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THE
# ONTARIO WEEKLY REPORTER

VOL. 26. TORONTO, APRIL 9, 1914. NO. 1.

HON. MR. JUSTICE LENNOX. FEBRUARY 28TH, 1914.

## HALLMAN v. HALLMAN.

5 O. W. N. 976.

*Husband and Wife—Action for Declaration of Nullity of Marriage —Non-Disclosure of Insanity of Defendant—Fraud—Consent—Declaration of Right—Jurisdiction—Judicature Act s. 16 (b)—Refusal of Order.*

LENNOX, J., *held*, in an action for a declaration of nullity of marriage upon the ground of fraudulent misrepresentation and concealment as to the presence of insanity in one of the parties, that the Court had no jurisdiction to declare the marriage null and void or to make any declaration whatever in respect thereof.

*A.* v. *B.*, 23 O. L. R. 261, and other cases followed and referred to.

That fraud of the most outrageous and iniquitous character does not prevent the marriage being binding as long as there is actual consent.

*Moss* v. *Moss*, [1897] p. 263; *Harrod* v. *Harrod*, 1 K. & J. 4 and *Swift* v. *Kelly*, c *Knapp*, 257, followed.

Action for a declaration of annulment of marriage.

E. P. Clement, K.C., for plaintiff.

J. R. Meredith, for defendant.

HON. MR. JUSTICE LENNOX:—Except that this action also fails upon the merits it is not distinguishable from *A.* v. *B.*, 23 O. L. R. 261. The ground set up for annulling the marriage in that case too was insanity and although Mr. Justice Clute found that the plaintiff was in fact insane at the time of the marriage he refused to give relief of any kind.

Upon the question of jurisdiction I am bound by the judgment in that case and by my own judgments in *Prowd* v. *Spence*, 10 D. L. R. 215; *Malot* v. *Malot*, 24 O. W. R. 884, and *Longworthy* v. *McVicor*, 25 O. W. R. 699. See also *Leakim* v. *Leakim*, 21 O. W. R. 855, and 23 O. W. R. 227.

Mr. Clement urged me if possible to at least make a declaration that the marriage was invalidated by the fraud practised upon the plaintiff, in that the defendant failed to disclose to the plaintiff that she had previously been confined in a lunatic asylum in Chicago. I regret to say that I am not able to assist the plaintiff in any way.

Counsel for the plaintiff admits that the defendant was sane, or at all events in a mental condition to understand and appreciate what she was doing, and the duties and obligations she was undertaking at the time of the marriage. In this respect this case differs from any insanity case which has come to my notice, and the claim set up is that the omission to mention the circumstance referred to was a fraudulent concealment sufficient to avoid the marriage. There is not to my mind sufficient evidence here to avoid an ordinary commercial contract. Marriage is a contract in a sense, but it is something more, and leaving out of sight even the moral and religious obligations which it creates, it creates a status from which the parties cannot voluntarily recede. But fraud of the most outrageous and iniquitous character does not prevent the marriage being absolutely legal and binding so long as there is actual consent. *Moss* v. *Moss*, [1897] P. 263; *Harrod* v. *Harrod* (1854), 1 K. & J. 4. It is argued that I should not feel bound by English cases. I think otherwise; but at all events, I am bound by the judgment of the Judicial Committee of the Privy Council in *Swift* v. *Kelly*, 3 Knapp. 257, at p. 293, where it is declared that: "No marriage shall be held void merely upon proof that it had been contracted upon false representations, and that but for such contrivances, consent never would have been obtained. Unless the party imposed upon has been deceived as to the person, and thus has given no consent at all, there is no degree of deception which will avail to set aside a contract of marriage knowingly made."

Neither can I make a declaration of right or status under sec. 16, sub-sec. (b) of The Judicature Act. That section does not enlarge or affect the jurisdiction of the Ontario Courts so far as the class of subjects which they can deal with is concerned. It does not make any radical change in the rules of practice. *Bunnell* v. *Gordon* (1900), 20 O. R. 281, and there was no right to make a declaration as to a claim which might or might not arise, and which was not incidental to any present relief, under a similar provision

of the old Act. *Ibid.* The only forum for relief is the Senate. And where there is a special forum the parties must go to it. *Attorney-General* v. *Cameron* (1899), 26 A. R. 103; and *Barraclough* v. *Brown*, [1897] A. C. 615. Counsel representing the guardian *ad litem* does not ask for costs. Following the course I took in other cases I make no order of any kind.

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HON. MR. JUSTICE LATCHFORD. FEBRUARY 28TH, 1914.

## RE LLOYD.

5 O. W. N. 974.

*Infants — Moneys of in Possession of Administrator — Application for by Foreign Guardian—Claim of Past Maintenance—Exaggeration—Doubt of Bona Fides — Benefit of Infants—Refusal of Order—Future Maintenance.*

LENNOX, J., refused to direct the payment over to a foreign guardian by an administrator with the will annexed of moneys belonging to infants, children of such guardian, where it was evident that such payment would not be for the benefit of the children but for the benefit of the guardian, who had submitted an exaggerated claim for past maintenance, totalling more than the moneys to the credit of the infants.

*Hanrahan* v. *Hanrahan*, 19 O. R. 396, distinguished.

Application by Hattie E. Lloyd, of Norton, Runnels County, Texas, widow, the guardian of her four infant children, aged respectively 11, 15, 17 and 19, appointed by the County Court of Runnels County, for an order that the London & Western Trusts Co., the administrators with will annexed of the estate of one Robert E. Lloyd, deceased, should pay over to the applicant as such guardian all moneys in the hands of the said company, to which such infant children are entitled under the will of Robert E. Lloyd.

E. W. Scatcherd, for motion.

T. Coleridge, for Official Guardian.

C. G. Jarvis, for London and Western Trusts Co.

HON. MR. JUSTICE LATCHFORD:—I permitted the notice to be supplemented so as to include in addition an application for maintenance.

Robert E. Lloyd was an uncle of the infants. He was a resident of and domiciled in Ontario at the time of his death, and all his estate administered by the Trust Company

was derived from property situate in this province. The amount to which the applicant's children are entitled is about $5,500. The money is invested on mortgage, and realizes, it is said, 5½ per cent. per annum.

Mrs. Lloyd deposes that since the death of her husband Wm. Lloyd, in 1904, leaving property not worth more than $350, she has supported her children by her own labour. There were five children, but one died in May, 1910. The mother estimates that it cost her $10 a month for each of the five children up to the time of the death mentioned, and a like amount monthly since for each of the four children. She thus builds up a claim for past maintenance amounting to $6,400.

Her affidavit is unsupported except by copies of the proceedings in the County Court of Runnels County connected with the appointment of the applicant as guardian. For the effect of such appointment, and as to the right of the guardian to receive the moneys of her wards, I am referred to the Statutes of Texas.

In *Hanrahan* v. *Hanrahan* (1890), 19 O. R. 396, Mr. Justice Rose, in a considered judgment in which many cases were reviewed, held that the duly appointed tutors in the province of Quebec of an infant domiciled and residing there—Quebec having also been the domicile of the infant's father at his death—were entitled to have paid over to them from the administrators in Ontario of the father's estate moneys coming to the infant from such estate collected in this province.

A guardian appointed under the laws of Texas, has doubtless the same powers as a tuteur under the laws of the province of Quebec. The material filed on the point is defective, but I should allow it to be properly supplemented, if I were satisfied the claim of the guardian was made for the benefit of her wards. But it is quite clear that the claim is not for their benefit, but for her own. It exceeds for past maintenance—by $900—the whole fund in the hands of the trust company. If the funds were transferred to her upon this application and the children afterwards claimed an account, they would undoubtedly be met by the contention that this Court had recognized that she was entitled to their shares for past maintenance. Her good faith is open to question by reason of the exaggerated amount of her claim. The security which she is said to have given may, for anything that

appears, be worthless. Her sureties made no affidavits of justification. In the words of Kekewich, J., in *In re Chatard's Settlement*, [1899] 1 Ch. 712, 717: "I ought to consider whether when the fund is handed over to the guardian it will be properly applied for the benefit of the infants, and whether it is not better that it should remain here and be paid to them when they attain their majorities."

