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CARTWRIGHT, MASTER. FEBRUARY 26TH, 1909.

CHAMBERS.

REX EX REL. INGOLDSBY v. SPEIRS.

Municipal Elections—Controverted Election of Reeve—Property Qualification—Assessment for Sufficient Property—Remedy by Appeal—Interest in Property—Freehold Estate for Life — Dismissal of Former Motion owing to Defects in Recognisance.

Motion by the relator to have the respondent removed from the office of reeve of the township of Chinguacousy, for want of the necessary qualification.

W. H. McFadden, K.C., for the relator.

B. F. Justin, K.C., for the respondent.

THE MASTER:—The respondent is assessed as owner of a farm of the value of $4,000 for land and $2,000 for buildings.

If the decision in Regina ex rel. Hamilton v. Piper, 8 P. R. 225, at p. 234, is applicable, then the motion must fail. Section 51 of the Act R. S. O. 1877, as it then was, has been re-enacted exactly in 4 Edw. VII. ch. 23, sec. 66, and the only way in which the respondent's qualification can be attacked would be an appeal from the assessment. But let it be assumed that this is not decisive, and that the judgment of Armour, J., on that section—"This makes the roll absolutely binding, and prevents the relator from going behind the roll"—is not of universal application, the question then will be, is the respondent qualified?

There are no facts, fortunately, in dispute. The only point for decision is the effect of the deed given to the respondent by his son on 7th December, 1907, on which day the respondent had conveyed to his son the property in question. The son at the same time and in consideration of such deed gave the respondent a rent charge of $125 a year on the land for his life, with the usual provisions to secure payment. That deed also contained this clause: "And the said party of the first part covenants and agrees with the said party of the second part to provide the said party of the second part with a comfortable home in the dwelling house upon the said lands during the natural life of the said party of the second part." Does this give the respondent any estate in the land? If it does, then he has a freehold interest sufficient to qualify him as reeve of the township.

Much argument was expended on the point, and many cases were cited on both sides.

On behalf of the relator reliance was placed chiefly on Wilkinson v. Wilson, 26 O. R. 213; Millette v. Sabourin, 12 O. R. at p. 261.

Counsel for the respondent cited a great many more authorities, but argued that Judge v. Splann, 22 O. R. 409, was decisive in his favour. In that case the words were, "shall remain and live on said place." There many of the cases were cited and discussed by Ferguson, J., and he held that the words then in question gave a life estate. These words are more like those in the deed in question than those in the cases cited by Mr. McFadden. There is also a case which I remember of Bartels v. Bartels, 42 U. C. R. 22. There it was decided by the Queen's Bench (Harrison, C.J., Adam Wilson, J., and Morrison, J., affirming the judgment of Gwynne, J.), that the words "shall have at all times the privilege of living on the homestead and maintained out of the proceeds of the said estate during their natural lives" gave a life estate in the whole property.

Under these authorities I think the respondent here has a freehold—it may be that under the last cited case he has a right to the exclusive occupation of the house upon the said lands. The words used are unusual and do not follow any decided case exactly. While, therefore, the motion is dismissed, I do not think that there should be any costs.

I have not overlooked Mr. Justin's preliminary objection that a former motion having been dismissed with costs owing to defects in the recognisance, it was not permissible to take

this second proceeding. I have not formed any opinion on this point, and I have not found any authority on the question.

Mr. Justin relied on Regina ex rel. Grant v. Coleman, 7 A. R. 619, and what is said at p. 626. But it does not seem decisive. Could not another relator have moved after the dismissal of the first motion? To hold otherwise, even after an apparent dismissal on the merits, would open the door to collusive proceedings taken really in a respondent's interest in order to anticipate and prevent a bona fide attack. If the matter goes further, it will still be open to the respondent to raise this objection.

LATCHFORD, J. MARCH 1ST, 1909.

WEEKLY COURT.

RE CRYSLER.

Will—Construction—Direction to Set apart Fixed Sum to be Realised out of Lands—Sale of Lands in Lifetime—Direction in Respect of that Event—Direction as to Balance of Proceeds of Sale—Sum Realised Less than Sum Fixed.

Application on behalf of the executors of the late Eunice Jane Crysler, of Port Hope, for an order determining certain questions arising on the construction of her will.

W. E. Middleton, K.C., for the executors.

D. G. M. Galbraith, for Mabel Smith Lockhart.

H. A. Ward, Port Hope, for W. A. Bletcher and other legatees.

M. C. Cameron, for infant children of Anna F. Seeley.

LATCHFORD, J.:—The testatrix by her will, dated 20th April, 1906, devised certain real property in the city of Kingston to her executors, upon trust to sell and convert the same into money, and from and out of the proceeds to set apart and invest the sum of $2,000, and to pay the net income thereof to her sister Charlotte E. Hunt during her life. After the death of Charlotte E. Hunt, the trustees were to stand possessed of the $2,000, and the investments representing that sum, for two nieces of the tes-

tatrix in equal shares. As to the balance of the proceeds of the sale and conversion, the trustees were to stand possessed therof for the benefit of all the children of said nieces.

The will then proceeds: "In the event of my selling my said house and land during my lifetime, my trustees shall, out of my ready moneys and investments for money, set aside and invest, as hereinbefore directed, the sum of $2,000, as a portion of the said proceeds of such sale, and pay the net income thereof to my said sister Charlotte E. Hunt during her natural life, and shall pay over a sum equal to the balance of the said proceeds of such sale in equal shares and proportions to all the children then living, equally amongst themselves, of my said two nieces Florence Ellen Smith and Anna F. Seeley: and upon the death of my said sister Charlotte E. Hunt, my trustees shall stand possessed of the said sum of $2,000 for my said two nieces Florence Ellen Smith and Anna F. Seeley, in equal shares and proportions, as their absolute property."

The property in Kingston was sold by the testatrix before the date on which the will was made, and the purchase money paid over at Kingston to the agent there of the testatrix. The sale appears to have been completed on or before 22nd March, 1906, when the conveyance to the purchaser was registered, but possession was not to be given until 1st May, 1906. The property was subject to a mortgage, amounting, with interest and costs of discharge, to $1,021.02, and the amount realised on the sale was but $1,941.48, after the agent's commission of $62.50 had been deducted. The draftsman of the will of 20th April was not aware that the property had been previously sold. The testatrix, however, must then have known of the deed which she had executed previously, on 20th March. I think, however, that on 20th April she regarded the sale as not completed, owing to the fact, established upon the application before me, that possession was not to be given until 1st May. The sale to which she referred in paragraph 5 of the will relates to the property in Kingston beyond question, and to no other property. The proceeds of the sale had not been remitted to her, but had been invested in mortgages by her agent at Kingston. The only statement from him appearing in evidence bears date 17th December, 1907, about a week subsequent to the death of the testatrix. Mrs. Crysler may properly, under the circumstances, have regarded the sale as incomplete. That she did so regard it is, I think, clear

from the opening words of clause 5 of her will. Effect can be given to her intention as expressed in that clause. That intention was, that in the event of her selling the property in her lifetime—which event happened—her trustees should, out of her moneys and investments, set apart the sum of $2,000, the income of which should be paid to her sister Charlotte for life. After Charlotte's death the fund was to be equally divided between the two nieces of the testatrix. Locke King's Act, sec. 37 of R. S. O. 1897 ch. 128, has no application. The clause of the will directing the executors to sell the Kingston property could not come into effect when the property was sold in the lifetime of the testatrix, and the mortgage which existed on that property may be disregarded. The testatrix did not die seised of the Kingston lands.

