New Brunswick is working under the same constitution as Ontario. The question of the legality of assessments of this kind may reach the Supreme Court from any Province in the Dominion. But, aside from this, I cannot accept this view of my duty. I have indicated what I conceive to be the power of the Legislature; and in any case I am bound by the decision of the Supreme Court.

In Victorian Railways Commissioners v. Coultas (1888), 13 App. Cas. 222, the Privy Council pronounced against damages occasioned by "nervous shock." In Bell v. Great Northern R.W. Co. of Ireland (1890), 26 L.R. Ir. 428, and Dulieu v. White & Sons, [1901] 2 K.B. 669, the Judges refused to follow the Coultas case, as they were not bound by it, and the Privy Council decision was severely criticised by eminent legal writers and in legal publications; but when, subsequent to all this, the question came up in Henderson v. Canada Atlantic R.W. Co. (1898), 25 A.R. 437, our Court followed the Privy Council—although it was not a case which could be taken to the Privy Council—and the reason was given by Mr. Justice Moss, delivering the judgment of the Court, at p. 445, as follows: "Whatever weight may or ought to be given to these views by other Courts, it is incumbent on this Court to accept and follow that case (the Coultas case) as a decision of the ultimate Court of Appeal for this country."

I have nothing to do with where the case is carried; what I have to do is to adopt the law as declared by the highest of our Courts—the Privy Council—if I can find a case, and so back through the Courts until I come to Judges of "co-ordinate authority," in conformity with the principle of sec. 32 of the Judicature Act. Anything else would be a scandal. Could a Judge refuse to be governed by the decision of the Supreme Court or Privy Council because the case being tried was not appealable to these tribunals?

Webb v. Outrim, [1907] A.C. 81, was a good deal relied upon in the St. John case, and I think might be said to be adopted

by the judgment of Mr. Justice Davies. It was argued by Mr. McCarthy that it has no application to this case. That all depends upon whether the constitutions of Australia and Canada are, upon this point, as contended, practically identical. If they are substantially the same, then Webb v. Outrim, of course, is binding upon Canadian Courts.

Reference may be made to: Bank of Toronto v. Lambe (1887), 12 App. Cas. 575; Attorney-General for Quebec v. Reid (1884), 10 App. Cas. 141; and as to the plenary powers of the Legislatures, see Canada's Federal System (Lefroy) pp. 64-5-6, and cases referred to.

I find that the official incomes of Judge MacWatt and Judge Taylor are subject to taxation. I make no order as to costs.

FALCONBRIDGE, C.J.K.B. JANUARY 5TH, 1914.

GEORGE WHITE & SONS CO. LIMITED v. HOBBS.

Sale of Goods—Action for Price of Engine Sold—Defects—Oral Representation of Agent of Vendor—Provisions of Written Agreement—Notice of Defects—Imputed Knowledge of Contents of Written Agreement.

Action for the price of a new White traction engine.

I. F. Hellmuth, K.C., for the plaintiffs.
T. N. Phelan, for the defendant.

FALCONBRIDGE, C.J.K.B.:—I find that McIntyre, the plaintiffs' agent, represented to the defendant that the engine "would fire as easy as any engine ever made or sold." I find that the engine did not answer this representation. Lumley, the plaintiffs' expert, said, in presence of the defendant and G. Scott, she was the "worst———" (extremely vulgar word) "he ever saw to fire." This was a most important matter to the defendant, whose business is that of thresher.

But the contract says: "There are no warranties, guaranties, or agreements, express or implied, other than those connected (sic) herein; and the company shall not be held responsible for any statements made at any time, in any way, or by any person or agent or representative, in connection with this matter, unless expressed in this contract. It is also understood that no

money is to be paid on account herein to any person without the written order of an officer of the company at the head office."

I find, also, that the engine did not work properly and do good work, particularly in this regard that it consumed about 33 per cent. more fuel and water than the defendant's old Waterloo engine. Also, as compared with the latter, it required an enormous amount of steam pressure to do the work.

The result of this was that there was a great loss of time to the defendant, his men and his employers, the farmers. The farmers, too, who supplied fuel and water, began, as the defendant says, to "kick," and many of them said that they would not have it on the place if they could get another engine.

I prefer the evidence of the defendant and his witnesses to that of the experts called for the plaintiffs. These latter did not see it at work on the ground. The defendant and the men who operated it there were practical men of long experience and fully competent to exercise good care, proper usage, and skilful management so as to make it work properly and do good work—but it failed to do so.

It seems hard that the defendant should have to pay for the engine under these circumstances.

But here again the contract says: "The above machinery and goods are warranted to be well made, of good material, and, with good care, proper usage, and skilful management, to work properly and do good work. Defects or failure in one or more parts of said machinery or goods shall not afford grounds for condemning or returning the whole or any other part. This warranty is good for five days only after starting, and written notice of any complaint must be given to the company, at its head office, and also to the agent through whom purchased, before the expiration of said five days, stating in detail wherein this warranty is not satisfied; and reasonable time thereafter shall be given to the company to send competent workmen to remedy the difficulty, the purchasers agreeing to render necessary and friendly assistance with men and horses gratuitously, if requested, and the company to have the right to replace any part or parts within reasonable time, after which, if anything is not in accordance with this warranty, it is to be returned by the purchasers to the place of shipment free of charge without delay, and the company shall then have the right to substitute other parts or machines therefor, within reasonable time, on the same conditions, and under and subject to the terms of this

contract. Failure so to make such trial or give such notices within said five days shall be conclusive evidence of the due fulfilment of warranty by said company. When at the request of the purchasers men are sent to operate said machinery and find that it has been carelessly or ignorantly handled to its injury in doing good work, the expenses so incurred shall be paid by the purchasers and form part of the debt secured under or by virtue of this agreement. This warranty shall be operative only in case the purchasers perform fully all their obligations under this agreement, and it shall be void in the event of any representations or statements made by the purchasers being untrue. No remedy other than the return of the defective part or machine shall be had for any breach of warranty. This warranty does not apply to second-hand machinery."

There is no pretence that written notice or any notice was given within the five days. The defendant's only written complaint is more than a month later (contract 18th September; letter 26th October).

It does not avail the defendant to say that he did not read the contract, a copy or duplicate original of which was left with him. He is not a marksman nor entirely illiterate. His education and intelligence have been deemed sufficient to qualify him to be a county constable, which office he holds.

Again, on the 26th November, when Lumley, the expert, came, the defendant signed the following:—

"Date 26th November.

"The Geo. White & Sons Co. Ltd., London, Ont.

"Dear Sirs:—This is to certify that your Mr. Lumley has been here and fixed my engine for me and that same is now entirely to my satisfaction.

"W. Hobbs."

He says he had not his glasses, and he signed a paper "just to shew that he" (Lumley) "was there." That this paper does not express the attitude of his mind at any time, I am sure, but what can be done for or with a man like this?

The result will be judgment for the plaintiffs with costs.

The exact form of the judgment can be settled when I am advised of the terms on which the plaintiffs took back this engine.

LENNOX, J., IN CHAMBERS. JANUARY 6TH, 1914.

RE CULIN INFANTS.

Infants—Custody—Right of Half-brother Nominated by Deceased Father—Insanity of Mother—Children's Aid Society—Foster Parents—Compensation—Children's Protection Act of Ontario, 8 Edw. VII. ch. 59; 3 & 4 Geo. V. ch. 62—Order under, Improvidently Made by two Justices—Habeas Corpus—Order of Judge of Supreme Court Changing Custody—Difference in Religion—Infants Following Religion of Father.

Motion by Emil Culin, a half-brother of the infants Josephine Culin and John Culin, for an order, upon the return of a writ of habeas corpus, for delivery of the infants to the custody of the applicant.

Harcourt Ferguson, for the applicant.
J. R. Cartwright, K.C., for the Children's Aid Society.
T. W. McGarry, K.C., for the foster parents.

LENNOX, J.:—Josephine Culin is about eleven years old, and her brother about thirteen months younger. Their father, Angelo Culin, was a Protestant. He died in June, 1907, and their mother, Elizabeth Culin, is not in her right mind, and is not capable of looking after these children. The mother is a Roman Catholic.

Emil Culin, who is applying for the custody of these children, is a son of Angelo Culin by a former marriage. He is twenty-seven years old, and he and nine other children of the first marriage was brought up in their father's faith. Angelo and Elizabeth Culin were married, and their children Josephine and John Culin, the infants, were baptized by a Protestant clergyman. The father of the infants made it a point that these infants should be educated in the Protestant faith; and, so far as might be, for children of their age, they attended their father's church during his lifetime. By the father's will it was provided that his widow should have a home on the farm with the applicant. The widow and these children continued to live with the applicant until January, 1909; and it does not appear that he failed to afford them a comfortable home or to provide properly for them.

