The
Ontario Weekly Notes

VOL. XIX. TORONTO, JANUARY 21, 1921. No. 19

APPELLATE DIVISION.

SECOND DIVISIONAL COURT. JANUARY 10TH, 1921.

*HICKS v. McCUNE.

Trespass—Search of Premises under Search-warrant—Information upon which Warrant Issued not Shewing Grounds of Suspicion —Criminal Code, sec. 629, and Form 1—Jurisdiction of Magistrate under Statute and at Common Law—Form of Action —Trespass or on the Case—Warrant, whether Void or Merely Irregular—Verdict of Jury—Damages—Complainant Taking Part in Search—Judge's Charge—Dismissal of Claim for Malicious Procedure.

Appeal by the defendant and cross-appeal by the plaintiff from the judgment of ROSE, J., upon the verdict of a jury, in an action for damages for wrongful dismissal and other wrongs.

The plaintiff alleged that he had been wrongfully dismissed from his employment with the defendant and that the defendant had, falsely and maliciously and without reasonable and probable cause, sworn to an information charging the plaintiff with stealing a number of tools, etc., and had also caused to be issued a search-warrant directing that the plaintiff's premises should be searched for these tools, and further that the defendant, in the company of two police officers, had unlawfully trespassed upon the premises of the plaintiff and his person and made a search.

At the trial, the claim of the plaintiff for wrongful dismissal was disposed of adversely to him, and the claim for malicious procedure in making the affidavit and issuing the search-warrant was also dismissed, the learned trial Judge holding that the plaintiff had not shewn that the defendant had not reasonable and probable cause for what he did. The trial then proceeded

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

as to the alleged trespass upon the plaintiff's property and the search thereon, and the jury assessed the damages at $200, for which amount with costs the trial Judge directed that judgment should be entered.

The defendant appealed from that part of the judgment, and the plaintiff from the dismissal of his other claims.

The appeals were heard by Mulock, C.J. Ex., Hodgins, J.A., Riddell and Masten, JJ.

Daniel O'Connell, for the defendant.

A. C. Heighington, for the plaintiff.

Hodgins, J.A., in a written judgment, said that the plaintiff's appeal had been dismissed at the hearing.

Considering the defendant's appeal, he said that it was contended that, even if the search-warrant was void or defective, the only action in which the defendant could be made liable was one on the case, in which malice must be shewn, and that trespass did not lie, as a warrant, legal on its face, protected the defendant.

Assuming the learned trial Judge to have been right in withdrawing the claim for malicious procedure from the jury (and this Court had dismissed the plaintiff's appeal from that ruling), the damages which had been found included every element which could properly have been taken into consideration by the jury, either in trespass or case, if trespass could be laid notwithstanding that ruling. The distinction between trespass and case did not seem to be material, as mala fides in the execution of the warrant was left to the jury as proper for their consideration. See Cooper v. Booth (1785), 3 Esp. 135.

Damages had been given by the jury for all the consequences of the issue of the search-warrant, apart from those which might have been recovered in an action for malicious procedure, if that had been successful. The whole of the issues raised and the consequences flowing therefrom were properly presented to the jury.

The defendant in the sworn information which led to the issue of the search-warrant failed to comply with the provisions of sec. 629 of the Criminal Code, which confers jurisdiction upon a Justice of the Peace to issue a search-warrant, provided he is satisfied by information upon oath, in form 1, that there is reasonable ground for believing that there is in any building . . . anything upon or in respect of which any offence against this Act has been or is suspected to have been committed," etc. Form 1 requires the statement on oath of "the causes of suspicion, whatever they may be," and this statement was omitted from the information. The basis, therefore, upon which alone the Justice

could act was faulty in a material respect—he could not come to the conclusion that reasonable ground existed for believing, etc.; consequently his issue of the search-warrant was contrary to law and therefore void.

At common law the jurisdiction of a Justice is the same as under the Code: 2 Hale's Pleas of the Crown, p. 113; Burn's Justice of the Peace, 13th ed., vol. 5, p. 1179. The statement in Halsbury's Laws of England, vol. 9, p. 310, para. 625, is too broad.

Regina v. Walker (1887), 13 O.R. 83, and Rex v. Kehr (1906), 11 O.L.R. 517, do not indicate, as was suggested, that the search-warrant was merely irregular and therefore voidable and not void.

The warrant not being a lawful one, the defendant is not protected by sec. 25 of the Criminal Code.

The conclusion of the learned Justice of Appeal upon the whole case was, that the defendant, by failing to set out the causes of his suspicion, rendered the magistrate incompetent, for want of jurisdiction to issue the warrant either under the Criminal Code or at common law; that the defendant was liable for the consequences that followed from his act; that, the warrant being void, the trespass and search made under it were unlawful; that the defendant, having taken part in them, was liable in damages, and was not protected by sec. 25 of the Code; that, in view of the trial Judge's ruling that the claim for malicious procedure failed, the only damages to which the defendant had been shewn to be liable were those consequent upon the trespass and search; that the charge of the trial Judge included all the elements which could properly be taken into consideration by the jury in that respect; and that the judgment below was right.

Both appeal and cross-appeal should be dismissed with costs.

Mulock, C.J. Ex., and Masten, J., agreed with Hodgins, J.A.

Riddell, J., read a dissenting judgment. He said that the verdict proceeded on a wrong basis, and the judgment should, if the defendant desired it, be set aside. The warrant was not void, but merely irregular. An action in trespass lay not only against the magistrate but also against the defendant. The damages would be allowed for all the consequences of the issue of the warrant; and the defendant might be well-advised to pay the amount awarded against him rather than have a new assessment on a different principle. If the defendant should be so advised, the appeal should be dismissed with costs. If not, the appeal should be allowed and a new trial ordered; costs here and below to be costs in the cause.

Appeal dismissed (Riddell, J., *dissenting*).

SECOND DIVISIONAL COURT. JANUARY 11TH, 1921.

REX v. SAVINO.

Criminal Law—Case Stated by Trial Judge pursuant to Order of Court Made on Application of Defendant—Defendant Permitted to Abandon Case without Prejudice to Renewal of Application.

The defendant was tried before SUTHERLAND, J., and a jury, and convicted of rape and sentenced to imprisonment in the Provincial Penitentiary for 8 years.

Pursuant to an order of the Appellate Division, made on the application of the defendant, a case was stated by SUTHERLAND, J., upon questions of law arising at the trial.

On the 7th December, 1920, the case came on for hearing before MULOCK, C.J. Ex., RIDDELL, SUTHERLAND, and MASTEN, JJ., and FERGUSON, J.A.

W. R. Murphy, for the defendant.

F. P. Brennan, for the Crown.

At the request of counsel, the hearing was adjourned until the January sittings.

On the 11th January, 1921, it was announced by RIDDELL, J., on behalf of the Court, that the prisoner was allowed to abandon the stated case, without prejudice to a renewal of his application at a later date if circumstances required such a course to be adopted.

SECOND DIVISIONAL COURT. JANUARY 11TH, 1921.

REX v. DUMONT.

Criminal Law—Murder—Evidence—Judge's Charge—Stated Case.

Motion on behalf of the prisoner, convicted of murder, for an order directing LATCHFORD, J., the trial Judge, to state a case for the opinion of the Court.

The motion was heard by MEREDITH, C.J.C.P., RIDDELL, MIDDLETON, and LENNOX, JJ., and FERGUSON, J.A.

J. W. Curry, K.C., for the prisoner.

Edward Bayly, K.C., for the Crown.

MEREDITH, C.J.C.P., said that the opinion of the Court was that a case should be stated upon the following questions:—

(1) Whether there was a want of direction by the trial Judge to the jury, vitiating the verdict, in not pointedly directing the attention of the jury to the fact that, without the testimony of the woman, there was no evidence to support a conviction, and to the contradictory statements made by her going to shew that she was not a credible witness.

