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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. MARCH 15TH, 1916.

CANADA STEAMSHIP LINES LIMITED v. STEEL CO. OF CANADA LIMITED.

Contract—Carriers—Action by, for Freight—Deduction of Sum for Damages — Failure to Prove Damages — Judgment for Amount Due for Freight without Prejudice to Future Action.

Appeal by the defendants from the judgment of BRITTON, J., 9 O.W.N. 351.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

G. Lynch-Staunton, K.C., for the appellants.

R. I. Towers, for the plaintiffs, respondents.

THE COURT dismissed the appeal with costs.

SECOND DIVISIONAL COURT. MARCH 13TH, 1916.

*GEORGE v. LANG.

Mortgage—Action for Foreclosure Brought without Leave—Interest Accruing de Die in Diem under Special Clause in Mortgage—No Default in Payment of Regular Gales of Interest—Mortgagors and Purchasers Relief Act, 1915.

Appeal by the plaintiff from an order of CLUTE, J., in Chambers, setting aside the writ of summons and dismissing the action, which was brought (without leave of the Court) to enforce a mortgage by foreclosure. The mortgage was made before the 4th August, 1914.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

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

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

A. J. Reid, K.C., for the defendant the Glenlavon Land Company.

W. N. Tilley, K.C., for the other defendants.

MEREDITH, C.J.C.P., said that the action was brought in the teeth of the Mortgagors and Purchasers Relief Act, 1915, which prevents the enforcement of payment of the principal money due upon the mortgage during the war. The Act leaves it open to a mortgagee to insist upon being paid the incidentals of his mortgage—the interest, taxes, and so forth. The interest is the interest which the mortgagor has covenanted to pay. If he pay that regularly, he is not to be prosecuted in any action upon the mortgage for mortgage-moneys without the leave provided for in the Act. The Act makes an exception of the interest; the onus is upon the mortgagee to shew that his claim comes within the exception. The exception applies only to interest contracted, in the ordinary manner, to be paid. It does not apply to interest payable de die in diem, if it is so payable, under a special clause in the mortgage.

The learned Chief Justice added that, in his opinion, the clause* had not the effect contended for by the plaintiff, the mortgagee. The mortgage-deed contained the usual and special clauses dealing with the payment of principal and interest, one clause providing that, in default of the payment of interest, the principal secured should become payable. The obscure words of the clause relied on should not be given an effect different from the plain words of the mortgage dealing with such payments. Those words might very well be applicable only to the default dealt with in the clause.

MASTEN, J., was of the same opinion. The statute, he said, was to be construed as relating only to the regular gales of interest falling due at the periods mentioned in the mortgage.

RIDDELL and LENNOX, JJ., concurred.

Appeal dismissed with costs.

*The clause was a covenant by the mortgagors to the effect that if they made default as to any of the covenants or provisoes contained in the mortgage-deed the principal should, at the option of the mortgagee, "forthwith become due and payable and in default of payment of same with interest as in the case of payment before maturity the powers of entering upon and leasing or selling hereby given may be exercised forthwith." There was a proviso "that the mortgagee may distrain for arrears of interest" and "that in default of the payment of the interest hereby secured the principal hereby secured shall become payable."

SECOND DIVISIONAL COURT. MARCH 17TH, 1916.

*REX v. GAGE.

Liquor License Act — Conviction — Imprisonment — Refusal of Motion on Habeas Corpus for Discharge of Prisoner—Appeal—Condition Precedent—Certificate of Attorney-General —R.S.O. 1914 ch. 215, sec. 113(1).

Appeal by the defendant from the order of LATCHFORD, J., ante 13, refusing to discharge the defendant from custody.

The appeal was heard by GARROW, J.A., RIDDELL, LENNOX, and MASTEN, JJ.

J. B. Mackenzie, for the appellant.

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

THE COURT held that, in the absence of a certificate from the Attorney-General, as provided in the Liquor License Act, R.S.O. 1914 ch. 215, sec. 113(1), the appeal could not be entertained.

Rex v. Graves (1910), 21 O.L.R. 329, approved.

SECOND DIVISIONAL COURT. FEBRUARY 18TH, 1916.

*RE J. F. BROWN CO. AND CITY OF TORONTO.

Municipal Corporations—Erection of Urinal upon Public Street —Injury to Property Abutting on Street—Depreciation in Value—Liability of Municipal Corporation to Make Compensation—Arbitration and Award—Municipal Act, R.S.O. 1914 ch. 192, secs. 325, 406(8).

Appeal by the Corporation of the City of Toronto from an award of the Official City Arbitrator awarding the J. F. Brown Company $10,200 in full satisfaction for injury to the company's property on the south side of Queen street east, at the corner of Parliament street, upon which the company carried on the business of a departmental store, by the erection and user of a public lavatory and urinal upon Parliament street, near the company's property. The company also appealed from the award, seeking to increase the amount.

The appeals were heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

Irving S. Fairty, for the appellants.

G. W. Mason and F. C. Carter, for the respondents.

MEREDITH, C.J.C.P., was of opinion, for reasons stated in writing, that there was no ground upon which the award could be supported. He thought that Grand Trunk Pacific R.W. Co. v. Fort William Land Investment Co., [1912] A.C. 224, was conclusive against the award. He referred to sec. 406(8) of the Municipal Act, R.S.O. 1914 ch. 192, authorising the passing of by-laws for the construction and maintenance of conveniences such as had been erected by the city corporation in Parliament street, and to sec. 325, providing for the allowance of compensation for lands injuriously affected by the exercise of the corporation's powers. The main appeal should be allowed and the cross-appeal dismissed.