I am asked to direct the payment over as a matter of right to a foreign guardian of moneys derived from the estate of a person not domiciled in the foreign State, but domiciled here. No such case is made as in *Hanrahan* v. *Hanrahan*. The ordinary rule and practice of the Court is that the Court will not direct the payment over of the moneys of infants unless satisfied that it will be applied for the benefit of the infants. Their welfare and interests are the paramount considerations. In the circumstances the order must be refused. Costs of Trust Co. and Official Guardian out of fund.

On a proper case made, it will, of course, be open to Mrs. Lloyd to apply for an order for future maintenance.

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HON. MR. JUSTICE MIDDLETON. FEBRUARY 24TH, 1914.

## PIERCE v. GRAND TRUNK Rw. CO.

5 O. W. N. 962.

*Particulars—Statement of Claim—Action against Railway Company for Death of Engineer—Negligence—Res Ipsa Loquitur—Workmen's Compensation for Injuries Act, s. 15 — Names of Employees Guilty of Negligence — Limitation of Rule—Rules and Regulations of Company—Order for Particulars of Struck out.*

MIDDLETON, J., *held*, that the Workmen's Compensation Act s. 15, requiring particulars of the name and description of any person in the service of the defendant against whom negligence is charged, only applies where the claim of the plaintiff is based upon some specific act of misconduct on the part of a fellow-servant and not to a case where the maxim *res ipsa loquitur* applies and the plaintiff will have made out a *prima facie* case as soon as the facts in relation to the accident are shewn.

That a plaintiff should not ordinarily be called upon to give particulars of the rules and regulations of a defendant railway company upon which he relied to establish his case, the more especially since the defendant does not require such particulars for pleading, being at liberty to plead "not guilty" by statute.

Appeal by the defendant from an order of Master in Chambers, refusing to direct particulars of the name of the employees of the defendant company whose negligence it was

alleged caused the accident complained of; and cross-appeal by the plaintiff from the same order in so far as it directed particulars of the rules and regulations of the railway imposing upon the train crew in charge of the way freight in the pleadings mentioned, the duty to close the main line switch and set the distant semaphore, and of the rule or regulation imposing upon the defendant's servants the duty to furnish the conductor of the said way freight a copy of the train order in question, and of the rule or regulation imposing upon the defendant's servants in charge of the way freight, the duty of stationing a flagman to warn approaching trains, and lastly of any rule or regulation in contravention of which the railway authorized and sanctioned a defective and improper system in allowing the switch to remain open and unprotected for long intervals while way freights switched back and forth over different siding tracks.

Argued 21st February, 1914.

F. McCarthy, for Grand Trunk Rw.

T. N. Phelan, for the plaintiff.

HON. MR. JUSTICE MIDDLETON:—In so far as particulars are said to be for pleading, particulars are not required here, for the defendant company has the privilege accorded to it by statute of pleading not guilty by statute.

By sec. 15, of the Workmen's Compensation Act, it is provided that in an action brought under that Act, if a plaintiff claims that his injury was caused by reason of the negligence of any person in the service of the defendant, the particulars shall give the name and description of such person. The defendants claim that this gives them the statutory right to have the name of every employee against whom negligence is to be charged, and that the Court has no discretion in the matter.

The statement of claim here sets forth circumstantially what took place. At St. Catharines the station house is so situated as to prevent any extended view along the tracks. There is in addition to the main track a passing track, and two other sidings. A train had been given through orders not calling for any stop at St. Catharines. For some time before it reached the station a way freight had been shunting upon the sidings. The switch had been left open from the main track, and the distant semaphore had not

been set to warn any train running on the main track, nor had there been any man stationed to flag an approaching train. By reason of this, the oncoming train ran into the siding, and the engineer of that train was killed. His infant children now sue, alleging negligence in the matters above set out, and in the alternative that if this condition of affairs was in conformity with the system by which the railway was operated, the system was itself negligent.

The railway now seeks to impose upon these infant plaintiffs the obligation of fixing the blame on some particular individual, and of pointing out the specific rules of the railway company which had been disobeyed by the servants of the company in bringing about this dangerous and disastrous result, as a condition of being allowed to prosecute the action. The contention needs only to be stated to shew its fallacy. Our law places no such obligation upon a plaintiff.

Section 15, if it has any application, applies only where the claim of the plaintiff is based upon some specific act of misconduct on the part of a fellow servant, and I do not think it ought to be extended to the class of cases in which the plaintiff will have proved his case as soon as the facts in relation to the accident are shewn. Where the rule *res ipsa loquitur* applies, the statute does not intend to shift the onus and call upon the plaintiff to locate the fault.

Nor do I think the Master should have ordered particulars of the rules. The defendants, it may be presumed, know their own rules and regulations. They have the means of knowing exactly what happened, for they are called upon to investigate every accident, and nothing could seem more oppressive than the order sought in this case, nor could anything be devised more likely to occasion a miscarriage at the trial.

In the result the plaintiffs' appeal succeeds and the defendants' appeal fails. The plaintiffs should have the costs throughout in any event.

HON. MR. JUSTICE LATCHFORD. FEBRUARY 25TH, 1914.

## BLACK v. JOHNSTON.

5 O. W. N. 968.

*Division Courts—Jurisdiction—Claim in Excess of $100—Division Courts Act R. S. O. 1914, c. 63, s. 77—Action Brought in Named Place of Payment—Refusal of Judge to Transfer Same—Discretion—Motion for Prohibition—Dismissal of.*

LATCHFORD, J., *held*, that under Division Courts Act R. S. O. (1914), c. 63, s. 77, where the debt exceeds $100, the action may be brought in the Court of the division of the named place of payment, and the provision in subsection 1 (2) of the said section permitting the Judge to transfer such action is permissive only. *Brazill* v. *Johns*, 24 O. R. 209, distinguished.

Motion for prohibition to the Fifth Division Court of the county of Ontario on the ground that the promissory note sued on, which was for $114.46, though dated and made payable at Cannington, within the jurisdiction of the said Court, was in fact made outside such jurisdiction in the city of Toronto where both defendants reside. The defendants disputed the jurisdiction of the Court and applied to have the place of trial changed to Toronto. Their application was refused.

Jas. R. Roaf, for defendants.

Martin H. Roach, for plaintiffs.

HON. MR. JUSTICE LATCHFORD:—The facts are not in dispute. The only question is whether the note can be sued on in a division in which the whole cause of action did not arise, and in which neither of the defendants resides.

If the debt or money payable did not exceed $100, as was the case in *Brazill* v. *Johns* (1893), 24 O. R. 209, prohibition would be granted.

But as the debt does exceed $100 sec. 77 of the Division Courts Act, R. S. O. 1914 applies. This section differs materially from sec. 86 of R. S. O. 1887, ch. 51, and sec. 90 of R. S. O. 1897, ch. 60, but follows almost *verbatim* sec. 77 of the Division Courts Act of 1910.

It provides that where the debt . . . exceeds $100 and is made payable by the contract of the parties at a place named therein, the action may be brought thereon in the Court of the division in which the place of payment is situate, subject, however, to the action being transferred to the

Court of any division in which but for this section it might have been brought.

This action was therefore properly brought in the Fifth Division Court of the county of Ontario but was subject to be transferred to Toronto.

Sub-section 2 of sec. 1 provides that the Judge of the Court in which the action is brought may upon application of the defendant, made within the time limited for disputing the plaintiffs' claim, make an order transferring the action accordingly.

By the Interpretation Act, R. S. O. ch. 1, sec. 29, the word "may" shall be construed as permissive.

The Judge could grant or refuse the application which the defendants made. He chose to refuse it, and was entirely within his rights in doing so.

That he might have been compelled to transfer the place of trial under sec. 90 of the Act of 1897 is not a matter for decision. It is sufficient to say that he cannot be compelled under the law as it exists to-day. Section 77 gives a jurisdiction until changed. The Judge in the exercise of his discretion has refused to change it. The jurisdiction continues. Prohibition does not lie and the motion must be refused with costs.