The Rev. Father O'Leary was undoubtedly the means of getting this helpless woman to leave her home and take the children with her. That he was actuated by an honest desire to promote the best interests of these children, from his point of view, I am not disposed to question, although I am bound to say that his methods were not by any means commendable. I am only concerned, however, in the actions of the Rev. Father O'Leary in so far as their scrutiny may assist me in determining whether these children were ever properly and legally committed to the custody of the Children's Aid Society. The Justices who committed them have been ordered to return the records and papers into Court. There are none. There was no record kept. The proceedings were instituted by Father O'Leary, or by Mr. Miller, an agent of the society, upon his instructions. Father O'Leary understood the situation fairly well. . . .

As to how these children were committed, Mr. Miller, secretary and inspector of the Children's Aid Society, swears that he was instructed by Father O'Leary, and "that the said Father O'Leary stated before the two Justices of the Peace, and in my presence, that the above-named infants Josephine and John Culin were entirely in his care and under his charge and control; that the parents were Roman Catholics, but that the father died, and the mother was mentally incapable of looking after the children, and that the children are dependent; and requested that they both be made wards of the Children's Aid Society as Roman Catholics, there being nobody to support and educate them; and, on the said priest's statement, the order for the committal of the said children to the Children's Aid Society was made." The affidavit of Mr. Greene, one of the Justices of the Peace, is to the same effect. On the other hand, there are two affidavits to the effect that Elizabeth Culin, the mother of the infants, handed them over to the Rev. Father O'Leary before the commitment, and signed a document to that effect; and that, in the opinion of the deponents, Mrs. Culin was then of sound mind. I am prepared to believe that this generally demented woman did purport to make over these children in the way stated.

But take it all in all this thing should not have happened.

The Culin children were not "neglected children" within the meaning of the Children's Protection Act of Ontario, 8 Edw. VII. ch. 59, or the present Act, 3 & 4 Geo. V. ch. 62. The Children's Aid Society, or persons acting in concert with them, must keep within the limits of the Act or they are trespassers—

wrongdoers like any other person interfering with the liberty of the King's subjects. There is no provision as yet in the statute for the case of an insane parent. These children had a home— a good home, as I believe—and they were never rightfully away from it.

These children could only be committed after a proper judicial inquiry.

"A Judge" includes "two Justices of the Peace" (8 Edw. VII. ch. 59, sec. 2(1) (f).)

The Judge is to "investigate the facts of the case and ascertain whether the child is a neglected child and its age, and the name, residence, and religion of its parents" (sec. 10(2)). He can compel the attendance of witnesses (sec. 10(3)); and the parents or the person having the actual custody of the child shall be notified of the investigation (sec. 10(4)). The applicant should have been notified. It is idle to talk of the Rev. Father O'Leary taking his place, after reading his letters and the affidavit of Dr. Proctor as to the condition of the mother. A judicial inquiry, then, must be conducted by recognised methods, including evidence upon oath. See Powell on Evidence, 9th ed., p. 216, referring to the Prevention of Cruelty to Children Act, 1904; Regina v. Dent, 7 J.P. 511; Phipson on Evidence, 5th ed., pp. 441, 459. The order was improvident, improper, and probably illegal; and, at all events, the custody or control of the children was never lawfully committed to the Children's Aid Society.

The next consideration is, should the custody be changed? I am quite satisfied that it should be. The children have been placed with Roman Catholic foster parents, and the evidence satisfies me that both the children are well treated, and that they are with respectable, kindly people. But these children should not have been placed in Roman Catholic homes, because, according to our law, they should be brought up in the religious faith of their father. . . . It is distinctly improper and contrary to law to send a Roman Catholic child to a Protestant institution or foster home and vice versa. Section 28 of 3 & 4 Geo. V. ch. 62 is specific upon this question. I have, therefore, come to the conclusion that these children should be removed from their present foster homes.

I now come to the question of compensation. I have decided not to direct payment of anything to the foster parents, because, amongst other reasons, I do not think that they will be out of pocket at all. I was requested to have a talk with the children,

and I reluctantly consented. I did not ask them any questions as to their religious views or preferences or as to where they prefer to live. I did not think it proper to discuss the religious feature of the case with children of this age. Nor would I be much influenced by what they might say under such circumstances. It is unfortunate that this delicate and supremely important matter will probably have to become a debated controversial question to each of these children sooner or later. I am quite convinced that they are satisfied with their present homes and have no desire to get away; but, all the same, they both made it perfectly clear to me that they have been very busy and useful—working hard in the time they have been at home—but not too hard. The boy, for instance, had his arm in splints, and this led to him giving me a pretty full account of the work he has been in the habit of doing; and Josephine seems to have been very usefully employed in all kinds of house-work, including scrubbing; and outdoor work too of certain kinds, including throwing down hay, and, I think, perhaps, milking cows, although I am not sure as to this. I do not think that compensation should be ordered, particularly as both the statute and the contracts provide for termination at any time by the society.

I have referred to the statute shewing that the religion of the child is to determine its foster home. It remains to be pointed out how the religion is to be determined. The religion of the child is the religion of the father; and, in determining the home or custody of a child, side by side with the religious question, must be the inquiry, what is really in the best interest of the child? It is considered of importance to keep the members of a family together. This was emphasised by Mr. Justice Anglin as to a brother and sister in Re Faulds, 12 O.L.R. 245. . . .

[Reference also to In re Newbery, L.R. 1 Eq. 431; Hawksworth v. Hawksworth, L.R. 6 Ch. 539.]

It was the father's wish that these children should be brought up in the home of the applicant. It is shewn by a number of affidavits that he is a respectable and worthy man—has a comfortable home, and is a proper person to have the custody of children. . . .

I, therefore, order and direct that the infant children abovenamed be forthwith delivered into the custody and control of Emil Culin, their half-brother, and that he have charge and control of them as members of his family, and the direction and supervision of their education, secular and religious, for

so long as he remains within the jurisdiction of this Court, and until the infants respectively attain the age of twenty-one years; but subject to such order as this Court may hereafter see fit to make.

I make no order as to costs.

MIDDLETON, J., IN CHAMBERS. JANUARY 6TH, 1914.

REX v. DAVEY.

Appeal—Leave to Appeal to Appellate Division from Order of Judge in Chambers Quashing Magistrate's Conviction—Refusal of Application.

Motion by the prosecutor for leave to appeal from the order of Lennox, J., quashing a conviction: ante 464.

H. E. Rose, K.C., for the prosecutor.
E. E. A. DuVernet, K.C., for the defendant.

MIDDLETON, J.:—I am by no means satisfied with the conclusion at which my learned brother has arrived; but this alone is not sufficient to justify granting leave to appeal. The matter involved is trivial: the payment of a small fine. The difficulty arises from the carelessness of the magistrate and the prosecutor in failing to see that the agreement as to the admission of evidence taken in the other prosecution (if in fact made) was properly recorded. If such an agreement was made—and I am inclined to think that the defendant's testimony and other evidence, notwithstanding denial by the accused, shew that it was—then the miscarriage, if miscarriage there was, is the result of the carelessness of those charged with the conduct of the prosecution and the trial; and, if the result is to impress the necessity of care in having understandings of the kind in question reduced to writing, much will be gained.

I therefore refuse the application, but give no costs.

Having taken this view of the merits of the application, I have not considered the question raised by Mr. DuVernet as to whether there is now any right to appeal, even by leave.

MIDDLETON, J., IN CHAMBERS. JANUARY 6TH, 1914.

DELAP v. CANADIAN PACIFIC R.W. CO.

Discovery—Production of Documents—Motion for Better Affidavit on Production and for Further Examination for Discovery—Relevancy of Documents Sought—Claim of Privilege—Sufficiency—Production by Mistake of Privileged Documents for Inspection of Opposite Party—Use of Copies Made at Inspection—Costs.

Motion by the defendants for an order for a further and better affidavit on production from the defendant and for the further examination of the plaintiff for discovery.

The action was the offspring of the old action of Delap v. Great North West Central R.W. Co., which was supposed to be settled for all time by an agreement of the 11th February, 1898.