RIDDELL, J., was also of opinion, for reasons stated in writing, that the company had no claim enforceable by arbitration, and that the main appeal should be allowed and the cross-appeal dismissed.

LENNOX, J., was of opinion, for reasons stated in writing, that the main appeal and the cross-appeal should both be dismissed, and that the award should stand. At the end of his opinion, he summarised his reasons as follows:—

(1) But for the statute, what the council of the city had done in erecting the urinal would be an unlawful obstruction of the highway, a common law nuisance, and an indictable offence.

(2) By reason of what had been done, the claimant company had suffered financial injury differing in kind and extent from the injury and inconvenience occasioned to others, and but for the statute would have a cause of action against the city corporation.

(3) The statute gives the company an absolute right to compensation to the extent to which their property is injuriously affected, without shewing a common law right of action—the right of the city corporation to injure the company's property is conditional upon making compensation.

(4) The assumption that fair compensation is to be made for injury to property affected is the only basis upon which it can reasonably be inferred that the city corporation had the right to exercise their powers to the prejudice of owners or occupiers of properties; and, if otherwise, the statute conferred no power to execute the work where it had been executed, and the city corporation could have been and can be restained by injunction.

MASTEN, J., was also of opinion, for reasons stated in writing, that the appeal and cross-appeal should both be dismissed.

The Court being evenly divided, the appeal and cross-appeal were dismissed with costs.

SECOND DIVISIONAL COURT. MARCH 17TH, 1916.

*TOWNSHIP OF EUPHRASIA v. TOWNSHIP OF ST. VINCENT.

Highway—Liability for Maintenance and Repair—Attempt to Establish as Deviation from Township-line — Evidence — Municipal Act, R.S.O. 1914 *ch.* 192, *secs.* 458, 468.

Appeal by the defendants from the judgment of CLUTE, J., 9 O.W.N. 273.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

W. N. Tilley, K.C., and G. Alberry, for the appellants.

W. E. Raney, K.C., and W. D. Henry, for the plaintiffs, respondents.

MEREDITH, C.J.C.P., read a judgment in which he referred to secs. 458 and 468 of the Municipal Act, and said that, if the legislation referred to a permanent change of locality, then the road in question could not be a deviation, for no one ever had any such intention; whilst, if the legislation embraced temporary deviation, there might be much to be said in favour of the finding of the trial Judge that the case was really one of a deviation. But there was that which was conclusive against the plaintiffs—the time had come to an end; within their rights, the defendants insisted upon opening the original allowance and ending the temporary deviation. There was no power to prevent that; all that could be done was to require the county council to determine as to the character of the work to be done, or as to the proportion of the cost of the work to be borne, by each township. The result was not unjust to the plaintiffs. For many years they had gone on improving and repairing the road as if it were entirely under their control, and they alone bound to keep it in repair. A bridge upon the road now needed rebuilding; the necessity for the payment of a considerable sum of money for that purpose had caused some research for a means of putting the burden on other shoulders; and the way grasped at was to make it out to be part of the town-line, the bridge of which the county corporation must maintain. The plaintiffs could not escape in that way.

The appeal should be allowed and the action dismissed.

LENNOX, J., concurred.

RIDDELL, J., reached the same conclusion, for reasons also stated in writing. The concluding words of his judgment are as follows: "Looking now at the all-important matter, i.e., how the road was 'laid out and opened,' it is plain that it was not 'laid out and opened' with the intention of following the boundary-line even in part; that it did not and was not intended 'in some place or places' to deviate from the boundary-line. It was not a deviation, whatever might be said else for it, even assuming that the adoption of the road by the township could be considered a ratification of Walters' actions." (John Walters, a miller, was the original builder of the road, for which he gave much of his own land.)

MASTEN, J., concurred.

Appeal allowed with costs and action dismissed with costs.

SECOND DIVISIONAL COURT. MARCH 17TH, 1916.

*McEWAN v. TORONTO GENERAL TRUSTS CORPORATION.

Executors and Administrators—Claim against Executors of Deceased Person—Alleged Promise to Pay Sum of Money on Settlement of Action for Rent — Evidence — Failure to Establish Binding Promise—Failure to Prove Consideration.

Appeal by the defendants from the judgment of SUTHERLAND, J., 9 O.W.N. 185.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

A. Weir, for the appellants.

C. Garrow, for the plaintiff, respondent.

MEREDITH, C.J.C.P., read a judgment in which he said that this action was brought to recover from the estate of one Carter, deceased, a sum of money which it was said the plaintiff and his brothers were to get in addition to $3,800 paid them for settling their claims in a former action. After a review of the evidence, the learned Chief Justice went on to say that it would be extremely dangerous if claims such as this could be established against a man who could not be heard in his own defence, upon such equivocal and uncertain evidence as that adduced in this case; and that, none the less, because the witnesses all spoke as

fairly and accurately as could be expected after such a lapse of time: see Hill v. Wilson (1873), L.R. 8 Ch. 888; In re Garnett (1885), 31 Ch. D. 1. The appeal should be allowed and the action dismissed, for two reasons: (1) that no binding promise was proved to have been made; and (2) that no consideration had been proved.