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HON. MR. JUSTICE LATCHFORD. FEBRUARY 25TH, 1914.

## FITZ BRIDGES v. WINDSOR.

5 O. W. N. 969.

*Municipal Corporations—Bonus By-law—Injunction to Restrain Submission to Ratepayers — Insufficiency of Material—Industry of Similar Nature to one Already Established — Balance of Convenience.*

LATCHFORD, J., refused an injunction restraining a municipality from submitting a bonus by-law to a vote of the ratepayers, holding that the material in support of the motion was insufficient.

The circumstances are exceptional which will justify the granting of an injunction to restrain the passing of a by-law.

*Newmarket* v. *London*, 20 O. W. R. 929, referred to.

Motion by the plaintiff for an injunction restraining the City of Windsor from submitting to its ratepayers on the 3rd March, a by-law granting a bonus to one Klingensmith, who proposes to establish in Windsor an industry for producing and selling distilled water and what is known as artificial ice.

S. Cuddy, for the motion.

F. McCarthy, contra.

HON. MR. JUSTICE LATCHFORD:—The plaintiff is engaged in the business of harvesting, storing and selling natural ice cut in the Detroit river, and stored as cut outside the defendant municipality, but with subsidiary storage premises in Windsor, and stables with accommodation for some of the vehicles used by the plaintiff in delivering the ice are said to be maintained.

The statute empowering the defendant municipality to grant aid by way of bonus for the promotion of manufactures is 7 Edw. VII. ch. 97, as amended by 10 Edw. VII. ch. 136. Subject only to the assent of two-thirds of the duly qualified ratepayers, and to the provision that no bonus shall be granted to a manufacturer who proposes establishing an industry of a similar nature to one already established unless the owner of such established industry or industries shall first have given their consent in writing to the granting of such an aid, the council of the city of Windsor may by a three-fourths vote of all the members thereof pass by-laws for granting aid by way of bonus for the promotion of manufactures within the limits of the city to such persons or body corporate and in respect of such branch of industry as the council may determine upon.

The application is made within eight days of the date of the submission of the by-law to the ratepayers and the material upon which it is based is unsatisfactory. It is important to know to what extent the business of the plaintiff is carried on within the municipality of Windsor. The plaintiff's affidavit does not shew this. To prevent the ratepayers from voting on the 3rd proximo, after considerable money has been expended in the necessary advertising, might work a serious wrong to the defendants, if it should ultimately appear from additional material that the by-law is not within the prohibitory clause of the statute. On the other hand, the voting upon the by-law by the ratepayers will even in the event of a sufficient assent being secured work no injury, so far as appears, to the plaintiff; and should the necessary assent not be secured the proposed by-law will be a nullity. I think no adequate case is made out for the granting of such an extraordinary remedy as an injunction.

If the by-law should be assented to by two-thirds of all the ratepayers, the plaintiff may be able to satisfy the Court that the by-law should be quashed, as granting a bonus for the establishment of an industry similar to that which the plaintiff may shew is now carried on by him within the municipality.

The circumstances are exceptional which will justify the granting of injunction to restrain the passing of a by-law. See *Newmarket* v. *London* (1912), 20 O. W. R. 929, and the cases there cited.

The motion is refused. Costs in the cause.

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HON. MR. JUSTICE MIDDLETON. FEBRUARY 26TH, 1914.

## WOLFE v. EASTERN RUBBER CO. LIMITED.

5 O. W. N. 979.

*Contract—Architect — Action for Fees—Denial of Employment—Evidence—Testimony of Discharged Employees — Animus—Suspicion—Dismissal of Action.*

MIDDLETON, J., dismissed an action by an architect for remuneration for his professional services, holding that he had not proven employment by the defendants.

Action by an architect to recover $2,000, remuneration for the preparation of plans in connection with a proposed factory of the defendant company, tried at Toronto Non-jury sittings, 15th February, 1914.

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

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

HON. MR. JUSTICE MIDDLETON:—Further reflection confirms the view expressed at the close of the hearing, that the plaintiff has failed to substantiate his claim. I think all the probabilities surrounding the case go to support the evidence of Mr. Main, the general manager of the defendant company.

The company had retained its own architect; they had prepared plans; a permit had been issued, and the foundation of the building had been excavated. The company was making enquiry with a view to letting tenders for the construction. Lannen, a contractor in Toronto, interviewed the company and suggested that the construction was unnecessarily expensive, and suggested also that his friend Mr.

Wolfe, of Buffalo, an American architect, was a man of ability, and had made a specialty of the construction of factory buildings in Buffalo, and was anxious to obtain an opportunity of shewing his skill in this line in Toronto.

Mr. Wolfe was introduced, and pointed out many respects in which the expense of the building might be cut down. The question at once suggested itself whether this reduction could be made and the plans conform to the building by-law. Mr. Wolfe was in effect told that he might prepare plans, and I think Mr. Main is right when he says that all that was being done in this line was entirely at Mr. Wolfe's risk. If Mr. Wolfe could shew a reduction in the cost of $10,000 to $15,000 and the plans would pass scrutiny, it is altogether likely that a change would be made and he would be employed in the place of the present architect; but I think Mr. Wolfe's own story that on the first interview, without any enquiry as to the skill or ability, without any mention of price or terms of employment, this company abandoned in this informal way all that had theretofore been formally arranged and sanctioned by the directors, and employed by Mr. Wolfe, as he suggests, as most improbable. The actual cost of the preparation of the plans would not be very large, and there is nothing unreasonable in the supposition that this outside architect, anxious to obtain an opportunity of shewing his skill, would risk this much for what appeared to be a favourable opportunity.

All that follows is quite consistent with this theory. When the plans came, the first thing was to require them to be submitted to the city architect to see if they were in conformity with the building by-law. True, the company paid for the permit; but the permit was taken out not in the company's name but in the name of the expectant contractor. He was then required to make an estimate of cost. This estimate was not forthcoming until September, and it shewed a reduction in cost of about $6,000. Nothing which took place from then on can be in any way suggested as the formation of any new contract or the adoption of the plans and the employment of the architect in pursuance of any earlier understanding. When the plans came the company had the right to employ Mr. Wolfe or to refuse to do so; and I cannot find on this evidence that there ever was any employment.

Mr. Wolfe himself bases his case entirely upon what took place at the first interview. He, however, seeks to

strengthen his position by calling some ex-employees of the company. Evidence of this class never appeals strongly to me, and I always view the testimony of discharged employees, especially when given with *animus*, with the greatest suspicion. I find nothing in this evidence that helps, and a good deal that hurts, Mr. Wolfe's case.

The action fails, and must be dismissed with costs.

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HON. MR. JUSTICE BRITTON, IN CHRS. FEB. 3RD, 1914.

## SNIDER v. SNIDER.

5 O. W. N. 956.

*Pleading—Reply — Motion to Strike out Paragraphs — Action on Promissory Notes—Former Judgment Striking out Similar Material from Statement of Claim — Material Valid as Reply — Costs.*

BRITTON, J., *held*, that in an action upon certain promissory notes in which the defence was a denial of the making of the same and of consideration therefor that the plaintiff in his reply should be allowed to plead the facts which shewed how the notes came into his possession and on which he relied to prove his case.

Judgment of Master-in-Chambers reversed.

Appeal from an order of the Master-in-Chambers, striking out paragraphs 2, 3, 4, 5, 6 and 7 of the plaintiff's reply herein.

HON. MR. JUSTICE BRITTON:—The action was commenced on the 1st February, 1913, by a specially endorsed writ. The endorsement was for two promissory notes of $5,000 each, dated 1st February, 1909.

Upon the application of the defendant, the plaintiff delivered a statement of claim, in which the facts and circumstances in regard to the making of the notes sued upon, were set out. The defendant moved before the Senior Registrar, acting as Master-in-Chambers, to set aside this statement of claim. This motion was dismissed. Upon appeal the learned Chancellor reversed the master and set the statement of claim aside.

The report of the case before the master will be found in 25 O. W. R. 286, and that before the Chancellor, 5 O. W. N. 528, O. L. R.

The defendants put in their statement of defence.