At the time of the settlement, the plaintiff had acquired control of ninety per cent. of the capital of the Great North West Central Railway Company, $500,000. The company had created bonds to the amount of £515,600 sterling, and Delap claimed to hold these as security for advances made for the company. Messrs. Angus and Shaughnessy, representing the Canadian Pacific Railway Company, agreed to pay $550,000 for all the stock and assets of the company, except the ownership of so much as was represented by one-tenth of the subscribed capital stock, which the plaintiff was not to transfer; this to be free of all debts, liabilities, and charges which the plaintiff, on his part, was to get rid of out of the price paid to him. The price was to be advanced by the purchasers to enable him to get rid of these claims.

The written agreement shewed nothing concerning the purchase of the ten per cent. retained by the plaintiff; but the plaintiff alleged that the effect of the agreement was to leave him the co-owner with the railway company, in the proportion of one to nine, of the assets of the company, and that there was a parol agreement by which the Canadian Pacific Railway Company and Messrs. Angus and Shaughnessy would buy from the plaintiff his ten per cent. at a price to be ascertained on the basis of a tenancy in common or partnership with regard to the entire assets, as soon as all the claims against the railway company should be extinguished and the agreement should be

otherwise carried out. The claims having all been got rid of and the $550,000 having all been paid, the plaintiff made his claim in this action upon the alleged oral agreement.

There was a leasing agreement between the Great North West Central Railway Company and the Canadian Pacific Railway Company.

All the outstanding claims had not been discharged, but were still held by virtue of certain assignments.

The defendants denied the meaning attributed by the plaintiff to the written document, and denied the making of any such oral agreement as set up.

The plaintiff lived in England, and all the business on his behalf was done by his Toronto solicitor, who was probably the only person alive who could testify to the parol agreement, and who was the solicitor for the plaintiff. Mr. Clark, the solicitor for the Canadian Pacific Railway Company, with whom, it was said, the agreement was made, died before the present claim was put forward.

An order for production of documents by the plaintiff was issued by the defendants, and in due course an affidavit on production was made by the plaintiff, in which he referred to 58 documents, covering the agreement and many matters relating to the carrying of it out. These productions did not cover the correspondence between the plaintiff and his Toronto solicitor. Only one letter in that series was produced, that of the 8th March, 1898, the day on which the agreement in question was made. The plaintiff objected to produce these letters, because it was said by the plaintiff that they were "letters and documents in confidence passing between me and Mr. A." (his solicitor), "who has been throughout the transactions in this action my confidential legal adviser . . . giving me professional legal advice as to the matters in question in this action and in contemplation of the bringing of this action."

This production was deemed to be inadequate and unsatisfactory, and a demand was made for the production of the entire correspondence. The plaintiff's solicitor, while maintaining that the letters prior to the period for which privilege was claimed were not relevant, and contained nothing pertaining to the matters at issue, conceded that there was no reason why they should not be seen.

The Toronto solicitor caused to be prepared in his office a list of all the correspondence between himself and his client, intending that it should terminate in May, 1910, when the correspond-

ence as to which privilege was expressly claimed began; but, when the representative of the defendants' solicitors attended to inspect the documents produced, he was given the whole correspondence, including that for which privilege was claimed, and made copies of certain of the letters.

Angus MacMurchy, K.C., and A. M. Stewart, for the defendants.

F. Arnoldi, K.C., for the plaintiff.

MIDDLETON, J. (after setting out the facts) :—It is suggested that the correspondence contains matter going to shew that the claim is not made in good faith. . . . In Calcraft v. Guest, [1898] 1 Q.B. 759, it was held that the use of copies of privileged documents, where the production of the original cannot be compelled by reason of privilege, is not prevented even by fraud in the obtaining of the copies—a much stronger case than this, where the copies were not obtained fraudulently, but by the mere inadvertence of the solicitor.

Delap was examined for discovery in England after this, and necessarily his examination was most unsatisfying, owing to his entire lack of first-hand knowledge and his forgetfulness, and in some respects his failure to appreciate the significance and importance of matters which the defendants naturally desired to investigate in their endeavour to meet this claim, concerning which they are much handicapped by the death of Mr. Clark. . . .

It is said that the inspection of documents which has already taken place, and which entirely fell through after the episode referred to, by reason of the friction thereby engendered, has been entirely inadequate. There are, it is said, several hundred letters, of which only a few have been inspected. . . . Taken individually, it is quite possible that each letter may be said to be irrelevant. Taken collectively, the negative evidence which would be afforded by the complete absence of all reference to the alleged agreement may be of the greatest possible moment, particularly if a situation is developed in which such an agreement, if it existed, would naturally be mentioned. It seems to me clear that all these letters are subject to production.

Next, production is sought of the letters from January, 1910, prior to the bringing of the action, concerning which privilege is claimed. As to these, I think that privilege is adequately claimed, and that they are now liable to production. It may

be that at the trial the claim to privilege will be circumvented by the giving of secondary evidence; or it may be that the Judge will then be in a position to determine that the claim of privilege is not validly made; but I think that I am concluded by the affidavit. The affidavit, however, is not satisfactory, as I think that, in the circumstances of this case, it would be better to have this correspondence duly scheduled. I do not think that the case already referred to justifies me in receiving secondary evidence on this motion as to the contents of the letters. The case is not brought within Regina v. Cox, 14 Q.B.D. 153, as fraud is not charged.

The plaintiff's replies to the letters which are directed to be produced ought also to be produced; and his replies to the letters which are privileged ought to be scheduled.

From the documents produced by the defendants in their affidavit, it is quite clear that much correspondence took place between the solicitors representing the adverse parties which has not been produced. . . .

Mr. Castle Smith is a friend and adviser of the plaintiff in England. . . . He is a solicitor, but does not appear to have acted in this transaction as a solicitor. I think that the correspondence in this transaction between the Toronto solicitor for the plaintiff and Mr. Castle Smith, at any rate prior to the time at which privilege can be claimed ought to be produced. It ought at any rate to be dealt with in the affidavit. It is clear that there is some correspondence falling under this head which is not covered by the affidavit on production.

Then it is said that there are a number of particular documents referred to in different places in the examination. Attention has now been called to these particular documents, and there is no reason why they should not be mentioned and dealt with in the affidavit.

It is sought to have a further examination for discovery. I am not sure that any good purpose would be served by such an examination. If it is really desired, in view of the failure to produce, it will have to be ordered; but I think that the costs of this examination should be reserved. If it should turn out that there was no real necessity for the further examination, I should certainly not give the examining party the costs of it. If, on the other hand, in the result it appears that there was a real cause for the examination, a totally different result should follow.

An order should, in my view, be made directing the filing

of a further and better affidavit on production. If so desire, this order may contain specific directions concerning the matters specifically dealt with above. If it is thought better, the order may be general in its terms.

Costs of the motion will be to the defendants in any event of the cause. Costs of the examination reserved.

MIDDLETON, J., IN CHAMBERS. JANUARY 7TH, 1914.

RE SOLICITORS.

Solicitors—Retention of Moneys of Client in Settlement of Costs and Disbursements—Agreement with Client—Bill of Costs not Delivered—Motion for Account and Delivery of Bill Made after Lapse of Fifteen Years—Claim against Solicitors for Negligence—Statute of Limitations—Dismissal of Previous Application.

Motion by Kate M. Jordan for an order for an account of $233 paid to the solicitors in 1898, and of other moneys received by them from her or as her solicitors, and for delivery of a bill of costs in connection with certain litigation, and taxation thereof, and payment of the balance.

The applicant, in person.

Higgins (Macdonell & Boland), for the solicitors.

MIDDLETON, J.:—In and prior to 1898, Mrs. Jordan was a client of the solicitors. She had brought three actions; an action against her husband for alimony, an action against her husband for false imprisonment, and an action for false imprisonment against one Stone, her husband's solicitor. The false imprisonment actions were stayed upon the argument of a legal question, namely, the right of the wife to maintain an action against her husband for the tort alleged under the law as it then stood; and after the determination of this question the actions were discontinued. The alimony action was taken to trial and was there settled. In addition, the solicitors acted for the client in other litigation, in connection with the custody of the child.

In settlement of the alimony action, in October, 1898, the husband paid $500, partly secured by notes, and the wife was allowed to retain the $233 which had been paid for interim ali-

mony and disbursements; her solicitors being by the judgment discharged from the accounting therefor to the defendant. She had paid $25 to the solicitors on account of costs or as a retaining fee—it makes no difference which. Some adjustment took place at the time by which the solicitors allowed Mrs. Jordan to receive the whole $500, they retaining the money they had already received.