LENNOX, J., concurred.

MASTEN, J., also concurred, for reasons stated in writing. He was of opinion that no contract had been established to which the Court could give effect, because Carter's statement of intention, in the circumstances under which it was made, was too vague and uncertain in its nature to be capable of enforcement in a court of law; indeed, the statement of Carter was the statement of a gratuitous intention rather than of a binding contract.

RIDDELL, J., dissented, for reasons stated in writing.

Appeal allowed with costs and action dismissed with costs; RIDDELL, J., *dissenting.*

SECOND DIVISIONAL COURT. MARCH 17TH, 1916.

*CHARTERS v. McCRACKEN.

Mechanics' Liens—Lien of Material-man—Validity—Mortgagee—Release of Equity of Redemption in Favour of—Registration of Deed before Registration of Liens—Bona Fides—Absence of Actual Notice—Registry Act, R.S.O. 1914 *ch.* 124, *sec.* 2—*Mechanics and Wage-Earners Lien Act, R.S.O.* 1914 *ch.* 140, *sec.* 21—*Rights of Lien-holder as to Portion of Mortgage-moneys not Advanced.*

Appeal by the plaintiff (a material-man) from the judgment of an Official Referee in an action to enforce a mechanic's lien. The Referee found the plaintiff entitled to a lien, but found also that certain of the defendants, mortgagees, had priority to a named extent, and ordered the plaintiff to pay the mortgagees' costs of proving their claims.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

A. J. Russell Snow, K.C., for the appellant.

R. J. Gibson, for the defendants Lucas and Armstrong.

D. Urquhart, for the defendants Newton, Fabian, and Alexander.

MEREDITH, C.J.C.P., read a judgment in which he said that the defendant Lucas, having a contract for the sale to him of the land in question, entered into a contract with the defendant McCracken to sell it to him. McCracken bought for speculative purposes—to build upon the land and then to sell it at a profit. He did build upon it; and the plaintiff's and other claims of lien under the Mechanics and Wage-Earners Lien Act arose out of that work, which was done for him and on his credit. Of McCracken's purchase-money, $1,300 was unpaid; and, in addition to that, McCracken put a mortgage for $1,300 upon the property; nearly all the money received upon this mortgage was used in building. The speculation proving a failure, McCracken conveyed to Lucas all his interest in the land in consideration of the $1,300 due to Lucas and of Lucas assuming at its full amount the mortgage made by McCracken. No lien was registered against the land until some time after the later transaction between Lucas and McCracken had been carried out and the conveyance from McCracken to Lucas had been duly registered. The Referee found that Lucas had no actual notice of any of the liens until after the registration of his conveyance from McCracken.

In the first transaction between Lucas and McCracken, the learned Chief Justice said, Lucas, in so far as the Mechanics and Wage-Earners Lien Act was applicable, was to be treated as if mortgagee, and McCracken as if mortgagor, of the land; and so—if within the provisions of that enactment—the later transaction had the effect of a release by the mortgagor to the mortgagee of the former's equity of redemption in the land. And, under the provisions of the enactment, the plaintiff and other lien-holders had unregistered liens upon the land existing when the later transaction between Lucas and McCracken took place—liens which still existed, having been duly registered in time—unless they were cut out by the registration of the deed from McCracken to Lucas.

The main question was, which had priority?

The learned Chief Justice then referred to the interpretation clauses (sec. 2) of the Registry Act, R.S.O. 1914 ch. 124, and to sec. 21 of the Mechanics and Wage-Earners Lien Act, and stated the effect of the two enactments to be, in such a case as this, that, if the lien-holder delayed registration of his lien, he

did so at the risk of being cut out under the provisions of the Registry Act. The lien may be registered before or during the performance of the contract or within 30 days after the completion or abandonment of it, or before or during the furnishing or placing of the materials or within 30 days after the last of them is furnished or placed: see McVean v. Tiffin (1885), 13 A.R. 1.

Though the circumstances, the learned Chief Justice continued, naturally aroused suspicion as to the good faith of the transaction which, if upheld, gave priority to Lucas, enough could not be found in the evidence to warrant a reversal of the Referee's finding that Lucas was a subsequent purchaser for valuable consideration without actual notice, and so, having registered his instrument first, the liens were ineffectual against him; except, it might be, as to the amount not yet advanced of the $1,300 secured by the mortgage assumed by him at that amount: see Ross v. Hunter (1882), 7 S.C.R. 289; Rose v. Peterkin (1885), 13 S.C.R. 677.

If the lien-holders so desired, they might elect, within 10 days, to have the matter referred back to the Referee to deal with all questions respecting the mortgage-money; in other respects the appeal should be dismissed with costs.

LENNOX, J., agreed in the result, stating reasons in writing.

RIDDELL and MASTEN, JJ., concurred.

Judgment below varied.

SECOND DIVISIONAL COURT. MARCH 17TH, 1916.

*COLLERAN v. GREER.

Appeal—County Court Appeal—Appellant Absent from Trial—Motion for New Trial—Forum—Appellate Division—Rules 499, 768—County Courts Act, R.S.O. 1914 ch. 59, secs. 39, 40—Fatal Irregularity at Trial—New Trial Ordered—Costs.