The plaintiff replied and in his replication set out in the paragraphs now objected to, practically the same facts as

had been struck from the statement of claim. The defendant then moved before the master to have these paragraphs struck from the replication. The plaintiff now appeals.

The statement of defence is:—

(1) A denial that the deceased Thos. Albert Snider made the notes.

(2) That if the deceased made the notes, there was no consideration for the same, and if the said notes came into the possession of the plaintiff, the estate of the deceased is not liable for the same or any part thereof.

To this the plaintiff replies, and the learned master has struck out all of the replication, except the joinder of issue.

I see no objection to the material facts on which plaintiff relies to shew that he is entitled to recover upon the notes, and to shew how the notes came into his possession.

Upon the argument there was an attempt made to set aside the replication because of the "superfluous" language. Parts of some of the paragraphs considered objectionable do offend against the rule that pleadings should be limited to a concise statement of the material facts, but that in no way tends to embarrass the defendants. The defendants object to the substance, and rely upon the Chancellor's judgment as affording a conclusive reason for dismissing this appeal. I do not so read the reasons for that judgment.

One of the main objections was that these alleged facts put in a statement of claim was pleading in anticipation of the statement of defence. It was "leaping before coming to the stile." "The proper course of pleading is to wait until the defendants make their defence and then let the plaintiff meet it by appropriate pleading."

Again the Chancellor says: "If the questions raised by the second statement of claim, which I now set aside, are to come up by reason of the defence made, well and good, so long as they are properly pleaded, but at present, they are an excrescence on the record and should be removed."

The objection, if raised, to particular parts of each paragraph as to pleading what is evidence and stating what is irrelevant or superfluous—the plaintiff would be compelled to state more concisely what is the substance of the replication, but as I said, the objection is not to form but substance and that is not entitled to prevail.

The appeal will be allowed and replication restored.

Costs to be costs in the cause.

HON. MR. JUSTICE MIDDLETON. MARCH 4TH, 1914.

## GAULIN v. OTTAWA.

6 O. W. N. 30.

*Municipal Corporations—By-law Submitting Question to Electors—Form of Ballot—Municipal Act s. 398, s.-s. 10—Prevention of True Expression of Wishes of Electors—Quashing of By-law.*

MIDDLETON, J., *held*, that the Municipal Act s. 398 (10) permitting the passing of a by-law for "the submitting to a vote of the electors of any municipal question not specifically authorised by law to be submitted," contemplated a ballot providing only for the simple answer Yea or Nay and not a ballot where an elector can vote either for the negative or for any of five affirmative propositions.

Motion to quash by-law. Heard and disposed of on 4th March, 1914.

W. N. Tilley, for applicant.

G. F. Henderson, K.C., and F. B. Proctor, for city of Ottawa.

HON. MR. JUSTICE MIDDLETON:—The municipality of the city of Ottawa, being face to face with difficulty in obtaining an adequate water supply, the municipal council desired to obtain the opinion of the electorate as to the scheme which had commended itself to the council. The by-law in question is passed in supposed pursuance of the powers afforded by the Municipal Act, sec. 398, sub-sec. 10, which permits the passing of a by-law "for submitting to the vote of the electors of any municipal question not specifically authorised by law to be submitted." The provisions of the Act and the forms provided indicate that the intention of the Legislature in permitting this reference to the electors was that the question should be submitted in such a form as to permit of an answer, Yea or Nay. No doubt several questions may be submitted at the same time, but they must be submitted independently, so that each elector may have the opportunity of expressing his opinion upon each question submitted.

The by-law in question is not within what is permitted by the Municipal Act, because it is an endeavour, by the substitution of a tricky and adroitly drawn question, to practically preclude any true expression of the views of electors upon the question proposed to be submitted.

I would not interfere with the municipal action for any mere irregularity, but I think it is my duty to interfere when what is proposed will have the effect of preventing any fair expression of the wishes of the electorate from being obtained.

What has been done in the proposed submission is to provide a ballot which, instead of containing two compartments in which the elector may place his cross as indicating an affirmative or negative answer—which is what is contemplated by the Municipal Act—is to provide a ballot in which the affirmative section is divided into five sub-heads, one for each of the suggested schemes. The voter is then told that if he is opposed to all these, or to any change, he should mark his ballot in the negative. If he approves of any of these schemes, he is to place his mark opposite the scheme of his choice.

Manifestly there are two distinct matters to be determined by the vote: first, do the ratepayers desire the adoption of any scheme changing the present condition of affairs; and secondly, if so, what scheme do they desire?

Two by-laws, proposing different schemes, have already been submitted to the ratepayers. In round figures, each received an affirmative vote of 1,000 and a negative vote of 5,000.

These questions are to be submitted, not to the ratepayers but to the electors; and it is admitted that a large number of electors desire to negative any change. One of the schemes proposed is said to involve a very heavy expenditure as compared with the others suggested. It may be that the merits of this scheme so outweigh the disadvantage of the expense that it ought to be adopted; but it is safe to say that many of those who vote on the negative as to change would vote in favour of one of the less expensive schemes as against the more expensive one. What is sought is to stifle such a vote.

To illustrate the way in which the matter may work out, assume that 20,000 votes are cast; 9,999 being against any change and 10,001 in favour of a change. It can then be said that there is a majority in favour of the change. But the vice of the proposed ballot is that the 9,999 who vote against any change are prevented from expressing any preference amongst the competing schemes, assuming that a change is to be made.

It may be that half of the 10,001 voting in favour of change will vote for the more expensive scheme; the remaining vote may be equally divided between the 4 cheaper schemes. It will then be said that that scheme is favoured by 4 times as many voters as any of the others. It would be quite conceivable that 9,999 would have voted in favour of one of the less expensive schemes. In that event the majority against the expensive scheme would be as 3 to 1.

I give this illustration to shew that the by-law is not quashed upon any narrow or technical ground, but because it appears to be an attempt to stifle the free expression of the opinion of the electors rather than to obtain it.

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HON. MR. JUSTICE MIDDLETON. MARCH 3RD, 1914.

## RE MAY.

6 O. W. N. 29.

*Will—Construction—Devise of Lands for Life—Duty of Tenant to Provide for Mortgage Interest and Taxes — Devise Taken as Whole—Deficit on One Parcel to be made up out of Surpluses on Others.*

MIDDLETON, J., *held*, that a devisee for life of certain mortgaged parcels was bound to provide for interest on the mortgages and taxes out of the income thereof, and, where such outgoings exceeded the income upon one of such parcels, that the devisee must bear this deficit having accepted the devise as a whole.

Motion by executors for construction of will. Argued 2nd March, 1914.

J. R. L. Starr, K.C., for executors.

J. A. McIntosh, for executrix of widow.

E. C. Cattanach, for infants.

HON. MR. JUSTICE MIDDLETON:—The testator directed that all rents from his real estate should be paid to his wife for life, and on her death the lands should be sold and the proceeds divided between his children. The wife is now dead.

The lands of the deceased were subject to mortgages. That on Winchester street yielded a gross rental of $3,787, net $2,653.61; Parliament street lands yielded only $340; while interest and taxes amounted to $1,326.44. The widow

has paid the deficit, $986.44, out of the Winchester street rents.

Two questions are raised. The executrix of the widow claims that the widow was entitled to the gross rental without any deduction for taxes, etc., or for interest.

The gift to her of the rent makes her a life tenant, and she must bear the burden properly incident to her life estate —including the payments in question. No intention is here shewn to exonerate the lands from the debt charged on them by the mortgage, indeed, the contrary intention is clearly indicated as the lands might be sold by the executors, and in that case the will provides that the mortgage was to be paid out of the proceeds, and the widow was to receive the interest on the balance only.

Then the argument is made that the outgoings of the Parliament street property exceeded the income, and so the widow should be repaid this excess. I do not think so. The life estate was given in all the testator's property, and the widow was not given the right to pick and choose. She must take the fat with the lean—the bitter with the sweet—she accepted the devise and must bear all the burden.

The case is not at all like *Re Cameron*, 2 O. L. R. 756. There there was a duty to realize, but realization was delayed in the interest of the remaindermen, and this was not allowed to be at the expense of the life tenant. Here there was not any duty to sell till the termination of the life estate.