As set forth in the affidavit of one of the solicitors, they had disbursed the greater portion of this money, and had advanced considerable money to the client; so that it is clear that the money remaining in their hands would be only a small fraction of the amount which they would be entitled to against the client for costs. The papers were handed over to the client at any rate by 1902, and from that time on the matter has been regarded as closed between them. Now, after the lapse of more than fifteen years from the settlement and twelve years from the time the papers were handed over in 1902, when this lady sought and secured independent advice from other solicitors, and became emancipated from any control the other solicitors could possibly have over her, she seeks an accounting. She bases her motion in the first place upon the undertaking contained in the order for interim alimony. This undertaking was not an undertaking to her, but an undertaking in favour of the defendant, who was advancing the money, and that undertaking was discharged by the judgment of 1898.

At first I was impressed with the difficulty arising from the fact that no bill had ever been delivered. While it is true that in general there cannot be a settlement to preclude taxation without the delivery of a bill, and while it is equally true that the Court, in the exercise of its jurisdiction over solicitors as officers of the Court, would never allow a solicitor to set up any lapse of time where it was apparent that injustice was being done, I cannot think that there is not an exception where, as here, it is not only perfectly plain that no injustice has been done by the solicitors, but that, to rid themselves of a troublesome and perhaps an unfortunate client, they accepted in satisfaction of their claims much less than what was due to them.

In reality, this is not what is sought. In an indirect way it is sought to put forward claims against the solicitors based on a suggested misconduct or negligence on their part sixteen years ago. Of course any such claim is absolutely barred by the Statute of Limitations; and, although the solicitors occupied a fiduciary relationship towards the client, I think our present statute protects them; because by the arrangement made with

the client in 1898 the money then in their hands became their own, and they then ceased to hold it for the client.

A similar application for relief was made before the acting Master in Chambers in September last. This application was refused, and probably operates as a bar to the present application. I do not think it necessary to deal with this at length, as the present application appears to me to be entirely devoid of merit and purely vexatious.

The whole conduct of the applicant suggests that this is a case of paranoia querulans, aptly and forcibly described in the Encyclopædia Britannica, vol. 20, p. 769, and suggests very forcibly the desirability of legislation preventing litigious individuals from making the Courts an instrument of oppression. In England power is given by statute to prevent this abuse, and it is to be hoped that our Legislature may soon give to our Courts a like power.

LENNOX, J. JANUARY 7TH, 1914.

RE CLAREY AND CITY OF OTTAWA.

Municipal Corporations—Waterworks By-law—Expenditure of Money—Power of Council—Necessity for Submission of By-law to Ratepayers—Special Act, 3 & 4 Geo. V. ch. 109(O.) — Motion to Quash By-law — Former By-law Quashed—Res Judicata—Mandate of Provincial Board of Health—Effect of—Public Health Act—Absence of Plans and Details of Waterworks Scheme—Statutes — Dominion Act—Authorisation of Waterworks in Quebec—Necessity for Quebec Legislation.

Motion by Thomas Clarey to quash by-law No. 3678 of the Corporation of the City of Ottawa. See ante 370.

T. McVeity, for the applicant.
G. F. Henderson, K.C., for the city corporation.

LENNOX, J.:—Upon the motion to quash by-law No. 3678 it is not for me to pronounce upon whether the proposed expenditure is wise or unwise, but to determine and declare whether, as a matter of law, there was, on the 1st December last, vested in anybody, or in any body of men, other than the duly quali-

fied ratepayers of the city of Ottawa, a power to compel the municipal council to commit the city irrevocably to the Bennie waterworks scheme, pass the by-law, borrow the money, invade a sister province, and enter at once upon this gigantic work; and this without profiles, drawings, plans, specifications, or specific information of any kind. I say "a power in anybody to compel the council to pass this by-law" because it is not suggested that it can be upheld as the voluntary act of the council. On the contrary, upon the argument of this motion, it was frankly admitted that the right of the council, of their own motion, to withdraw the decision of this matter from the ratepayers was conclusively negatived and set at rest by the proceedings against the former by-law (see ante 370); and the sole ground upon which it is urged that this by-law is valid is that the Chief Officer of Health for Ontario has power to order, and has ordered, this thing to be done. I pass over the strenuous effort of Mayor Ellis to make sure of being "compelled to pass the by-law," as, whatever opinion I may have of the propriety of tactics of this kind, I require no argument to convince me that in this, as in all cases, Dr. McCullough was actuated solely by what he conceived to be in the public interest.

When it was proposed a few years ago by a Federal Government, strongly entrenched in the confidence of the Canadian people, to inaugurate a great national work, at an estimated cost to the country (I do not mean a total expenditure) of about $13,000,000, it was not for one moment pretended that this could be done without the sanction of the people's representatives in Parliament, and weeks and months were consumed in investigation and discussion before the expenditure was approved. It is a startling proposition then that, although the administration of the Dominion is controlled in the expenditure of money in the way I have intimated, yet one man, the Chief Officer of Health for Ontario, despite the protest, it may be, of any majority of her citizens, has the power to compel a small community like Ottawa to assume a burden of $8,000,000, or, for that matter, of $13,000,000 or more; and yet I have no doubt at all that, if the proper steps and proceedings are taken to this end, this officer has this power; and further, although it may be said that this is a long step from government of the people by the people, yet, in view of the criminal negligence of some municipalities, it cannot be said that the provisions of the Public Health Act are too arbitrary or drastic in this regard.

But, being an exceptional and drastic power, it is obviously

imperative that the conditions of its exercise must unquestionably exist, and be scrupulously observed.

About the 9th October last, Sir Alexander R. Bennie reported to the Municipal Council of Ottawa in favour of obtaining a water supply from Thirty-one Mile Lake and other lakes in the Province of Quebec, and, in a very general way, indicated the course of the pipe line and some of the outstanding features of the scheme; but, as the proposition might or might not be entertained, and it would occasion a delay of many months and an additional outlay of scores of thousands of dollars, the report was, of course, without designs, drawings, maps, plans, specifications, or detailed information of any kind. This report was sent to Dr. McCullough, Executive Officer, Chief Health Officer, and Secretary of the Provincial Board of Health. Immediately before the passing of by-law 3649 of the City of Ottawa, relating to this waterworks question, the council received a communication from Dr. McCullough, reporting the necessity for a new waterworks system for Ottawa and containing the following paragraph: "Under the authority of sub-sec. 1 of sec. 95 of the aforesaid Act (the Public Health Act), the Board hereby approves of the source of supply and of the establishment of the said works in accordance with the report thereupon made by Sir Alexander Bennie, dated October, 1913, and submitted to the Board for approval."

The report of the necessity for new waterworks is clearly covered by the statute, and nothing turns upon it except that a failure to appreciate the difference between the Board reporting the need of new waterworks of some kind and the Board approving of a matured and definite waterworks scheme, after examination of all plans, specifications, etc., is what probably led the council into the error of passing a second by-law. In the document forwarded on the 1st December, Dr. McCullough incorporated the one already quoted from, and directed the council to pass a by-law and proceed at once with the establishment of works "in accordance with the Bennie report."

With great respect, I am of opinion that, until plans and information of the character above indicated are submitted and dealt with, the Board has no power to approve of a waterworks system; that the Bennie system has not been approved of in fact or in law; that as yet there is no authority vested anywhere to order the council to proceed with the works in question; and that the council was not compelled to pass, or justified in passing, by-law number 3678.

The policy of the statute is clear, and its provisions are speci-

fic that, whether the council proceeds voluntarily or under the compulsion of a report (see secs. 89 and 95 and sub-sec. (2) of sec. 96, a sub-section evidently overlooked), no matter what the other conditions are, there must be plans, drawings, and specifications submitted to and examined, weighed, and passed upon by the Board before the municipal council is at liberty—much less compelled—finally to pass a by-law either to raise the money or proceed with the work. The statute is complied with so far as an engineer's report is concerned, and this and the source of supply have been approved. It may be that, if left to Sir Alexander Bennie, the scheme will in the end work out satisfactorily in detail, and that the plans and the rest of it will be all right; but this is not the question: the Board is a special tribunal; there can be no delegation of authority, no substitution, or evasion—the statutory conditions must be scrupulously, nay rigidly, observed.