Appeal by the defendant Dunn from the judgment of the District Court of the District of Thunder Bay in favour of the plaintiff in an action to recover a balance of the price of goods sold to the defendant. The judgment was given in the absence of the appellant, and he asked to have it set aside and a new trial ordered.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

J. H. Spence, for the appellant.
The plaintiff was not represented.

MEREDITH, C.J.C.P., reading the judgment of the Court, referred to Rule 499 of the Rules of Practice and Procedure of the Supreme Court of Ontario: "Where a party does not appear at the trial, the judgment may be set aside and a new trial ordered by the Judge presiding at the sittings, or by a Judge;" and said that the question was, whether the practice under that Rule applied to a County or District Court case.

Rule 768 provides that the Rules and the practice and procedure in the Supreme Court shall, so far as the same can be applied, apply and extend to actions in the County Courts; but the provisions of the County Courts Act, R.S.O. 1914 ch. 59, cover the subject of appeals from County and District Courts; and the provisions of the special enactment must prevail if there be conflict.

This case came plainly within both sec. 39 and sec. 40 of the County Courts Act, and so the motion was regularly before the Divisional Court, and must be dealt with.

Upon the facts disclosed in the affidavits and papers filed, the case was one in which as a matter of indulgence the judgment should be set aside and a new trial granted; and, besides that, the papers disclosed an irregularity in the proceedings at the trial which vitiated the judgment.

Order made setting aside the judgment and directing a new trial; no order as to costs and no terms imposed, because of the fatal irregularity at the trial, as well as because the respondent was not represented upon the appeal.

SECOND DIVISIONAL COURT. MARCH 17TH, 1916.

SMITH v. BLAKE.

Negligence—Death of Boy from Goring by Bull—Evidence of Vicious Disposition and Knowledge thereof by Owner—Findings of Jury—Liability of Owner—Action under Fatal Accidents Act.

Appeal by the defendant from the judgment of SUTHERLAND, J., of the 18th January, 1916, upon the findings of a jury, at the trial at Ottawa, in favour of the plaintiff for the recovery of $250 damages (with costs on the County Court scale and without set-off) in an action under the Fatal Accidents Act, by

the father of a boy of 15, who was employed by the defendant, and who was killed by a bull owned by the defendant, to recover damages for the death, the plaintiff alleging that the bull was vicious and the defendant negligent.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

G. F. Henderson, K.C., for the appellant.

C. A. Seguin, for the plaintiff, respondent.

MEREDITH, C.J.C.P., read a judgment in which he said that, as the case was presented, the sole question was, whether there was any evidence, proper to be submitted to a jury, that the bull was vicious, and that his owner knew it. There was direct and positive testimony of an angry and dangerous disposition: it was given by a young man named Garrett, a farm labourer, who lived in the defendant's neighbourhood for a couple of months both before and after the animal's dangerous disposition was proved in its killing of the boy. This witness said: "It seemed to be a cross bull. He used to come to the fence every time I used to be coming home or going. He used to be making signs of trying to get out at me—pawing the ground. The bull was right close to the road, in a little field. Sometimes he would try to get out at me—try to get his head through the wires."

That, the learned Chief Justice said, was evidence upon which, if believed, reasonable men could find against the defendant on the question of the mischievous disposition of the animal; whether it ought to have been believed was a question for the jury. And, if the bull's disposition was as stated by Garrett, the defendant must have known it. If Garrett's testimony ought to be believed, and the defendant's ought not, the verdict was a just one.

The appeal should be dismissed; but from the plaintiff's costs of the appeal should be deducted the costs of the defendant in it over and above what his costs would have been if the action had been brought, as it should have been, in a County Court.

LENNOX, J., concurred.

RIDDELL, J., was of opinion that the appeal should be allowed and the action dismissed. The learned Judge read a judgment in which he stated the law of England and Ontario to be that it is not in the ordinary nature of bulls to injure human beings, and that their owner is not liable for damages done by them by

goring, etc., unless he knows that the particular animal has a mischievous propensity toward the kind of act which caused the damage: Halsbury's Laws of England, vol. 1, p. 372; Buxendin v. Sharp (1695), 2 Salk. 662; Corby v. Foster (1913), 29 O.L.R. 83, 95; and other cases.

The learned Judge was of opinion that there was not a tittle of evidence to shew scienter on the part of the defendant. Assuming that the bull did try to get at the witness Garrett to attack him, no notice of the crossness of the bull was brought home to the defendant.

Questions 1 and 2 put to the jury and their answers were as follow: "(1) Was the bull . . . of a vicious or ferocious disposition? A. Yes. (2) If so, was the defendant aware of such disposition? A. Yes. We believe an experienced farmer, as the defendant is, should have known that any bull over two years of age is dangerous or liable to become so, especially to strangers. We think the bull should have been dehorned when one year old and should have had a chain affixed to its nose when running at large."

This was an attempt by the jury to impose upon the defendant a duty unknown to the law.

The appeal should be allowed and the action dismissed.

MASTEN, J., concurred.

The Court being divided, the appeal was dismissed with costs, qualified as stated by the Chief Justice (RIDDELL, J., dissenting as to costs).

SECOND DIVISIONAL COURT. MARCH 17TH, 1916.

UNION BANK OF CANADA v. MAKEPEACE.

Guaranty—Action on—Defence—Fraud—Evidence—Finding of Fact of Trial Judge—Appeal—Amount due upon Guaranty—Reference—Costs.

