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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. DECEMBER 31ST, 1918.

LYNCH-STAUNTON v. SOMERVILLE.

Solicitor—Bill of Costs—Action to Recover Amount of—Solicitors Act, R.S.O. 1914 ch. 159, sec. 34—Services Rendered by Plaintiff in Capacity of Solicitor—Lump-sum Charged for Specific Items of Services—Compliance with Statute.

Appeal by the plaintiff from the judgment of MASTEN, J., 43 O.L.R. 282, 14 O.W.N. 282.

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

Christopher C. Robinson, for the appellant.

H. S. White, for the defendants, respondents.

RIDDELL, J., in a written judgment, said, after stating the facts, that he agreed with the learned trial Judge that the bill of costs sued on was such as is covered by sec. 34 of the Solicitors Act, R.S.O. 1914 ch. 159, but was unable to follow him in his decision that the bill as rendered was not a sufficient compliance with the Act.

The present bill was easily distinguishable from those in question in Gould v. Ferguson (1913), 29 O.L.R. 161; Philby v. Hazle (1860), 8 C.B.N.S. 647, 7 Jur. N.S. 125; Wilkinson v. Smart (1875), 33 L.T.R. 573; Blake v. Hummell (1884), 51 L.T.R. 430.

In Gould v. Ferguson the Court did not—and did not affect to—overrule Re R.L.Johnston (1901), 3 O.L.R. 1.

Taking the lump-sum of $700 in the present bill, there was a detailed chronological account of what was done by the plaintiff in his negotiation leading up to settlement, so set out that the client could have no difficulty in exercising a judgment whether to pay or to have the bill taxed; and there was ample to enable the Taxing Officer to determine what (if anything) ought to be taxed off; and, therefore, it was sufficient.

The bill in question in Re Solicitor (1917), 12 O.W.N. 191, was not at all like that now under consideration.

The learned Judge said that he knew of no case binding upon this Court, at all like the present case, in which it had been held that a lump-sum charged for a series of negotiations or the like had been considered improper. If case-law and common sense had parted company, it was the function and duty of an appellate Court to reconcile them, unless absolutely prohibited by binding decisions from doing so.

Common sense indicates that the amount of remuneration a lawyer shall receive depends to some extent on the magnitude of the interests concerned, and more upon the skill which he manifests on his client's behalf than upon the number of interviews he may have or the time spent. When negotiating for a settlement in a matter of importance, it is often impossible to attach a particular value to a particular interview and less or more to another; nor should either the client or the Taxing Officer require it. It is infinitely better to state in reasonable detail what the lawyer has done and what he has accomplished, and from the whole course of the transaction determine the fee to be allowed.

No binding case having been found which precluded this Court from holding that the bill answered the statute, it should be so declared; the appeal should be allowed with costs here and below, the proper officer should be directed to tax the bill and deal with the costs of taxation, and judgment should be entered for the amount found due by the officer, with costs as above.

MULOCK, C. J. Ex., and CLUTE and SUTHERLAND, JJ., agreed with RIDDELL, J.

KELLY, J., agreed in the result, for reasons briefly stated in writing.

Appeal allowed.

SECOND DIVISIONAL COURT. DECEMBER 31ST, 1918.

*WITHERSPOON v. TOWNSHIP OF EAST WILLIAMS.

Municipal Corporations—Contract—Action for Balance of Price of Bridge Built by Plaintiff under Sealed Agreement with Township Corporation—Necessary Work—Completion according to Agreement—Executed Contract—Payment of Part of Price—Necessity for By-law—Municipal Act, R.S.O. 1914 ch. 192, sec. 249—Use of Bridge by Municipality—Right of Action not Defeated by Want of By-law—Failure to Plead Want of By-law—Amendment not Asked for—Dishonest Defence—Finding of Trial Judge on Real Issue—Fulfilment of Contract.

Appeal by the plaintiff from the judgment of ROSE, J., 14 O.W. N. 221, dismissing without costs an action to recover $2,500, the balance of the price of a bridge erected by the plaintiff for the defendants.

The learned trial Judge was of opinion that the decision of the Appellate Division in Mackay v. City of Toronto (1918), 43 O.L.R. 17, compelled him to hold that, even in the case of an executed contract such as that upon which the plaintiff sued, the other contracting party could not have judgment against the municipality unless the power of the council to enter into the contract had been exercised by by-law, in accordance with sec. 249 of the Municipal Act, or there had been an adoption of the contract, evidenced by a by-law.

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

T. G. Meredith, K.C., for the appellant.

J. M. McEvoy and C. St. Clair Leitch, for the defendants, respondents.

CLUTE, J., read a judgment in which he said that the findings of fact of the trial Judge should not be disturbed, and were quite sufficient to entitle the plaintiff to judgment if the want of a by-law was not an insuperable objection.

The learned Judge then proceeded to discuss and distinguish the Mackay case, supra. Among other things, he said that the contract in that case was quite out of the ordinary and one in which the strictest formality would be required. The present case was that of an ordinary contract. It was the duty of the

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

defendants to build the bridge which was the subject of the plaintiff's contract.

