The
# Ontario Weekly Notes

Vol. I. TORONTO, MARCH 30, 1910. No. 27.

## HIGH COURT OF JUSTICE.

DIVISIONAL COURT. MARCH 18TH, 1910.

## *CAMPBELL v. COMMUNITY GENERAL HOSPITAL ALMSHOUSE AND SEMINARY OF LEARNING OF THE SISTERS OF CHARITY, OTTAWA.

*Contract—Charitable Corporation—Absence of Seal and Writing—Partly Executed Contract—Powers of Corporation—Work and Labour—Recovery for Work Done—Quantum Meruit.*

Appeal by the plaintiffs from the judgment of BRITTON, J., ante 387, dismissing without costs an action brought to recover the value of work done for the defendants in digging a well.

The appeal was heard by BOYD, C., MAGEE and LATCHFORD, JJ.

A. E. Fripp, K.C., for the plaintiffs.

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

BOYD, C. (after stating the facts, which may be found in the former note, p. 387):—

That the contract is intra vires does not seem to me to be doubtful. The farm was held by the corporation for the purposes of the well-being of the sisterhood and all the beneficiaries of the charity. It provided supplies of butter, milk, and vegetables, which had to be procured from some source, and better from this farm managed in their interest than from any other. The farm was largely and substantially ancillary to the proper maintenance of the institution; and it follows that for the proper management of the farm and the stock a plentiful supply of good pure water was indispensable, and in no other way could this be procured than by the digging or sinking of wells. That this well was needed is not disputed—is indeed admitted—the only qualification made by the lady-manager is that it was "not very badly needed."

* This case will be reported in the Ontario Law Reports.

The modern doctrine as to corporate contracts not under seal, in the case of other than trading corporations, is thus given in "The Laws of England," published under the imprimatur of the Earl of Halsbury: "The rights and liabilities upon such contracts depend upon whether the contracts relate to matters incidental to the purpose for which the corporation exists, and whether the consideration therefor had been executed by the party seeking to enforce them:" vol. 8, tit. "Corporations," p. 383, No. 848 (1909).

Referring to the terms of the charter, it appears that the community had established an hospital for the reception and care of indigent and infirm sick persons of both sexes and of orphans of both sexes, and they were incorporated to carry on the good work, with power to hold and enjoy lands and tenements within the province: sec. 1 of 12 Vict. ch. 108. And by sec. 2 it was provided that the revenues, issues, and profits of all real and personal property should be applied to the maintenance of the members of the corporation, the construction and repair of buildings requisite for purposes of the corporation, and the payment of expenses to be incurred for objects legitimately connected with or depending on the purposes aforesaid.

These last words are, I take it, ample to cover a contract for the making of a well on the farm-land—that being an expense incurred for an object legitimately connected with the maintenance and the needs of the inmates of the institution. The learned Judge puts its very succinctly: "The corporation, being owner of a farm on which stock is kept, requires water for the purpose of carrying on the farm, and this work was a necessity for farm purposes; and that water is not found is not the point."

It seems to me that the distinction once insisted on as to the work done being "essential" to the purposes of the corporation is to be modified by the trend of recent decisions so that "beneficial" work is enough if it be incidental or ancillary to the purposes for which the corporation exists. Mathew, J., in his observations on this line of cases in Scott v. Clifton, 14 Q. B. D. at p. 903, uses "necessity" as almost synonymous with "benefit"—a seal not being required when the contract is for a purpose incidental to the performance of the duties of the corporate body, and its necessity is shewn by proof that the corporation, with full knowledge of its terms and of all the facts, had acted upon and taken the benefit of its performance.

Complete execution of the contract is not essential where there is actual part performance, and the completion of the work has been prevented by the act of the corporation. The well was sunk

to the depth of 150 feet, to be utilised at a later season, and the plaintiffs were willing and offered to prosecute the work till water had been reached. Of the benefit of this work the corporation has been in possession, and there is no complaint of its improper execution, as far as it has gone.

In Lawford v. Billericay Rural District Council, [1903] 1 K. B. 772, the argument for the corporation was that the combination of the two facts that the work has been done, and that it is incidental to the purposes of the corporation, is not enough to give a right of action. Besides, there must be at the making of the contract a question of convenience amounting to necessity, etc.: p. 778. In giving judgment, Vaughan Williams, L.J., in commenting on Nicholson v. Bradfield Union, which was based on Clark v. Cuckfield, says the ground of the decision was that the coals were accepted and used, and that the law raised an implied contract to pay for them, though there was no contract under seal, and he did not understand that the case was decided upon the recognised exception as to necessity: p. 781. And he treats Clark v. Cuckfield as decided upon the ground of the recognition of a contract arising on the receipt of the benefit of acts done at the request of the corporate body: p. 782.

And in Bernardin v. Municipality of North Dufferin, 19 S. C. R. 595, the majority of the Court approve of the sound and rational principle equally applicable to the case of every corporation, that where work has been executed for a corporation under a parol contract, which work was within the purposes for which the corporation was created, and it has been accepted and adopted and enjoyed by the corporation after its completion, it would be fraudulent for the corporation to refuse to pay for it because of the absence of the corporate seal: p. 595.