Appeal by the defendant from the judgment of MIDDLETON, J., 9 O.W.N. 202.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

W. S. MacBrayne, for the appellant.

D. C. Ross, for the plaintiffs, respondents.

MEREDITH, C.J.C.P., read a judgment in which he said that the defendant failed, upon the evidence, in her defence of non

est factum—that is, that she did not know that she was signing a guaranty. The other branch of the case presented more difficulty, chiefly because the evidence at the trial was so ill-directed to the material circumstances. It was plain, however, that the guaranty signed by the defendant was for debts to be incurred only. No other material fact was plainly proved: see Morrell v. Cowan (1877), 7 Ch. D. 151. When the guaranty was given, a note for the amount of it was taken from the debtors, and the amount of that note was placed to the credit of their overdrawn account, overdrawn to an amount greater than the amount of the guaranty and note, which was $2,500; and so at first sight it would appear that the guaranty had been misapplied; but there was some evidence from which it might be surmised that the guaranty was treated as creating an additional credit upon the security of which money was subsequently advanced which would be covered by it. This, of course, ought to have been plainly proved, if a fact, by the plaintiffs; and they were blamable for the unsatisfactory state of the evidence upon the point. In this unsatisfactory state of the evidence, the proper course was to refer the case to a local officer to ascertain and state what sum, if any, is really due upon the guaranty, reserving further directions and all questions of future costs. There was not enough evidence to prove a merger of the debt guaranteed in the mortgages taken—or otherwise any discharge of the guarantor. The appellant should have her general costs of the appeal.

The other members of the Court agreed in the result, LENNOX and MASTEN, JJ., each giving written reasons.

Appeal allowed in part.

SECOND DIVISIONAL COURT. MARCH 17TH, 1916.

*LAMBERT v. CITY OF TORONTO.

Negligence—Death of Workman Employed by Electric Company — Negligent Arrangement of Wires — Electric Shock — Failure of Foreman to Warn Workman—Liability of Company—Fatal Accidents Act—Workmen's Compensation for Injuries Act—Dangerous Condition Due to Operations of City Corporation—Liability of Corporation—Findings of Jury—Indemnity—Contract—Relief over.

Appeals by the two defendants, the Corporation of the City of Toronto and the Interurban Electric Company, from the judgment of MULOCK, C.J.Ex., of the 8th November, 1915, in

favour of the plaintiff against both defendants, upon the findings of the jury at the trial at Toronto, in an action brought by Ada Lambert, mother of Kenneth Lambert, to recover $10,000 damages, under the Fatal Accidents Act and the Workmen's Compensation for Injuries Act, for the death of her son caused by coming in contact with the electric wires of the defendants, on the 13th March, 1914. The judgment appealed from awarded the plaintiff $2,700 damages with costs; claims for indemnity made by each defendant against the other were dismissed without costs. The city corporation appealed against the judgment dismissing its claim for indemnity over against the Interurban Electric Company.

The appeals were heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

C. M. Colquhoun, for the appellant city corporation.

D. Inglis Grant, for the appellant company.

B. N. Davis, for the plaintiff, respondent.

RIDDELL, J., read a judgment in which he said that the predecessors in title of the defendant the Interurban Electric Company had a contract with the predecessors in title of the defendant city corporation, under which they erected a pole in St. Clair avenue. Upon this pole and its brethren were to be strung a wire or wires for the carriage of electricity of high tension; and, in the nature of things, it would be necessary for employees of the electric company to mount the pole to examine, adjust, and repair the wires. The city corporation absorbed the street, and on the 9th November, 1912, required the company to move this pole some feet back—and this was done. After this, the city corporation erected a pole not far from the one mentioned, and guyed it by a guy-wire running close to the company's pole and wound round the city's pole, in contact, by negligence, with a lightning arrester.

On the 13th March, 1914, the deceased Lambert, in the service of the company, was directed by his foreman to mount the company's pole and release certain wires. He did so, cut a wire of the company's in which there was a high tension current, and, his body coming near the city's guy-wire, a grounding was effected through his body, the guy-wire, and the lightning arrester—the current passed through him, and he was killed.

So far as the company was concerned, the jury were justified in finding negligence against it, through its foreman, who testified that the arrangement of wires was a trap; that the reason

he did not warn Lambert was that he did not see it himself; and that his not seeing it was an "overlook."

The city corporation was also properly found liable. The condition of affairs was perfectly safe up to the time when the city corporation, for its own purposes, threw a wire across near to the pole, and created a situation of danger for all persons mounting the pole and doing certain of the company's necessary work—knowing that it was to be expected that such work would be done.

Assuming that the workman's rights must be limited to those of the company, and that he must be barred if the company could not sue, the company was not prevented from suing by reason of its contract to indemnify the corporation against any action. The city corporation was made liable in this action not by reason of anything done or left undone in this action, but by reason of the city corporation's own negligence in changing a safe arrangement into an unsafe one. This case did not come within the indemnity contract, and the city corporation had no answer against the claim of the plaintiff.

The same considerations applied to the claim of the city corporation against the company.

The appeals should be dismissed with costs.

LENNOX, J., was of the same opinion, for reasons stated in writing.

MASTEN, J., concurred.

MEREDITH, C.J.C.P., dissented, for reasons stated in writing.

Appeals dismissed; MEREDITH, C.J.C.P., dissenting.