(2) Whether there was misdirection or nondirection or both, vitiating the verdict, in that part of the Judge's charge dealing with the evidence regarding getting the axe and the effect of that evidence, and in not charging the jury as to the law respecting justification or excuse in self-defence.

Pending the hearing of the case, execution of the judgment of the Court should be stayed; the time of execution should be postponed for one calendar month.

SECOND DIVISIONAL COURT. JANUARY 12TH, 1921.

ROSENBES v. ROSENBES.

Appeal—Motion for Leave to Appeal to Supreme Court of Canada after Time for Appealing Expired—Opposite Party not Notified —Amount Involved Insufficient—Exceptional Circumstances not Shewn—No Reason to Doubt Correctness of Judgment of Appellate Division—Delay in Moving.

Motion by the defendant for leave to appeal to the Supreme Court of Canada against a judgment in this action pronounced by this Court on the 31st October, 1919 (17 O.W.N. 137).

The motion was heard by MEREDITH, C.J.C.P., RIDDELL, LATCHFORD, MIDDLETON, and LENNOX, JJ.

The defendant, in person, supported the motion.

MEREDITH, C.J.C.P., reading the judgment of the Court, said that the application must be refused for these reasons:—

1. No notice of it was given to the plaintiff.
2. The amount involved is not sufficient to give a right of appeal; and there is nothing exceptional in the case which would warrant taking it out of the class of unappealable cases.
3. There is no reason to doubt the correctness of the judgment.
4. There has been too much delay in making this application.

Motion refused.

SECOND DIVISIONAL COURT. JANUARY 14TH, 1921.

*LAW v. CITY OF TORONTO.

Contract—Doing of Concrete Work upon Bridge—Asphalt Work Shewn on Plans—Clause of Contract Incorporating Plans and Specifications—Determination by Engineer of Owner that Asphalt Work Included in Contract—Construction of Contract—Power of Deciding Differences Given to Engineer by Contract—Decision of Engineer—Natural Bias—Absence of Fraud—Finality of Decision—Jurisdiction of Court Ousted.

An appeal by the Municipal Corporation of the City of Toronto, the defendants in the action, from the judgment of MIDDLETON, J., 47 O.L.R. 251, 18 O.W.N. 58.

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

G. R. Geary, K.C., for the appellants.

G. H. Kilmer, K.C., for the plaintiff, respondent.

MULOCK, C.J.Ex., reading the judgment of the Court, after stating the facts, said that the appeal related to one item only of the judgment below; and its determination depended upon the answers which should be made to the following three questions: (1) Was the plaintiff, according to the terms of the contract for work in the building of a bridge, bound to perform the work in question? (2) Was the defendants' engineer entitled, under the terms of the contract, finally to determine the answer to the first question? (3) Was the engineer, by reason of his bias or interest, disqualified from so determining it?

By the contract, the plaintiff agreed to supply the material and labour necessary for the "bridge floor except the wooden block pavement," and the question was, whether the contract included "one half inch mortar and the asphalt mastic" as shewn in the plan "D.9-50," and also referred to in the marginal explanatory notes opposite the detailed drawing of the bridge.

For the plaintiff it was contended that certain steel work formed a portion of the "bridge floor," and that a literal construction of the contract would require the contractors to supply this steel work; but, inasmuch as the defendants admitted that the steel work formed no part of the work covered by the plaintiff's contract, it might also be fairly contended that the plaintiff was not bound to perform all the other work the details of which appeared on plan "D.9-50." Irrespective of the details which appeared on that plan and the marginal notes which afforded a complete

answer to this argument, inasmuch as the contract implied that the structural steel work was to be the subject of another contract, there was no force in the argument. If the Court had jurisdiction to determine what work was covered by the contract, the learned Chief Justice's opinion would be that it included the debatable work.

The plan and marginal explanations shewed, resting on certain supporting material, a structure representing the "bridge floor" mentioned in the contract. This "bridge floor" was thus described in the marginal notes: "a 7-inch concrete slab, above that a covering of 3-ply, 8-oz., burlap asphalt, above that asphalt mastic, above that one-half inch of mortar, and above that 4-inch wood block pavement." It was clear that the work thus described constituted the "bridge floor" mentioned in the contract, the whole of which work, excepting the wood block pavement, the contractors were bound to perform. These details do not suggest that the structural steel is part of the "bridge floor."

By the contract (condition Z. 19) the parties agreed that, should "any difference of opinion . . . arise as to the meaning of the contract or of the general conditions, specifications, or plans . . . or as to any other questions or matters arising out of the contract, the same shall be determined by the engineer . . . and his decision shall be final and binding upon all concerned, and from it there shall be no appeal." The difference in question is one of the matters thus referred to the engineer for his final determination, and this Court has no jurisdiction to deal with it. This difference is an honest one, the plaintiff interpreting the plans and specifications in one way and the defendants in another. The engineer has rendered a decision in favour of the defendants; and, unless he is disqualified, by misconduct or incapacity, from performing his duty, the parties are bound by his decision. When the parties agreed to submit any differences to his final decision, he was, to the knowledge of the plaintiff, a paid employee of the defendants. His relationship to the defendants and his natural bias in their favour do not warrant the inference that he was incapable of honestly deciding any difference between the parties: Farquhar v. City of Hamilton (1892), 20 A.R. 86. He was bound to act in good faith toward both parties; and, if he did so act, his decision is not reviewable by the Court: Ormes v. Beadel (1860), 30 L.J. Ch. 1. Where the parties agree to accept as final the engineer's decision, and he reaches an honest one, they are bound by it: Clarke v. Watson (1865), 18 C.B.N.S. 278.

The learned Chief Justice said that he had carefully studied the contract and the evidence, including the plans and specifications, and he was satisfied that the engineer acted in good faith,

and that he was fully capable of rendering a fair decision. Such a decision, even if erroneous, is binding; but it was not erroneous, and was fully justified by the contract and what appeared on the plan and the marginal notes.

The appeal should be allowed with costs, and the amount of the plaintiff's judgment should be reduced by $2,450.

Appeal allowed.

SECOND DIVISIONAL COURT. JANUARY 14TH, 1921.

*CROSWELL v. DABALL.

Ship—Collision of Motor-boats in Inland Waters—Proximate Cause of Collision — Non-observance of Regulations — Contributory Breach by Plaintiffs—Findings of Trial Judge—Reversal on Appeal—Canada Shipping Act, R.S.C. 1906 ch. 113, sec. 916 —Limitation of Liability of Owner under sec. 921 (d)—Fault of Agent—Assessment of Damages—Reference—Costs.

An appeal by the defendants from the judgment of LOGIE, J., 47 O.L.R. 354, 18 O.W.N. 119.

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

R. McKay, K.C., for the appellants.

McGregor Young, K.C., for the plaintiffs, respondents.

The judgment of the Court was read by RIDDELL, J., who said that, after an attentive reading of the evidence and careful consideration of the arguments of counsel, he was unable to follow the learned trial Judge in his findings against the plaintiff.

The Canada Shipping Act, R.S.C. 1906 ch. 113, sec. 916, provides that a ship shall be deemed in fault "if, in any case of collision, it appears to the Court . . . that such collision was occasioned by the non-observance of any of such regulations . . ."

The want of the white light on the plaintiffs' boat had no part in causing the accident.

The Courts in Canada have not, in regard to inland waters, adopted the stringent rule casting upon a plaintiff who has infringed a regulation the burden of proving affirmatively that the fault had no part in occasioning the accident: The "Cuba" (1896), 26 Can. S.C.R. 651; The "Rosalind" (1908), 41 Can. S.C.R. 54; and other cases.

The trial Judge's finding that "the proximate and efficient cause of the collision was the disregard of Rule 32 of the Rules of the Road by the defendant Byron Daball" was right, and the finding against the plaintiffs, apparently inconsistent therewith, could not be supported.