The testatrix doubtless expected that the proceeds of the sale would exceed $2,000. She refers to $2,000 "as a portion of the proceeds of such sale;" but that expectation and reference cannot, I think, be held to cut down the clear and unqualified direction that the executors shall set aside and invest the sum of $2,000 for her sister and nieces, especially as that sum is to be taken out of her "ready moneys and investments for money." Besides, the proceeds of the sale are nearly $2,000, and they exceed that sum if the commission is not deducted from the price realised.

There will be an order that, upon a proper construction of the will, the executors are, out of the moneys and investments of the testatrix, to set aside and invest the sum of $2,000 in the manner and for the benefit of the persons named in clause 5 of the will. There is no "balance of proceeds" of the sale and conversion of the Kingston property of which the trustees can stand possessed for the benefit of the children of the nieces, Mrs. Smith and Mrs. Seeley.

Costs of all parties out of the estate, the costs of the executors as between solicitor and client.

MARCH 1ST, 1909.

DIVISIONAL COURT.

REX v. BUTTERFIELD.

Liquor License Act—Conviction for Selling Intoxicating Liquor without a License—Proof that Liquors Sold were Intoxicating—Criminal Code, sec. 786—Objection that Accused not Allowed to Make Full Answer and Defence—Evidence—Cross-examination of witnesses for Prosecution—Discrediting Witnesses—Irrevelant Questions—Refusal to Answer Sustained by Magistrate—Discretion.

Appeal by defendant from order of TEETZEL, J., ante 542, refusing to quash conviction for selling intoxicating liquor without a license.

The appeal, which was on the same grounds as those stated by TEETZEL, J., was heard by FALCONBRIDGE. C.J., BRITTON, J., RIDDELL, J.

J. Haverson, K.C., for defendant, contended that he should have been allowed, when before the magistrate, to cross-examine the Crown witnesses to credit and to discover the facts; that, even if the questions were irrelevant, he was entitled to have them answered, although he would be bound by the answers, and could not contradict the witnesses. He also contended that on the evidence—which was to the effec that the defendant, or his bar-tender, sold, on the occasion referred to in the information, a mixture of whisky and ginger-ale—there was nothing to shew that there was a sale of intoxicating liquor, i.e., that the mixture contained alcohol in quantity sufficient to intoxicate.

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

THE COURT were unanimous in the opinion that there could be no review of the finding of the magistrate that there was a sale of intoxicating liquor.

FALCONBRIDGE, C.J., and BRITTON, J., upon the other question, were of opinion, without laying down any general rule, that the magistrate had a discretion to refuse to allow the questions to be put, having regard to the fact that

another charge was pending against the defendant for an offence alleged to have been committed on the same day during different hours—the questions put and not allowed to be answered being in respect of events happening on that day, and the magistrate having confined the cross-examination to the particular hours stated in the information for the offence which was the subject of the present conviction.

RIDDELL, J., was of opinion that the evidence said to have been excluded should have been, and was not, specifically tendered; that the qustions could not possibly be material, and it was within the discretion of the magistrate to refuse to allow them to be put. For these reasons, as well as for those stated by Teetzel, J., the appeal should be dismissed.

The appeal was dismissed with costs.

MACLAREN, J.A. MARCH 2ND, 1909.

C.A.—CHAMBERS.

PRINGLE v. HUTSON.

Appeal to Court of Appeal—Stay of Execution—Removal—Rule 827 (2)—Absence of Special Circumstances.

Motion by plaintiff for a removal of the stay of execution under Rule 827 (2) consequent upon the defendant having given security for the costs of his appeal to the Court of Appeal.

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

A. J. Russell Snow, K.C., for defendant.

MACLAREN, J.A.:—In this case the plaintiff sued as assignee of the covenant contained in a mortgage, and recovered judgment for $3,395. The defendant has appealed to this Court, and has given security for the costs; but before he did so the plaintiff had placed an execution in the hands of the sheriff. According to plaintiff's affidavit, he has also taken proceedings to set aside a voluntary conveyance of property in this city made by the defendant to his sons

after the service of the writ, and has registered a lis pendens against this property, in which he says the defendant had an equity of over $5,000.

The plaintiff now applies for a removal of the stay of execution under Rule 827 (2) consequent upon the defendant having given security for the costs. No precedent was cited to me of such an order having been made in any similar case, nor am I aware of any. I do not think the circumstances are such as would warrant such an order under the practice of the Court. The main ground urged is the very ordinary one of sanguine respondents that the appellant has no ground for appeal.

Under the rule adopted in such cases as Confederation Life Association v. Labatt, 35 C. L. J. 443, and Wintemute v. Brotherhood of Railway Trainmen, 19 P. R. 6, I think the application must be dismissed, and with costs.

CARTWRIGHT, MASTER. MARCH 3RD, 1909.

CHAMBERS.

TITCHMARSH v. GRAHAM.

TITCHMARSH v. McCONNELL.

Pleading — Statement of Defence — Embarrassment or Irrelevancy — Action for Trespass and False Imprisonment—Defence Setting out Facts and Pleading "Not Guilty by Statute"—Conviction—No Allegation of Quashing.

Motion by plaintiff to strike out certain paragraphs (nearly the whole) of the statements of defence as irrelevant and embarrassing.

J. B. Mackenzie, for plaintiff in each action.

W. E. Middleton, K.C., for defendant Graham.

W. H. McFadden, K.C., for defendant McConnell.

THE MASTER:—The first action is against a magistrate and the other against constables. They are sued for trespass and false imprisonment on 31st July last, and for damages

caused to plaintiff in being "obliged to pay a large sum of money in proceedings instituted to quash the conviction by force of which, if at all, such imprisonment could have been justified." The defendants plead specially the facts leading up to the above conviction. They also plead "not guilty," and note in the margin R. S. O. 1897 ch. 88, secs. 1, 9, 14, and 15 in Graham's case, and 1, 5, 9, 14, and 15, in the other.