Waterous Engine Works Co. v. Town of Palmerston (1892), 21 Can. S.C.R. 556, was also distinguished, and many other cases were referred to.

If sec. 249 of the Municipal Act should be construed as requiring that all the powers of a council should be exercised by by-law, it would paralyse the action of municipal councils in their multitudinous duties.

The sound rule to be applied in a case like this is to have regard to the nature and subject-matter of the contract, and where the work to be performed by the contractor falls within the scope of the powers and duty of the corporation, and the contract has been executed, and the corporation has accepted the work, it is liable for the price thereof— and so even where the contract is not under seal.

The appeal should be allowed with costs and judgment should be entered for the plaintiff for $2,500 with interest and costs.

MULOCK, C.J. EX., agreed with CLUTE, J.

RIDDELL, J., agreed in the result, for reasons stated in writing. He was of opinion that, because the absence of a by-law was not pleaded, and no amendment was made or asked, the defendants could not succeed upon that ground. Even if an amendment were asked for, it should not be made to enable a litigant to obtain a dishonest advantage. The real issue was, whether the plaintiff had fulfilled his contract; that issue had been found in favour of the plaintiff; and on that finding the plaintiff should recover.

SUTHERLAND, J., agreed with RIDDELL, J.

KELLY, J., agreed in the result, for reasons stated by him in writing.

Appeal allowed.

HIGH COURT DIVISION.

LATCHFORD, J. NOVEMBER 27TH, 1918

GLEN EDEN SECURITIES LIMITED v. McKENZIE.

Fraud and Misrepresentation—Exchange of Properties—Evidence—Conflict—Failure to Prove Misrepresentations Inducing Contract.

Action against William T. McKenzie and the Guardian Trust Company Limited.

By the statement of claim it was alleged that the plaintiff company was the owner of certain lands in the city of Toronto, and the defendant McKenzie was the owner of certain lands in the Province of Saskatchewan; that on the 22nd June, 1916, the defendant McKenzie, by fraudulent misrepresentations made to the plaintiff as to the situation of the Saskatchewan lands, induced the plaintiff company to convey to him (McKenzie) the lands in Toronto, in consideration of McKenzie transferring the lands in Saskatchewan to the plaintiff company; that, immediately upon the exchange being completed, McKenzie conveyed the Toronto lands to his co-defendant and trustee, the Guardian Trust Company Limited; and that the plaintiff company was ready and willing to convey to the defendants, or either of them, the Saskatchewan lands. And the plaintiff company asked to have its conveyance of the Toronto lands to McKenzie and McKenzie's conveyance to the company set aside.

The action was tried without a jury at Toronto.

J. W. Curry, K.C., for the plaintiff company.

J. Y. Murdoch, for the defendants.

LATCHFORD, J., delivering judgment at the conclusion of the hearing, said that a certain Dr. Young owned nearly all the shares of the capital stock of the plaintiff company, and that the transaction in question in the action was with him as representing the company.

The defendant the Guardian Trust Company Limited was really the owner of the Saskatchewan lands.

The parties were at variance regarding the terms upon which the transaction was carried out.

It was asserted on behalf of the plaintiff company that it was on the basis of a certain letter, dated the 20th May, 1916, that the contract was made.

The learned Judge finds that this letter is a "fiction;" and that Young saw the plans of the Saskatchewan property before he agreed to make the exchange; and did not enter into the agreement and carry out the exchange on the faith of statements said to have been made by McKenzie and set out in the letter.

Action dismissed with costs.

MEREDITH, C.J.C.P. DECEMBER 30TH, 1918.

*BRAWLEY v. TORONTO R.W.Co.

Street Railway—Injury to Passenger—Fall Caused by Breaking of Strap—Negligence—Admission of Prima Facie Case—Endeavour to Displace by Evidence of Maker of Strap—Cause of Breakage not Known—Findings of Jury—Damages—Husband of Injured Passenger Joined as Plaintiff—Bills for Medical Attendance and Nurses Included in Amount of Verdict.

Action by Kate Brawley and her husband to recover damages for injuries sustained by the plaintiff Kate Brawley by reason of the breaking of a strap in a car of the defendants in which she was being carried as a passenger. The woman was standing in the car and holding the strap; when it broke, she was thrown to the floor, and was injured by the fall.

The action was tried with a jury at a Toronto sittings.

The jury, in answer to questions, found that the defendants were guilty of negligence causing the injury to the plaintiff Kate Brawley; that the negligence consisted in the breaking of the strap; that there was no contributory negligence; damages, $1,000 to the plaintiff Kate Brawley; no damages to the husband.