SECOND DIVISIONAL COURT. MARCH 17TH, 1916.

RE LEE AND LAKE ERIE AND NORTHERN R.W. CO.

Railway — Expropriation of Land — Dominion Railway Act — Compensation — Award — Appeal — Reduction of Amount Allowed for Severance—Costs.

Appeal by the railway company from an award of arbitrators, under the Dominion Railway Act, fixing the compensation to be paid to a land-owner for land taken for the railway and injurious affection of the remaining lands of the owner, the claimant.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and MASTEN, JJ.

W. S. Brewster, K.C., for the appellant company.

A. G. Slaght and T. J. Agar, for the claimant, respondent.

LENNOX, J., reading the judgment of the Court, said that, in view of the consent signed at the opening of the arbitration and the understanding then come to, as well as the way in which the evidence was directed, he did not think the award should be changed by reason of the divided ownership and severance of the land existing at one time. The finding of the majority of the arbitrators, dependent upon verbal testimony, should not be disturbed unless there was cogent reason for believing that an erroneous conclusion as to the measure of compensation had been come to.

The learned Judge was inclined to believe that the proper principle of assessment was acted upon; but the statement of the majority of the arbitrators did not put the matter entirely beyond controversy. The learned Judge was, however, strongly impressed with the view that the award was for a sum considerably larger than could be justified by the evidence. As to the smaller sums, including $1,250 for the land taken, the award should not be disturbed, although $250 an acre for the 5 acres taken was rather high. The allowance of $5,000 for severance, having regard to the total value of the land and the other considerations, was very much beyond anything that could be justified. The award should be reduced by $1,200.

The appellant company should have two-thirds of the costs of the appeal.

HIGH COURT DIVISION.

SUTHERLAND, J. MARCH 13TH, 1916.

McCLURE v. LANGLEY.

Company—Illegal Acts of Director—Meeting of Shareholders to Confirm—Injunction—Absence of Fraud or Concealment—Acts intra Vires of Company—Amendment—Parties.

Motion by the plaintiffs, two of the shareholders of McClure & Langley Limited, for an interim injunction restraining the defendant Langley, also a shareholder and director, from procuring a meeting of the shareholders to be called for the purpose of confirming alleged illegal acts on his part, and restrain-

ing the company (McClure & Langley Limited), and certain shareholders other than Langley, from proceeding with a meeting called for the 20th March, 1916, for the purpose mentioned. The plaintiffs also asked for leave to amend the writ of summons and the pleadings by stating that the plaintiffs sued on behalf of themselves and all shareholders of the company other than the defendant, and by adding the company and the other shareholders referred to as defendants. The plaintiffs also asked for a receiver.

R. B. Henderson, for the plaintiffs.

J. Tytler, K.C., for the defendant and the proposed defendants.

SUTHERLAND, J., after setting out the facts in a written opinion, said that from the material filed in opposition to the motion it appeared that the matters complained of by the plaintiff McClure had existed for several years, that that plaintiff had knowledge thereof, and had the opportunity from the annual statements and books of the company to ascertain what was being done, and that to some extent he admitted, or did not disaffirm, a part of the alleged agreement now put forward by the defendant Langley.

It would seem, the learned Judge continued, upon the facts disclosed in the material filed, that the matters complained of were such that the shareholders might well be considered to have a right to pass upon and deal with them at a meeting properly called for the purpose. It had not been made apparent that the defendant had been guilty of concealment or fraud, or that the matters in question were ultra vires of the company: Ellis v. Norwich Broom and Brush Co. (1906), 8 O.W.R. 25; Meyers v. Cain (1905), 6 O.W.R. 297; MacDougall v. Gardiner (1875), 1 Ch. D. 13, at p. 25; North-West Transportation Co. v. Beatty (1887), 12 App. Cas. 589; Lindley on Companies, 6th ed., p. 775; Burland v. Earle, [1902] A.C. 83; Dominion Cotton Mills Co. v. Amyot, [1912] A.C. 546. In the recent case of Cockburn v. Newbridge Sanitary Steam Laundry Co., [1915] 1 I.R. 237, it was held that the transaction in question was illegal and ultra vires.

Motion dismissed with costs to the defendant, unless the trial Judge shall otherwise order.

Order granted allowing the amendment asked for.

CLUTE, J. MARCH 17TH, 1916.

HENDERSON v. MORRIS.

Mortgage—Enforcement by Foreclosure—Claim of Lien-holder under Mechanics and Wage-Earners Lien Act, R.S.O. 1914 *ch.* 140, *sec.* 8(3)—*Lien upon Increased Value in Priority to Mortgage—Realisation of Lien—Lien-holder Foreclosed unless he Proceeds to Sale — Rights of Mortgagee — Costs of Sale.*

Appeal by the mortgagee from the report of the Local Master at Ottawa in a mortgage action for foreclosure.

The appeal was heard in the Weekly Court at Ottawa.

G. F. Henderson, K.C., for the appellant.

J. E. Caldwell, for the respondent, a lien-holder.

CLUTE, J., said that the question in appeal arose in a contest between the mortgagee and a lien-holder under the Mechanics and Wage-Earners Lien Act, R.S.O. 1914 ch. 140, sec. 8, sub-sec. 3, where the selling value of the land was admitted to have been increased to the extent of $300 for materials placed thereon, sub-sec. 3 providing that "the lien shall attach upon such increased value in priority to the mortgage or other charge."