If I rightly apprehend Mr. Mackenzie's argument, he maintains that in cases such as the present the defendants cannot plead by setting out the defences given in the statute, but must plead "not guilty" and name in the margin those sections on which they rely.

He also complained because they have not pleaded that the conviction under which they assume to justify is still in force. But there I think he is wrong. The statement of claim does not say whether the conviction was quashed or not. Apparently the pleader wishes this to be inferred; and in support of the motion he tenders a document which does quash a conviction which is not inconsistent with the one set up in the statements of defence. But, if it is material to the plaintiff's case to prove this fact, it must be done at the trial, and it should be pleaded in reply.

The defences on their face are neither irrelevant nor embarrassing. Unless the conviction is proved to have been quashed, the actions must fail. So far nothing appears in the pleadings to shew how this is.

In support of the motion were cited, among other cases, Bond v. Conmee, 15 O. R. 716, and McKay v. Cummings, 6 O. R. 400. The first of these only decides that if "not guilty by statute" is pleaded, the sections relied on must be noted in the margin, and no others can be invoked. The other decides that if "not guilty by statute" is not pleaded, then the statute will not avail the defendant, unless the defence is so framed as substantially to set it up. I do not see how these support the motion. They seem to me to have the contrary effect.

Reliance was also placed on Van Natter v. Buffalo and Lake Huron R. W. Co., 27 U. C. R. 581; but it does not seem to be relevant to the present motion.

The motion, in my opinion, must be dismissed with costs to defendants in the cause.

TEETZEL, J. MARCH 3RD, 1909.

WEEKLY COURT.

RE SISSON.

Will—Construction — Annuities — Income—Distribution of Estate — Hotchpot—Increase or Diminution of Annuities—Surplus—Ratable Distribution.

Motion by the executors of the will of William Sisson for the opinion and direction of the Court upon the following questions with regard to the construction of the will:—

(1) Are the annuities given by the will to the various children of the deceased payable out of income only?

(2) Do the children to whom the widow of the said William Sisson has devised property have to bring only the income of property received from their mother into hotchpot, or do they have to also bring the capital?

(3) Is the annuity given to Georgina to be increased beyond the sum of $400 by reason of a surplus of income over the above the amount required to pay the annuities provided for in the will of William Sisson?

(4) Are the annuities given by the will to be proportionately increased by the surplus income under the will and by any income under the will of the widow brought into hotchpot, or is such surplus income over and above the amount of the annuities to become capital, or is there an intestacy as to the same?

(5) Is Eugene Sisson, who takes under the wills of his two brothers property formerly belonging to the widow, obliged to account to the executors of William Sisson for the principal or income from such property, and to bring the same into hotchpot with the surviving children entitled under William Sisson's will, or is Eugene Sisson entitled to such property (principal and income) for his own absolute use?

(6) The income derived from the investments of the combined capital of William Sisson's and his widow's estates in certain years not being sufficient to pay each annuitant in full, can the deficiency in such years be made up out of the surplus income of subsequent years, and in what order should such payments be made?

The will was dated 30th May, 1883, and admitted to probate on 24th February, 1885. It was as follows:—

1. I will and direct that all my just debts, funeral and testamentary expenses, be paid by my executors and trustees, hereinafter named, as soon as convenient after my decease.

2. I give, devise, and bequeath to my executors and trustees, all my real and personal estate, goods, chattels, and effects, of whatsoever kind, nature, and description, upon the trusts hereinafter mentioned, that is to say:—

3. Upon trust to permit and suffer my wife to occupy and enjoy rent free my dwelling-house and the garden and grounds belonging thereto, together with all the household furniture, books, and other goods, chattels, and effects (other than money and securities for money) which shall at my decease be in, upon, or about my said dwelling-house, yards, premises, and out-buildings, for and during her natural life.

4. Upon trust to pay $400 per annum, payable by equal quarterly instalments from my decease, to my son Eugene, for and during his natural life, subject to be increased or diminished as hereinafter mentioned.

5. Also to pay $400 per annum, payable by equal quarterly instalments from my decease, to my daughter Marion Burnham, for and during her natural life, subject to be increased or diminished as hereinafter mentioned.

6. And upon the decease of my said daughter Marion, the children of my said daughter then living shall be entitled among them equally to the said annuity of $400, or other increased or diminished sum payable quarterly for and during their natural life or lives or the life of the survivors or survivor of them.

7. And the balance of the annual interest, profits, and income from all my said estate, moneys, security for money, bank and other stocks, funds, securities, and effects, of every kind and nature, to be paid quarterly from my decease unto my said wife, for and during her natural life or widowhood only, for the purpose of my said wife keeping up my said dwelling-house and premises, and for providing, supporting, clothing, and maintaining my two sons William and Bruce and my daughter Georgina.

8. And from and after the decease of my wife, I will and direct my executors and trustees to use, expend, and apply so much of my estate as may be necessary, not exceeding in the

whole the sum of $400 per annum, for the support, maintenance, and clothing of my daughter Georgina for and during her natural life.

9. And also from and after the decease of my wife to pay to each of my two sons William and Bruce, for and during their respective natural lives, the sum of $400 per annum, payable in equal quarterly payments from the decease of my wife, subject nevertheless to be increased or diminished as hereinafter mentioned. And from and immediately after the decease of my said wife, I authorise and empower my said executors and trustees, as soon as they may deem it advantageous and to the benefit of my estate, to sell and dispose of my said dwelling-house, garden, grounds, household furniture, books, goods, chattels and effects, in such way and manner, and either in parcels or otherwise, and at such price or prices, sum or sums of money, as to my said executors and trustees may seem prudent and expedient, and the proceeds of such sale or sales shall be and form part of my general personal estate in the hands of my said executors and trustees, and to be used, applied, and disposed of by them as herein mentioned.

10. In the event of the decease of my daughter Georgina during the life of her mother, I give and bequeath to the eldest daughter of my said daughter Georgina by her late husband Alpheus Jones, the sum of $200 per annum, for and during her natural life, payable by equal quarterly payments from the decease of my said daughter Georgina.

11. Upon the decease of my own last surviving child, I will and direct that the whole amount of principal moneys, estate, stocks, funds, and securities of every kind and nature, be equally divided between and among all the lawful children of my said daughter Marion Burnham and the said eldest daughter of my said daughter Georgina, and also any lawful child or children of any or either of my said sons William, Eugene, and Bruce.

12. I will and direct and it is my especial desire that no person or persons whomsoever taking any benefit under this my will shall have power to sell, transfer, hypothecate, pledge, incumber, or in any manner affect the provision hereby given to him, her, or them; and I direct my said executors and trustees to in no way or manner recognise any such attempted sale, transfer, hypothecation, pledge, or incumbrance, and such provision shall be paid only into the hands

of the person or persons so to be benefited thereby as herein mentioned.