F. B. Edmunds, for the plaintiffs.
D. L. McCarthy, K.C., for the defendants.

MEREDITH, C.J.C.P., in a written judgment, said that the agreement of counsel for the plaintiffs and defendants that the breaking of the strap was sufficient evidence of negligence to support a judgment for the plaintiffs in this action, made the way of the plaintiff Kate Brawley from verdict to judgment plain sailing. Starting upon that agreement, the verdict was plain, logical, and lawful. It meant that her injuries were caused by the negligence of the defendants, and that that negligence was that which the

breaking of the strap proved. But the contention of counsel for the defendants was that, though that was prima facie so, yet the evidence of the merchant who sold to the defendants this particular strap, and thousands more perhaps, relieved the defendants from the effect of the prima facie negligence and exonerated them.

Two difficulties, however, stood in the way of success upon any such ground: (1) the jury had found against it—they had found that the admitted prima facie negligence was the cause of the injury, and they had rejected the defendants' contention that that prima facie case was displaced by the evidence for the defence, shewing that due care had been taken; and (2) there was no evidence upon which reasonable men could so find.

The evidence did not go to relief from a prima facie case—it went rather to strengthen it; it did not go to shew any kind of inspection of straps, or any kind of oversight or special care of them; it went to shew that there was no prima facie case of negligence—that injury from the breaking of a strap was practically a thing unknown before, and so there was no need of inspection or any kind of especial care; and, after careful inspection of the broken strap, no witness was able to say more than that it was not possible for him to account for the breakage.

The female plaintiff was, therefore, entitled to the judgment which she sought, with costs of the action; and as to the male plaintiff the action must be dismissed, but without costs, as the adding of this plaintiff was desirable in order that all claims arising out of the accident might be finally dealt with in one action only; it was in the interest of the defendants, as well as of the plaintiffs; and the costs were in no substantial way increased by it.

Something was said about insufficiency of damages, and particularly of the male plaintiff's right to damages in the amount of bills for medical and surgical attendances, nurses, etc.; but the bills were at the trial treated as the bills of the female plaintiff; and there was no doubt that the jury made to her that which they deemed a reasonable allowance in respect of all the bills, in the amount of the verdict. The verdict was reasonable in all respects.

MIDDLETON, J. DECEMBER 30TH, 1918.

*McCURDY v. OAK TIRE AND RUBBER CO. LIMITED.

Company—Application for Shares Obtained by Misrepresentations of Agent—"Statement" Shewn to Purchaser—"Prospectus"—Ontario Companies Act, R.S.O. 1914 ch. 178, secs. 99, 101 (3)—Absence of Allotment and Notice of Allotment—Rescission of Application—Return of Money Paid.

The plaintiff sued for a declaration that he was not a shareholder in the defendant company, upon the grounds that his application for shares was obtained by fraud and misrepresentation, that the application was withdrawn before acceptance, and that the company failed to comply with the requirements of the Ontario Companies Act as to its prospectus. The plaintiff asked for a refund of $1,000 paid on account of the $2,000 worth of shares applied for. The plaintiff also sued for $1,140.72, the price of goods sold to the defendant company. Judgment had been granted for this sum, but the issue of execution had been stayed pending the trial of the counterclaim. The counterclaim was for the balance alleged to be due to the defendant company on the subscription for shares.

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

T. R. Ferguson, for the plaintiff.

C. W. Plaxton, for the defendant company.

MIDDLETON, J., in a written judgment, said that one Law and one Patterson, who had carried on business in partnership, on the 3rd March, 1916, procured a charter under the Ontario Companies Act for the "Acme Tire and Rubber Company Limited" having a capital of $400,000. Only $500 of stock was subscribed. An agreement was at once made for the purchase of the partnership business for $194,000, the purchaser assuming all the debts of the firm. This price was to be paid by $10,000 debentures and $184,000 stock, $500 of which was to pay the original subscribers' stock, and $183,500 was to be issued in fully paid stock to the vendors. This stock was in due course allotted and issued.

To obtain funds to carry on the business, it was proposed to issue $200,000 bonds; and a prospectus offering $50,000 of these bonds was prepared and filed. This prospectus, the learned Judge found, was not used in the sale of the stock to the plaintiff—another document was used.

The debenture scheme called for 30-year bonds, guaranteed by the Imperial Trust Company as to principal. All that this in fact meant, as shewn by an agreement of the 6th April, 1916, was that of each $100 debenture the trust company set apart enough to produce $100 by the accumulation of interest on the sum so set apart at the end of the 30 years—the surplus of the sum so set apart being all that was given to the ocmpany as working capital.

By the agreement the company undertook to give the trust company $50,000 paid-up stock for distribution among those who might take bonds—the intention being that this should be contributed by the promoters. Only $20,000 of these debentures were sold, and a commission of 25 per cent. was paid for procuring the subscriptions.

On the 22nd May, 1917, the company changed its name to "Oak Tire and Rubber Company Limited."

Stock had been sold or subscribed for; and, according to the returns, the total stock issued, including the $184,000 issued for the purchase-price, was a little over $300,000 of the $400,000.

This was the situation when C., an expert salesman of stock and bonds, entitled to a commission of 25 per cent. on all sales made, sought to induce the plaintiff to subscribe.