The contentions put forward by the representative of the widow fail.

Costs may be paid out of the estate.

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HON. MR. JUSTICE MIDDLETON. MARCH 7TH, 1914.

## RE ROCQUE.

6 O. W. N. 36.

*Will—Construction—Death of Devisee Prior to Making of Will—Intestacy.*

MIDDLETON, J., *held*, that there must be an intestacy as to a bequest to a daughter of the testatrix who had died prior to the making of the will, in the absence of any gift to her children.

Motion to determine question arising on the construction of the will of the late Margaret Jane Rocque. Argued 4th March, 1914.

E. Coatsworth, K.C., for the executors.

J. R. Meredith, for infant children of Catharine A. Hague.

R Nesbitt, for her adult children.

HON. MR. JUSTICE MIDDLETON:—By her will, dated 12th August, 1911, the testatrix, who died on the 31st December, 1913, gave $1,000 to be divided between the children of her daughter Catharine, reciting that she had already given $1,000 to her said daughter. After making certain other provisions for other children, she provided that the residue of her estate be divided into four equal parts; between her executor (a grandson), and her said three children. The "said three children" are her two sons and her daughter Catharine.

Catharine had died on the 7th March, 1906, more than five years before the making of the will. The conveyancer had evidently failed to apprehend the situation, and in some way was at cross purposes with the testatrix.

It appears to me that I must take the will as it reads and that I am not at liberty to guess what the testatrix would have done if her attention had been drawn to the matter. It may be that the testatrix did not intend to give to the children of Catharine more than $1,000, and that she intended that the residue should be divided equally between the executor and her sons, and that the error is in the enumeration; or it may be that she intended to direct that the share which would have gone to Catharine if she had been alive should be divided among her children. The will gives no key, and I must take it as it stands. The executor and the son are each given a fourth of the residue. The gift to Catharine cannot take effect, because she was then dead. There is no gift to Catharine's children; therefore, there is an intestacy as to this fourth.

The costs of all parties may come out of the estate.

HON. MR. JUSTICE LENNOX. MARCH 2ND, 1914.

## FEHRENBACK v. GRAUEL

6 O. W. N. 39.

*Vendor and Purchaser—Sale of Lands—Ability of Vendor to Convey —Tender of Purchase-Money Necessary—Right of Purchaser to Rescind—Measure of Damages—Action for Instalment of Purchase-Money—Costs—Terms.*

LENNOX, J., *held*, that under an agreement for the sale of certain lands there was no obligation to convey until the purchaser paid in full, and the vendor could prior thereto perfect his title.

That if purchaser had elected to rescind he would have been entitled only to the expense of investigating the title and preparation of the conveyance.

*Ontario Asphalt Block Co.* v. *Montreuil*, 29 O. L. R. 534, referred to.

Action to recover $3,330 and interest, money alleged to be due by the defendant under an agreement for the sale of land.

R. McKay, K.C., and A. L. Bitzer, for plaintiff.

Gregory, for defendant.

HON. MR. JUSTICE LENNOX:—The plaintiff acted in good faith, and when he entered into the contract was justified in believing that by the time the defendant became entitled to a deed he would be in a position to convey. The recitals in the agreement were sufficient to give notice to the defendant of the chain of assignments leading to the plaintiff; and the defendant was aware of the arrangement with Zettle. There was no obligation upon the plaintiff to convey until the defendant paid in full; and the defendant is not entitled to damages. At most, if he had elected to rescind, he would only be entitled to the expense of investigating the title and preparation of the conveyance. *Bain* v. *Fothergill*, L. R. 7 H. L. 158; *Gas Light & Coke Co.* v. *Towse* (1887), 35 Ch. D. 519; *Ontario Asphalt Block Co.* v. *Montreal*, 24 O. W. R. 289; 29 O. L. R. 534.

The defendant appears to have been allowed $200, and in adjusting the accounts it must be made clear that he has the benefit of an abatement to this extent as of the date of the cheque for $7,290.

The defendant made no application of the money at the time of payment excepting in so far as the wording of the

cheque affects the question; and the plaintiff had a right to apply it without reference to future instalments, under the terms of the agreement, and because he was releasing a part of his security.

I would like to relieve the defendant from payment of costs, as he has been at some inconvenience and loss, but as this has been without fault of the plaintiff, I have no discretionary right to relieve him except upon terms.

There will be judgment for the plaintiff for the $3,000 instalment due on the 1st November, 1913, with interest upon the outstanding balance at the contract rate to that date, and interest since then at 5 per cent., with costs; but if the defendant undertakes not to carry the action to appeal, the judgment will be without costs.

Stay for thirty days.

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HON. MR. JUSTICE MIDDLETON. MARCH 7TH, 1914.

## GAULIN v. OTTAWA.

6 O. W. N. 38.

*Municipal Corporations — Submission of Question to Electorate— Municipal Act, s. 398 (10) — Non-Compliance with—Lack of By-law—Injunction.*

MIDDLETON, J., restrained a municipality from submitting a question to a vote of the electors without a by-law therefor and without a compliance with conditions imposed by s. 398 (10) of the Municipal Act.

*King* v. *Toronto*, 5 O. L. R. 163, referred to.

Motion for an injunction restraining the defendant, a municipal corporation, from submitting a question to a vote of the electors. Heard 6th March, 1914.

W. N. Tilley, for plaintiff.

H. M. Mowat, K.C., for defendant.

HON. MR. JUSTICE MIDDLETON:—A by-law of the defendants for the taking of a certain vote has been quashed, but the defendant intends nevertheless to go on and take the vote, apparently upon the theory that a vote may be taken by a municipality without a by-law so directing.

Prior to the passing of the statute, now sec. 398 (10) of the Municipal Act, the right to submit any question to the

electorate was by no means clear. See *Helm* v. *Port Hope*, 22 Grant. 273; *Davies* v. *Toronto*, 15 O. R. 33; *Dalby* v. *Toronto*, 17 O. R. 554; *King* v. *Toronto*, 5 O. L. R. 163.

The statute was passed for the express purpose of defining the conditions under which a vote on any municipal question may be taken. It has been held that this vote is something quite outside of what is permitted by the Act, and is not in conformity with its provisions. It follows as a matter of course that an injunction must now be awarded to restrain a proceeding already determined to be illegal.

As this injunction determines all that is involved in the action, this motion should be turned into a motion for judgment and the order should be framed accordingly.

The plaintiff is entitled to his costs.

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HON. MR. JUSTICE MIDDLETON. MARCH 7TH, 1914.

## RE DORAN.

6 O. W. N. 37.

*Will—Construction—Life Estate—Vested Remainder—Conversion—Reconversion.*

MIDDLETON, J., *held*, that a gift to executors in trust for a daughter of the testator for life and thereafter for the child or children of her marriage, conferred a vested interest in the children.

Motion to determine certain questions arising on the will of the late John Doran. Heard 4th March, 1914.

J. Harley, K.C., for Esther Anne Force.

M. W. McEwen, for her husband.

A. E Watts, K.C., for executors of John.

HON. MR. JUSTICE MIDDLETON:—John Doran died on the 2nd August, 1895, having first made his will, dated 23rd July, 1884, by which he devised certain lands to his daughter Esther Anne Force for life, free from the control of her husband. Upon the death of the daughter he directed the lands to be sold and the proceeds to be divided among his brothers. By a codicil to the will, dated 11th April, 1888, made after the birth of the only child born to Mrs. Force, the testator directed his executors to hold the land after the

death of his daughter in trust for the child or children of her then present or any future marriage, and that after the sale the executors should apply the income towards the maintenance of the children, dividing the proceeds when the youngest child attains twenty-one, if more than one, and handing over the proceeds to the child on its attaining maturity, if there is only one.

The child died when fourteen years old; on the 25th October, 1899. I think the interest was vested in the child and upon its death its father and mother took as its heirs. There is no need for the conversion of the remainder, and they may take it in specie.

The costs of all parties may come out of the estate.

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YORK COUNTY COURT.