I do not further labour this point as to the absence of the seal—which does not appear to me to affect the plaintiffs' right of action.

The learned Judge has expressed the opinion that, if the plaintiffs are entitled to recover, their damages should be assessed at $175. But the action is not for breach of contract, but to recover the value of the work done, so far as it went — in effect a quantum meruit—and the usual rule in such case is to take the contract price as the measure to be applied. In that view, the plaintiffs should have judgment for $308 and costs, and to that I think they are entitled.

MAGEE and LATCHFORD, JJ., concurred.

DIVISIONAL COURT. MARCH 18TH, 1910.

## *RE JONES TRUSTS.

*Trusts and Trustees—Settled Estate—Appointment of New Trustee—Selection of Person—Discretion—Wishes of Settlor—Independent Trustee—Person out of the Jurisdiction—Relationship to Cestuis que Trust—Appointment by Foreign Court—Appeal from Order Appointing New Trustee—Jurisdiction of Divisional Court.*

Appeal by Kathleen Alice Jones from the order of FALCONBRIDGE, C.J.K.B., ante 418, directing that one Herbert W. Sangster should be appointed a trustee of a settled estate in place of Arthur P. Nagle, who had become insane.

The appeal was heard by CLUTE, LATCHFORD, and SUTHERLAND, JJ.

N. F. Davidson, K.C., for the appellant.

Eric N. Armour, for the petitioners.

F. W. Harcourt, K.C., for the infants.

The judgment of the Court was delivered by CLUTE, J., who, after setting out the facts, said, in reference to the preliminary objection that no appeal lies to a Divisional Court, that sec. 74 of the Judicature Act expressly provides for such an appeal. . . .

The principal points outstanding are, that the appellant is the settlor, who, owing to family estrangements, conveyed a large estate, amounting to somewhere between $60,000 and $120,000, to her children, reserving a modest, if not scanty, income for herself. The lands are in Ontario. The proposed trustee does not reside in this province. The family estrangement has separated the appellant from her husband, her sister, her mother, and her nephews and nieces. Mr. Sangster is her sister's husband, with whom her sister and her mother reside. Her mother has a power of appointment which may be exercised in favour of any of her children, including the appellant.

It is further charged that the proposed trustee is solicitor to the mother, who has this power of appointment, and who may appoint in his wife's favour. He denies that he is solicitor for the mother, although he has acted for her in some trifling mat-

* This case will be reported in the Ontario Law Reports.

ters. But the fact is that she resides with him, and is liable to be subjected to his influence, if he sought to exercise it in favour of his wife with respect to the power of appointment and in regard to the management of the trust generally.

Under these facts and circumstances, would the appointment of Mr. Sangster as trustee be in accord with the well-recognised principles upon which the Court should act? . . .

[Reference to In re Tempest, L. R. 1 Ch. 485, judgment of Turner, L.J., laying down rules with regard to such appointments.]

It would appear to me that the appointment of the proposed trustee would be contrary to the principle laid down in every one of these rules. The appellant, the settlor in this case, is very strongly opposed to his appointment, and not unreasonably. He is in a position where he might exercise, and where, having regard to his relations to his wife, it would be to his interest to exercise, an influence against the appellant and in favour of his wife. It is difficult to see how he can hold an even hand between the parties interested under the trust. . . .

As pointed out in Lewin on Trusts, 11th ed., p. 823, the Court will not in general appoint persons trustees who are resident out of the jurisdiction: Re Guibert, 16 Jur. 852; Re Curtiss Trusts, 5 Ir. Rep. Eq. 439; but has done so in several cases where the special circumstances render that course advisable. . . . In re Lilliard, 14 Ch. D. 310; In re Freeman's Settlement Trusts, 37 Ch. D. 148; Easton's New Trustees, p. 65.

As a general rule, the Court will not appoint a cestui que trust or the relation of a cestui que trust: Ex p. Clutton, 17 Jur. 998; Wilding v. Boulder, 21 Beav. 222; Seton's Judgments and Decrees, 6th ed., p. 1226; . . . Easton, pp. 65, 66, 67; Re Kemp's Settled Estates, 24 Ch. D. 485.

In this case there would seem to exist, not one, but many reasons why the proposed trustee should not be appointed . . .

Reading the many cases bearing upon the question, to some of which I have referred, I find it impossible to say that, in the circumstances of this case, the proposed trustee should be appointed. There is only one point upon which on the argument I felt and still feel some hesitation, and that is that, Mr. Sangster having been appointed within the province of Nova Scotia, and the appeal against the appointment having been dismissed for want of prosecution, and the Chief Justice having made the order, this Court ought not to intervene. There was no case cited, nor have I found one, directly in point. There is, however, the analogous case of ancillary letters, where foreign probate or

administration has been granted: In re Enohin and Wiley, 10 H. L. C. 1 . . . In re Medbury, 11 O. L. R. 429. . . .