The instrument used by C. was called a "statement." It was a "prospectus" within the meaning of sec. 99 of the Companies Act, R.S.O. 1914 ch. 178, as it was "issued for the purpose of being used to promote or aid in the subscription or purchase of" the shares of the company. It was silent as to the actual affairs of the company, and stated only the result of the manufacture of an hypothetical number of tires at an assumed cost, which would leave $275,000 per annum "available for reserve and dividends on $250,000 common stock . . . This estimate is on the basis of 100 tires only per day, whereas, as shewn, the plant has a capacity of 400 tires per day." This indicated a general lack of fairness and honesty.

Nothwithstanding that only a little more than $300,000 shares had been issued in the way indicated, this "prospectus" bore on its face the statement, "Capital authorised $400,000, all common shares, full paid, and non-assessable." The statement made to the plaintiff of the amount of stock issued was substantially accurate; but what the plaintiff complained of was, that it was made in such a way as to indicate that this amount of money had been put into the business—the payment of the bulk of the amount by the transfer of assets being concealed. The issue of debentures was also concealed, and the plaintiff was told that there was no incumbrance. The "statement" indicated that all the earnings would be available for the common stock.

It was represented to the plaintiff that the factory superintendent had taken $5,000 stock. This was a misrepresentation, and to the plaintiff a serious one, for it indicated that a man brought from similar works in the United States had such confidence in the business that he was ready to put his own money in it.

These misrepresentations were made out, and were sufficient to justify a rescission of the agreement (if any) to take stock.

The "statement" sinned against every provision of part VII. of the statute. No attempt was made to defend it as a prospectus. If it was not a prospectus, no prospectus was delivered at the time the plaintiff's subscription was obtained; and, under sec. 101 (3), the plaintiff was not bound by, and was entitled to withdraw, his subscription; and, as no notice of allotment was ever sent to him, his withdrawal could be at any time.

Both allotment and notice of allotment were necessary; and, upon the evidence, there was no allotment to the plaintiff.

There should be judgment for the plaintiff declaring him not to be a shareholder in the company and to be entitled to a rescission of his application for shares, for a return of the $1,000 paid, with interest from the 31st December, 1917, for cancellation of the plaintiff's promissory note for $1,000, for enforcement of the judgment for $1,140.72, and dismissing the counterclaim, all with costs.

LENNOX, J. DECEMBER 31ST, 1918.

*STONER v. SKENE.

Seduction—Action by Mother for Seduction of Daughter—Death of Father before Seduction—Remarriage of Mother—Stepfather Living at Time of Seduction but Dead before Action Brought—Cause of Action—Seduction Act, R.S.O. 1914 ch. 72, secs. 2, 3—Married Women's Property Act, R.S.O. 1914 ch. 149, sec. 4 (2)—Trustee Act, R.S.O. 1914 ch. 121, sec. 41.

Action by a widow for the seduction of her daughter.

The action was tried by LENNOX, J., and a jury, at a Toronto sittings; the jury found for the plaintiff with $3,000 damages.

The defendant moved for a nonsuit.

A. R. Hassard, for the plaintiff.

J. M. Godfrey and T. N. Phelan, for the defendant.

LENNOX, J., in a written judgment, said that the daughter was the plaintiff's child by her first husband, who died before the

seduction. The plaintiff, before the seduction, married again; her second husband, Edward Stoner, died before the action was brought, and before the birth of the illegitimate child, but he was living at the date of the seduction. The learned Judge said that he would assume that the plaintiff and her second husband were living together at the time of the seduction. The daughter was only 16 years of age when seduced.

The defendant denied the seduction, and pleaded that the statement of claim disclosed no cause of action.

The origin and basis of the action for seduction in this Province was the right to service, and the interruption of the right through the act of the defendant; and at common law the plaintiff's action, upon the facts here disclosed, must fail—the cause of action (if any) being in Stoner, the girl's stepfather, upon the master and servant theory. But the Seduction Act and other statutes had to be considered.

The learned Judge distinguished Entner v. Benneweis (1894), 24 O.R. 407, saying that that action was launched, attempted to be maintained, and decided as a common law action, and no statutory provision was or could be invoked in favour of the plaintiff. The deceased in that case was the father of the girl, not the second husband of the mother; the girl was seduced in the lifetime of her father, and the cause of action vested in him and continued to be vested in him until his death; and there was no statute which divested or transmitted a cause of action so vested in the father to the mother in the event of his death.

Hamilton v. Long, [1903] 2 I.R. 407, [1905] 2 I.R. 552, also distinguished; and Whitfield v. Todd (1844), 1 U.C.R. 223, and Smith v. Crooker (1863), 23 U.C.R. 84, referred to.

Section 2 of the Seduction Act, R.S.O. 1914 ch. 72, provides that the father or, in case of his death, the mother, whether she remains a widow or has married again, of an unmarried female who has been seduced, and for whose seduction the father or mother could maintain an action if such unmarried female was at the time dwelling under his or her protection, may maintain an action for the seduction, notwithstanding that such unmarried female was, at the time of her seduction, serving or residing with another person upon hire or otherwise. By sec. 3, upon the trial of an action brought by the father or mother, service shall be presumed, and no evidence shall be received to the contrary.