But, aside from the mere question of approval, the by-law is clearly an illegal and improper one. The order set up is an order to proceed and to proceed at once with a specific work—the Bennie waterworks scheme—a work to be executed mainly in the Province of Quebec. The operation of the Dominion Act—necessary to authorise the crossing of the inter-provincial boundary and the Gatineau river—is made conditional upon the authorisation of the work by the Legislature of the Province of Quebec. This has not been and may never be obtained. What right has anybody to order the council to proceed now? Provincial rights and autonomy are not less sacred because the proposed invasion comes from a Province instead of the Dominion. It is simply idle talk of being forced into action by a Board of Health or anybody in such a case. Until Quebec has spoken, the Ontario Act only runs to the boundary line, and the Dominion Act remains in suspense. What by-laws the council might, of its own motion, tentatively pass is another matter, but this phase of the case was disposed of upon the former motion. Indeed, if I were disposed to do so, it might be sufficient for me to treat this whole question as res judicata. Dr. McCullough's letter, as was admitted in argument, effects no change in the situation—there is no change in the circumstances in any way, and the present by-law is identical with the one quashed on the 29th November (ante 370), except as to the amount and currency of the debentures, and the omission of recitals—all of them changes which tell against this by-law.

Many arguments were used which I cannot refer to. When all is said, the outstanding objection is the same as before. The

council has no power finally to deal with this question in its council chamber. It was argued that the special Act gives power to build outside the Province, and that for the limitation of $5,000,000 I should substitute the order of the Board. I cannot divorce what the Legislature has so solemnly joined together. Neither covertly, by borrowing $5,000,000 for an $8,000,000 work, nor in any other way, can the Ontario special Act be stretched or distorted to embrace the present scheme.

I was asked to withhold judgment, in case I formed an opinion adverse to the by-law, until application could be made to the Legislature. I will not do this. The only thing that would induce me to delay judgment would be if it would result in the saving of time. It would not have that effect; and, in my opinion, it is better that the decks should be cleared for the unhampered action of the Legislature, if legislative action is to be invoked.

There are no two opinions about the crying need of good water for the city of Ottawa; no doubt about the duty of the council to act with vigilance; there is no insuperable obstacle in the way. There should not be an hour wasted—there need not be. There is an open, straight, and narrow path. Go direct to the ratepayers and take their ballots, or go to them, indirectly, through the Legislature; and, in view of the stringent provisions as to approval of plans, the latter course is, perhaps, to be preferred. Side-stepping will inevitably make for loss of time.

The by-law will be quashed with costs. The applicant will be entitled to take the deposit out of Court.

KELLY, J. JANUARY 8TH, 1914.

FINE v. CREIGHTON.

Vendor and Purchaser—Agreement for Sale of Land—Objections to Title—Tender by Vendor of Conveyance—Refusal of Purchaser to Accept—Termination of Agreement under Provision therefor—Action by Vendor for Specific Performance or Damages—Dismissal.

Action by the purchaser for specific performance of a contract for the sale and purchase of land, or for damages for the breach thereof by the vendor, the defendant.

A. Cohen, for the plaintiff.
L. E. Awrey, for the defendant.

KELLY, J.:—There is little of merit in the plaintiff's case.

Briefly, the facts are the following. Levee, an agent, approached the defendant on the 3rd October, 1912, with a view to seeing if he would sell this property. Levee was not acting for the defendant; but, on the same evening, he returned with a written offer to purchase, signed by the plaintiff, and containing a term that time was to be of the essence of the offer. The defendant then accepted this offer, having stipulated with Levee that he was not to be liable for the payment of any commission; and he notified him, as the fact was, that he had not received the deed of the property. Levee received from the plaintiff a cheque for $50, intended as a deposit, which, however, he did not turn over to the defendant.

Other terms of the offer were that the sale was to be completed on or before the 1st November, 1912; that the purchaser was to be allowed ten days to investigate the title; and that, if, within that time, he should furnish the vendor in writing with any valid objection to the title which the vendor should be unable or unwilling to remove, and which the purchaser would not waive, the agreement should be null and void, and the deposit should be returned without interest, and the vendor should not be liable for costs or damages.

In his evidence the plaintiff admitted that he bought property for speculation alone. On the 10th October, he and one Turkel, who, though it did not so appear in writing, had a half interest in the agreement for purchase, entered into a contract with one Rebecca Levi for the assignment to her of the agreement with the defendant, the contract with Mrs. Levi, however, being defeasible if the agreement with the defendant should not be closed by reason of any default on his part or because of any defect in title. The plaintiff did not, within the ten days allowed for that purpose, submit written objections to title; but, on the 17th October, 1912, the defendant's solicitor having some days previously submitted to the plaintiff's solicitor for approval a draft conveyance, the plaintiff's solicitor delivered to the defendant's solicitor written requisitions on and objections to title. On the 24th October, the defendant's solicitor made reply thereto, giving answers to some of the requisitions, but stipulating that the doing so was without prejudice to the defendant's rights under the contract, and merely for the purpose of assisting the plaintiff's solicitor in his search. This was followed by a letter of the 26th October from the defendant's solicitor, also written without prejudice, stating that the defendant was unable to furnish any evidence in answer to the requi-

sitions, and returning the draft mortgage which had been forwarded by the plaintiff's solicitor with the requisitions on title on the 17th October.

On the 1st November, the day fixed by the contract for the closing of the sale, a clerk from the office of the defendant's solicitor attended at the office of the plaintiff's solicitor with a conveyance signed by the defendant and his wife, and stated to the clerk in charge of that office—the plaintiff's solicitor not then being at the office—the object of his call: and he asked for some one who would close the transaction, to which he received the reply that there was no one there who could close. Failing in his object, he left the office, and the defendant and his solicitor thereafter treated the transaction as at an end.

The plaintiff's solicitor seems to have regarded the answers to the requisitions as insufficient, while the defendant's solicitor asserted that he had made all the answers that it was possible for the defendant to give.

On this condition of things, the plaintiff has brought this action for specific performance, or, in the alternative, for damages.

Beginning with the manner of making the offer, the whole transaction seems to have been very loosely carried on for and on behalf of the plaintiff. The plaintiff's object was undoubtedly to speculate upon the property and turn it over immediately at a small profit, incurring as little expense as possible in the transaction. Soon after entering into the contract of purchase, he was "peddling" the property for sale, and on the 10th October, he entered into an agreement for the disposal of the interest of himself and Turkel in it, on terms which would give him a return of $175 or $125—as to which sum the contract is not just clear. After the delivery of the requisitions on title, the only serious effort made to carry out the transaction was on the part of the defendant, who was ready to deliver a conveyance signed by himself and his wife, and who, through his solicitor, tendered the same at the office of the plaintiff's solicitor, with the result above-mentioned.

It is true that the title was not then in a condition which was acceptable to the plaintiff; but, had his representative on that date met the defendant's solicitor with the cash payment which was then payable, other objections to title might have been removed. There were still further objections which clearly the defendant could not remove, though it is equally clear that he made reasonable efforts to satisfy the plaintiff's demands in that respect. The plaintiff being so unwilling to complete without a

further clearing up of the title, the defendant fell back on his rights under the contract and treated the matter as at an end.

I do not see how the plaintiff can succeed, under the conditions which present themselves here; and my finding is against him. Had my conclusion been otherwise, the most he could hope to obtain by way of judgment would be—not a decree for specific performance—but the profit which he and Turkel lost by reason of not being in a position to carry out the resale to Mrs. Levi. That amount was such that, even had he so far succeeded, he could not have hoped to be awarded costs except on the lower scale, with the probability of a set-off against him of costs on the higher scale.

The action must be dismissed with costs.

BRITTON, J. JANUARY 8TH, 1914.

McGREGOR v. WHALEN.

Contract—Sale of Timber—Unilateral Agreement—Consideration—Construction — Conditions Precedent — Removal of Timber and Payment of Price—Subsequent Sale of same Timber—Notice — Action for Trover—Conversion — Third Party—Costs.

Action for the conversion of timber, tried with a jury at Port Arthur.

D. R. Byers, for the plaintiff.

A. J. McComber, for the defendant Whalen.

W. D. B. Turville, for one Niemi, brought in as a third party.

BRITTON, J.:—The action is one of trover, brought by the plaintiff against the defendants Whalen and the Burrill Construction Company, for the wrongful conversion of 91 pieces of timber, of which the plaintiff claimed to be the owner in possession.

The trial was commenced with a jury; but, after proceeding a little way, I withdrew the case from the jury except as to two questions, which I submitted to them, and which, with their answers, I will mention later. The facts as found are as follows.

On the 16th November, 1912, the plaintiff and one Niemi, now the third party in this action, entered into an agreement, and the following writing was signed by Niemi:—

"Whitefish, Ont., Nov. 16, 1912.

"To whom it may concern.