The priority of the lien upon the increased value being admitted, the question raised was as to the respective rights of the parties arising thereon. The mortgagee contended that the right of the lien-holder was limited to his priority in respect of the increased selling value; and that, having a lien in respect of the $300 only, it was his duty to realise that lien by proceeding to a sale of the property in the usual way, and that, in default of his so proceeding, he should be foreclosed. The mortgagee relied on Patrick v. Walbourne (1896), 27 O.R. 221.

The learned Judge said that, having regard to the statute and its construction, so far as indicated by the case cited, the clause of the report objected to was erroneous, inasmuch as it gave the lien-holder priority to the mortgagee, not limited, as it should be, to the increased selling value, out of which only the lien could be realised. The report should limit the right of the lien-holder accordingly.

The statute does not cast upon the mortgagee the duty of realising the lien-holder's claim. If the lien-holder desires to realise, he must take the necessary steps to do so either by asking a direction to proceed with the sale himself or by paying into Court $80, in the usual way, to have a sale by the mortgagee.

The costs incurred in a sale ought not to be charged against the mortgagee's interest, but should come out of the sum admitted as the increased selling value, in this case $300.

Appeal allowed.

MIDDLETON, J. MARCH 18TH, 1916.

O'CONNOR v. CHARLESON.

Vendor and Purchaser—Contract for Sale of Land—Apprehended Proceedings to Enforce Payment of Instalment of Principal of Purchase-money — Proceedings in Foreign Court for Purpose of Reaching Foreign Assets—Application of Mortgagors and Purchasers Relief Act, 1915.

Motion by the plaintiff, purchaser, for an interim injunction restraining the defendant, vendor, from taking proceedings to enforce payment of certain principal money now past due under an agreement for the purchase of certain lands in the city of Ottawa.

The motion was heard in the Ottawa Weekly Court.

J. F. Orde, K.C., for the plaintiff.

H. Fisher, for the defendant.

MIDDLETON, J., said that the proceedings which the plaintiff apprehended were proceedings in the Courts of the Province of Quebec, where the plaintiff resides and owns property.

The action is based upon the theory that the Mortgagors and Purchasers Relief Act, 1915, 5 Geo. V. ch. 22 (O.), precludes a vendor who resides in Ontario from taking any action, even in Quebec, upon a contract, without the leave of an Ontario Court, where there is no default save in regard to an instalment of principal.

The fundamental difficulty is, that the Legislature of Ontario did not intend to interfere with any proceedings save those in this Province.

The whole frame of the statute, and particularly the provisions found in sec. 2(2), seems to indicate that proceedings in a foreign Court to reach foreign assets were never contemplated by the Legislature.

The motion should be turned into a motion for judgment, and a judgment pronounced dismissing the action with costs.

TOWNSHIP OF STAMFORD v. ELECTRICAL DEVELOPMENT CO. OF ONTARIO—SUTHERLAND, J.—MARCH 13.

Assessment and Taxes—Municipal By-law—Exemption from Taxation—Validating Legislation—School Rates—Public Schools Act, 55 *Vict. ch.* 60, *sec.* 4—*Special By-law.*]—In this action, tried without a jury, SUTHERLAND, J., found that the matters in dispute were substantially the same as in Electrical Development Co. of Ontario v. Township of Stamford (1914), 50 S.C.R. 168; and the judgment of the Supreme Court of Canada in that case had recently been affirmed by the Judicial Committee of the Privy Council. He, therefore, directed judgment to be entered for the plaintiffs for $7,930, with interest as claimed in the statement of claim, and with costs. J. H. Ingersoll, K.C., for the plaintiffs. F. C. McBurney, for the defendants.

TOWNSHIP OF STAMFORD v. CANADIAN NIAGARA POWER CO.—SUTHERLAND, J.—MARCH 13.

Assessment and Taxes—Municipal By-law—Exemption from Taxation—Validating Legislation—School Rates—Public Schools Act, 55 *Vict. ch.* 60, *sec.* 4—*Special By-law.*]—The same result was arrived at in this case as in the preceding one and for the same reason. Judgment for the plaintiffs for $6,886.50 with interest and costs. J. H. Ingersoll, K.C., for the plaintiffs. Wallace Nesbitt, K.C., and A. Monro Grier, K.C., for the defendants.

ONTARIO BANK v. O'REILLY—SUTHERLAND, J., IN CHAMBERS—MARCH 13.

Summary Judgment—Failure to Disclose Defence—Action on Judgment for Recovery of Money.]—Appeal by the defendant McCullough from an order of the Master in Chambers whereby he directed judgment to be entered for the plaintiffs against the defendant McCullough; and motion for leave to file a further affidavit by the defendant McCullough, to stay all proceedings in this action, to set aside the judgment entered in favour of the present plaintiffs in a former action on the 17th July, 1906, and to restrain further proceedings thereon. The plaintiffs' claim in this action was upon the judgment recovered in the former action, the amount claimed being $33,542.30 and interest and costs, amounting in all to $53,573.14. In the affi-

davit filed by the defendant McCullough with his appearance in this action, he stated that he was not a member of the Ottawa Cold Storage and Freezing Company for six months or more previous to the former action; that he was never served with a copy of the claim or writ in that action; that on the trial of that action he was subpœnaed by the plaintiffs as a witness to assist them in proving their case; that he was told by the plaintiffs' manager that, if he would assist the plaintiffs, there would be no judgment taken against him; and that he had been all the time unaware that judgment had been entered against him in that action. The learned Judge, after setting out the facts in a considered opinion, said that he agreed with the view of the Master that, in the circumstances, none of the allegations in the affidavit disclosed any ground of defence to the action; and the present motion and appeal should be dismissed with costs. J. H. Fraser, for the defendant McCullough. M. L. Gordon, for the plaintiffs.