## CITY OF TORONTO v. CONSUMERS GAS COMPANY.

*Municipal Corporations — Rights over Highway—Construction of Sewers—Removal and Replacement of Mains of Gas Company —Cost of—By whom Borne—Estoppel — Public Utilities Act 3 and 4 Geo. V. c. 41, s. 51 — Moneys Paid by Municipality under Protest—Judgment for Return of.*

WINCHESTER, Co.C.J., *held*, that the right of a gas company to lay mains in a highway was subject to the paramount right of the municipality to utilize such highway for public purposes, such as the construction of sewers, and when by reason of the carrying out of such public purposes it becomes necessary to relay the mains of the company, the work is to be done at their expense.

*New Orleans Gas Light Co.* v. *New Orleans Drainage Commission*, 197 U. S. 453, referred to.

Action brought to recover $222.22, the cost of work done by the defendants in lowering one of their gas mains on Eastern avenue in the city of Toronto. The lowering of the gas main was made necessary by the construction of a sewer on the street by the plaintiffs. Plaintiffs paid the defendants the amount of such cost under protest and brought this action to recover same.

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

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

HIS HONOUR JUDGE WINCHESTER:—It is admitted that the work claimed for was done for the cost charged, and while the plaintiffs were constructing a sewer, in the public

interests, on Carlaw avenue, the work being done by the defendants and the price being paid to them by the plaintiffs under protest. The defendants contend that the gas main referred to was lawfully in the soil below the surface on Eastern avenue prior to the month of August, 1913, and subsequent to that time the defendants, not for their own benefit and advantage, but at the request of the plaintiffs and for the purpose of facilitating them in the construction of a sewer on Eastern avenue lowered the defendants' main at the cost of $222.22. The defendants refused to do the work necessary to lower the gas main unless and until the plaintiffs agreed and undertook to pay the cost of such lowering, which costs the plaintiffs finally agreed to pay, and did pay, under protest; that the plaintiffs were properly liable to pay the cost of the lowering and the defendants were entitled to receive the payment made by the plaintiffs and that the plaintiffs are not entitled to recover same from the defendants notwithstanding the fact that the payment was made under protest. Counsel for the defendants claimed that the plaintiffs were estopped by reason of their actions during a number of years previously in paying the defendants for works similar to the one in question. A number of letters and receipts being produced to shew that the engineers of the plaintiffs' corporation for the time being, had ordered work to be done similar to that in question and had paid the defendants for such work. This continued from the year 1891, apparently, up to 1913 when the present engineer of the plaintiffs objected to paying the cost of the work, but undertook to do so if the city were held to be liable, stating that an action would be brought to determine the question and in the meantime the amount would be paid under protest. Counsel for the defendants also contended that the pipes and mains of the defendants' company were laid on land on which they paid taxes and cited the case of *Consumers Gas Co.* v. *Toronto*, 27 S. C. R. 453, and that the plaintiffs had no right to interfere with the property of the defendants as claimed by the plaintiff. He also referred to the Public Utilities Act 3 and 4 Geo. V. ch. 41, sec. 51, sub-sec. 1, which provides as follows: "Main pipes or conduits for carrying or conveying any public utility underground in any way, shall not be laid down therein by a municipal corporation or company within a distance of 6 feet of the main pipes or conduits for carrying or conveying any public utility underground or any person

without the consent of such parties or the authority of the Ontario Railway and Municipal Board." The contention being that under this Act the plaintiffs have no right to lay their pipes within a distance of 6 feet from the mains and pipes of the defendants' company. A reference to that Act as carried into the R. S. O. 1914, ch. 204, shews that it does not apply to the work of constructing a sewer—see sec. 12, part 4. Counsel for the plaintiffs claims that no estoppel can be claimed against the corporation which represents the public, and also that no rights can be given to the defendants' company to interfere with the conduits of the plaintiffs' corporation in connection with the looking after the necessary work in the public interests on the public streets. A number of cases were cited by both counsel. Counsel for the plaintiffs, while citing some English cases, relied on a number of American cases. I have consulted the cases referred to by counsel, and I find the English cases were decided under special acts of Parliament and not applicable to the case in question. With reference to the case of *City of Toronto* v. *Consumers Gas Co. supra*, in connection with the assessment of their mains, I am of opinion that the occupation of the ground under the Act of Incorporation and amending acts by the mains and pipes do not make such mains and pipes land within the meaning of the statute. It was held there that the mains and pipes being connected with the freehold of the plaintiffs were assessable against the company as owner of the freehold. I would respectfully refer to the decision of Mr. Justice Rose reported on that point, he, while agreeing with the majority of the Court to dismiss the appeal from the decision of the Chancellor who held that the defendants were properly assessable under the Consolidated Assessment Act, for their mains and pipes as pertinent to the land owned by the company for the purpose of its business, stated: "Looking at the Act of Incorporation and the Amending Acts I cannot agree that the occupation of the ground under such Acts by the mains and pipes makes such mains and pipes land within the meaning of the statute. . . . The mains and pipes remain the property of the company; the land remains the property of the city. . . ." See 23 A. R. at p. 554.

With reference to estoppel, it is stated in Dillon on Municipal Corporations, 5th ed., sec. 1192, that estoppel does not apply to the sovereign rights of the people, except

as they are restricted in the constitution, citing *Ralston* v. *Weston*, 46 W. Va. 544, and other cases cited. In *Ralston* v. *Weston*, the Court said, with reference to the doctrine of estoppel: "The use of the highways is a sovereign right, common to all the people, and of which they cannot be divested, except in accordance with their will and appointment for the public weal. The law is best enunciated in the case of *Webb* v. *City of Demopolis*, 95 Ala. 116, where it is held that "a city or town has no alienable interest in the public streets thereof, but holds them in trust for its citizens and the public generally; and neither its acquiescence in an obstruction or private use of a street by a citizen, nor laches in resorting to legal remedies to remove it, nor the Statute of Limitations, nor the doctrine of equitable estoppel, nor prescription, can defeat the right of a city to maintain a suit in equity to remove the obstruction."

I understand that it has been held by the Dominion Board of Railway Commissioners that there can be no estoppel against the city in connection with the streets. I am of opinion that the objection on the ground of estoppel is not a valid one in the present case.

With reference to the rights of gas companies it has been held that a franchise for laying gas pipes, etc., in the city streets under a general grant of authority to use the streets therefore are subject to the paramount power and duty of the city to repair, alter, and improve the streets as the city in its discretion may deem proper, and to construct therein sewers and other improvements for the public benefit. This paramount power and duty of the city is clearly governmental in its nature, and, in many cases at least, form a part of the police power of the municipality. The decisions hold that the grantee of the franchise has no cause of action for any damage which it may sustain by acts of the city in the reasonable performance of its duty in these respects; sec. 1271 of Dillon, one of the leading cases in connection with this question of franchise is that of *New Orleans Gas Light Co.* v. *New Orleans Drainage Commission* (1905), 197 U. S. 453. In that case it was held that the gas company had, by statute, the right or franchise to lay pipes and conduits in the streets and alleys of the city at its own expense, in such manner as to least inconvenience the city and its inhabitants, and the company was required afterwards to repair with the least possible delay

the streets it had broken. There was nothing in the grant of the franchise which gave the company the right to any particular location in the streets. It was held that the construction of a system of drainage in the interests of public health and welfare was one of the most important purposes for which the police power can be exercised, and that the changing of the location of the gas pipes at the expense of the gas company to accommodate the system, did not amount to a deprivation of property without due process of law. Mr. Justice Day, who delivered the opinion of the Court, said: "It would be unreasonable to suppose that in the grant to the gas company of the right to use the streets in the laying of its pipes, it was ever intended to surrender or impair the public right to discharge the duty of preserving the public health. The gas company did not acquire any specific location in the streets. It was content with the general right to use them, and when it located its pipes, it was at the risk that they might be, at some future time, disturbed, when the state might require, for a necessary public use, that changes in location be made. The gas company, by its grant from the city, acquired no exclusive right to the location of its pipes in the street as opened by it under a general grant of authority to use the streets. The city made no contract that the gas company should not be disturbed in the location chosen. In the exercise of the police power of the state for a purpose highly necessary in the promotion of the public health, it has become necessary to change the location of the pipes of the gas company so as to accommodate them in the new public work. In complying with this requirement at its own expense, none of the property of the gas company has been taken and the injury sustained is *damnum absque injuria*. See also *Scranton Gas and Water Co* v. *Scrantou* (1906), 214 Pa. 586, where it was held that "the easement which a gas or water company has in the streets of a municipality, is subject to the superior right of the public, both in the surface and the soil beneath the surface. When a city changes the grade of a street in order to do away with a railroad grade crossing, and a gas and water company is compelled to move its pipes from the street by reason of the change of grade, the company can recover no damages from the city for the injuries sustained." *Re Deering* (1883), 93 N. Y. 361 (N. Y. Ct. of Appeals) it was held that "the provision of the Act providing for the incorpor-