"I hereby agree to sell to A. McGregor, of Stanley, 350 pieces of piling, cut and standing in bush as they are, on lot 8, concession 2, township of Strange, for $2 per stick, same to be suitable to the requirements of the Canadian Stewart Co.; about 60 feet long, 12 inches, two feet from butt, and 6 inches top. The piling are to be paid for, before loading or leaving Whitefish siding.

"Nicolas Niemi."

The plaintiff cut 9 pieces and assisted in the cutting of 82 pieces more, making the 91 pieces for which this action is brought.

The plaintiff had contracted with the Stewart company to sell to them at least as large or a larger quantity than the quantity Niemi agreed to sell to the plaintiff. The piling in question was upon Niemi's land, and the plaintiff did not pay to Niemi any part of the price, viz., $2 per piece, which the plaintiff was to pay before the piling was removing from Whitefish siding.

The plaintiff did pay to Niemi $4.50, but that was for the board of one man, working for the plaintiff. That payment was quite apart from any part of the purchase-money. The plaintiff himself marked, or allowed the Stewart company to mark, many of the 91 pieces, with their hammer mark—C. S. No doubt, people in that vicinity, engaged in lumbering operations, knew the mark; and a fair inference is, that the men employed by Whalen knew that part of this piling was marked as I have stated.

The plaintiff did nothing more until March, 1913, when he took men to break roads preparatory to getting the piling out; but a snow-storm came on, and the plaintiff and his men desisted. Later on, the plaintiff was again on the ground, but no steps were taken to get out piling from the bush or to pay for or remove the 91 pieces. Later on and in 1913, piling was badly wanted by the defendant Whalen, to assist in filling his contract with the Burrill Construction Company; and Whalen, by his agent Dolan, endeavoured to make a contract with the plaintiff for the delivery of piling, but they could not agree upon terms. Whalen ascertained that there was piling upon Niemi's land; and he, Whalen, supplied his agent Gardiner

with $100 in money and sent him to Niemi to close a bargain. Gardiner did not conclude a bargain, but Niemi was induced to go to Whalen's office, where a bargain was made by Whalen for the piling, and it was taken away and turned in to the Burrill company. The agreement for sale by Niemi to Whalen's firm or company was made on the 28th August, 1913. In September, the plaintiff's solicitor wrote to Whalen and also to the Burrill company, demanding the money. The Burrill company paid the money into Court. The defendant Whalen fights; and, upon his application, an order was made by a Local Judge on the 14th November, 1913, bringing in Nicolas Niemi as a third party.

The questions submitted to the jury and the answers were:—

(1) Did the defendant Whalen, before the purchase by him from Niemi, have notice of the agreement between McGregor and Niemi? A. Yes.

(2) Did the plaintiff, McGregor, leave the piling beyond what was a reasonable time for taking it away under the contract? A. Yes.

In the view I now take of the case, it was not necessary that I should find, or set out all of my findings upon the facts, but they are for the Court, should the case go further. The alleged contract is unilateral. It is a document addressed "to whom it may concern," signed by Niemi, which states that he agrees to sell to McGregor, the plaintiff. McGregor has not signed. It is objected by counsel for Niemi that this is void as against Niemi for want of consideration. Apart from that, and assuming that it is a contract on which the plaintiff may rely, what is the true construction of it? It was not a contract of actual sale, by which the property immediately passed to the plaintiff. It was at most an agreement to sell; and the conditions precedent to the plaintiff becoming entitled to the property were, that the plaintiff would remove it within a reasonable time, and that, before removing it, the plaintiff would pay the price agreed upon. The plaintiff did not pay, nor did he tender, the amount required. He did not attempt or offer to remove the property within a reasonable time from the day of the date of the agreement. The plaintiff had not the actual possession, nor had he the right of property or possession in the piling at the time of the sale to Whalen. There was no tender. What took place between Ray Short & Co. and the plaintiff, by which the plaintiff could have got the money, even if that was communicated to Niemi by any messenger sent by Ray Short & Co., could not amount to a tender, and there was no waiver by Niemi of the payment, or of any of the conditions in

his agreement to sell. Upon the construction I am obliged to put upon the agreement, the plaintiff fails in this action.

Many cases were cited by counsel for the respective parties, not only upon the question of the plaintiff's right to succeed in this action of trover, but upon the many points discussed at bar. No useful purpose will be served by referring to the great majority of these. Lord v. Price, L.R. 9 Ex. 54, Milgate v. Kebble, 3 M. & G. 100, and Brown v. Dulmage, 10 O.W.R. 451, establish the defendant's contention.

The defendant Whalen had notice of the plaintiff's claim; and, after such notice and after an unsuccessful attempt to buy from the plaintiff, bought from Niemi. It would be with great reluctance that I would hold, if I found myself bound by authority so to do, that a purchaser under such circumstances would be a purchaser in good faith, within the meaning of the Bills of Sale and Chattel Mortgage Act.

The third party, up to the time of the sale by him to Whalen, was a consenting party to the plaintiff's delay in removing the piling. So far as appears, he made no demand upon the plaintiff, nor did he give any notice requiring payment for or removal of the piling. A tempting offer was made to Niemi to break what he thought was a binding obligation on him to sell to the plaintiff.

The action will be dismissed, but without costs. The claim of the defendant Whalen against the third party will be dismissed without costs. There will be no costs payable by the plaintiff to the Burrill Construction Company, but that company should be paid their costs, which I fix at $20, out of the money in Court—$10 out of the money belonging to the third party, Niemi, and $10 out of the money belonging to the defendant Whalen. There will be no costs paid to or by the third party by reason of the application for the third party order or of the order or of the trial.

As the action is framed, I cannot deal with any claim by the plaintiff against Niemi, but the judgment will be without prejudice to any action or proceeding by the plaintiff against the third party, in reference to the piling, or any of it, mentioned in the alleged contract.

As to the $819, money in Court, $453 belonged to Niemi and the balance to the defendant Whalen. Assuming that to be so. $10, part of the Burrill Construction Company's costs, should be deducted from each and $443 paid out to Niemi, and $356 paid out to the defendant Whalen. If there is any dispute as to amount belonging to Niemi, the matter can be spoken to and determined on settling the minutes.

MIDDLETON, J. JANUARY 9TH, 1914.

BANK OF BRITISH NORTH AMERICA v. HASLIP.

BANK OF BRITISH NORTH AMERICA v. ELLIOTT.

Bills and Notes—Cheques Drawn on Bank—Presentment—Dishonour—Notice of—Time — Non-liability of Endorsers—Bank Act, sec. 86*—Clearing House—Rules of.*

Actions to recover the amounts of two cheques drawn in favour of the two defendants respectively by Maybee & Wilson, upon the Standard Bank of Canada, endorsed by the defendants, cashed by the plaintiffs, and dishonoured.

G. L. Smith, for the plaintiffs.

E. G. Porter, K.C., and Eric N. Armour, for the defendants.

MIDDLETON, J.:—Messrs. Maybee & Wilson were cattle dealers, carrying on business in the city of Toronto. They purchased cattle from the defendants Elliott and Haslip; and on the 30th September, 1913, gave to Haslip a cheque drawn upon the Standard Bank of Canada, at its branch on the corner of King and West Market streets, Toronto, for $1,864.49. On the 1st October, they gave to Elliott a cheque drawn upon the same branch of the Standard Bank of Canada for $1,041.03.

On the morning of the 1st October, Elliott and Haslip, who were friends, met at the Western Cattle Market at West Toronto, and went into the office of the branch of the Bank of British North America at the cattle market, this branch being a sub-branch of the West Toronto branch, opened at the market for the convenience of drovers there. They asked the manager in charge if he would cash the cheques. As Messrs. Maybee & Wilson were then regarded as a firm of substance, and their credit was perfectly good, he replied: "Certainly; the cheques are perfectly good."

It was not convenient for the bank at the time to give currency for the cheques, as they had not much currency in this sub-branch office. The manager suggested that he would issue to them what is described as "a drover's cheque," that is to say, he allowed the defendants to deposit Maybee & Wilson's cheques and to draw against this deposit cheques for identically

the same amount, which he accepted and marked as good and payable at par at any branch of the Bank of British North America. The defendants, of course, endorsed the respective cheques which they deposited. No account was opened for either of them individually; but the deposit of the cheques and the cross-entry representing the issue of the drover's cheque appeared in a special account kept for that purpose.

Having received these drover's cheques, the defendants left for home, Haslip living in Belleville and Elliott at a village a few miles from Belleville. The drover's cheques were in due course deposited in their respective bank accounts and honoured.