In the present case the estate which formed the subject of the settlement came from the will of the late John Bell, a resident of Toronto. The estate is in Toronto, and under the will of John Bell is being administered by the Toronto General Trusts Corporation of Toronto—one of the present trustees residing in New Brunswick and the other in Nova Scotia. The appellant resides in Boston, and the petitioners reside in Nova Scotia. Inquiries regarding the trust estate, its value, and the most opportune time for sale, would have to be made where the estate is, and it would, I think, be most convenient in the interest of all parties and beneficial to the estate, aside from other considerations, that one of the trustees should be resident here.

With great deference, I do not think that there are such special circumstances as should induce the Court to depart from the well-recognised principles applicable to a case of this kind.

The order appointing James W. Sangster must be set aside. Costs of all parties here and below out of the estate.

---

RIDDELL, J. MARCH 19TH, 1910.

## TRADERS FIRE INSURANCE CO. v. APPS.

*Contract—Subscription for Company Shares—Evidence that Subscription Obtained by False Representation—Corroboration—Refusal to Accredit Uncontradicted Evidence of Witnesses.*

The defendant, a widow, admittedly signed a subscription for $3,000 of the capital stock of the plaintiffs, a fire insurance company, therein covenanting to pay $300 within 60 days, and all calls as made by the directors. She paid the $300, and received a certificate for 30 shares. Subsequent calls were made, but she did not pay; and this action was brought to recover these calls.

H. Cassels, K.C., for the plaintiffs.

L. F. Heyd, K.C., for the defendant.

RIDDELL, J.:—To avoid liability the defendant sets up that while she knew she was subscribing for $3,000, she was assured that she never would be called upon to pay more than $300; and that the subscription she signed was read over to her as contain-

ing such provision. Her son corroborates her. She also says that one Carrol represented that he himself was going to take stock in the company; but, even if this were true, it would not advantage the defendant, being not a representation of an existing or past fact; and, moreover, Carrol was not in any way connected with the company.

If I could accept her statements as being true, the well known cases of Foster v. MacKinnon, L. R. 4 C. P. 704, and Lewis v. Clay, 14 Times L. R. 149, would be relied upon as furnishing a complete defence. I shall assume, without deciding, that the principle of these cases applies.

There is no contradiction of the evidence; Camp, the agent, is dead, and it is said that Carrol cannot remember anything about the facts.

When the evidence was being given in the witness box, I thought that the defendant and her son were not consciously and intentionally stating what was untrue, but I was not at all satisfied that what they swore to was the truth—rather the reverse. I reserved judgment to see if my mind would be changed by a perusal of the documents and further consideration. I do not think that any good end would be achieved by going into the correspondence and transactions subsequent to the execution by the defendant of the subscription. There is nothing to indicate that the story of the defendant is true.

In Rex v. VanNorman, 19 O. L. R. 447, I held that "there is no rule in our law that a Judge or jury or other trial tribunal must accredit any witness, even although not contradicted:" p. 449. The Chief Justice of the Common Pleas refused to allow any appeal from this decision, and I follow it.

On the short ground that, it being admitted that the defendant executed the document sued upon, and consequently the onus is upon her to prove that her understanding of the document was different from its actual contents, and that, from what I saw of the witnesses in the box, I cannot find that she has met the onus, the defence fails. I have no doubt that both she and her son have persuaded themselves of the truth of their story, but I cannot accept it as the fact, and I do not think that any misrepresentation of any kind has been proved.

No objection was taken to the right to recover or the amount, if the defendant were held bound by the subscription.

The plaintiffs will have judgment for the amount sued for, interest, and costs.

MEREDITH, C.J.C.P. MARCH 21ST, 1910.

## RE *ORANGEVILLE LOCAL OPTION BY-LAW.

*Municipal Corporations — Local Option By-law — Submission to Electors—Scrutiny of Ballot Papers by County Court Judge—Scope of Inquiry — Right to Vote of Persons who Voted — Voters' Lists Act, 1907, sec. 24—Finality of Lists—Persons Becoming Disentitled by Change of Residence—Prohibition.*

Motion by W. T. Bailey and F. Franks for an order prohibiting the Judge of the County Court of Dufferin, before whom was proceeding a scrutiny under sec. 371 of the Consolidated Municipal Act, 1903, of the ballot papers which were cast when a vote was being taken on a proposed local option by-law of the town of Orangeville, from entering upon an inquiry as to the qualification to vote of the persons who voted, or for a mandamus directing him to inquire how the persons who might be found not to have been entitled to vote voted, and to take evidence for the purpose of that inquiry.

H. E. Irwin, K.C., and C. R. McKeown, K.C., for the applicants.

J. Haverson, K.C., for the petitioner for the scrutiny.

A. A. Hughson, for the town corporation.

MEREDITH, C.J., said that it was clear that the Judge had no authority to require any person who voted to state for whom he voted: secs. 198, 199, and 200 of the Consolidated Municipal Act, 1903; Haldimand Election Case, 1 Ont. Elec. Cas. 529, 547, 548, 559.

But for In re Local Option By-law of the Township of Saltfleet, 16 O. L. R. 293, the Chief Justice would have thought it clear that, upon a proceeding under sec. 371, the Judge had no jurisdiction to enter upon an inquiry as to the right to vote of any one who had deposited his ballot paper. The inquiry is, in the Chief Justice's opinion, limited to a scrutiny of the ballot papers, and differs from a recount only in that the Judge is not limited to dealing with the ballot papers ex facie, but may take evidence . . . (sec. 372) for the purpose of determining whether any ballot paper ought or ought not to be counted, this power being in terms limited to taking evidence as to all matters arising on the scrutiny. . . .