Here the cause of action did not vest in the second husband; he was eliminated by the words "whether she remains a widow or has married again."

The learned Judge referred also to the Married Women's Property Act, R.S.O. 1914 ch. 149, sec. 4 (2), conferring upon a married woman the capacity of suing and being sued alone,

"either in contract or in tort or otherwise, in all respects as if she were a feme sole;" and to the Trustee Act, R.S.O. 1914 ch. 121, sec. 41, eliminating the common law doctrine of actio personalis moritur cum persona.

There should be judgment for the plaintiff for $3,000 with costs.

ROSE, J. DECEMBER 31ST, 1918.

*MATHESON v. TOWN OF MITCHELL.

Will—Devise of Land to Municipal Corporation for Public Park—Acceptance on Conditions of Will—Condition as to Order and Repair—Breach—Action for Mandatory Order to Corporation to Keep in Order and Repair—Obligation to Superintend Performance not Accepted by Court—Forfeiture for Breach—Action for Declaration—Continuous Breach Beginning more than 10 Years before Action—Limitations Act, R.S.O. 1914 ch. 75, secs. 5, 6 (9).

Action by the surviving executor of the will of Thomas Matheson, deceased, for a mandatory order requiring the defendants, the Municipal Corporation of the Town of Mitchell, to keep in proper order and repair, and as a public park should be kept, a certain piece of land devised to the corporation by Thomas Matheson for park purposes, or, in the alternative, for a judgment declaring that the land had reverted to the testator's estate.

The action was tried without a jury at Stratford.

J.C. Makins, K.C., for the plaintiff.

F. H. Thompson, K.C., for the defendants.

ROSE, J., in a written judgment, said that Thomas Matheson died in 1883. By his will he devised to the defendants the land in question, which is outside the town limits. The devise was to the corporation and its successors for ever and to be used and kept as a place of recreation and amusement for the inhabitants of the town for ever: "provided that if the said corporation neglects or refuses to keep the same and the fences surrounding it in proper order and repair, and as a public park should be kept, I hereby in that event cancel the said gift and direct that the said lands shall revert to and form part of my estate." A few months after the death of the testator, the town council accepted the gift, on the conditions of the will. Possession was taken on behalf of the corporation, and had ever since been retained.

Upon the evidence, the plaintiff was justified in his contention that there had been a continuous breach of the condition from at latest a year or two after the death of the testator.

A decree that the defendants should keep the park and its fences in proper order and repair should not be made. If it were made, the Court would have to assume the obligation of superintending for all time to come the performance of continuous duties, in the performance of which the exercise of a certain amount of discretion must necessarily be allowed to the defendants—an obligation which the Court does not assume: see the judgment of Ritchie, C.J.C., in Bickford v. Town of Chatham (1889), 16 Can. S.C.R. 235.

In answer to the claim for a declaration that the title to the land had reverted to the estate, the defendants pleaded sec. 5 of the Limitations Act, R.S.O. 1914 ch. 75. There was no doubt that the condition was first broken more than 10 years before the commencement of this action; but on behalf of the plaintiff it was pointed out that sec. 6 (9) of the Act does not say that the right shall be deemed to have first accrued when the forfeiture was *first* incurred or such condition was *first* broken; and it was argued that, there having been continuous or repeated breaches of the condition, the plaintiff, waiving the breaches which occurred more than 10 years before the commencement of his action, was entitled to rely upon the recent breaches, and that the statute had no application. No authority for this proposition was cited, and the learned Judge had found no case directly in point. Cases like Spoor v. Green (1874), L.R. 9 Ex. 99, and other cases decided upon the statute 3 & 4 Wm. IV. ch. 42 (R.S.O. 1914 ch. 75, sec. 49), seemed to depend upon different considerations. The present case must be determined upon the wording of sec. 6 (9) alone.

Upon the words as they stood, the plaintiff's contention was not well-founded. The right to bring *an* action to recover the land accrued to him much more than 10 years ago, when the condition was first broken; and, that neglect being found to have been continuous, it would be straining the facts and taking a very narrow view of the statute if it were held that the present action was not *the* action which the plaintiff might have brought as soon as the neglect was manifested, but another action founded upon another neglect. There seemed to be one breach, continuing over many years, of the condition; and the time for commencing the action founded upon that breach expired in 10 years after the breach had begun.

Action dismissed with costs.

MIDDLETON, J. JANUARY 2ND, 1919.

*SNOW v. CITY OF TORONTO.

Municipal Corporations—Land Entered upon and Excavated for Sewer—Drainage System—By-law—Intra Vires—Municipal Act, 1903, secs. 2 (8) and 554—Expropriation of "Easement"—Compensation and Damages.