It was admitted that in the claim against Byron Daball a defence of contributory negligence would be effective; but there was no contributory negligence; and the judgment against Byron Daball should stand.

Other considerations applied to the appeal of the defendant Alonzo W. Daball.

Section 921 of the Act provides that "the owners of any ship . . . shall not, whenever without their actual fault or privity . . . any loss or damage is by reason of the improper navigation of such ship . . . caused to any other ship or boat . . . be answerable in damages in respect of . . . loss or damage to ships . . . or other things . . . to an aggregate amount exceeding $38.92 for each ton of the ship's tonnage."

It was suggested that this limitation applies only where the owner of the delinquent ship has brought action to limit his liability; but no such proposition is even referred to in the leading case of Sewell v. British Columbia Towing and Transportation Co. (1884), 9 Can. S.C.R. 527; and the defence pro tanto succeeded in Waldie Brothers Limited v. Fullum (1909), 12 Can. Ex. C.R. 325.

The fact that the agent has been at fault does not preclude the owner who is himself personally blameless from limiting the liability: The "Obey" (1866), L.R. 1 Ad. & Ec. 102; The Yarmouth, [1909] P. 293.

The question, then, to be determined is, whether the owner can be rendered liable for the incidental or consequential damages proved beyond the amount mentioned in the statute—in the present case the profits expected for the season.

The damages recoverable (in the absence of statutory limitation) for loss of a ship by collision, as in the present case, include the estimated earnings of the boat for a reasonable time after the day of the collision: Rheinhardt v. The "Cape Breton" (1913), 15 Can. Ex. C.R. 98.

Accordingly, the statutory limitation must be considered to apply to all damages which without it could have been recovered.

The appeal of the defendant Alonzo W. Daball should be allowed: the amount of the judgment against him should be according to the statute; if the parties cannot agree, there should be a reference; costs in the discretion of the Master.

The same counsel and solicitors representing both defendants, there should be no costs of the appeal, and no interference with the award of costs below.

SECOND DIVISIONAL COURT. JANUARY 14TH, 1921.

MAIZE v. GUNDRY.

Partnership—Liability of Firm for Debt of Partner—Fraud—Evidence—Novation—Assignment by one Partner in Firm's Name for Benefit of Creditors—Right to Rank on Assets of Firm in Respect of Promissory Note—Finding of Fact of Trial Judge—Appeal.

An appeal by the defendants Gundry and Allen from the judgment of LOGIE, J., 16 O.W.N. 350.

The appeal was heard by MULOCK, C.J. Ex., HODGINS, J.A., and RIDDELL and MASTEN, JJ.

William Proudfoot, K.C., for the appellants.

Charles Garrow, for the plaintiff, respondent.

MULOCK, C.J. Ex., in a written judgment, said that during the argument counsel for the respondent stated that the chief question involved in this appeal was, whether the firm of McFarlane & Maize was liable to the defendant Allen in respect of a promissory note for $5,100, or of a renewal note given for the unpaid portion thereof, and that if that question was determined the parties would probably be able to agree upon all the other matters involved in the appeal. The learned Chief Justice therefore dealt with that question only.

The trial Judge held that Allen was not entitled to rank as a creditor of the firm in respect of the note or the unpaid portion thereof. It was a case depending on the credibility of the witnesses. The learned trial Judge, who heard them under examination and observed their demeanour in the witness-box, having reached a definite conclusion as to where the truth lay, it was impossible for an appellate Court to say that he erred. There was ample evidence in support of his findings, and his reasons for judgment indicated great care on his part in weighing the evidence and reaching correct conclusions. The appeal from the finding in respect of Allen's claim should be dismissed with costs.

If the parties are unable to settle the other terms of the order upon the appeal, the matter may be spoken to before a Judge of the Divisional Court which heard the appeal.

RIDDELL and MASTEN, JJ., agreed with MULOCK, C.J. Ex.

HODGINS, J.A., agreed in the result, for reasons stated in writing.

Appeal dismissed.

SECOND DIVISIONAL COURT. JANUARY 14TH, 1921.

DUNLEY v. TOWN OF FORT FRANCES.

Municipal Corporations—Right of Municipal Treasurer to Commission on Proceeds of Tax Sales—Assessment Act, sec. 166—Payment of Salary—Commission Treated as Revenue of Corporation—"Arrangement with Council"—Evidence—Gift—Resolution—By-law.

Appeal by the Municipal Corporation of the Town of Fort Frances, the defendants, from the judgment of the Judge of the District Court of Rainy River in favour of the plaintiff, a former treasurer of the corporation, to recover a commission on the proceeds of sales of lands for arrears of taxes.

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

A. A. Macdonald, for the appellants.

H. J. Scott, K.C., for the plaintiff, respondent.

MULOCK, C.J. Ex., read a judgment in which he said that the council of the defendants, by a by-law of the 7th February, 1916, appointed the plaintiff treasurer for 1916, at a salary of $100 a month; and, by a by-law of the 3rd April, 1916, instructed him to proceed with the sale of lands liable to sale for arrears of taxes. Thereupon the plaintiff took the necessary tax sale proceedings, in the course of which various sums, covering the arrears of taxes, commission, and other charges allowed by the Assessment Act, came to his hands. The plaintiff was of opinion that the proper method of accounting on his part would be to open an account in the corporation's ledger in respect of tax sales and deposit the gross receipts therefrom in the bank to the credit of the corporation, the corporation paying thereout to the treasurer the commission to which, under the Assessment Act, he was entitled. This proposed method he submitted to the corporation's auditor, who approved of it; the plaintiff adopted it and followed it in connection with the proceeds of the two tax sales of 1916 and 1917 conducted by him. The sale for 1916 was completed on the 27th October, 1916, and soon afterwards the plaintiff rendered an account to the defendants of $149.33, being commissions in respect of such sale, but it was not paid, and was part of his claim in this action, for which he obtained the judgment now in appeal.

On the 4th December, 1916, the council passed a resolution to the effect that the commission on taxes in arrear be paid into or retained in the funds of the municipality, and that this rule be followed in the future.

The account remaining unpaid, the auditor, towards the close of 1916, instructed the plaintiff that, in accordance with the system of accounting referred to, a cheque for $149.33 should issue in favour of the corporation. This method was advised by the auditor and adopted by the plaintiff, not with the idea of the plaintiff forgoing his right to payment, but as a mere transfer for bookkeeping purposes, the plaintiff understanding that such a course was not to prejudice his right to the money.

On the 5th February, 1917, the plaintiff, was, by by-law, appointed treasurer for 1917, at a salary of $80 per month, and in that year effected another tax sale. He claimed commission on the fruits of that sale also, and interest.

Section 166 of the Assessment Act, R.S.O. 1914 ch. 195, provides that every treasurer shall be entitled to 2½ per cent. commission upon the sums collected by him; but, where he is paid a salary for his services, such commission may, "by arrangement with the council," be paid into the funds of the municipality like any other revenue.

The plaintiff, by reason of this section, was prima facie entitled to the commission sued for; and the onus was upon the defendants to establ sh the contrary.

The defence was that, "by arrangement with the council," the plaintiff was not so entitled.

Until after the tax sale of 1916 and until after the plaintiff became entitled to the commission, there was no "arrangement with the council" that he was to forgo it. He had then earned the money, and had received no consideration for surrendering his right to it. To hold that the adoption of the accounting system referred to constituted an "arrangement with the council" would be to find that the plaintiff had made a gift of the fund to the corporation. As an officer of the corporation, he signed the cheque above-mentioned, but he did so merely as a bookkeeping act; he did not intend to make a gift to the corporation; and his signature would not prejudice his right to the money.