The Maybee & Wilson cheques were taken from the sub-branch at the market to the West Toronto branch of the Bank of British North America. The manager of the West Toronto branch put these cheques, with others drawn upon the Standard Bank of Canada, in an envelope, summing up thereon the total of the cheques so enclosed, and transmitting it to the head office of the Bank of British North America at Toronto.

At ten o'clock on the 2nd October, this bundle was taken by the representative of the Bank of British North America to the Clearing House, and formed part of the claim there presented by the Bank of British North America against the Standard Bank of Canada, and this entered into the clearing that then took place; the balance due from one bank to the other being paid in legal tender.

The officer of the Standard Bank of Canada took these cheques to his own head office, and in due course transmitted them, with any other cheques drawn upon the market branch of the Standard Bank of Canada, to that branch office. They were received at the branch office during the forenoon of the 2nd October. The manager of that branch office conceived that his course of action was to be governed by rule 12 of the Clearing House regulations, and that it became his duty to present the cheque at his own bank "not later than the following banking day."

It is not clear what was done by way of formal presentment, but Maybee & Wilson's account was not in a position to permit payment of the cheque. Maybee & Wilson were notified, and it was expected that a deposit would be made which would protect the cheques. The manager says that the cheques were then presented and dishonoured. This was on the 3rd.

Under the same regulation, the next day being Saturday,

the cheque "must be returned to the depositing bank not later than . . . twelve o'clock noon." The manager, still expecting Maybee & Wilson to make a deposit, held the cheques, and only returned them on the 4th at eleven forty-five, when he sent them to the West Toronto branch of the Bank of British North America. On that day, the bank handed the cheques to its notary, who again presented them, and, there not being sufficient funds, he protested them. The notice was not signed until the following Monday, the 6th; and, owing to some bungling on the part of the notary, it was not properly addressed, and was insufficient as a notice of protest. The cheques were dated at Toronto, no address was given by the endorsers, the notice of protest was sent to the endorser, "care Bank of B.N.A., Union Stock Yards, West Toronto"—an address which was manifestly entirely improper under the circumstances.

When the protest notice reached the manager of the Bank of British North America, he ascertained the probable residences of the defendants from the endorsements upon the drover's cheques. Haslip had deposited his cheque with the Merchants Bank of Canada, at Belleville, and Elliott had deposited his with the Standard Bank of Canada at Belleville. The manager had the notices readdressed and forwarded to the defendants, care of their respective banks at Belleville. Communications took place by wire, and every endeavour was made to get in touch with the defendants; but they did not learn of the dishonour of the cheques until the 8th. Action is now brought against Haslip and Elliott upon their endorsements of the cheques.

It is admitted that the protest and notice of protest are of no avail to the plaintiffs. The plaintiffs present their case thus: "The cheques were dishonoured on the 4th. Notice of dishonour was then given in sufficient time." The defendants resist payment, putting their contentions in alternative ways. They first say that the cheques were in fact dishonoured on the 3rd, and, if so, clearly there was insufficient notice of dishonour. In the second place they say that, even if the dishonour was on the 4th, the notice of dishonour was not adequate; and, lastly, if the cheques were not presented until the 4th, they were not presented within reasonable time, and the defendants are discharged.

In the result, I think that the plaintiffs fail. I do not think that I am called upon to criticise the circumlocution incident to the Clearing House. It is an institution created for the benefit of the bankers, and its rules and regulations cannot modify

the provisions of the Bank Act. I am, therefore, compelled to face the problem apart from the regulations in question, and to ascertain first whether a presentation on the 4th is a presentment "within a reasonable time" (sec. 86) of a cheque endorsed to the bank on the 1st.

I think it is not. Bear in mind the situation. On the morning of the 1st, early in the forenoon, these cheques were cashed at West Toronto.

They were not presented at the branch bank upon which they were drawn until the 4th. These two branch banks are both in the city of Toronto, a few miles apart. I can see no reason why the presentment should not have been made either the same day or the next day. It seems to me altogether too lax to hold that a presentment on the 4th was sufficient.

Moreover, I think that, when the cheques were presented on the 3rd, they were dishonoured, and that notice of dishonour should have been given in time reckoned from that date. I do not think that the plaintiffs could extend the time for giving notice of dishonour by holding the cheques until the next day and again presenting them. They were dishonoured on the first presentment.

It would be a great hardship to hold these men liable on their endorsement of these cheques, when they cashed them on the morning of the 1st, and until the 8th heard nothing to indicate that the cheques had not been paid. That the change of position which may have taken place in the interval probably did take place is demonstrated by the fact that, even after the 8th, such proceedings were taken as resulted in intercepting a great portion of the amount of the small cheque, so that fortunately the amount involved in the litigation, so far as this is concerned, is now less than $100.

This case was argued by both counsel upon the assumption that the by-laws, rules, and regulations of the Toronto Clearing House had some effect other than as an agreement between the banks.

The Canadian Bankers' Association, by its Act of incorporation, 63 & 64 Vict. ch. 93, assented to on the 7th July, 1900, is given power from time to time to establish a Clearing House for banks and to make rules and regulations for the operation of the Clearing House; but no such rule or regulation is to have any force or effect unless and until approved by the Treasury Board. Pursuant to this power, certain rules and regulations

were passed and approved. These are set forth in the pamphlet, commencing at p. 7. Rule 12, above mentioned, forms no part of these regulations, but appears to be a mere domestic rule of the Bankers' Association, not having any validity save as forming part of the conventional agreement between the bankers.

The action fails, and must be dismissed with costs.

MIDDLETON, J., IN CHAMBERS. JANUARY 10TH, 1914.

McAVOY v. RANNIE.

Parties—Joinder of City Corporation as Defendant—Liability for Acts of Police Constable—Pleading.

Motion by the Corporation of the City of Toronto for an order striking out the name of the corporation as a party defendant, upon the ground that the statement of claim disclosed no cause of action against the corporation..

Irving S. Fairty, for the corporation.
R. H. Holmes, for the plaintiff.

MIDDLETON, J.:—Upon the argument some question was raised as to how the corporation became added in the action. The writ of summons appears to have been against Rannie only, and no order can be found justifying the addition of the city corporation.

Be this as it may, it is clear that there is no cause of action against the city corporation. What is alleged is, that Rannie, a constable, conspired and colluded with the Singer Sewing Machine Company to assault, beat, and unlawfully imprison and detain the plaintiff. This is followed by the allegation, without any facts being stated to justify it, that the Corporation of the City of Toronto is liable to the plaintiff for the wrongful acts of Rannie.

The motion is allowed with costs.

SUTHERLAND, J. JANUARY 10TH, 1914.

KOSTENKO v. O'BRIEN.

Master and Servant—Injury to Servant—Negligence — Defective System—Cause of Injury—Finding of Fact by Trial Judge—Damages.

Action for damages for injuries sustained by the plaintiff while working for the defendants, owing to the negligence of the defendants, as alleged.

The action was tried without a jury at Port Arthur on the 15th December, 1913.

A. G. Slaght, for the plaintiff.

T. W. McGarry, K.C., for the defendants.

SUTHERLAND, J.:—While a claim under the Workmen's Compensation for Injuries Act was set up in the statement of claim, it was admitted at the trial that, as no notice that the injury had been sustained had been given within the time limited by that Act, and the action itself had been commenced too late, the plaintiff could have no remedy thereunder.

At the conclusion of the argument, I disposed of the general facts and fixed the damages at $900, in case I should determine that the plaintiff was entitled to succeed at common law. I reserved judgment mainly to consider whether, upon the evidence, it could be held that the defendants were doing their work under a defective system, and that the accident resulted in consequence thereof, but also to enable counsel to put in additional authorities.

The system under which the defendants were carrying on their work was discussed by me in dealing with the general facts of the case. The work which the plaintiff was directed to do, and was doing at the time of the accident, namely, assisting other men in carrying the logs from the pile to the dump, was a part of the system adopted by the defendants in carrying out their construction contract, as was the work of those who were felling the trees.

For the defendants to perform their work in such a way as that trees would be felled so close to as to fall across the paths along which men were obliged to carry logs, and thus make it likely that the trees would fall upon the men, without any super-

vision to prevent injury to them, was, in my opinion, adopting and following a negligent system. What might reasonably have been expected to happen, and might easily have been averted, was what did happen. It was this negligent system of carrying on the work which, I think, occasioned the accident.

Reference to Sword v. Cameron, 1 Ct. Sess. Cas. (2nd series) 493; Smith v. Baker & Son, [1891] A.C. 325, at pp. 337 and 339; Williams v. Birmingham Battery and Metal Co., [1899] 2 Q.B. 338; Ainslie Mining and R.W. Co. v. McDougall, 42 S.C.R. 420; Brooks Scanlon O'Brien Co. v. Fakkema, 44 S.C.R. 412.