13. In the event of my wife surviving me, and by her last will and testament devising or bequeathing her separate property other than equally (in value) between and among all of our children surviving her, I will and direct, and it is my express wish and desire, notwithstanding anything hereinbefore contained to the contrary, that from the time of my wife's decease, my said executors and trustees do and shall increase or diminish the annuities or provision hereinbefore made for and on behalf of any of my children, and in proportion to the amount to which they would severally be entitled under this my will at the decease of my wife, in order that the annual interest, income, or provision of each and every of my children surviving my said wife shall be equal, but nevertheless in the proportions hereinbefore mentioned, in the same manner as if my wife's separate estate and also my own estate were one common fund out of which all such annuities or provisions were to be paid and payable in the proportions mentioned in this my will.

14. I appoint the Toronto General Trusts Company to be executors and trustees of this my will.

E. G. Long, for the executors.

M. C. Cameron, for the official guardian.

D. H. Chisholm, Port Hope, W. F. Kerr, Cobourg, and J. F. Edgar, for the beneficiaries.

TEETZEL, J.:—I think it is plain from the language of the whole will that the testator intended that, with the exception of the annual allowance not exceeding $400 for the support, maintenance, and clothing of his daughter Georgina, there should be an equal annual allowance provided for his children after his wife's death, as far as he could control the situation.

I think it is equally plain that he intended the allowances to be charged upon the income, and not upon the corpus, the whole of which he disposed of upon the death of his last surviving child.

It was also the intention of the testator that in the event of his wife surviving him and devising or bequeathing her separate property to one or more of his children, instead of equally to all, such child or children should not get both the full annuity under his will and the benefit under her will, but that in such an event, notwithstanding the benefit so

obtained, the annual income of all his children, except Georgina, should be equal.

The wife did devise or bequeath all her separate estate to two sons, William and Bruce, and between her death in 1889 and their death in 1908, they brought the income from their mother's estate into hotchpot with the income from their father's estate, and submitted to an equal division; but the total income of both estates was not enough to meet in full the annuities provided under the father's will.

Since the death of the two sons, it is said that the income of the testator's estate will be more than sufficient to pay the remaining annuities. Out of the surplus the arrears of annuities should be paid ratably to the living and to the representatives of the deceased annuitants until such arrears without interest are paid in full.

If at the death of the last surviving child a surplus of income after providing for annuities and arrears has been accumulated, I do not think the will makes provision for it. The disposition at that time is confined "to the whole amount of principal money," etc. Any such surplus income will have to be distributed as upon an intestacy.

William and Bruce by their respective wills gave all their estates to Eugene, and a question arises whether the annuity to Eugene is to be diminished, or that of the others increased, assuming that as beneficiary under his brothers' wills he receives what they received under their mother's will.

I think that upon the death of William and Bruce, the annuities to them at the same time ceasing, the purpose of the 13th paragraph of the testator's will was fully met and satisfied, and that there is nothing in the will which extends any obligation upon Eugene to bring the income from their estates into hotchpot with the income of his father's estate in order to entitle him to full payment of his annuity.

On the basis of the above, the questions submitted must be answered as follows:—

1. The annuities are payable out of income only.
2. Income only.
3. No.
4. Any surplus at death of last child after providing for annuities and arrears thereof must be distributed as on an intestacy.
5. No.
6. Yes, payable ratably.

Costs of all parties out of the estate.

RIDDELL. J. MARCH 4TH, 1909.

WEEKLY COURT.

ANDERSON v. ROSS.

Local Master — Report—Appeal — Reference back — New Report—Disregard of Findings of Court—Second Appeal —Reference to another Referee—Adjudication on Evidence already Taken—Election.

Appeal by plaintiff from report of local Master at Port Arthur, upon a reference back to the Master as directed by RIDDELL, J., 11 O. W. R. 852.

J. E. Jones, for plaintiff.

H. Cassels, K.C., for defendant.

RIDDELL, J.:—This case, in part reported in 11 O. W. R. 852, has got into an unfortunate condition.

The matter was referred back to the Master at Port Arthur, and he, instead of accepting the findings of the Court, as was his duty, thought himself justified without further evidence in disagreeing with these findings. This cannot be tolerated in any inferior tribunal.

It is undoubtedly one of the inalienable rights of every judicial officer (a right which he shares with every freeman) to believe that those who differ from him, including appellate tribunals, are wrong; the expression of such opinion in respect of superior and appellate courts must be a matter of judicial decorum and good taste; but there can be no doubt that it is the duty of an inferior court or officer loyally to accept the findings of a court sitting in appeal from him. If the finding of the court sitting in appeal were for any reason thought to be wrong, it should have been appealed from—not having been appealed from, it stands, and must stand so long as the same evidence only is to be looked at.

The decision of the Master being based upon an alleged fact which was found not to be proved, it cannot stand, but must be set aside with costs.

If the respondent desires, I shall remit the case to another referee, who may take further evidence; if not, I shall dispose of the case upon the evidence already taken. The respondent will have 10 days to make his election.

BRITTON, J. MARCH 4TH, 1909.

TRIAL.

CLISDELL v. KINGSTON AND PEMBROKE R. W. CO.

Railway—Carriage of Goods—Delivery to Company—Neglect of Company to Pay Tolls for Carriage—Dominion Railway Act, secs. 344, 345—Seizure of Goods by Railway Company—Retention after Attempt to Sell—"Seize"—Carriers' Lien—Seizure not Maintainable after Absolute and Unconditional Delivery to Consignee—"Tolls"—Demand—Insolvency of Consignee Company—Winding-up Order—Action by Liquidator for Conversion—Tort—Measure of Damages—Set-off.

Action brought by the plaintiff, as liquidator of the Wilbur Iron Ore Company, against the defendants, to recover damages for the removal from the premises of the company of a quantity of coal and the conversion of it to defendants' own use.

A. W. Holmested, for plaintiff.

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

BRITTON, J..—The defendants as carriers had carried coal for and delivered the same to the Wilbur Iron Ore Company, in large quantities, and at different times. On 10th, 13th, and 15th August last, the defendants carried coal in 4 cars in all, and on these days delivered that coal to the company named upon their own property. Upon this coal so delivered the tolls and freight charges had not been paid. The coal was in a pile called a "stock" pile.

On 31st August, the defendants, about 6 o'clock in the afternoon, took possession of coal from that pile, intending to take, and taking, so far as it could be identified, coal that had been carried by defendants on the 10th, 13th, and 15th August named.

A winding-up order of the Wilbur Iron Ore Company was made on 26th August, 1908, and the plaintiff was on that day appointed liquidator.

It was admitted at the trial that the quantity of coal taken by the defendants was 138 1/10 tons. It was also admitted that the tolls and freight and other charges due the defend-

ants and unpaid prior to and on 26th August, 1908, upon the coal taken, and upon coal that had been consumed by the Wilbur company carried on the days mentioned, amounted to $568.25.