The learned District Court Judge had accepted the evidence of the plaintiff and the auditor throughout, and was well warranted in so doing.

To constitute a perfect gift, the donor must intend to give. The resolution of the council of the 4th December, 1916, was inoperative to affect the plaintiff's rights—being passed after the plaintiff had earned the money. The plaintiff was, therefore, entitled to payment of the commission in respect of the moneys realised in 1916.

In regard to the proceeds of the sale of 1917, the defence was the resolution of the 4th December, 1916. By by-law of the 5th February, 1917, the council re-appointed the plaintiff treasurer

for that year, but the by-law was silent as to the commission on the proceeds of any tax sale held in that year. The council did not bring the resolution to the plaintiff's attention nor in any way intimate to him that his acceptance of the office at a salary of $80 a month involved the forgoing of his statutory right to commission on any tax sales during 1917; and the passage of a mere resolution by the council of 1916 could not be construed as an arrangement between the plaintiff and the corporation. An "arrangement" must receive the concurrence of both parties. If the plaintiff was to be bound by the resolution, it was the duty of the council to call his attention to it and to give him to understand that his acceptance of the treasurership for 1917 was conditional on his forgoing the commission in that year.

There was no evidence of any arrangement, and the District Court Judge had found that there was none.

The appeal should be dismissed with costs.

RIDDELL and SUTHERLAND, JJ., concurred.

MASTEN, J., also concurred, for reasons briefly stated in writing.

Appeal dismissed.

HIGH COURT DIVISION.

KELLY, J. JANUARY 10TH, 1921.

RE KERLEY.

Will—Construction—Legacy not Paid in Full—Death of Legatee—Payment to Personal Representative or into Court—Bequest to Nephew Predeceasing Testator—Lapse—Wills Act, sec. 37 (9 Geo. V. ch. 25, sec. 15)—Residuary Estate—Division of "Equally" among Legatees—Division not to be Made pro Rata according to Amounts of Bequests—Succession Duty.

Application by the executor of William Kerley for an order determining four questions arising in the administration of the testator's estate according to the provisions of the will.

The motion was heard in the Weekly Court, London.

E. C. Sanders, for the executor.

J. S. Robertson, for Rose Trimby.

F. P. Betts, K.C., for the Official Guardian, representing the infant children of William Hounsell.

KELLY, J., in a written judgment, took up the four questions seriatim:—

(1) The disposition to be made of that portion of the bequest to William Hounsell not paid to him in his lifetime was not a question which should require any direction from the Court, payment in such cases being usually made to the legal personal representative of the deceased legatee, or, in a proper case, into Court.

(2) The bequest to the testator's nephew Edwin Flemington, who predeceased the testator, lapsed, there being no express disposition of it in the event that happened, and he not being within the class referred to in sec. 37 of the Wills Act, as enacted by 9 Geo. V. ch. 25, sec. 15. The executor said that certain of the beneficiaries were desirous that the amount of the bequest should be paid to the widow and children of Flemington; but that was a matter for those who would be affected by such payment; without their consent the Court could not interfere.

(3) The testator provided for his wife during her lifetime, and then made this provision (para. 11): "I also desire that any amounts that may be left after my decease or decease of my wife, not otherwise provided for and after all necessary expenses have been paid *shall be equally divided among the above bequests.*" The executor expressed doubt as to the meaning of the words italicised. It was obvious that the testator used the word" equally" with an appreciation of its meaning and effect; and there was nothing to support the suggestion that the division he thus directed to be made of "any amounts that may be left" should be ratably among those whom he desired so to benefit. This was emphasised by the fact that in the very next paragraph, where provision was made for abatement in the event of an insufficiency of assets to meet the bequests, be made use of the words "pro rata," thus making a sharp distinction between the two methods to be applied. It was admitted that there were assets more than sufficient to pay the bequests. In directing the division equally among "the above bequests" the testator meant a division into as many equal parts as there were bequests. As to what these bequests are, it should be declared that what goes to the nephew William Hounsell is one bequest, and what goes to Charles Hounsell is another bequest; also that the $500 to George Hadley (para. 5) is a bequest, and that the $500 placed in his hands "for him to divide equally to his brothers and sisters who may be living at that time" is another separate bequest. The executor's doubts seemed to be in respect of the bequests made by paras. 4 and 5. The division under para. 11 will be equally amongst those to whom bequests were made by paras. 3, 4, 5, 6, 8, 9, and 10—the bequest made by para. 7 being excluded by reason of the lapse.

(4) The 4th question did not require the assistance of the Court. The Succession Duty Act defined the rate at which duty was payable upon bequests, according to the degree of relationship of the beneficiaries to the testator; and on the material no uncertainty arose calling for the direction of the Court.

There should be an order declaring accordingly; costs of the application out of the surplus of the estate—those of the executor as between solicitor and client.

KELLY, J. JANUARY 11TH, 1921.

CONTRACTORS SUPPLY CO. v. GOW.

Contract—Construction—Lease of Quarry with Option to Purchase—Independent Agreements—Oral Acceptance of Offer to Purchase within Proper Time—Specific Performance—Action for Possession—Claim for Price of Goods Supplied—Damages—Counterclaim — Costs — Proceeding against Vendee as Overholding Tenant.

Action to recover possession of land and for compensation for non-delivery of 90 tons of hydrated line, and for other and general relief.

Counterclaim by the defendant for specific performance of an agreement by the plaintiffs to convey to him the land claimed and for damages.

The action and counterclaim were tried without a jury at a Toronto sittings.

Donald Macdonald, for the plaintiffs.

R. S. Cassels, K.C., for the defendant.

KELLY, J., in a written judgment, said that the plaintiffs had, before this action was brought, obtained from a County Court Judge an order for possession of the land in question, upon a summary proceeding under the sections of the Landlord and Tenant Act applicable to overholding tenants, but the order had been set aside on appeal, and this action had then been brought.

At the hearing, the plaintiffs were allowed to amend their statement of claim by adding a claim for $736.50 in respect of fuel, bags, money for repairs, freight, and wages, alleged to have been supplied or paid for by the plaintiffs to or for the defendant.

The document in which the business relationship between the parties was established, which resulted in the summary proceedings

and in this action, was dated the 17th March, 1920. It set forth that, in consideration of the covenants, etc., of the defendant, the vendors (plaintiffs) "hereby demise unto the vendee" (defendant) "their lime stone quarry and the lime-making plant situate . . . from the date hereof until the 15th May, 1920;" and the plaintiffs covenanted: (1) to give the defendant the option to purchase the quarry and plant up to and inclusive of the 15th May, 1920, for $20,000, payable in the manner set forth; (2) to supply the defendant with sufficient coal to make 250 tons of lime, and bags to bag up the hydrated line; (3) to purchase from the defendant the lime manufactured by him at the market-value as sold to dealers; (4) to advance the defendant cash amounting to one-half the value of each car as shipped; and (5) to return to the defendant, at the expiration of the option, money spent by him in repairs up to $150.

The defendant, for the foregoing considerations, covenanted: (1) to return to the plaintiffs the money or its equivalent in lime for material bought by them and used in manufacturing; (2) to operate the plant from the execution of the agreement until the 15th May, 1920, and to produce 250 tons of lime; and (3) to bag and ship the lime to the plaintiffs in Toronto or to such place or places as they might direct.

Throughout the document the plaintiffs were referred to as vendors and the defendant as vendee, and from its whole tenor it was evident that it was meant not merely as a promise to give an option but as an actual giving of an option open for acceptance by the defendant up to and including the 15th May, 1920, and containing terms appropriate for the carrying out of a contract for sale.

No real difficulty presented itself in determining the character of the document, and there was no inconsistency in the existence of a tenancy terminating on the 15th May, 1920, and a contract for sale and purchase, should the defendant decide to accept the option.