Action for a mandamus to the defendants, the Corporation of the City of Toronto, to compel the closing of a sewer, for an injunction restraining them from operating the sewer, and for damages for trespass to the plaintiff's land.

The action was tried without a jury at a Toronto sittings.
W. J. Elliott, for the plaintiff.
Irving S. Fairty, for the defendants.

MIDDLETON, J., in a written judgment, said that the plaintiff owned land on the east side of Balsam avenue, fronting on Lake Ontario. In the spring of 1913, the defendants, as part of the East Toronto drainage system, entered upon the plaintiff's land and excavated a trench across it from east to west, a distance of 100 feet, and constructed a sewer; filling in the trench, and in some measure restoring the surface of the ground.

The defendants justified the entry under a by-law, No. 6347, passed on the 10th February, 1913, intituled "A By-law to acquire an Easement over certain Lands."

It was admitted that compensation-money must be paid under the Municipal Act, and it was agreed that a claim for damages for things done beyond what the by-law authorised should be dealt with by the tribunal charged with fixing the compensation, if the by-law should stand.

The plaintiff contended that the by-law was ultra vires the city council.

Reference to Re Davis and City of Toronto (1891), 21 O.R. 243, decided under sec. 479 (15) of the Municipal Act, R.S.O. 1887 ch. 184, and the amendment made in 1892 (in consequence of the decision in the Davis case), 55 Vict. ch. 43, sec 1.

It was argued that the amendment had not the effect attributed to it, as all that the municipality could do under the statute as it now stands (see the Municipal Act, 1903, 3 Edw. VII. ch. 19, secs. 2 (8) and 554) was to expropriate an existing easement, and that it could not now, any more than it could before the amendment, take any lesser estate than that owned.

Reference to Pinchin v. London and Blackwall R.W. Co.

(1854), 5 De G. M. & G. 851; In re Prittie and Toronto (1892), 19 A.R. 503.

The right to build the sewer is not in strictness an easement, but an hereditament: Metropolitan R.W. Co. v. Fowler, [1892] 1 Q.B. 165; but in the statute of 1892 the Legislature followed the Court in the Davis case in calling the right taken an easement; and, if necessary, it should be held that the intention was to enable the municipality to take the right to construct a sewer through land without taking the land itself.

Reference to the Pinchin case, supra; Halsbury's Laws of England, vol. 11, paras. 470, 471; Rex v. Hall (1892), 1 B. v. C. 123, 136.

There was no hardship in allowing the defendants to construct the sewer across the plaintiff's land without acquiring the absolute ownership. Compensation must be paid. No advantage would accrue to the plaintiff if the defendants were compelled to take an absolute title to the strip occupied by the sewer. Such a severance of the entire estate would do grievous harm and compel the defendants to pay heavy damages instead of a comparatively small sum. See Roderick v. Aston Local Board (1877), 5 Ch. D. 328.

Why should a municipality charged with the duty of maintaining a sewer system be compelled to acquire absolute title to land at a great expense and serious damage, when an underground passage doing little harm was all that was needed? Why not impute a reasonable rather than an unreasonable intention to the Legislature?

It should be declared that the by-law was within the powers of the council; that the plaintiff was entitled to compensation, to be determined under the Municipal Act, for all that was authorised by the by-law, and to damages for anything done beyond what was authorised, this damage to be assessed and determined by the Official Arbitrator, as a special referee, in the arbitration proceedings.

Costs reserved until after report.

ROSE, J., IN CHAMBERS. JANUARY 4TH, 1919.

*NEWCOMBE v. EVANS.

Costs—Taxation—Appeal—Items Disallowed by Local Officer—Fees of Witnesses Examined upon Foreign Commission—Motion to Strike out Pleading—Conduct Money Paid to Witness not Called—Affidavit of Disbursements—Preparation for Trial—Costs Thrown away by Postponement—Tariff A., Item 6—Correspondence—Motions for Postponement of Trial—Disbursements for Photographs—Disputed Signature—Documents not Capable of Production—Rule of Court of December, 1913—Fees Paid to Foreign Witnesses—Evidence—Review by Taxing Officer at Toronto.

Appeal by the defendant from the certificate of the Local Registrar at Sandwich upon the taxation by him of the defendant's costs of the trial, pursuant to the judgment pronounced at the trial, as varied by the order made by a Divisional Court on the 23rd April, 1918: Newcombe v. Evans (1918), 43 O.L.R. 1.

Frank McCarthy and A. H. Foster, for the defendant.
J. H. Rodd, for the plaintiff.

ROSE, J., in a written judgment, took up the items disallowed by the officer as follows:—

1. Fees of witnesses examined upon commission in Massachusetts. There was an affidavit by an attorney practising in Massachusetts that the disbursements were necessarily made. This made a prima facie case, and, in the absence of any contradiction, would have justified the allowance of the fees, subject to its appearing to the satisfaction of the officer, that it was necessary or reasonable to examine the witnesses. This item must be reconsidered, and upon the reconsideration either party may, if so advised, adduce further evidence as to the law of Massachusetts.