The defendants made reasonable efforts to sell the coal so taken, and failed, and, as the cars in which the coal was placed were required, the coal was mixed with defendants' own coal and used by defendants for their own purposes.

The defendants assert a statutory right to follow and seize the coal in question, under sec. 345 of the Dominion Act respecting Railways.

Section 344: "In case of refusal or neglect of payment on demand of any lawful tolls or any part thereof, the same shall be recoverable in any court of competent jurisdiction."

Section 345 (1): "The company may, instead of proceeding as aforesaid for the recovery of such tolls, seize the goods for or in respect whereof such tolls are payable, and may detain the same until payment thereof, and in the meantime such goods shall be at the risk of the owner thereof.

(2) "If the tolls are not paid within 6 weeks, and, where the goods are perishable goods, if the tolls are not paid upon demand, or such goods are liable to perish while in possession of the company by reason of delay in payment, or taking delivery by the consignee, the company may advertise and sell the whole or any part of such goods, and out of the money arising from such sale retain the tolls payable and all reasonable charges and expenses of such seizure, detention, and sale.

(3) "The company shall pay or deliver the surplus, if any, or such of the goods as remain unsold, to the person entitled thereto."

This sec. 345 first appeared in substance as sec. 234, 51 Vict. ch. 29. There power was given to the agents or servants of the company to seize the goods, etc. It was, in a slightly changed form, re-enacted as sec. 280 of ch. 58, 3 Edw. VII. (1903).

The word "seize" is relied upon by defendants. That word does not appear in the corresponding section of the English Act, viz., sec. 97, 8 Vict. ch. 20 (1845). I am unable to agree with defendants' contention that by virtue of the word "seize," they are virtually given a lien on property carried, to such an extent and of so general and wide an

application as to allow them to retake goods which have been delivered, and as to which the ordinary carrier's lien has terminated. The word "seize," in practice, generally means "taking possession of the property of a person condemned by the judgment of some tribunal:" see Bouvier's Law Dict.; or, "taking possession of property pending a trial or an adjudication in reference to something which might result in the property being liable, should the adjudication be adverse to the owner." It usually implies force. The ordinary meaning is to take possession of, to lay hold of. Generally, a seizure is made under a writ or warrant or authority or process specially issued in paticular cases provided for by law.

The section under consideration does nothing more, in my opinion, than confirm and establish the carriers' lien. If, while that lien exists and can be enforced, there is from the circumstances any condition that renders a seizure necessary, it may be made; if not, there remains the right to detain and dispose of the goods as provided by the section. If defendants are right, the startling result would be that without warrant or claim in Court, or legal process, they could follow the goods carried and take them wherever found, and at any time after the delivery to the consignee, so long as the goods retained their original character and could be identified, no matter how long after the delivery—subject, possibly, to the right of a bona fide purchaser for value without notice, and so long as the claim as to time would not be barred by the Statute of Limitations. It was not the intention of the Act that there should be any such result. The section was not intended to give the right to seize where the lien has ceased. There is the right to seize and detain, but the right must be exercised and enforced before there is an absolute and unconditional delivery of the goods to the consignee, as there was in this case. If the defendants had deposited the coal upon the land of the Wilbur Iron Ore Company under an express agreement, or under circumstances from which an agreement could be implied, that it was still liable for the tolls, and that the defendants' lien was not at an end, that it was still within the grasp of the defendants, the seizure might be maintained. I do not say that the word "seize" or "seizure" is not applicable to property in the possession of the carrier; again, in the case of a carrier who, having brought goods to their destination and being ready to deliver,

demands payment of tolls, and pending payment delivers the goods to consignee, subject to such payment, if tolls not paid on such demand, the goods carried could be seized, could be re-taken and detained. In such a case there would be no abandonment of lien. The goods would thereafter be held and dealt with by the carrier, at risk of owner. Apart from the right to seize upon which this case turns, the rights of carriers as to lien are dealt with in the very recent case of Lord v. Great Eastern R. W. Co., [1908] 1 K. B. 195, [1908] 2 K. B. 54, [1909] A. C. 109.

In the present case the defendants did not proceed to sell the coal or any part of it, as required by sec. 345. They endeavoured to sell it, and failing put it upon their own coal pile, mixed it with their own coal, used a part of it, and intend to use it all. They had no right to do this. This coal, in addition to charges for freight for carriage by defendants, was liable for freight on other roads and for duty before it was taken possession of by defendants. The defendants assumed to seize for the entire amount, including these back charges.

It was objected that "tolls," as defined by the Railway Act, sec. 2, sub-sec. 30, does not include "duty" or charges for transportation before the coal was received by defendants. That point is important in justifying a distress.

Section 344 requires a demand. If on demand or refusal to pay, the company may sue, or, instead of suing, they may (under sec. 345) seize. Demand of a gross sum, which includes a sum for tolls not separately stated, will not justify a distress: Field v. Newport, 27 L. J. Ex. 396. Presentation of a bill which had been given for carriage of goods, and which had been dishonoured, was held not to be a sufficient demand to justify distress; North v. London and South Western R. W. Co., 14 C. B. N. S. 132. The admissions in this case do not include one that a formal or sufficient demand was made, and the evidence does not establish it.

The seizure was made under the direction of the solicitor of the defendants, who was present and directed it. He did not know of the issuance of the winding-up order until after the taking of the coal and loading it upon the cars of defendants. He was advised of it before the removal of the cars from the siding of the Wilbur Co. That, in my opinion, is not material. The defendants did know, before starting to

take the coal, of the insolvency, in fact, of the Wilbur Iron Ore Company.

I find that the defendants did not have the consent of the plaintiff or of the said Wilbur Iron Ore Company to take the coal.

The defendants are liable, and the measure of damages is the value of the coal. The Wilbur Company being insolvent, and being wound up, had no use for the coal for working purposes. Its fair value at the place where and when taken was $3.25 a ton. The quantity being admitted as 138 1/10 tons makes the amount for which defendants are liable $448.83. I do not allow interest.

The action is for tort. The defendants are not entitled to set off their claim against the liquidator. They will, no doubt, prove against the company in the winding-up proceedings.

Judgment for the plaintiff for $483.35 with costs.

CARTWRIGHT, MASTER. MARCH 6TH, 1909.

CHAMBERS.

KNICK v. AIKENS.

AIKENS v. KNICK.

(AND FOUR OTHER ACTIONS.)

Parties — Joinder of Plaintiffs—Rule 185—Right to Relief in respect of same Series of Transactions — Claims by Shareholders of Company against another Shareholder for Fraudulently Procuring them to Sell their Interests —Joining 5 Claims in one Action—Cross-actions for Commission—Consolidation — Stay of Cross-actions — Leave to Counterclaim—Amendment—Particulars.