Fulfilment of the defendant's agreement to deliver lime was not a condition precedent to his right to accept the option to purchase the property and plant. The two agreements—the leasing to the 15th May and the option to purchase—were independent.

On the 11th May, the defendant notified the president of the plaintiff company that he would accept the offer and carry out the purchase. The president admitted that he made no objection to the defendant's declaration that he would carry out the purchase, and neither said nor did anything to indicate that the defendant would not get the property. The acceptance was not in writing, but that was not necessary: Reuss v. Picksley (1866),

L.R. 1 Ex. 342. No objection to the purchase was raised until early in June; and then proceedings were launched against the defendant as an overholding tenant.

The plaintiffs were not entitled to possession of the land; and they had not established their claim for compensation for non-delivery of lime. The defendant was entitled to have the contract for purchase of the quarry and plant specifically performed. He had expressed his willingness to abandon his claim for damages in the event of his being found entitled to specific performance.

There should be judgment for the plaintiffs for $474.95 on their claim added by amendment at the hearing; the action should be dismissed in respect of their other claims. The defendant should have judgment on his counterclaim for specific performance.

The plaintiffs should pay the defendant's costs of the action and counterclaim and also his costs of the application to the County Court Judge and of the appeal to the Appellate Division.

ORDE, J. JANUARY 11TH, 1921.

*JAMES RICHARDSON & SONS LIMITED v. J. McCARTHY & SONS CO. LIMITED.

Company—Mortgage Made by Trading Company—Irregularities Unknown to Mortgagees—Agency of Company's Secretary for Mortgagees not Proved—Powers of Company—Ontario Companies Act, 1907, 7 Edw. VII. ch. 34, secs. 73, 74, 78—Mortgage Given to Cover Liabilities of Company to Mortgagees—Powers of Directors without Special Authority from Shareholders—"Indoor Management" of Company—Presumption of Regularity—Failure to File Mortgage in Office of Provincial Secretary (sec. 78)—Effect of.

An appeal by the defendants from a certificate of the Local Master at Ottawa, upon a reference, of his finding that the plaintiffs' claim upon a second mortgage should be allowed.

The appeal was heard in the Weekly Court, Ottawa.
W. C. McCarthy, for the defendants.
G. F. Henderson, K.C., for the plaintiffs.

ORDE, J., in a written judgment, said that the action was for foreclosure, brought by the plaintiffs as assignees of a first mortgage made by the defendant company. The plaintiffs also held a

second mortgage for $20,000, and on the reference filed a claim in respect thereof. The defendant company was in the course of being wound-up, but the action was brought or continued by leave given in the winding-up proceedings. Upon the reference the validity of the second mortgage was contested by the defendants, but upheld by the Master.

The defendant company was incorporated on the 17th May, 1895, by letters patent under the Ontario Joint Stock Companies Letters Patent Act then in force. The defendants had for many years had business dealings with the plaintiffs and had become heavily indebted to them. Some time before 1906, the defendants, at the suggestion of the plaintiffs, took into their employment as manager one McAdam, who was a brother-in-law of one of the Richardsons. The defendants contended on the reference that McAdam was the agent or representative of the plaintiffs and had been put in charge and control of the defendants' business to protect the interests of the plaintiffs as large creditors of the defendants. The Master found that there was no such agency, and the learned Judge saw no reason for disagreeing with his decision in that respect.

The second mortgage was executed on the 22nd April, 1910, under the corporate seal of the defendants and the signatures of T. C. McCarthy as president and J. McAdam as secretary; it was duly registered in the registry office for the County of Grenville on the 14th May, 1920, but was not filed in the office of the Provincial Secretary.

The Master found that there were such irregularities in the manner in which the mortgage was obtained as would render it invalid if the plaintiffs had knowledge of such irregularities; but that, McAdam not being the representative or agent of the plaintiffs, they were not fixed with knowledge of the irregularities, and therefore the mortgage was a good and valid security. There was no evidence to establish any knowledge on the part of the plaintiffs of any irregularity, apart from McAdam's knowledge; and the only remaining question was, whether the mortgage might not be invalid in spite of the plaintiffs' lack of knowledge of any irregularity.

The Act which, at the time when the mortgage was given, governed the defendant company's power to borrow money and to give securities was the Ontario Companies Act of 1907, 7 Edw. VII. ch. 34, secs. 73, 74, 78. Section 78 confers upon the directors, without special authority from the shareholders, full power to mortgage the property of the company to secure any liability of the company: Hammond v. Bank of Ottawa (1910), 22 O.L.R. 73.

The mortgage was given to cover liabilities of three distinct kinds: (a) for goods purchased; (b) for advances made to enable the defendants to discharge other liabilities; and (3) for future advances. It was not necessary to go into the question whether or not the directors of a trading company are excluded by the express provisions of secs. 73 and 74 from exercising the company's common law power to borrow money. It is well-established that one who lends to a company money which is borrowed by the company in excess of its powers may nevertheless recover if the moneys are in fact used to pay either existing or future liabilities of the company, and that the lender is entitled to hold any securities given him by the company in respect of the moneys so advanced: Blackburn Building Society v. Cunliffe Brooks & Co. (1882), 22 Ch. D. 61, and other cases.

The mortgage being one which the directors had power to give, the plaintiffs were not put upon inquiry as to the regularity of the resolutions authorising its execution. The case was clearly one of "indoor management" of the company, which those dealing with the company were entitled to presume was regularly conducted: Mahony v. East Holyford Mining Co. (1875), L.R. 7 H. L. 869, 893, 894; Royal British Bank v. Turquand (1856), 6 E. & B. 327; McKnight Construction Co. v. Vansickler (1915), 51 Can. S.C.R. 374.

Failure to file the mortgage in the office of the Provincial Secretary, as required by sec. 78, did not invalidate it as between the defendants and the plaintiffs. The requirement is directory only.

Appeal dismissed with costs.

ORDE, J. JANUARY 12TH, 1921.

*CHEESEWORTH v. CITY OF TORONTO.

Municipal Corporations—Application for Permit for Erection of Dry-cleaning Plant upon Property in City—Opposition by Residents in Neighbourhood—Report of Property Committee Recommending Granting of Application—Adoption by Resolution of City Council—Recommendation of Board of Control to Council that Resolution be Rescinded—Injunction Restraining Council from Rescinding Former Resolution—Judicature Act, sec. 17.

Motion by the plaintiff to continue an interim injunction, turned by consent into a motion for judgment.

The motion was heard in the Weekly Court, Toronto.

W. D. McPherson, K.C., for the plaintiff.

C. M. Colquhoun, for the defendants.

Orde, J., in a written judgment, said that the plaintiff, desiring to establish a dry-cleaning plant on certain premises in rear of Pendrith street, entered into negotiations with the owners for the purchase thereof, and it was arranged that the owners should apply to the defendants for the usual permit. The application was considered and approved by the property committee of the city council, and the committee's recommendation was approved by the council on the 25th May, 1920. The plaintiff thereupon completed the purchase of the premises, and took steps to erect her buildings. To this certain persons residing in the neighbourhood took objection, and applied to the property committee to rescind the recommendation which it had previously made. On the 27th December, 1920, the board of control, by its report No. 27, recommended to the council that the resolution of the property committee which the council had adopted should be rescinded.

This action was thereupon brought for an injunction to restrain the defendants from adopting the report of the board of control.

There is much force in the argument that a report or recommendation from the board of control is ineffective until it has been adopted by the council; it would have greater force if the council had not already, by its resolution of the 25th May, come to a final and definite decision in the matter, upon which the plaintiff had acted. The city council is a powerful body, with power not of an administrative but of a legislative character; and the threat or suggestion of proceedings to prevent the plaintiff from building might seriously hamper her in borrowing money to complete her building or in otherwise dealing with her property, and might cast a cloud upon her title.