[Reference to the provisions of secs. 139-143, 145, 350, 351; In re McGrath and Town of Durham, 17 O. L. R. 514.]

* This case will be reported in the Ontario Law Reports.

It is a scrutiny of ballot papers, not of votes, which the County Court Judge is authorised to hold. . . .

The Chief Justice proceeded:—

I am, however, bound to follow the decision of the Divisional Court in the Saltfleet case, and to hold that upon scrutiny of the ballot papers under sec. 371 the Judge has jurisdiction to enter upon an inquiry as to the right of the persons who have voted to vote.

Then comes the question as to the scope of the inquiry. It was held by Riddell, J., in the Onondaga case, 14 O. L. R. 606, following Regina ex rel. McKenzie v. Martin, 28 O. R. 523, that he had no power, upon a motion to quash, to examine "into the propriety of the various names being on the voters' list;" and . . . a fortiori the County Court Judge has no such power upon a scrutiny of the ballot papers. If ever there was any doubt upon the point, it has been removed by sec. 24 of the Voters' Lists Act, 1907.

[Reference to the exceptions in paragraphs 1, 2, and 3 of sec. 24, i.e., persons not entitled to vote, paragraph 1 being "persons guilty of corrupt practices at or in respect of the election in question on such scrutiny, or since the list was certified by the Judge."]

The only one of these three paragraphs which, in my opinion, is applicable to a municipal election is paragraph 1. . . .

I do not wish to be understood as expressing the opinion that, upon a proceeding to unseat a candidate who has been declared elected, or on a motion to quash a by-law, it would not be open to the Court to inquire whether a person whose name was entered on the voters' list had not, by something which had subsequently occurred, lost his right to vote, and, if that was found to be the case, to disallow the vote. I reserve my opinion as to such a case until it is presented for decision.

I am here again met with the decision in the Saltfleet case that upon a scrutiny of the ballot papers under sec. 371 a "subsequent change of residence which would disqualify may be investigated under sub-clause 2, but not a subsequent change of status:" per Boyd, C., at p. 302. . . . My duty is to follow the Saltfleet case, and not to give effect to my own opinion. . . .

The opinion of the learned County Court Judge, as I understand, is that he may go beyond these limits, and that, where a person whose name is entered on the voters' list at any time subsequent to its having been certified is not a resident within the municipality, the list as to him is not final and conclusive, but his right to be entered upon it may be questioned, and, if it appears

that he had not that right, his vote may be disallowed even in a case such as that of a freeholder, where residence is not required to entitle him to vote. . . . He errs in treating the mere fact that a person whose name appears on the list has subsequently not been a resident within the municipality to which the list relates, although such non-residence in no way affected his right to vote, as in the case of a freeholder under the Municipal Act, as taking away the conclusive character of the list and warranting an attack upon his right to be entered on it.

Such a view is, in my opinion, entirely opposed to the policy on which the Voters' List Act is based, which is, that the list is to be final and conclusive . . . (with the exceptions named in paragraphs 1, 2, and 3) . . . paragraphs 2 and 3 being, in my opinion, applicable only to elections under that Act.

To attribute to the legislature the intention of opening the door to an attack on the voters' list simply because a person whose name is entered on it whose right to vote is challenged may have ceased, temporarily it may be, to reside in the municipality, where his ceasing to do so did not affect his right to vote, is not, I venture to think, very complimentary to the good sense of that body. . . .

Limiting the scope of the inquiry before the County Court Judge as I have held it to be limited, the question of his jurisdiction to deduct the bad votes from the number cast in favour of the by-law, as I understand the facts, becomes in this case academical, as, these being deducted, the majority is still sufficient to carry the by-law.

My present impression is that—while a Court may have that power when dealing with a motion to quash—the jurisdiction of the County Court Judge being purely statutory, where the bad votes are sufficient in number, if cast for the by-law, to defeat it, he has not that power, and that his proper course is to certify the facts to the council; but, if the question is or becomes material in determining the fate of the by-law, I will hear counsel further as to it.

In the meantime, an order must go prohibiting the learned Judge of the County Court from entering upon any inquiry as to the right to vote of any person whose name is entered on the voters' list upon which the voting took place, unless, under the provisions of the Consolidated Municipal Act, 1903, subsequently to the list being certified he had become by change of residence disentitled to vote; and there will be no order as to costs.

DIVISIONAL COURT. MARCH 22ND, 1910.

## STRONG v. VANALLEN.

*Contract—Trading Company—Sale of Shares, Business, Assets, Stock, and Goodwill — Construction — Previous Option—Assumption of Liabilities by Purchaser—Liabilities not Appearing on Books—Liabilities Incurred between Dates of Contract and Transfer—Debts—Salary of Manager—Quantum Meruit —Set-off of Certain Items.*

Appeal by the defendant and cross-appeal by the plaintiffs from the judgment of BRITTON, J., 13 O. W. R. 490, in favour of the plaintiffs for the recovery of $2,597.69 and for other relief.