Motion by Aikens, the defendant in the first action, for an order striking out 4 paragraphs of the statement of claim in the first action, and requiring the 5 plaintiffs to elect as to which of them should proceed with the first action, and dismissing the action as to the others, and to compel an amendment or for particulars.

Motion by Knick and 4 others, the plaintiffs in the first action, and defendants in the other 5 actions, for an order consolidating all the actions.

W. T. Henderson, Brantford, for Aikens.

H. E. Rose, K.C., for defendants in the 5 actions of Aikens against Knick et al.

THE MASTER:—The first action was brought on 30th September by Knick and 4 others as plaintiffs against Aikens.

The statement of claim was delivered on 18th February. It alleges that the plaintiffs and defendant were shareholders in a company called the Erie Natural Gas Co., in the business and management of which the defendant took the prominent part. Defendant was also interested in the Henderson Co. doing a similar business, and in this also the defendant took the prominent part. The defendant was anxious to dispose of his interest in these two companies, and tried to make a sale of them both to the Manufacturers Natural Gas Co., and succeeded in doing so at a price of $65,000. The defendant, it is said, obtained the consent of the plaintiffs by making false representations and concealing from them material and essential facts, and the plaintiffs were thereby induced to sell their interests in the Erie Co. for $44,000, and the defendant was enabled to sell the shares of the Henderson Co. for $21,000. And the plaintiffs, by reason of the premises, claim $10,000 damages.

On 28th September Aikens commenced 5 separate actions against the plaintiffs in the first mentioned action. But statements of claim were not delivered until 22nd February. In each case the claim is for commission of 10 per cent. on shares held by the 5 respective defendants.

All parties have proceeded in a very leisurely way, so that all the statements of claim were irregular, being filed too late and without leave. No doubt, settlement has been discussed. Notwithstanding Smith v. Fox, 11 O. W. R. 672, I think the plaintiffs can join under Rule 185. The purpose of the defendant in getting control of the shares of the other 5 in the Erie Co., so as to be able to sell his interest in the Brantford Co., seems to be within the expression "the same transaction or series of transactions," but they could not have been sued jointly by Aikens for commission. It therefore follows that the most convenient disposition of the cases will be to

stay the actions brought by Aikens and leave him to counterclaim in the other action.

The plaintiffs should amend, setting out the facts on which they rely to prove their allegations of fraud, or else give all necessary particulars of the same in a week. See the case, even under the old procedure, of Armstrong v. Lewin. 34 U. C. R. 629.

The costs of Aikens's 5 actions will be costs in the cause in the other action, as well as the costs of this motion.

The time for statement of defence to be 8 days from delivery of particulars or amendment of statement of claim to that effect.

CARTWRIGHT, MASTER. MARCH 6TH, 1909.

CHAMBERS.

HEBERT v. EVANS.

Parties — Joinder of Plaintiffs—Rule 185—Right to Relief in Respect of same Series of Transactions—Claims by Miners against Directors of Mining Company for Wages —Joining 16 Claims in one Action—Judgments Recovered against Company by 14 Plaintiffs—Position of Plaintiffs who have not Recovered Judgments.

Motion by defendants for an order requiring the 16 plaintiffs to elect which of them should proceed with the action, and directing that the action be dismissed as to the other 15.

F. J. Roche, for defendants.

A. G. Ross, for third parties.

J. McGregor Young, K.C., for plaintiffs.

THE MASTER:—The statement of claim sets out that 14 of the plaintiffs have recovered judgments against the Imperial Cobalt Silver Mining Co., which are wholly unsatisfied, except as to about 14 per cent. of their respective judgments. The other two had their actions stayed, by the company being put into liquidation. These two may find difficulty in proceeding with their action. But at present that question does not arise.

The plaintiffs are working miners, and are proceeding against the 3 directors who are resident in Ontario, under R. S. O. 1897 ch. 191, sec. 85. These defendants have brought in as third parties the other 3 directors, who are resident in the United States.

The only matter for determination at present is, whether the plaintiffs come within the terms of Rule 185, i.e., do they allege any right to relief in respect of or arising out of the same transaction or series of transactions, etc.? Had these plaintiffs been injured in one and the same accident, they could certainly have united in bringing one action, or if they had been shareholders induced by alleged misrepresentations in the prospectus to take stock in the company, or in some cases if they were attacking the directors for breach of their duty to the shareholders in any respect. Yet in all such each plaintiff would necessarily have a separate cause of action and must prove his separate claim. And it was to allow this to be done in one action that the Rule was put into its present form. Here all the 16 claim for work done for the company, and the first 14 have recovered judgment against the company for their services. Having regard to what was said by Mr. Justice Riddell in Smith v. Fox, 11 O. W. R. 673, and the whole trend of the later decisions, it does not seem right to be astute to limit the scope of the amended Rule. Subject, therefore, to what may be set up as against the two who have not recovered judgment, and leaving the question of costs to be disposed of at the trial, I think the action should be allowed to proceed.

The avowed policy of the Judicature Act is to make one action do the whole work as far as possible, and parties should (as far as the Rules permit) be encouraged to concentrate their claims in a single action, instead of (as they no doubt might have done) bringing 16 different actions, some in the County Court and the rest in the Division Court.

The costs of the motion will be in the cause.

Time for defence to run only from service of this order.

CARTWRIGHT, MASTER. MARCH 6TH, 1909.

CHAMBERS.

NIXON v. JAMIESON.

Writ of Summons—Service out of Jurisdiction—Rules 162, 163 — Affidavit—Sufficiency—Cause of Action—Agent's Commission on Sale of Goods—Place of Payment—Breach of Contract — Place of Acceptance — Correspondence—Forum—Discretion—Conditional Appearance.

Motion by defendants to set aside order for issue of writ of summons for service out of the jurisdiction under Con. Rule 162, and service made thereunder.

C. A. Moss, for defendants.

T. M. Higgins, for plaintiff.

THE MASTER:—The affidavit on which the order was granted was to the effect that the defendants were justly and truly indebted to plaintiff for sales of goods made by him on commission for them, that such sales were made in Toronto, and the said moneys became payable to plaintiff at Toronto. This, I think, was sufficient under Con. Rule 163.

The motion is now made on the ground that the alleged cause of action did not arise within the jurisdiction of the Court, and is supported only by the examination of the plaintiff taken by defendants. This was done at some length. It appears therein that the real claim is one for 7½ per cent. on £800 stg. (which would be $296) for goods sold to an agent of the Hees Co. by the defendants in Scotland. The plaintiff claims that, as the Hees Co. carry on business in Toronto, he is entitled to commission under the arrangement he had with the defendants.