McANDREW v. NAGRELLA MANUFACTURING CO.—MONCUR v. IDEAL MANUFACTURING CO.—MIDDLETON, J.—MARCH 14.

Company—Subscription for Shares—False and Misleading Statements—Cancellation of Subscription—Winding-up of Company—Action by Liquidator for Declaration of Invalidity of Mortgage made by Company—Fraud Practised upon Individual Shareholders—Inability to make Restitution.]—The first action was brought for cancellation of the plaintiff's subscription for 20 shares of the defendant company's stock, and for consequent relief. The second action was brought by the liquidator of the Nagrella Manufacturing Company to have it declared that a mortgage for $15,000 made by that company in favour of the defendant company was invalid, and for consequent relief. The actions were tried without a jury at Hamilton.—MIDDLETON, J., delivering judgment, said that the statements made by Mr. Fletcher and the letter given by Mr. Main were intended by Mr. Fletcher to induce subscribers to take stock in the Nagrella Company, and were false and misleading. Mr. Main probably had no evil intention, and failed to realise the real nature of his acts and the use to which his letter would be put; but to take this charitable view of his conduct taxed to the very limit the credulity and charity of the judicial mind, and caused amazement at the simplicity of mind of an "auditor" who seemed to enjoy some large measure of public confidence. The plaintiff

McAndrew was entitled to be relieved of his subscription for stock in the Nagrella Manufacturing Company—his action having been brought before the winding-up began.—The other action seemed to be misconceived. The fraud was practised upon the individual shareholders who purchased from Welsh, and their right of action should be asserted by them individually. Neither Welsh nor the company was, so far as shewn, the victim of any fraud, and the liquidator could not assert the rights which the shareholders as individuals had against Fletcher. Though Fletcher and the Ideal Manufacturing Company were in many aspects identical, yet in law they were separate, and nothing was shewn to make the company answerable for his deceit. It was not now possible to rescind the contract. Matters had gone too far, and there could be no restitution.—In the result the Moncur action should be dismissed without costs, and McAndrew's action should succeed with costs. C. W. Bell and T. B. McQuesten, for the plaintiffs. E. E. Gallagher, for the defendant the Nagrella Manufacturing Company. M. J. O'Reilly, K.C., and C. V. Langs, for the defendant the Ideal Manufacturing Company.

RICHARDSON v. MCAULEY—CLUTE, J.—MARCH 17.

Money Lent—Action to Recover—Improvident Transactions—Evidence.]—Action to recover $1,900 advanced by the plaintiff to the defendants. The plaintiff, at the time of the trial, was 81 years of age, and was 78 at the time when the advances began, in the spring of 1913. There was no written agreement between the parties, and the plaintiff had no independent advice. The action was tried without a jury at Kingston. CLUTE, J., read a judgment in which, after setting out the facts, he said that the plaintiff was entitled to recover for money lent. The advances alleged were made at different times in three sums, of $600, $500, and $800. The defendants alleged that the third advance was only $500. The first advance, $600, the learned Judge found, was quite sufficient to satisfy any claim the defendants had for the period that the plaintiff remained with them. As the plaintiff might be mistaken as to the amount of the third advance, he gave the defendants the benefit of the doubt; and directed that the plaintiff should have judgment for $1,000, with interest from one year after the 6th August, 1914, and with costs. The transactions could not be supported, upon the defendants' statement, as moneys paid upon a good considera-

tion or otherwise. The onus was upon the defendants, and the transactions were improvident on the part of the plaintiff. J. M. Farrell and A. E. Day, for the plaintiff. T. J. Rigney, for the defendants.

JAROSHINSKY v. GRAND TRUNK R.W. CO.—FALCONBRIDGE, C.J.K.B.—MARCH 18.

Railway — Injury to Pedestrian at Crossing — Evidence — Findings of Jury.]—Action against the Grand Trunk Railway Company and the Wabash Railroad Company to recover damages for injuries sustained by the plaintiff when struck by a locomotive engine in attempting to cross a line of railway. The action was tried with a jury at Sandwich. The action was, at the trial, dismissed as against the Wabash company. The jury answered questions in regard to the issues between the plaintiff and the Grand Trunk company. Counsel for the Grand Trunk company argued that, upon the plaintiff's own evidence, the action ought to be dismissed: Grand Trunk R.W. Co. v. McAlpine, [1913] A.C. 838. The learned Chief Justice was of opinion that, although the evidence of the plaintiff was unsatisfactory, there was something upon which the jury might find in his favour as to his position when he looked before attempting to cross and as to the want of warning by bell. Upon the jury's findings, the Chief Justice directed judgment to be entered for the plaintiff for $1,254 and costs. F. W. Wilson, for the plaintiff. D. L. McCarthy, K.C., and W. E. Foster, K.C., for the defendants.