The defendant, having a controlling interest in E. VanAllen & Co. Limited, of Hamilton, gave an option to the plaintiff Strong, bearing date the 1st November, 1906. This option was not taken up by Strong, and expired on the 16th November, 1906. On the 30th November the defendant gave a further option to the plaintiff Strong as follows:—

"Referring to the negotiations which have taken place between us in regard to the purchase of all the capital shares of E. VanAllen & Co. Limited, and all the real and personal property, assets, and effects of the company as set out in the option I gave you, dated 1st November instant, I beg leave to say that I am prepared to accept $230,000 cash for the same on the basis of the last stock-taking, 31st August last, the date of termination of the company's fiscal year; you to get the transfer of all the said shares and the conveyance of all the said property, assets, and effects as at that date, and also all the property, assets, and effects of the company subsequent thereto; you assuming the liabilities of the company as they stood on the books of the said company on the 31st August last, and also all the ordinary running expenses and liabilities of the company incurred since that date; you to have the benefit of all property acquired by the company subsequent to said date, and the benefit of all business of the company transacted subsequent to said date; I to receive $50,000 cash on acceptance of this proposition, in writing, on or before the 5th December instant, and the balance when properly conveyed and transferred in the usual form. The transaction to be proceeded with and closed within ten days from acceptance of offer."

This option was accepted, and on the 5th December the defendant was paid $50,000 on account of the purchase money therein mentioned, and on the 15th December he was paid the balance, $180,000, upon payment of which a written receipt was given by

the defendant, and a written undertaking to do whatever might be necessary in perfecting the title and conveying the property and assets purchased.

The plaintiffs (Strong and the company) alleged that the defendant did not carry out his agreement.

The gist of the complaint was that the assets were depleted by reason of a large number of payments made for liabilities which did not appear on the books of the company on the 31st August; and a claim was also made for over-payment of salary to the defendant while manager of the company.

The judgment appealed from declared that the defendant, as between the parties to this action, was bound to pay all the liabilities of the company existing on the 31st August, 1906, which did not appear on the books of the company as of that date, and all liabilities of the company incurred after the 31st August, 1906, and prior to the 15th December, 1906, other than ordinary running expenses and liabilities of the company for that period; and directed the payment by the defendant to the plaintiffs of $2,577.42, being the amount of such liabilities and of salary overdrawn by the defendant.

The appeal was heard by MEREDITH, C.J.C.P., MACMAHON and CLUTE, JJ.

G. Lynch-Staunton, K.C., and F. Morison, for the defendant.

N. W. Rowell, K.C., for the plaintiffs.

CLUTE, J.:— . . . The purchaser was taking over the business for $230,000; he was entitled to all the assets as and from that date; and he was to pay the liabilities as they stood on the books as of that date, and the ordinary expenses and liabilities from that date. The plaintiff Strong did examine the books after the first option. It was said he did not do so after the second option. The second option clearly refers to the property mentioned in the first, and, if there had been any serious depletion or any radical change in the condition of the capital, the purchaser had just cause to complain, because he had examined what the property was under the first option, and his second option relates back to that, and declares it to be the same property. This was in fact a purchase from the balance sheet. There is no suggestion of fraud. The question turns finally (giving due weight to the other portions of the agreement) upon what the liabilities of the company were as "they stood on the books on the 31st August."

. . .

I agree with the trial Judge that, upon the true construction of the agreement, the defendant is liable for debts of the company which existed on the 31st August, 1906, and which did not appear on the books of the company as debts of that date. There is nothing in the evidence . . . to vary or alter the plain meaning of the agreement.

Taking this view, I have gone over the evidence bearing upon the various items making up the account for which judgment has been given, and here I agree also with the findings of my brother Britton.

With reference to the item for salary, it appears from the evidence, that the defendant, who had previously received $3,000 a year, asked $5,000 a year, and that the plaintiffs were not unwilling to pay that salary, provided he would engage himself definitely for that period. After a good deal of correspondence, this he refused to do, but left the plaintiffs' employment abruptly, at a time of the year when his services were greatly required. He is clearly not entitled to recover at that rate for a portion of the year on contract; and on quantum meruit, if that were allowed, it is not satisfactorily shewn that his services were worth that amount, having regard to the time and manner of his leaving the plaintiffs' service. Having regard to the salary which he had previously received, and the manner in which he left the plaintiffs' employment, I do not think that he was justified in drawing more on salary than at the rate he had previously received.

As to the cross-appeal, I am of opinion that the Drake and Avery claim of $768 for heating apparatus was properly disallowed. The work and materials were furnished after the 31st August, and there was no liability on that date. The other item mentioned in the cross-appeal was $437.17, which the plaintiffs admitted should be allowed to the defendant if his counterclaim was acceded to. The trial Judge, having found in favour of the plaintiffs, deducted this amount, and I think, in the circumstances, this ought not to be disturbed.

The result is that the appeal and cross-appeal should, in my opinion, be dismissed with costs.

MacMahon, J., concurred.