There are no particulars given in the correspondence as to the mode of payment. The plaintiff says he was never sent money by defendants, but always drew on them for his commission. This might indicate that the payments were to be made in Scotland, in which case the breach would be there.

The plaintiff in his affidavit in answer to this motion says that he accepted the defendants' offer as given in their letters of June and August, 1901, by letter posted here. That letter

is not yet forthcoming, but, if it is as plaintiff says, then the contract was made in Ontario, and for the reasons given in Blackley v. Elite Costume Co., 9 O. L. R. 385, 5 O. W. R. 57, this would require the debtor to make payment here, until the contrary was shewn. It would seem, therefore, that the only thing to be done now is to make the same order as was made in the Blackley case, and allow the defendants to enter a conditional appearance, with costs in the cause.

No doubt, the Court has a discretion, as Mr. Moss argued, as to allowing service under the Rule. This was decided by the Divisional Court in Baxter v. Faulkner, 6 O. W. R. 198 (see judgment of Meredith, C.J., at p. 199). Here, however, the whole or at least the substantial point is, whether the sale made in Scotland by defendants to the agent of the Hees Co., under the agreement with plaintiff and the custom of the business, entitled the plaintiff to his usual commission. The evidence on this point must be found here if the contract was made here. There is no affidavit from defendants here, as there was in the Baxter case, so that, so far, they do not deny the plaintiff's story. This would, therefore, seem not to be a case in which the discretion of the Court should send the plaintiff to seek relief in Scotland.

The defendants should plead in a fortnight.

BRITTON, J. MARCH 6TH, 1909.

TRIAL.

WINGER v. VILLAGE OF STREETSVILLE.

Contract — Work and Labour—Concrete Work of Dam and Power-house Built for Municipal Corporation—Change of Site—Engineer—Disputes — Certificate—Evidence—Delay—Defective Work—Notice — Waiver — Dismissal of Contractor—Damages.

Action for balance of contract price of work done by plaintiff for defendants. Counterclaim for damages for delay, defective work, etc.

W. Proudfoot, K.C., and W. A. Skeans, for plaintiff.

J. Bicknell, K.C., and H. H. Bicknell, for defendants.

BRITTON, J.:—A contract was entered into between the parties on 27th March, 1907, for completing a concrete work of a dam and power-house at Streetsville for the defendants.

The work was to be done agreeably to plans and specifications prepared by John S. Fielding, and to the satisfaction and under the direction and personal supervision of Mr. Fielding or a representative or clerk of works appointed for the purpose—to be completed before 15th October, 1907.

The matters which have taken up a lot of time, and created some confusion during the trial, are all carefully provided for by this contract.

The defendants had the right to change the site of the coffer-dam. The defendants were to pay for the gravel, or to supply a gravel pit. That means practically that they selected and furnished the gravel, and, subject to certain qualifications as to screening, &c., they were responsible for and took chances as to its quality. The defendants and their engineer had the right to make changes at any time during the progress of the work, and questions as to labour or material or as to anything to be paid for, and not provided for by the contract, were to be determined by the engineer. Any dispute in regard to the construction of plans or specifications, or any dispute during the construction of the contract, was to be referred to the engineer. Apparently no such disputes as are within the contemplation of this contract did arise during its continuance. This was a contract to construct the whole work for a price to be ascertained by the schedule of prices named for particular things to be done. The plaintiff was to be paid upon the basis of work done, upon an estimate and certificate in writing to be given by the engineer. Each payment was to be 80/100 of the work done, but not to include work of one week next before the date of the certificate. The payments were called "progress payments."

The contract is a very full and complete one, apparently providing for every possible contingency, and, as usual in such contracts, aims to protect the proprietors whatever may occur.

The plaintiff entered upon the work, and all agree that at first and for a considerable time there was no serious complaint, but it is a fact that the plaintiff did not proceed even in the early part of his work in a pushing or vigorous way. He acted as if he had plenty of time, and so did not make the most of his opportunity. He was warned that he was

not getting the best out of his men, and that he would lose money. He admitted that his foreman, a good man in many respects, was not so good in dealing with men, in employing them, in superintending, in allotting work, and seeing that men fairly did their duty to their employer. It would not be too strong, perhaps, to say that there was some pottering about the work, but there is nothing to indicate that at the time when any of the witnesses speak of delay. prior to the middle of August, the plaintiff could not easily, if defendants had done their part, have completed this contract by 15th October.

By the contract the plaintiff was permitted to carry on the work in his own way and by his own methods (p. 4). Exercising his own judgment, he arrived at a certain stage of the work when he required the plans of the power-house. No doubt about this. Members of the council heard of it, and tried to hurry up the plans. It is not left to conversations, although there is evidence of such, but on 3rd September the plaintiff wrote to the engineer and asked for the plans. He refers to his request of the week before. He wrote on 13th and 29th September.

The plans were not immediately furnished. Why? I cannot tell; it was a simple matter; the contract had been made 6 months before. They were not furnished until 26th September, when small white plan was furnished, and not until 3rd October, when complete plans and specifications were furnished. And then it was too late to enable the plaintiff, working reasonably and with means at his disposal, and as the defendants would. from their knowledge of him and his resources, expect him to work, to complete his contract by 15th October.

It was the duty of the defendants to furnish plans and specifications. The plaintiff was entitled to these; there was delay in furnishing these; and that delay was the cause of plaintiff not being able to complete his contract by the time named.

The defendants did not treat the matter as if time was of the essence of the contract.

On 21st October (a week after expiry of time) an arrangement was made by which the plaintiff was to concentrate his energy and labour upon the concrete work, and the defendants undertook to fill up the opening and do the work necessary to the west of the power-house, and the opening to the east of the waste weir, and the opening at end of

cut, conveying water from above the coffer dam. It is true that the plaintiff did, after that arrangement, fill up the opening to the east of waste weir, but defendants did the rest, and the plaintiff did continue to work at the concrete work, and under growing disadvantages, owing mainly to the frost which was at hand. Shortly after that, the crisis came. The plaintiff thought he was entitled to money on 15th November. Mr. Fielding would not give him the certificate. He asked plaintiff for a statement of his affairs. The plaintiff refused to give such a statement, but offered to give a certificate such as the contract provides for. That apparently would not satisfy the engineer. In fact, at that time, unquestionably, Mr. Fielding was aroused and anxious and angry at the situation on the edge of winter.