I was referred by counsel for the defendants to the case of Kreuszynicki v. Canadian Pacific R.W. Co., 5 O.W.N. 312, which is, I think, distinguishable. The work being done in that case was not work in connection with the general system of the railway's operation, but an isolated piece of work required to be done and which was being done under the direction of an apparently competent foreman.

The case of Fairweather v. Owen Sound Stone Quarry Co. (1895), 26 O.R. 604, was also referred to, but does not, in my opinion, assist the defendants. I quote from p. 607: "The manner of working the quarry ought to be known to the governing body of the corporation defendants, and they should be answerable if the system is dangerous or negligently conducted: Rex v. Medley, 6 C. & P. 292."

There will be judgment for the plaintiff for $900 with costs of suit.

FALCONBRIDGE, C.J.K.B. JANUARY 10TH, 1914.

HOME BANK OF CANADA v. MIGHT DIRECTORIES LIMITED.

Buildings—Party Wall — Failure to Establish — Evidence—Easement—Injunction—Damages.

Action for an injunction and damages in respect of a trespass by the defendants upon the wall of the plaintiffs' building in Church street, in the city of Toronto, to the north of land upon which the plaintiffs were building, and in doing so making openings in the wall and placing girders therein, asserting that the wall was a party wall.

E. D. Armour, K.C., and A. E. Knox, for the plaintiffs.
Gideon Grant and D. Inglis Grant, for the defendants.

FALCONBRIDGE, C.J.K.B.:—The facts are little, if at all, in dispute. . . .

It is quite evident, and it is practically admitted, that the plaintiffs' building was erected before the defendants.'

I am of opinion that the defendants have failed to establish that the plaintiffs' south wall is a party wall.

1. The title-deeds, lease, etc., favour the plaintiffs' contention, reserving nothing to the defendants.

2. So does the general appearance of the buildings and of the wall in question.

3. So also does the construction of the wall.

Mr. C. J. Gibson, architect, called by the defendants, could not recall a case of a party wall being built like this one. It is plumb on the south (i.e., the far) side, with steps or jogs on the Home Bank side. The base is about 22 in. thick, the first floor 18 in., the second floor 14 in. and above that there is a parapet of 9 in. If then this were a party wall and the line in the centre thereof at the base, the bank would own less and less of the wall as it goes up until the parapet would be entirely on the defendants' land.

The only matter which has given me any trouble is the fact that there are openings in the south side of the wall for the insertion of joists and timbers from the other building, and into these openings joists and timbers have been inserted. There are also spaces for fire-places leading to chimneys in two places —in one of these the fire-place has been used by the defendants or their predecessors. The other fire-place looks out into empty space, being above the level of the defendants' building.

There being nothing of record shewing a grant or reservation to the defendants' predecessors of any right to use the wall, it may be the case that the owner and builder thereof had in his mind the event of another building being erected to the south, the owner of which might pay for the privilege of using these appliances.

No doubt, the defendants have acquired an easement for the support of their joists, etc., and for their smoke, as matters stood when they began to erect their present structure; and the injunction, which I now make perpetual, does not affect this.

Judgment for the plaintiffs with $5 damages and costs.

McCALLUM v. PROCTOR—ARMSTRONG v. PROCTOR—LENNOX, J.—JAN. 5.

Fraud and Misrepresentation—Purchase of Land on Faith of False Representations of Agent of Vendor—Action against Agent—Damages—Measure of.]—Actions for damages for false and fraudulent representations knowingly made by the defendant to induce the plaintiffs each to take a one-sixth interest in 7,808 acres of land in Saskatchewan and to pay A. J. McPherson therefor at the rate of $10.25 an acre. The learned Judge, in a short written opinion, states the effect of the evidence, and finds that certain material representations, which were false to the knowledge of the defendant, were made by him to induce the plaintiffs to purchase, and that the plaintiffs acted thereon and purchased on the faith thereof. The plaintiffs contended that they should recover back the amounts they had paid with interest; but the learned Judge was of opinion that they were not entitled to that relief against the defendant. The difference between actual value and what they had to pay was the measure of their loss occasioned by the defendant. Before discovery of the fraud, the lands were divided; but this did not affect the question. Reference to Redgrave v. Hurd, 20 Ch.D. 1; Rawlins v. Wickham, 3 DeG. & J. 304; Smith v. Chadwick, 9 App. Cas. 187; Derry v. Peek, 14 App. Cas. 337; White v. Sage, 19 A.R. 135; McCabe v. Bell, 1 O.W.N. 523; Boulter v. Stocks, 47 S.C.R. 440. Judgment for each plaintiff for $5,700 with costs. R. McKay, K.C., and R. T. Harding, for the plaintiffs. R. S. Robertson and J. J. Coughlin, for the defendant.

LEONARD v. CUSHING—MIDDLETON, J., IN CHAMBERS.—JAN. 6.

Appeal—Leave to Appeal to Appellate Division from Order of Judge in Chambers—Service of Process out of the Jurisdiction—Conflict of Authorities.]—Motion by the defendants for leave to appeal from the order of LENNOX, J., ante 453. MIDDLETON, J., said that the question raised was of importance to the parties. The case was very near the border line, and the authorities were not easy to be reconciled, if indeed reconciliation was possible. The case was one in which (in the learned Judge's opinion) leave should be granted; and, in this view, it would not be proper to discuss the merits of the application. Glyn Osler, for the defendants. Featherston Aylesworth, for the plaintiffs.

McNALLY v. HALTON BRICK CO.—KELLY, J.—JAN. 8.

Master and Servant—Injury to and Death of Servant—Defective Condition of Plant of Brick-works—Negligence—Common Law Liability—Knowledge of Superintendent—Omission of Precaution—Liability under Workmen's Compensation for Injuries Act—Findings of Jury—Damages.]—Action by the widow and administratrix of the estate of Louis McNally, deceased, for damages for his death, he having been killed on the 27th June, 1913, while working for the defendants in their brick-works. He was engaged in wheeling brick into kiln No. 4, where the bricks were being built up or set by two setters preparatory to the process of burning. When all the floor space of the kiln had been built upon, except about 8 feet square just inside the door, a large quantity of the bricks so built fell over upon McNally and another man who was engaged with him in wheeling, and McNally was killed. The action was tried with a jury. At the close of the plaintiff's case the defendants moved for a nonsuit, but the Judge ruled that there was evidence to go to the jury, and the case was submitted to the jury on the question of the defendants' liability. The jury's findings on the whole evidence were, that McNally met his death through negligence on the part of the defendants in that the floor was not kept in proper repair by them, and was not in a proper condition at the time of the accident; and that there was an act of omission on the part of the defendants' officials in not ordering the props to be left in position. They also found that there was no contributory negligence on the part of the deceased, and that he may have had a knowledge of danger, but not an appreciation or apprehension of the risk he ran. The learned Judge reserved judgment upon the whole case, and now gave written reasons for his conclusions. He referred to Halsbury's Laws of England, vol. 20, p. 129, sec. 252; Wilson v. Merry, L.R. 1 H.L. Sc. 326, 332; Smith v. Baker & Son, [1891] A.C. 325, 362; and said that failure to maintain proper plant and equipment was a breach of the master's duty at common law. Kennedy was the defendants' managing director; and, according to his own evidence, he acted as superintendent. Kennedy's only experience with brick kilns was what he acquired with the defendants, and he admitted that he knew of the condition of the floor and that there was danger. The negligence found by the jury of the defendants not keeping the floor in repair and of its improper condition at the time of the accident was negligence which, in view of the evidence upon

which that finding was based, rendered the defendants liable at common law. They were also liable under the Workmen's Compensation for Injuries Act, it having been in effect found that there was a defect in the condition of the building or premises, and Kennedy having admitted his knowledge of that condition; with which might also be considered the evidence—not contradicted—that Lycett, a workman, complained on that morning to Townsend, the foreman, who was then in the position of superintendent, of the condition of the floor. The jury having before them these facts and Kennedy's admission that he knew that there was danger, and that he did not warn the men against taking out the props, the finding of the jury that there was an omission contributing to McNally's death in not ordering the props to be left in position could well be taken as a declaration of negligence for the consequences of which the defendants were liable. Judgment for the plaintiff for $3,000, the amount assessed by the jury as damages at common law, with costs. H. Guthrie, K.C., and W. I. Dick, for the plaintiff. E. E. A. DuVernet, K.C., and B. H. Ardagh, for the defendants.