Under the wide jurisdiction given to the Court to grant an injunction "in all cases in which it appears to the Court to be just and convenient" to do so (Judicature Act, sec. 17), the Court, while it must be governed by legal and equitable principles, is not restricted to cases where there is no other remedy: Aslatt v. Corporation of Southampton (1880), 16 Ch. D. 143. Nor must it wait until the other party has entered upon the doing of the injurious act. If there is reasonable ground to believe that the threat may be carried into operation, an injunction may be granted.

The recommendation of the board of control constitutes a sufficiently authoritative threat of the impending course of action on the part of the council as to justify interference at this stage.

There should, therefore, be judgment for the plaintiff permanently restraining the defendants and the council from rescinding the resolution of the council of the 25th May, 1920, or the recommendation of the property committee approving of the application for a permit to erect a dry-cleaning plant upon the premises in rear of Pendrith street. The defendants should pay the plaintiff's costs.

LENNOX, J. JANUARY 12TH, 1920.

ALLEN v. ST. LEGER.

Sale of Goods—Action for Price—Credits—Contract—Interest—Delay in Payment—Judicature Act, sec. 35 (2)—Trade Discounts—Exchange Charges—Contract with Foreign Vendors—Payment in Canadian Money—Question of Fact—Payment of Money into Court—Costs.

Action to recover $3,888.61 and interest for goods sold and delivered by the plaintiffs to the defendants.

The action was tried without a jury at a Toronto sittings.
J. P. MacGregor, for the plaintiffs.
T. J. Agar, for the defendants.

LENNOX, J., in a written judgment, said that the matters in dispute, in addition to a $910 payment not credited by the plaintiffs in the endorsement of the writ of summons, but now admitted, were: (1) trade discounts; (2) exchange charges; and (3) interest.

As to interest, the learned Judge said that, if the plaintiffs were entitled, it must be by way of damages for breach of contract. It was said, by one McCafferty, a witness at the trial, that the legal rate in Massachusetts (where the plaintiffs carried on business) was 6 per cent.; but he was not a competent witness to prove the law of that State; and, in the absence of proof, it was proper to infer that the rate there did not exceed the rate in Canada. In the part of the contract which was in writing there was nothing about interest, and interest had never been paid or demanded. The first reference to interest was in the endorsement on the writ of summons. There was no interest included in the sum claimed in the plaintiffs' solicitors' letter of the 26th July, 1920; and the case was not brought within the terms of sec. 35 (2) of the Judicature Act, R.S.O. 1914 ch. 56. Interest should be computed from the date of the writ of summons only, and at the rate of 5 per cent. per annum.

The defendants were clearly entitled to a credit of 6 per cent. discount off the face of the invoices. This was the bargain and the course of dealing. These trade discounts are agreed to by reason of the volume of business, and per se have no reference to the time of payment. A vendor cannot ex post facto create a forfeiture for delay.

As to charges for exchange, it appeared that before the date of the earliest orders and invoices produced there was an established course of dealing between the parties to the action, and the endorsement made by the plaintiffs' manager, Bridges, upon the invoices filed, "terms as before," meant that the established method of dealing was to be continued. This was common ground.

The orders for the goods were endorsed with a memorandum, "This order is taken subject to confirmation and acceptance by the company at Lynn, Mass.;" and counsel for the plaintiffs argued that this made the contract a foreign one, and that the rights under it—specifically as to the question of exchange—were to be determined by the law of Massachusetts.

In regard to exchange, the question is not, where is the money payable? but, what kind of money is to be paid? This is a question of fact, to be determined by the evidence put in at the trial.

The learned Judge finds that the goods were sold and accepted upon the understanding and agreement that they were to be paid for in Canadian money.

The defendants were not liable for the exchange charges claimed; and, crediting the 6 per cent. trade discount and the $910 mentioned above, the amount which the defendants had paid into Court was the full amount owing to the plaintiffs, except interest from the date of the writ to the time of payment into Court, $2.04.

The plaintiffs should have costs of the action up to the time of the payment into Court, and the defendants the costs of defence subsequent to that time, both on the Supreme Court scale. The plaintiffs' costs and the $2.04 interest should be set off against the defendants' costs pro tanto, and the balance found owing to the defendants should be paid out of the money in Court. Subject to this, the money in Court, with its accrued and accruing interest, should be paid to the plaintiffs.

Judgment accordingly.

ORDE, J., IN CHAMBERS. JANUARY 12TH, 1921.

*RE N. BRENNER & CO. LIMITED.

Bankruptcy and Insolvency—Practice and Procedure—Authorised Assignment to Authorised Trustee—Action Brought by Insolvents Pending at Date of Assignment—Judgment for Insolvents Entered after Assignment—Motion by Trustee for Leave to Proceed in Action—No Necessity for Leave—Permission of Inspectors—"Property"—Chose in Action—Proceedings to be Continued in Official Name of Trustee—Præcipe Order to Continue Proceedings—Bankruptcy Act, 1919, secs. 2 (dd), 10, 20 (c), (2)—Supreme Court Rules 300-302.

Motion on behalf of Osler Wade, an authorised trustee in bankruptcy, to whom an authorised assignment had been made by the above-named company, for an order empowering him to continue the proceedings in an action in the Supreme Court of Ontario, commenced by the company, before the assignment, against H. J. Garson & Co.

H. H. Shaver, for the applicant.

ORDE, J., in a written judgment, said that the applicant had misconceived the course to be taken in order to proceed with the pending action. By sec. 20 of the Bankruptcy Act, the trustee may, with the permission in writing of the inspectors, (*c*) bring, institute, or defend any action or other proceeding relating to the property of the debtor. The powers given by sec. 20 are conferred upon the authorised trustee, whether acting under a receiving order or under an authorised assignment. The written permission must not be general, but to do the particular thing for which permission is sought: sub-sec. 2.

The wider power to "bring" an action would include the lesser one to "continue" one already brought; and, apart from that, the words "to institute . . . any . . . other legal proceeding" would be sufficient to authorise the trustee to take the necessary steps in the pending action to continue it in his official name.

No leave to proceed, so far as these insolvency proceedings are concerned, is necessary.

It is equally clear that the trustee cannot proceed with the action in the name of the insolvents. By sec. 10, the assignment vested in the trustee all the property of the assignors at the time of the assignment, except property held by them in trust and property exempt from execution or seizure under legal process.

"Property" includes "things in action:" sec. 2, para. (*dd*). So that the insolvents' right of action against H. J. Garson & Co. passed to the trustee under the assignment, and the action could not thereafter be properly continued in the name of the insolvents, and the entry of judgment in their name after the assignment was irregular. See Jackson v. North Eastern R.W. Co. (1877), 5 Ch.D. 844.

The chose in action having passed to the trustee under the assignment, it was his duty, upon getting the written permission of the inspectors, to take out a præcipe order to continue proceedings: Rules 300 to 302.

The proceedings will not be continued in the name of Osler Wade as authorised trustee but in his official name, "The Trustee of the Property of N. Brenner and Company Limited, authorised Assignor:" see sec. 16.

A præcipe order may not be sufficient to cure the irregular judgment which has been signed—an additional order may be required.

ORDE, J., IN CHAMBERS. JANUARY 13TH, 1921.

*REX v. JOHNSTON.

Ontario Temperance Act—Magistrate's Conviction for Offence against sec. 40—Selling Liquor without License—Conviction for Second Offence—Proof of Second Offence—Admission—Sec. 58 of Act—Description of Offence—Defects in Form in Information and Conviction—Amendment under secs. 101, 102.

Motion, on the return of writs of habeas corpus and certiorari, for an order for the discharge of the defendant from custody under a warrant of commitment issued pursuant to a conviction under the Ontario Temperance Act.

James Haverson, K.C., for the defendant.
F. P. Brennan, for the convicting magistrate.