Meredith, C.J., for reasons stated in writing, dissented in part, being of opinion that the amount to which the plaintiffs were found entitled should be reduced, and, with that variation, that the appeal should be dismissed without costs, and the cross-appeal with costs.

DIVISIONAL COURT. MARCH 22ND, 1910.

## HUBBERT v. HOME BANK OF CANADA.

*Promissory Note—Signature to Blank Form—Delivery to Agent for Specific Purpose—Fraud of Agent—Filling up Blanks and Negotiating Note—Holder in Due Course—Payment of Note by Maker's Bankers—Right of Maker to Recover—Bills of Exchange Act, secs. 31, 32, 56, 57.*

Appeal by the defendants from the judgment of BRITTON, J., ante 405.

The appeal was heard by MULOCK, C.J.Ex.D., MACLAREN, J.A., and CLUTE, J.

J. Bicknell, K.C., for the defendants.

J. D. Falconbridge, for the plaintiff.

MULOCK, C.J.:—The Court is of opinion that the case of Smith v. Prosser, [1907] 2 K. B. 735, relied upon by Mr. Falconbridge, counsel for the respondent, and referred to and relied on by the trial Judge, governs in this case. We can add nothing to what has been set forth in the judgment of the trial Judge, and, for the reasons assigned by him, we think this appeal fails and should be dismissed with costs.

MACLAREN, J.A.:—I agree, but desire to add two brief observations. First, I do not wish to be understood as expressing any opinion as to the charging up of the note against the savings bank account of the plaintiff, as, in my opinion, this has nothing to do with the ground upon which the case turns. Second, I consider that the evidence of the plaintiff shews that the instrument he gave to Stirton was to be completed as a promissory note under certain circumstances, as the following extract from the evidence shews:—

"HIS LORDSHIP. If you passed the examination, then the note was to be good? A. Yes.

"Q. You intended it should be a note if you passed the examination? A. Yes, it was to be drawn on this date if I passed."

This brings it precisely within the case of Smith v. Prosser, and our decision does not go beyond what was expressly decided there.

CLUTE, J.:—I agree with the Chief Justice.

MORSON, JUN. CO.C.J. MARCH 23RD, 1910.

## REX v. HENDERSON.

*Medicine and Surgery—Ontario Medical Act, R. S. O. 1897 ch. 176, sec. 49—"Practising Medicine"—Osteopathy—Treatment—Conviction—Evidence.*

An appeal to the 1st Division Court in the County of York, by Robert B. Henderson, the defendant, an Osteopath, from a conviction, dated the 14th December, 1909, made by George Taylor Denison, police magistrate for the city of Toronto, of the defendant for practising medicine without being registered, contrary to sec. 49 of the Ontario Medical Act, R. S. O. 1897 ch. 176, which is as follows:—

"It shall not be lawful for any person not registered to practise medicine, surgery or midwifery for hire, gain, or hope of reward; and if any person not registered pursuant to this Act, for hire, gain or hope of reward practises or professes to practise medicine, surgery or midwifery or advertises to give advice in medicine, surgery or midwifery, he shall upon a summary conviction thereof before any Justice of the Peace, for every such offence, pay a penalty not exceeding $100 nor less than $25."

Glyn Osler, for the appellant.

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

MORSON, JUN.CO.C.J.:—The material facts are shortly these. Two private detectives, Kissock and Gadstein, employed by one Charles Rose, the prosecuting officer of the Ontario College of Physicians and Surgeons, went to the offices of the appellant on three occasions for treatment, for which they paid, falsely alleging they were ill and did not know what was the matter. Gadstein said the appellant made him take off his coat and waistcoat; he then manipulated his back by rubbing with his thumbs up and down the spine two or three times; he found a lump, so he said, and attributed it to his bowels being out of order; he asked him how his bowels and kidneys were working; he then made him lie down on his side on a couch or operating bench, and rubbed him again up and down the back, pressing hard, and turned him over and rubbed his stomach, and turned him back again and then on his side, and lifted him up bodily twice and stretched his neck, twisted it from one side to the other; he also used an electrical knob, running it up and down his back; he told him to avoid stimulants and eat very little and drink plenty of water to wash out the system. On the visit to his house he made him strip and sit on a

stool, and went through very much the same thing, and, when he complained of a pain in the neck, he told him he had caught cold. He then examined his heart with a stethescope, and told him it was beating rather slowly. Kissock in his evidence corroborated Gadstein. He was told his system had been poisoned, and that some medical men would call it pleurisy and give him medicine; but the appellant said he would not, that his method of working was to put the system in a proper condition and let nature do her own work; he also told him to take plenty of exercise and to be careful of his lungs, and that his liver and kidneys were out of order. Dr. Graham Chambers, who heard the evidence of the two detectives, said that what they were told would be what ordinary practitioners would tell their patients; he said they also advised as to the essentials of health, such as moderation in eating and fresh air, and sometimes give medicine and sometimes not; that the administering of medicine was not necessarily a part of the practice of medicine. On cross-examination, he said he would not diagnose kidney or liver disease by merely feeling a patient's back, that what the appellant did was not a diagnosis of liver or kidney disease; he further said that medical men did not apply massage, but called in a masseur; that they sometimes practised passive movements only, but it was not general.