ation of gas-light companies, which authorises such corporations to lay their pipes through the streets of cities and villages, with the consent of the municipal authorities, does not exempt them from the risk of their location, and they may be required to make, at their own cost, such changes as public convenience or security requires." *National Water Works Co.* v. *City of Kansas* (1886), 28 Fed. Rep. 921, it was held that "a water company laying its pipes in the streets of a city, under a contract with the city, does so subject to the right of the city to construct sewers in the said streets whenever and wherever the public interest demands; and if, in consequence of the exercise of this right, the company is compelled to relay its pipes, it can maintain no claim therefor against the city, unless the action of the city is unreasonable or malicious. An allegation that the sewer might have occupied other space in the street is not equivalent to an allegation that the city acted unreasonably or maliciously. Mr. Justice Brewer, in his judgment at p. 922, said: "An ordinance was passed authorising plaintiff to construct waterworks, the provisions of which, being accepted by the plaintiff, constituted the contract between the parties. In this ordinance it was provided as follows: 'The city reserves to itself the right, at all times, to make and enforce all reasonable and proper regulations as to the place where pipes may be laid in the streets, and the conducting of all operations thereon and therein by said company.' Also that the city of Kansas, by its authorized agent or agents, shall have a right to designate on what streets water-pipes shall be laid, and the places at which hydrants shall be located; but said company shall not be required to lay pipes on any street on which the grade shall not have been established, and the places for the location of hydrants shall be designated by the city, as aforesaid, at such times and in such manner as not to impede or interfere with the laying of pipes by the company. The plaintiff contends that by this contract it was bound to lay its water-pipes in this street, that it did lay it in the place and manner by the city directed, and thereby acquired such a vested property right in an undisturbed location and possession that any future trespass upon or invasion thereof, like any other attack on private property, would subject the city to an action for damages; while the contention of the city is that the matter of sewerage is one affecting the public health; that it could not if

it would, and it did not if it could, contract away the right to construct sewers in any part of the public streets it might deem necessary and that the plaintiff took its contract right to lay its pipes in the public streets subject to the paramount and inalienable right of the city to construct its sewers wherever therein, in its judgment, the public interests demanded. I think the contention of the city is correct." (Citing *Butchers Union Co.* v. *Crescent City*, 111 U. S. 746). See also *Belfast Water Co.* v. *Belfast* (1898), 92 Me. 52.

In the English case of *Southwark and Vauxhall Water Co.* v. *Wandsworth District Board of Works*, [1898] 2 Ch. 603, where "a water company in exercise of statutory powers laid down pipes under the surface of the street, and the highway authority of the district afterwards, in exercise of their power in that behalf, proposed to lower the surface of the street, without altering or disturbing the position of the pipes, but so as to leave only a few inches of soil over them. In an action to restrain the highway authority from lowering the surface of the street without at the same time lowering the pipes of the company to a corresponding depth under the new surface, it was held that the 98th section of the Metropolis Management Act, 1855, under which the highway authority acted, did not impose on them, when exercising the power thereby given to them of altering the level of a street, any express or implied duty to exercise also at their own expense the power by the same section given of altering the position of the pipes thereunder for the benefit of the water company, in a case where the highway company did not require for their own purposes to interfere with such pipes. Lord Justice Lindley, M.R., in his judgment at p. 608, said: "The plaintiff pay nothing for the privilege of laying their pipes down in a public path or road, and they run the risk of having the surface made higher or lower by the road authorities under their statutory powers." Lord Justice Chitty, L.J., at p. 609, said: "The case is one of some importance; for the decision will affect not only water companies, but gas and other like companies who have the like statutory privilege of laying pipes under the public streets in the metropolis. For these privileges they make no payment. I am unable to find in the section any express or implied duty cast on the road authority. When

they exercise their power of altering the level of the road, whether by raising or lowering it, to exercise at their own expense their power of altering the position of the pipes for the benefit of the company owning the pipes, must less any duty to place the pipes at a depth below the new surface corresponding with the depth at which they stood below the old surface. I think that no such duty is imposed upon the appellants. The real question is on whom the expense of altering the position of the pipes is to fall. It appears to me that it falls on the company, as between the road authority and the company, I think that the road authority are paramount. They are entrusted with the powers over the street, not for their own profit as a statutory body, but for the benefit of the public using the streets as a highway. The statutory undertaking of the water company is vested in them with a view to their own profit as a company, etc., "and for the purpose of affording a supply of water to consumers of water in their district."

Without going further into the various cases and authorities referred to, I am of opinion that the corporation of the city of Toronto has the paramount duty of providing for the health of the citizens with reference to the construction of sewers on their streets, and that the defendants have only the right to use the streets for their own benefit, subject to that paramount authority, and that the defendant company cannot compel plaintiffs to go to the expense of removing their pipes when it is necessary in the public interest they should be removed, but they are compelled to remove same at their own expense. In coming to this conclusion, I follow the decisions of the American authorities which, in my opinion, are applicable to the point at issue. Judgment will be entered for the plaintiffs for $222.22, and costs of the action.

SUPREME COURT OF ONTARIO.

FIRST APPELLATE DIVISION. MARCH 9TH, 1914.

## KOHLER v. THOROLD NATURAL GAS CO.

6 O. W. N. 67.

*Contract—Purchase of Natural Gas—Terms—Evidence—Damages—Measure of—Profits—Reference—Appeal.*

SUP. CT. ONT. (1st App. Div.) *held*, that defendants had not committed a breach of their contract to take certain natural gas from the plaintiffs upon the terms therein stated.

That in any case the measure of damages was not the contract price of such gas, but the profits lost by plaintiffs.

*Silkstone and Dodsworth Coal and Iron Co.* v. *Joint Stock Coal Co.*, 35 L. T. R. 668, followed.

Judgment of BOYD, C., reversed.

Appeal by defendants from a judgment of HON. SIR JOHN BOYD, C., dated 13th October, 1913, affirming the report of His Honour Judge Douglas, the Local Master at St. Catharines, dated 9th August, 1913, by which the appellants were held liable for breach of contract to take and pay for natural gas to the extent of 44,853,170 cubic feet.

Damages were assessed on the basis of the price contracted to be paid, namely, at 16 cents per cubic foot, which, after crediting the amount ($197) received by the respondents for some 1,300,000 cubic feet sold with defendants' consent, amounted to $6,979.50.

H. H. Collier, K.C., for appellant.

W. T. Henderson, K.C., for respondent.

The appeal to the Supreme Court of Ontario (First Appellate Division) was heard by HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE and HON. MR. JUSTICE HODGINS.

HON. MR. JUSTICE HODGINS:—The appellants maintain that they committed no breach of contract but that if they did, damages are not properly proved, are excessive, and are based upon an erroneous principle.

The respondents are gas producers, and had, when the contract was made, 15 wells in Canboro field extending over 1,000 acres and own an 8-inch pipe line from the field to

Dunnville; while the appellants own a transmission line through Dunnville and Winger, where the gas is delivered to the United Gas Co. to be supplied to consumers in St. Catharines and elsewhere.

Naturally the respondents desire to sell all the gas their wells produce and the appellants are anxious to control the supply and transmit as much as they can.

The contract sued upon, dated October 14th, 1911, must be read in the light of the situation of the parties at the time it was made.