ORDE, J., in a written judgment, said that the charge laid against the defendant before the Police Magistrate for the District of Temiskaming was, that on the 15th August, 1920, at the town of Cochrane, the defendant "did unlawfully sell liquor contrary to the Ontario Temperance Act made and provided and this being his second offence." The conviction was for that he "did unlawfully sell liquor on the 15th day of August, 1920, at Cochrane, in

the district of Temiskaming, and this being his second offence." He was sentenced to 6 months' imprisonment. The warrant of commitment, reciting the conviction, read, "did unlawfully sell liquor contrary to the provisions of the Ontario Temperance Act made, this being his second offence." There was also among the papers returned a "certificate of conviction," signed by the magistrate, in which the defendant was said to have been "duly convicted of having on the 13th day of August, 1920, at the town of Cochrane, unlawfully sold liquor without the license therefor by law required," and no mention was made of the conviction having been for a second offence.

The sole ground upon which the conviction was attacked was that the previous conviction had not been proved. The only evidence of the previous conviction was contained in the following note, which appeared at the conclusion of the evidence for the prosecution: "Chief Portland draws the attention of the court that this is the second offence against the defendant, the defendant's counsel admits that he was convicted on the 16th day of April, 1920, and paid $500 and costs $8;" and in the cross-examination of the defendant, where he said, "I was convicted for selling liquor some time ago."

The "Form of Information for a Second or Subsequent Offence" and the "Form of Conviction for a Second or Subsequent Offence," appended to the Act, contemplate that both the information and the conviction shall set out explicitly the date when, the place where, and the names of the magistrates before whom the accused was previously convicted, and also the date when and the place where the previous offence was committed and the specific nature of the previous offence.

Neither the information nor the conviction complied with any of the requirements of these forms; but if the previous conviction was sufficiently proved, this conviction ought not to be quashed, but should be amended under sec. 102.

An offence committed after a previous conviction is not as an offence different from a first offence; but sec. 58 provides that in such case the penalty imposed shall be greater. The exact nature of the previous offence is not material if it is sufficiently established that it falls within any of the enumerated sections. Here the admitted previous offence was that of selling liquor. That sufficiently describes the offence to bring it within sec. 58.

The omission of the name of the magistrate and of the places and times of the offence and previous conviction did not invalidate this conviction.

There may be cases in which the omission of these particulars would be unfair to the accused; but in the present case no injustice

was done to the accused by his conviction as for a second offence; and the wide powers given to a Judge on a motion such as this, by secs. 101 and 102, should be exercised.

The motion should, therefore, be dismissed with costs, but the conviction and warrant of commitment should be amended by setting out those particulars respecting the previous conviction which were in fact proved or admitted before the magistrate.

ROSE, J. JANUARY 13TH, 1921.

POTTER v. JOHNSTON.

Deed—Conveyance of Land—Evidence to Shew Consideration Different from that Mentioned in Deed—Admissibility—Existence of Real Consideration—Deed not Executed by Grantee—Liability of Grantee to Pay to Estate of Grantor Sum of Money Mentioned in Deed—Implied Covenant.

Action by one of the heirs at law of David Mannen, deceased, to compel the defendant David A. J. Mannen to deliver to the defendant Johnston, as administrator of the estate of David Mannen, a farm which formerly belonged to David Mannen, now in the possession of David A. J. Mannen; or, in the alternative, to compel the defendant David A. J. Mannen to pay to the administrator $4,000 as the purchase-price of the farm.

The action was tried without a jury at Sarnia.
J. P. Dawson, for the plaintiff.
R. I. Towers, for the defendant Mannen.
J. R. Logan, for the defendant Johnston.

ROSE, J., in a written judgment, said that it was clearly proved by the evidence of the defendant Mannen and others that David Mannen conveyed the farm to the defendant Mannen, by a conveyance duly executed and delivered. The defendant had, therefore, to rely on the alternative allegation that the purchase-price was not paid.

The conveyance was expressed to be in consideration of $4,000 paid by the grantee to the grantor, "receipt whereof is acknowledged;" it contained no covenant for payment, and it was not executed by the grantee. The defendant Mannen swore—and his evidence was amply corroborated and was to be believed—that the real consideration was that he and his wife should support the grantor, his father, during his life, and that the support was

furnished. The admission of this evidence was objected to, the plaintiff contending that it was evidence going to contradict the deed.

Cases such as Clifford v. Turville (1845), 9 Jur. 633, which state the law to be that it is not permissible to prove a consideration inconsistent with that stated on the face of the deed, and cases such as Wilson v. Leonard (1840), 3 Beav. 373, which shew that a grantee who has not executed the deed, but has taken benefits under it, may be liable on covenants contained in it, were cited; and it was argued that the result of the authorities is that the defendant Mannen, having entered into possession, became bound to pay the $4,000, and cannot escape liability by shewing that the real consideration was something other than the consideration expressed, and that he gave the real consideration.

In the learned Judge's opinion, the decisions do not support the argument. What the result would have been if the deed had contained a covenant for payment of the $4,000 need not be considered. What is contended here is, in effect, that the statement in the deed that the grant is in consideration of the sum of $4,000 paid, the receipt whereof is acknowledged, shall, by some fiction, be turned into a covenant on the part of the grantee to pay, and that the grantee shall be precluded from shewing that the grantor received and accepted something other than the grantee is presumed (contrary to the fact) to have covenanted to pay.

The first step in giving effect to the argument would be to read into the deed a covenant on the part of the defendant Mannen to pay the $4,000. No case seems to require such a covenant to be implied, and it would require some direct and binding authority to induce a Court to imply one for the purpose of producing a result so directly opposed to the result intended by the parties.

Reference to Churchward v. The Queen (1865), L.R. 1 Q.B. 173, 195, 196.

Action dismissed with costs.

MIDDLETON, J. JANUARY 15TH, 1921.

*McINTYRE v. TEMISKAMING MINING CO.

Company—Power to Purchase Shares of another Company—Ontario Companies Act, secs. 23 (e), 94—By-law Passed by Directors and Approved by Shareholders—By-law in General Terms not Authorising Purchase of any Particular Shares—Validity—"Expressly"—Limitation by sec. 23 to Certain Kinds of Companies.

Motion by the plaintiff for an interim injunction, turned by consent into a motion for judgment.

The motion was heard in the Weekly Court, Toronto.
W. R. Smyth, K.C., for the plaintiff.
Strachan Johnston, K.C., for the defendants.

MIDDLETON, J., in a written judgment, said that the plaintiff, a minority shareholder of the defendant company, on behalf of herself and all other shareholders, asked for a declaration that a certain by-law, passed by the directors of the company and confirmed by the unanimous vote of the shareholders present or represented by proxy at a general meeting of the shareholders, was ultra vires and void.

The by-law was "that the directors be and they are hereby expressly authorised from time to time and whenever they see fit to purchase shares in any other corporation and to use the funds of the company for such purpose."

The question raised was, whether, under sec. 94 of the Ontario Companies Act, R.S.O. 1914 ch. 178, a by-law in general terms was permissible. The plaintiff contended that a separate by-law, approving of each individual transaction in shares of another corporation, was necessary.

Section 23 (*e*) of the Act provides that a company shall possess, as incidental and ancillary to the powers set out in the letters patent, inter alia the power, subject to sec. 94, to acquire and hold shares in any other company having objects altogether or in part similar to those of the company or carrying on any business capable of being conducted so as directly or indirectly to benefit the company.

Section 94 (1): "The company, although authorised . . . to purchase shares in any other corporation, shall not do so or use any of its funds for such purpose until the directors have been expressly authorised by a by-law passed by them for the purpose and confirmed by a vote of the shareholders present . . . at

a general meeting duly called for that purpose and holding not less than two-thirds of the issued capital stock represented at such meeting."