On these facts the appellant contends that he was not practising medicine contrary to the Act, because no medicine was prescribed or used. It is quite clear on the evidence that no medicine was used. The treatment adopted appears to have been for nothing in particular, and was what might properly be called physical treatment, as distinguished from the prescribing of medicine; there was no proper diagnosis of any particular disease, no advice given except in a very general and harmless way, only such as would be given by any one outside the medical profession, who was possessed of ordinary common sense and sufficient intelligence to permit nature to be her own physician. The so-called diagnosing and advice and examination of the heart were merely incidents in the treatment, forming in fact no part of it, the substantial treatment being the rubbing of the body and spine, a treatment which is not usually, if at all, adopted or practised by medical men, and which is apparently known as osteopathy.

Is then the practising of osteopathy (if this is the proper term to apply to the treatment in question) the practising of medicine contrary to the Act? On the evidence in the present case, and following Regina v. Stewart, 17 O. R. 4, I am of opinion that it is not. In that case the defendant neither prescribed nor administered any medicine, nor gave any advice, the treatment consisting

of merely sitting still and fixing his eyes on the patient. Mr. Justice MacMahon, after defining the word medicine, says: "To practise medicine must, therefore, be to prescribe or administer any substance which has, or is supposed to have, the property of curing or mitigating disease." See also Regina v. Hall, 8 O. R. 407; Regina v. Howarth, 24 O. R. 561; and Regina v. Coulson, 27 O. R. 59—in all of which cases medicine was prescribed or used. There appears to be no case holding that medicine can be practised without the use of medicine. In In re Ontario Medical Act, 13 O. L. R. 501, which was a reference to the Court of Appeal by the Lieutenant-Governor in council as to the construction of this sec. 49, a majority of the learned Judges expressed the opinion that there *might* be the practising of medicine without the use of medicine, provided the treatment or method adopted was such as is used by medical men registered under the Act, and this opinion I adopt. They did not, however, so decide, it not being their province to do so under a reference of that kind; they were only to advise what the law was, not to decide it. Chief Justice Moss and Mr. Justice Garrow said they were to be guided in giving their opinion by the decided cases, and that it was not for them to say whether they ought to or might not have been decided as they were. This case then left the law as it was in the cases I have referred to. If, however, the law had been changed, and it had been decided in accordance with the opinions expressed, I think, even then, the treatment and method adopted by the appellant was not such as is used or adopted by medical men, and there would still be no violation of the Act. If the Ontario Medical Council desire the meaning of the word "medicine" extended to cover the present case, they must apply to the Legislature. As Mr. Justice Meredith says in In re Ontario Medical Act, if the medical profession and the public want protection from osteopaths, Christian Scientists, and others of a like class, they must obtain it by an Act of Parliament.

For the reasons, then, that I have stated, the conviction is wrong in law, and I quash it with costs.

---

RE SMITH AND MILLAR—DIVISIONAL COURT—MARCH 16.

*Mines and Minerals—Mining Agreement—Cancellation by Mining Recorder without Notice—Appeal to Mining Commissioner—New Trial.*]—Appeal by J. A. Smith from the decision of the Mining Commissioner for Ontario, dated the 13th January, 1910, affirming an order of the Mining Recorder for the Temiskaming District, cancelling the entry on his books of an agreement dated

the 8th November, 1909, by which the appellant agreed to purchase from J. W. Millar certain mining claims, for the sum of $100,000, payable in four equal instalments of $25,000 each, the first of which was to be paid on the 8th December, 1909; but, in consideration of $2,000, it was provided by a subsequent agreement that this payment should be made on the 8th January, 1910. Default was made in this payment, and on the 13th January, 1910, on the ex parte application of the respondent, Millar, and without notice to the appellant, the Mining Recorder removed the agreement from the registry, and subsequently gave notice of his having done so to the appellant. The appellant thereupon appealed to the Mining Commissioner, on the grounds: (1) that the Recorder had no right to cancel the entry of the agreement without notice to the appellant; (2) that the failure of the appellant to comply with the terms of the agreement was a question of fact and law, and therefore not within the jurisdiction of the Recorder; (3) that the procedure followed in cancelling the entry of the agreement was irregular and contrary to the provisions of the Mining Act of Ontario. The appeal was heard by the Commissioner on the 9th February, when the appellant was absent, and his counsel asked for an adjournment, which was refused. The case was proceeded with in the absence of the appellant, and judgment given by the Commissioner affirming the decision of the Recorder. The Commissioner rendered his decision on what was practically a re-trial of the case on the merits. It was conceded that the Recorder should not have cancelled the entry of the agreement without notice to the appellant, but it was strongly argued that under sec. 133(2) of the Act, the Commissioner had full power to retry the matter, that it was the appellant's own fault that he was not present with his witnesses to give evidence at the trial, and that the documents produced at the trial, and the evidence of the respondent, clearly shewed that the appeal was without merits. The Court (BOYD, C., MAGEE and LATCHFORD, JJ.) were, however, of opinion that the only question raised by the appeal to the Commissioner was as to the authority of the Recorder to cancel the entry of the agreement on his books without notice to the appellant, and that the Commissioner should not have tried the case on the merits without giving the appellant an opportunity to have his whole case heard. The case was accordingly remitted to the Commissioner for re-trial, on terms that the appellant should proceed with the matter in ten days, and that the overdue instalments, amounting to $50,000, with interest, should be paid into Court within four days. Costs reserved, to be dealt with by the Commissioner. O. E. Fleming, K.C., for the appellant. G. M. Clark, for the respondent.