2. Costs of a motion, made at the trial, to strike out a portion of the statement of defence. This motion was not abandoned; and, there being no order awarding the costs of it, the appeal should be dismissed.

3, 4, 7, 10. Conduct money, Maud Gauthier. The witness was not called at the trial, and the affidavit of disbursements was silent as to the necessity of having her at the trial. The appeal should be dismissed.

5, 8, 12. Preparation for trial. The case was on the list for trial at the sittings held in September, 1916, November, 1916, and January, 1917, and was finally tried in May, 1917. A fee of $50

was allowed, upon the fiat of the Taxing Officer at Toronto, for preparation for trial at the sittings of September, 1916. The defendant claimed a fee of $25 for each of the other three sittings. The learned Judge did not find in Tariff A. any indication of an intention that, in the absence of special order, costs of preparation for trial wholly or partly thrown away by a postponement of the trial should be allowed; nor any indication that, in the absence of a special order, there should in any circumstances be more than one fee for preparation for trial (Tariff A., item 6).

In November, 1916, the trial was postponed by the order of Middleton, J., the costs of the motion for the postponement and of the order being reserved to be disposed of at the trial. The judgment pronounced did not deal with the costs, and the defendant had no order for the payment of costs thrown away; so the appeal must fail as to preparation for trial on this occasion.

In January, 1917, the postponement was ordered by Latchford, J., who, by his order, awarded to the defendant the costs thrown away by the postponement. This entitled the defendant to payment for such of the services covered by tariff item 6 as were performed specifically with reference to the expected trial in January, 1917, and were thrown away by the postponement. There must be a reconsideration of item 8 of the objections.

The appeal against the disallowance of a fee for preparation for the trial in May, 1917, failed. There was no special order for such an allowance, and the one fee taxable under tariff item 6 had been allowed. The officer, having allowed it where it first appeared in the bill, had no authority to allow it again.

Item 13. Correspondence. It was contended that, in addition to the $10 taxed under tariff item 16, there ought to be an allowance for correspondence necessitated by the postponements of the trial. What had been said with reference to the fee for preparation for trial applied equally to this. If there was any correspondence thrown away by the postponement in January, 1917, the defendant was entitled to payment for it under the order of Latchford, J.; and there ought to be an extra allowance unless the $10 allowed fairly covered all the correspondence pending the suit, including that in question. This item must be reconsidered.

Items 6 and 9. Contested interlocutory motions in Court for postponement, 27th November, 1916, and 24th January, 1917. There was no order awarding these costs; and the appeal failed.

Item 11. Disbursements for photographs. Expert evidence was given as to whether a disputed signature was genuine. The expert witnesses prepared photographs of the signature and of other signatures proved to be genuine, and in giving their evidence referred to these photographs. This was a convenient procedure. Whether it ought also to be said that some or all of the photographs

were reasonably "necessary for the due understanding of the evidence," so as to warrant an allowance of a reasonable sum for the preparation of them, under the Rule of the 24th December, 1913 (Holmsted's Judicature Act, p. 1556), was something to be determined upon the taxation. Other photographs were of documents which, apparently, were in the custody of a bank and could not be produced at the trial. If it would have been proper to use the documents, had they been available, it was proper to use the photographs; and the officer ought to have dealt with each of them upon the merits. This item must be reconsidered.

Item 14. Moneys paid to detectives. The appeal as to this was abandoned upon the argument.

Item 15. Fees paid to foreign witnesses, November, 1916, January, 1917, and May, 1917. For the reasons already given, the fees of the foreign witnesses brought to the November sittings could not be allowed. The defendant was, however, entitled, under the order of Latchford, J., to the costs thrown away in January, 1917, and, under the judgment, to the costs of the trial held in May, 1917. These costs the officer taxed, and professed to apply the rule stated in Ball v. Crompton Corset Co. (1886), 11 P.R. 256. But confusion seemed to have arisen in applying the rule; and this item must be reconsidered. Further evidence might be adduced; and the officer should consider, in the case of each witness, whether he ought to have been brought to the trial or whether it would have been more reasonable to examine him upon commission.

The bill should be referred to the Taxing Officer at Toronto to consider and report upon such items as had been directed to be reconsidered. Further consideration of the appeal and the question of the costs of the appeal and of the review were reserved to be disposed of in Chambers after the Taxing Officer had made his report.

ROSE, J. JANUARY 4TH, 1919.

ALEXANDER v. CITY OF LONDON.

Municipal Corporations—Action against City Corporation and Public Utilities Commission for Loss by Fire—Failure of Water Supply—Order of Ontario Railway and Municipal Board—Absence of Pressure at Outbreak of Fire—Duty to Maintain Supply—Negligence—Obligation to Protect Property of Ratepayers.

Action against the Corporation of the City of London and the Public Utilities Commission of London for damages for the loss

of the plaintiff's goods, attributable, as he alleged, to the failure of the water supply on the occasion of a fire which occurred in the premises occupied by him.