There is no authority upon the question raised; but the reasoning of the Court in Mackenzie v. Maple Mountain Mining Co. (1910), 20 O.L.R. 615, determines the case against the plaintiff.

The intention of the Legislature was, that no company should purchase the shares of any other company until the shareholders had expressly authorised it. Once the authority is conferred, the purchasing of any particular shares is part of the corporate business resting rightly with the directors and not with the shareholders.

The word "expressly" in sec. 94 is intended to indicate that if the power is to be validly conferred upon the directors it must be done in plain and unmistakable language—not given by implication.

The implied charter-power (sec. 23) is to purchase shares in any other company having objects similar to those of the company or carrying on a business capable of being conducted so as to benefit the company. The wide wording of the by-law must in practice be regarded as controlled and limited by the narrower provisions to be read into the charter.

The action failed and should be dismissed—with costs if demanded.

Mulock, C.J. Ex. January 15th, 1921.

McCREEDIE v. WEIR.

Landlord and Tenant—Sublease of Mill—Covenant of Sublessors to Repair, Alter, and Equip Mill in Accordance with Requirements of Sublessee—Construction of Covenant—Requirements Specified in Proper Time—Failure of Sublessors to Fulfil—Provision for Arbitration—Failure to Resort to—Jurisdiction of Court not Ousted—Quantum of Damages—Assessment of—Costs.

Action for damages for breach of covenant contained in a certain lease, dated in March, 1916, whereby the defendants demised to the plaintiff a grist-milling property for 2 years from the 1st May, 1916, at a rent of $500 a year, with the option to the plaintiff of a renewal for an additional year, the defendants paying all of the taxes for the first year and one-half thereof for the remainder of the term.

The covenant was to repair and alter the buildings upon the demised premises and to equip them so as to make them fit for the purpose of carrying on the plaintiff s business, which was that of threshing and scutching flax and cleaning flax-seed.

The action was tried without a jury at Stratford.

R. S. Robertson, for the plaintiff.

J. M. McEvoy, for the defendants.

Mulock, C.J. Ex., in a written judgment, said that it was provided in the lease that all the repairs, alterations, and installations were to be made to the plaintiff's satisfaction and within such time as should be determined by him. Flax is a spring crop, maturing early in August, and is then hauled to the mill to be threshed and afterwards scutched. The plaintiff, in ample time, notified the defendants of the required alterations, reparations, and installations in the mill, in order to enable him to take care of the flax-crop of 1916; but the defendants delayed in complying with some of the requirements and made default in complying with others. In consequence, the plaintiff, at his own expense, made various alterations and reparations to the building and installed some of the equipment supplied by the defendants. The plaintiff, also at his own expense, furnished other machinery and equipment which he contended that the defendants were bound to have supplied; and this action was brought to recover damages in respect of the cost and expense to which he was put by the defendants' default.

After the action had been commenced, a serious fire occurred in the building, whereby the machinery and equipment installed by the plaintiff were destroyed; and the plaintiff, having received from an insurance company a sum representing his loss, now limited his claim to damages in respect of alterations and reparation which, as he alleged, the defendants, under their covenant, were bound to have made, but did not make.

The lease provided that, if the defendants considered any requirement of the plaintiff unreasonable, the question might be referred to one Forrester. This meant that the reference was to precede the duty of complying with such requirement; but, as the mill was to be in working condition early in August, as the defendants knew, it was their duty, if they objected to any requirement, promptly to demand a reference. This they did not do, and it was now too late for them to avail themselves of that provision of the lease. Further, the lease did not make Forrester final arbitrator to the exclusion of the jurisdiction of the Court.

The learned Chief Justice found, upon the evidence, that the plaintiff was entitled to recover; but he said that the plaintiff's claim appeared to be excessive.

The defendants were not the owners of the premises, but lessees only, and their lease expired at about the same time as the sublease to the plaintiff.

It was not contemplated by the parties that the defendants, having a lease of the mill premises for about 3 years only, were to put them in the condition of a new mill, equipped with new or what was equal to new machinery; and, in the circumstances, the Court should not concede to the plaintiff the unqualified right to such alterations, reparations, and installations of machinery as he might demand, but only such as would put the premises in a proper condition for a period not exceeding 3 years.

The defendants to some extent had made default in putting the mill into this condition; and to that extent were liable in damages. The plaintiff's claim was for expenditures beyond this limit; and some of the expenditures claimed for here were in excess of anything covered by the covenant. Again, a part of his claim was in respect of labour in the installation of machinery and equipment supplied by himself, and afterwards destroyed by fire.

There should be judgment for the plaintiff for $900 without costs.

RE JACQUES DAVY & CO.—ORDE, J.—JAN. 13.

Contract—Sale of Goods—Terms of Bargain—Letter and Acceptance—Evidence to Vary Terms—Inadmissibility—Ascertainment of —Price—Issue—Findings of Fact—Costs.]—Trial of an issue before ORDE, J., as Judge in Bankruptcy, sitting in Toronto. ORDE, J., in a written judgment, said that the issue was between the F. A. Fish Coal Company Limited and J. P. Langley, trustee in bankruptcy for Jacques Davy & Co., a partnership firm which had made an assignment under the Bankruptcy Act, 1919. The issue arose out of a certain contract between the coal company and the partnership. On the 18th May, 1920, the coal company wrote a letter to their own solicitors stating the terms upon which they were willing to purchase from the partnership certain lands then under lease to the coal company. One of the terms was, the delivery to the vendors of "coke stored at the foot of Princess street . . . as per attached bill and receipt." The letter also contained this paragraph: "Coke turned over to Jacques Davy & Co. as of the morning of May 19th at inventory weights less 5% to cover shrinkage, less 30 tons of screenings already taken out of the coke pile, said 30 tons of screenings invoiced at $5 per ton on the ground in yard." The proposal was not accepted by the partnership until about the 5th July, when one of the partners wrote upon the letter the words "accepted as of May 19th, 1920," with the signature of the partnership. No bill or receipt was attached to the letter, but it was alleged that a statement dated the 19th May, 1920, produced from the custody of the trustee,

was the statement referred to. It was made out by the coal company and purported to sell to the partnership 996.39 tons of coke at $9 per ton, $8,967.51, less 5 per cent., $448.37, equal to $8,519.14. To this were added the 30 tons of coke screenings at $5, $150, making in all $8,669.14. It was admitted by both parties that the term "inventory weights" was intended to refer to the railway rates; that is, the partnership was to accept the coke in the pile according to the railway rates, and that the deduction of 5 per cent. was to cover the shrinkage through drying out of the pile. The coal company contended that the quantity of coke was definitely fixed and agreed upon, as shewn by the statement, at 996.85 tons less 5 per cent. On the other hand, the trustee tendered evidence to shew an understanding between the parties as to the quantity. The learned Judge refused to admit this evidence, because it tended to vary or modify the written contract; and he found that the price of the coke taken over by the partnership was to be ascertained as follows: inventory or railway rates in the original pile, 2,129.29; 5 per cent. allowance for shrinkage, 106.46, leaving 2,022.83; deduct quantity removed, 1,102.44, and screenings 30, making 1,132.44: total tonnage, 890.39, which at $9 per ton makes $8,013.51, to which add 30 tons of screenings at $5, making $8,163.51 as the amount to be allowed the coal company upon this item, instead of $8,669.14, as shewn in the statement, thereby adding $505.63 to the cash payable by the coal company to the trustee upon the completion of the purchase. Judgment upon the issue accordingly. As the dispute was due to the somewhat loose way in which the terms of the bargain were settled on both sides, the parties should each bear their own costs. M. L. Gordon, for the coal company. A. E. Knox, for the trustee.

CORRECTION.

In British Whig Publishing Co. v. E. B. Eddy Co. Limited, ante 279, in the second line after the catch-words, change "18 O.W.N. 378" to "18 O.W.N. 255."