MACDONELL v. TEMISKAMING AND NORTHERN ONTARIO RAILWAY COMMISSION—MASTER IN CHAMBERS—MARCH 18.

*Particulars — Statement of Claim — Dates.*]—Motion by the defendants for better particulars of paragraphs 4, 8, and 9 of the statement of claim. Order made for better particulars of paragraph 4 to supply the omission of dates. Reference to Millbank v. Millbank, [1900] 1 Ch. 385. Motion dismissed as to paragraphs 8 and 9. Costs in the cause. Strachan Johnston, for the defendants. A. M. Stewart, for the plaintiff.

---

DEVANEY v. WORLD NEWSPAPER CO.—MASTER IN CHAMBERS—MARCH 19.

*Pleading—Conspiracy—Defamation — Joinder of Defendants and Causes of Action—Particulars.*]—After the decision on the previous motion, noted ante 454, affirmed on appeal, ante 472, the statement of claim was amended so as to allege mainly a joint conspiracy to defame the plaintiff, and that, as part thereof, the individual defendants spoke the words complained of, and further, in pursuance of said conspiracy and as part thereof, the defendants wrote and published and caused to be written and published the libel complained of. In paragraph 7 it was alleged that by reason of the conspiracy complained of and of the wrongful acts of the defendants as part of the conspiracy and done pursuant thereto, and by reason of the libel complained of in paragraph 6, the plaintiff had been injured in her reputation, &c. The plaintiff claimed for the conspiracy and overt acts connected with and done as part thereof $1,500 damages, and for the libel complained of in paragraph 6, $1,500 damages. All the defendants now moved against this as in the former motion of the defendant Fasken. Held, as far as the motion was based on improper joinder of defendants and causes of action, that it could not succeed: Walters v. Green, [1899] 2 Ch. 696, 701. This does not conflict with Pope v. Hawtrey, 85 L. T. R. 263. Reference to Evans v. Jaffray, 1 O. L. R. 621. The concluding words of paragraph 4, alleging "many other slanders and libels, particulars and details of which are unknown to the plaintiff," are objectionable; they must be struck out or particulars of them must be given. They can only be used, if at all, as part of the acts proving the conspiracy or done in pursuance of it. In other respects motion dismissed. Costs in the cause. H. E. Rose, K.C., for the defendant Fasken. D. Urquhart, for the defendant Urquhart. H. R. Frost, for the defendant Keough. K. F. Mackenzie, for the defendant company. W. N. Ferguson, K.C., for the plaintiff.

McALPINE v. FLEMING—DIVISIONAL COURT—MARCH 21.

*Company—Directors—Payments Improperly Made—Liability—Account.*]—Appeal by the plaintiffs from the judgment of TEETZEL, J., dismissing the action as against the defendants Fleming, Straith, and Pinchin. The action was brought by Benjamin McAlpine, in the name of the McAlpine Tobacco Co., to recover moneys alleged to have been improperly paid out of the funds of that company by the defendants named, as directors. The trial Judge found that an oral agreement was made between the plaintiff and one Pratt, on the one side, and the defendants Fleming, Straith, and Pinchin, on the other, whereby the latter were to be at liberty—pending the disposal of their stock in a new company which had been formed—to use its funds in paying the debts which, in the amalgamating agreement, the Consumers' Tobacco Co. had covenanted to pay. The Divisional Court (BOYD, C., MAGEE and LATCHFORD, JJ.) held that the payments made could not be regarded as incidental to the main purposes of the company. Reference to Williams Machine Co. v. Crawford Tug Co., 16 O. L. R. 245; Tomkinson v. South Eastern R. W. Co., 35 Ch. D. 675, 680; Henderson v. Bank of Australasia, 40 Ch. D. 170, 180. Appeal allowed with costs here and below. The defendants Fleming, Straith, and Pinchin to account to the plaintiffs. Reference to the Master in Ordinary. Further directions and costs of the reference reserved. E. E. A. DuVernet, K.C., and N. Sommerville, for the plaintiffs. D. L. McCarthy, K.C., and Frank McCarthy, for the defendants Fleming, Straith, and Pinchin.

---

A. E. THOMAS LIMITED v. STANDARD BANK OF CANADA—STANDARD BANK OF CANADA v. A. E. THOMAS LIMITED—DIVISIONAL COURT—MARCH 23.

*Company—Guaranty—Seal—Chattel Mortgage—Assignment of Book Debts.*]—An appeal by A. E. Thomas Limited from the judgment of TEETZEL, J., ante 379, was dismissed by a Divisional Court composed of MULOCK, C.J.Ex.D., CLUTE and LATCHFORD, JJ. C. St. Clair Leitch, for the appellants. G. H. Kilmer, K.C., for the respondents.