I have no doubt the plaintiff said that if he did not get the money he would not "do another tap on the job," or words to that effect, and, if the engineer had then and there taken the plaintiff at his word, a different situation would have resulted, but he did not take him at his word, and did not then take the work off plaintiff's hands. Plaintiff continued on the work, doing more or less until 22nd November. As to just what was said and what occurred on the 22nd, the parties differ. Mr. Fielding says that he asked plaintiff, in substance, to give up the work, and that plaintiff consented; that he asked plaintiff if he would waive the 5 days' notice required by the contract, and that plaintiff said he would. The members of the council present, who did not hear the whole conversation, did hear the plaintiff say what they understood to mean a willingness to give up, without waiting for the expiration of 5 days after notice. The plaintiff denies that he was willing to give up, and denies that he agreed to waive the 5 days' notice. Whether the engineer is right or plaintiff is right as to the exact words used, it is clear that the plaintiff had not on the 15th, and did not on the 22nd November, or at any time, throw up the contract.

The engineer, acting for the defendants, dismissed the plaintiff and prevented the plaintiff from going on any further with the work.

The conclusion I drew from the evidence is that the engineer did not intend that plaintiff should not get pay for the work done by him, but that he would go on and push the work, charging plaintiff with actual cost, and allowing to him such amount for the actual work done as he would

have been entitled to if plaintiff had himself completed it. The engineer expected that it would cost the defendants more to complete than if plaintiff had completed, and he intended to charge plaintiff with the difference, and that is practically the situation which plaintiff must accept, and that is fair to the plaintiff.

I find that the plaintiff is not liable to the defendants for damages for non-completion of the work within the time specified, and that the plaintiff is entitled to be paid for the work actually done by him, of which the defendants have got the benefit.

There is no difficulty in this case in arriving at the amount.

The plaintiff cannot, in my opinion, be liable, in any view of the case, for cost of filling up the upper end of the cut, near the east end of coffer dam. No case has been made for such liability.

I find that the plaintiff is not liable for any damages by the flood in the spring of 1908, when water went over embankment, east of waste weir, and carried away the filling which had closed the gap which formerly had been there. He is not liable for the damage, if any, to the bank to the west of the power-house, as the defendants had taken upon themselves the doing of anything there.

A great deal of evidence was given about defective work, but, after all, the defects are comparatively few. Witnesses for defence say it is a fairly good job; apart from some particular defects in power-house, the work was fairly well done. Special complaint was made that large stones were put in, some too large for 14 inch casing, and some too large for 18 inch.

It is admitted by plaintiff that a mistake did occur, but only once, in not noticing the specifications prohibiting larger stones than 8 inch in the 14 inch. He says that, apart from one occasion where a man did not obey orders and was discharged for such disobedience, these larger stones were not put in.

It is almost inconceivable that with the clerk of works and inspector on the work, with members of the council keeping close watch as the work progressed, and with the engineer, who says he was kept well in touch, the work can be to any considerable extent inferior by reason of stones larger than specified going into the work. Some of the alleged bad work was from improper reinforcing iron. The

weight of evidence is largely in favour of the proposition that the iron furnished was not suitable for the purpose for which used, and that to some extent explains the work alleged to be defective where wire and stones were seen through the cement. The omission to put 2 ribs, as called for, was wholly and satisfactorily explained. I understand from Mr. Fielding's evidence that he accepted the explanation and exonerated the plaintiff from blame in this.

The defective work referred to by the witness Sexsmith, at the cost of $82, should be allowed to defendants.

I am not in a position, upon the evidence, to allow the plaintiff anything for damages by reason of the delay in furnishing plans. No time was kept of men idle while waiting. There was other work to do. It could not be done, plaintiff says, to the same advantage, but when the loss is to be measured, I am unable to find any sum. Theoretically there was some loss, but the plaintiff had other work to do. He was absent from the work and about his other business a good deal. Possibly there was gain in that. If he intended to claim, he should have been more careful to keep an account of his loss.

As to plaintiff's alleged loss of profits, that claim very properly was not pressed.

The defendant conceded that, if the plaintiff is entitled to recover at all, he is entitled to the sum of $521.40. This will appear from the following: The engineer reported to the reeve and clerk of the defendant corporation on 3rd April, 1908, giving itemised account of the measurement of work to which plaintiff was entitled, and, after making the charges against the plaintiff, found a balance in his favour of $1,845.03. On 17th April the engineer reported that the further sum of $336.96 should be allowed, making a total of $2,181.99.

The defendants contend that, apart from any question of damages, they should deduct the further sums:—

Engineer's expenses after 15th October. 1908.	$ 89 15
Liens and costs	1,571 44
	$1,660 59

This would only leave for the plaintiff $521.40.

The plaintiff claims, exclusive of any damage for not furnishing plans, $2,126.40, made up as will appear by statement No. 2 handed in on the argument.

I find in favour of the plaintiff the sum of $1,440.12, arrived at as follows:—

Balance as per engineer's report 3rd April, 1908..	$1,845 03
Additional allowance as per letter 17th April	336 96
It was stated during the trial, and not contradicted, that there was an error in Fielding's addition in computing excavation	12 15

The difference between the parties is in the following items:—

(1) Cutting upper river diversion	$876 15
Coffer dam	116 70
Charged by plaintiff	$992 85
Allowed by engineer	375 00
Difference	$617 85

The defendants do not dispute plaintiff's measurements, but they rely upon the clause of the contract, which, as they contend, leaves this wholly to the engineer.

Only $375 is allowed, and the evidence does not satisfy me that the engineer acted upon any measurement as to this item, or that he acted as an arbitrator or judicially between the parties. The evidence is, that he at first, upon the claim being put forward, refused to allow anything, then he offered $100, then $200, and finally $375. The plaintiff refused to accept even the $375 except on account.

As the work was done, and as plaintiff's measurement was established, this difference should, in my opinion, be allowed	$617 85
(2) The items for core wall in eastern bank, $51 and $17.07, should be allowed	68 07
(3) I allow picking down face of concrete	13 50
(4) I am unable to find evidence that would justify the allowance of $48.40 for flooring and wheel pit, extra strength.	
(5) Extra expense of arching wheel pit is charged at $275. This includes an item of waste of 4,000 ft. of lumber. There is not satisfactory evidence of such waste of lumber, and I allow the sum at	200 00

The result will be allowances as above..	$1,845 03	
	336 96	
	12 15	
	617 85	
	68 07	
	13 50	
	200 00	
		$3,093 56
As against this the defendants are entitled to cost of removing and renewing work in pressure chamber, labour $67, material $15		82 00
Leaving		$3,011 56

I am not overlooking the evidence given by plaintiff and his witnesses as to reasons why the work in pressure chamber was defective, but the plaintiff should not have done the work as it was done without at least a special protest to the engineer or inspector.

Deducting for liens and costs	$1,571 44
Will leave	$1,440 12

for which amount I direct judgment for plaintiff, with costs.

The other items, 10 in all, amounting to $685.80, were considered by me. I would disallow of these $136.80; that would leave $549; and it was in respect of these items, so far as I can follow the engineer, that he allowed the $336.96 credited to the plaintiff above. I cannot allow more than the $336.96.