The action was tried without a jury at London.
P. H. Bartlett and F. E. Perrin, for the plaintiff.
T. G. Meredith, K.C., for the defendants.

ROSE, J., in a written judgment, said that the plaintiff's premises were in Pottersburg, a part of the Township of London annexed to the City of London by an order of the Ontario Railway and Municipal Board made on the 19th December, 1912.

The order directed that the annexation should take effect upon and subject to certain terms and conditions, of which the following was one:—

"That it shall be the duty of the Water Commissioners for the City of London to cause to be laid water-mains for fire and domestic purposes, and to extend the street lighting system of the said city upon such streets and portions of streets within such limit or limits of the annexed district as will, in their opinion, adequately protect and meet the requirements of the property of the said annexed district."

The water-mains were laid, and no question as to their sufficiency was raised; but it was alleged that the defendants were responsible to the plaintiff for the absence of pressure at the outbreak of the fire.

The fire broke out about 1.30 a.m. on the 5th February, 1918. The weather at the time was, and had been for some days previously, exceedingly cold.

The plaintiff's theory was that if there had been pressure at the hydrants when the firemen, who came with admirable promptness, arrived on the scene, the fire would have been confined to the building in which it originated and would not have damaged his goods. There was evidence to support this theory, but the fact was not established.

The claim against the Public Utilities Commission was put in two alternative ways: (1) that there was negligence; and (2) that the order of the Board imposed upon those defendants an absolute duty to maintain at all times a water supply adequate for the protection of the buildings in Pottersburg against fire.

There was no negligence. The shutting off of the supply in order to accumulate an adequate reserve was necessary in the interest of the whole city; and the valve was opened and the pumps started as promptly as possible upon receipt of information from the firemen that the water was required.

The clause of the order set out above meant no more than that such mains as the Commissioners might deem necessary should be laid down. When they were laid, the inhabitants of the annexed district acquired the same rights (if any) as were possessed by the inhabitants of other parts of the city in which there were water-mains, to compel the furnishing of water, but no higher or other rights; and it was not suggested that any inhabitant of one of the older parts of the city would have a right of action against the Commission for damages occasioned by a failure of the supply occurring without the fault of the Commission.

The claim against the city corporation also failed. Even if the order of the Railway and Municipal Board, which was an order that the Commission should lay down certain mains, could be treated as casting some obligation upon the city corporation to compel the Commission, its servant, to do the work commanded, the claim against the city corporation, based upon the theory that the command was to maintain an adequate supply of water at all times and in all circumstances, failed for the reason given in the discussion of the similar claim made against the Commission.

The alternative claim, based upon negligence, is answered by Gagnon v. Town of Haileybury (1913), 5 O.W.N. 435, in which it is laid down that, even when a municipality sees fit to establish a fire brigade, it does not come under any legal obligation to have the brigade vigilant in protecting the property of ratepayers against fire. Here the allegation was not that the firemen did anything which they ought not to have done; the only possible claim against them was that they did not act as promptly as they ought to have acted in notifying the men at the pumping station that water was required. There may have been a little unnecessary delay in sending the message, but the Haileybury case shewed that, even if that delay was the cause of the damage, it did not give rise to a right of action.

Action dismissed with costs.

ROSE, J. JANUARY 4TH, 1919.

JERMY v. HODSON.

Vendor and Purchaser—Agreement for Sale of Land—Construction—Legal Title not in Vendor—Time for Making Conveyance—"All Reasonable Diligence to Obtain Title"—Action for Return of Purchase-money—Absence of Notice to Convey within Certain Time—Vendor not in Default

Action for the return of money paid by the plaintiff as the price of land in Alberta.

The action was tried without a jury at London.

G. S. Gibbons, for the plaintiff.

L. Macaulay, for the defendant.

ROSE, J., in a written judgment, said, after stating the facts, that upon the contract between the parties it seemed plain that, while the plaintiff was bound to make his payments within a limited time, the defendant's obligation was, not to be ready to convey to the plaintiff the moment the purchase-price was paid and the contract surrendered, but to use all reasonable diligence to "obtain title"—i.e., to procure transfers, for the defendant already had the equitable title under the contract with his vendors—as soon as possible after the money was paid; and, unless the defendant failed to use that reasonable diligence, there was no breach of contract upon his part. It ought not to be found as a fact that he failed to use all due diligence; and, even if he was not quite as diligent as he ought to have been, there was no such inaction upon his part as indicated such a repudiation of his obligations as justified the plaintiff in treating the contract as at an end and demanding a return of the purchase-price. It seemed to be quite clear that the plaintiff did not, at any stage, take effective steps to make delivery of the conveyances within a certain time a term of the contract.

The learned Judge's conclusion was, that, before the commencement of this action, there had been no such breach by the defendant, either of a term of the contract as written or of a condition as to time, added by notice given by the plaintiff, as to justify the plaintiff in declaring the contract at an end and demanding the return of his money.

Reference to Gregory v. Ferrier (1910), 3 Sask. L.R. 191.

Action dismissed with costs.