So far as that appears in evidence it may be summarised thus: There were two earlier contracts on foot; one of the 13th February, 1909, between Waines and the United Gas Co., (which was amended on the 19th May, 1909, so as to allow the United Gas Co. to substitute a pipe line to be laid by the appellants for one which they had agreed with Waines to construct), and one between Aikens, Lalor & Beck and the appellants, dated 28th June, 1911. Aikens who was one of the parties to the latter contract is one of the respondents here.

By the Waines contract, as amended, the United Gas Co. were bound to take a specified quantity of gas or such less quantity as Waines should be able, from time to time, to deliver for 16 cents per cubic foot until 1st May, 1913, after which the price was to be 20 cents, and the quantity was to be slightly less. The United Gas Co. were bound to pay up to the specified quantity whether they took delivery or not.

By clause 7 of that agreement, the gas was to be delivered into the company's pipe line, or into the appellants' transmitting line at or near the west end of Canal street in the town of Dunnville, and was to be supplied and maintained at the point of delivery "at a pressure of at least 50 pounds to the square inch, provided that the company shall not maintain a pressure of greater than 50 pounds in its own line at the said point."

It may be noted that this last restriction is not expressly made to apply to the line of the transmitting company, but this is not important in view of the provisions of the present contract.

The last clause of the agreement provides that if in consequence of Waines not maintaining a pressure of 50 pounds

to the square inch at the point of delivery the company is unable to market the quantities agreed to be purchased, its obligation to pay shall be limited to the extent to which it can receive delivery at such pressure.

The second contract, which was between Aikens, Lalor & Beck and the appellants, recites the contract as amended, and the agreement of the appellants with the United Gas Co. to transmit the Waines gas through the appellants' line. The provision as to the delivery of the gas at a pressure of 50 pounds is recited in these words: "Provided that a greater pressure is not maintained in the company's line between Dunnville and Winger." The contract then proceeds:—

"And whereas the company desires to recognise the obligations of the United Gas Company binding on it under the said Waines contract in so far as the transmission of the Waines gas through its line is concerned, and whereas the company has agred . . . to lay a line . . . of such capacity as to transmit the gas herein agreed to be purchased for delivery to the company at such a pressure as will enable it to be transmitted to the lines of the United Gas Company . . . having regard to the conditions as to pressure aforesaid."

Then follow provisions for the supply of specified quantities of gas and for such additional gas to the extent to which the company shall secure customers therefor.

The contract provides for its continuance on certain conditions, one of which is, so long as the contractors are able to deliver gas at a pressure sufficient to enable the company to transmit it to its customers. The result of these two contracts, so far as it affects the parties to this appeal, is that the Waines gas was to be delivered at a pressure of at least 50 pounds to the square inch, and that in order that that pressure should enable the gas to enter the company's main, the company was not (and this is the provision) to maintain a pressure in its pipe of more than 50 pounds. This restriction, though not in terms made applicable to the appellant, is recognised as an obligation of the United Gas Co. in second contract and in the one sued on. Under the second contract the obligations of the United Gas Co. as to pressure were recognised and the Aikens gas was to be delivered at a pressure sufficient to enable the company to

transmit it to its customers. Just what that pressure was must have been known to the respondents, through Aikens. It is also to be noted that the price of the Waines gas was 16 cents up to the 1st May, 1913, and of the gas under the contract with Aikens Lalor & Beck 13 cents to 1st October, 1913; while under the contract sued on it was 20 cents up to the 1st April, 1912, and 16 cents thereafter, and that trouble does not occur until the price of the respondents' gas is lowered to 16 cents. As that was the price of the Waines gas there was no reason to favour one as against the other.

The agreement sued upon in this action recites these two prior contracts and the provisions therein as to pressure and proceeds:

"The contractors (the respondents) agree to sell and deliver to the company at its meter house in the town of Dunnville . . . against the line pressure, from time to time, in the company's line at that point having regard to the contracts aforesaid, all the natural gas . . . which is now being or which may be hereafter obtained from the lands now leased or controlled by the contractors . . . in such amounts as they shall have available for delivery at the rate of 20 cents per 1,000 cubic feet up to April 1st, 1912, and after that at the rate of 16 cents per 1,000 cubic feet to May 1st, 1913, and thereafter at the rate of 20 cents per 1,000 cubic feet."

The gas was to be delivered through two standard meters in the company's meter house at Dunnville and the average of the readings of the two meters was to be taken as the correct measurement. These meters were equipped with recording volume and pressure gauges.

The contract further provided that it was to remain in force only so long as the contractors were able to deliver gas at a pressure sufficient to enable the company to transmit it to the United Gas Co. at its line in Winger. A report of the daily meter readings of gas sold was to be mailed each day by the contractors.

The question is as to the meaning of the words in the contract "deliver against the line pressure from time to time in the company's line . . . having regard to the contracts aforesaid."

It is to be observed that while the obligation of the United Gas Co. not to maintain a pressure in its own pipe

at the delivery point in Dunnville of greater than 50 pounds, was not applied to the appellants' line, yet the obligations of the United Gas Co. were recognised in the contract sued on and the delivery would be subject to that obligation and is so treated in both of the Aikens contracts. No evidence was given, however, shewing that the United Gas Co. or the appellants, did maintain a pressure in its pipes of more than 50 pounds, nor whether Waines did or did not maintain the 50 pounds pressure, though the appellants' manager says they did not take the full amount contracted for from Waines (p. 44, ex. 16). The question seems narrowed to whether the appellants were entitled to allow and provide for the Waines pressures which was to be "at least 50 pounds pressure" and might be more. The appellants did so by putting in a regulator, and their manager (p. 43) says: "It was necessary to do so to regulate the gas so we could take the gas which we were under contract to take from Waines and Root, and also from Aikens, Lalor & Beck." This regulator is said to have been adjusted to 50 pounds so that when the pressure in their pipes got above 50 pounds the respondents' gas was shut off. This seems to me to be a correct view of their rights. The respondents were entitled to deliver against the line pressure, and if Waines' pressure was under 50 pounds they could get it, whereas if it were 50 pounds or over the gas coming in under the Waines contract had the right of way. In order to enable it to use that privilege the gas in the United Gas Company's main at Dunnville into which it entered was to be kept down below 50 pounds. This pipe has been treated as synonymous with the appellants' pipe at Dunnville, and rightly so in my opinion, not only because the latter pipe was evidently substituted for that of the United Gas Company's pipe at that point, but for the reason that the contract sued on expressly recognises that it was the line pressure, "having regard to the contracts aforesaid" against which delivery was to take place. On looking at exhibits 5 and 20 it will be found that every supply pipe line has a gate valve, a regulator, and a meter. The Waines gas entered the main pipe line outside the meter house after going through the house and passed, as it started on its way to St. Catharines, the opening or junction of the respondents' pipe. If the regulator shut off the respondents' supply entirely just as it entered the meter house,

it would form a dead end into which the Waines gas could back up or which it would fill if it could back up through the meter. But it is obvious that if the respondents' pipe were working at a pressure greater than that at which the Waines gas was being delivered, the result was that the pressure rose above 50 pounds, then Waines would be delivering against conditions which his contract said were not to exist against him. If then the delivery of the respondents' gas were subject to the provision that the company was not to maintain against the Waines gas a pressure of greater than 50 pounds, the appellants were in my judgment entitled so to regulate the entry of the gas under the contract sued on, so that it could not prevent the Waines gas from entering and feeding. If, as was sworn to, the regulator was set and maintained so as to open automatically wnen the pressure went below 50 pounds, there could be no valid reason, in my judgment, for concluding that the appellant had done anything wrongful. There was no evidence to meet that of Price and Fuller, upon the condition of the regulator, and the latter was not even cross-examined upon his statement that he was in the regulator house of the appellants practically every day in the course of his duty; that the regulator was in perfect condition all summer, and that it was never at any other point than 50 pounds, and that no one else had access to it.

This construction of the contract is objected to by the respondents who claim themselves for the benefit of the appellants' contract with Waines not to maintain a pressure of over 50 pounds. They say this meant that the appellants were so to manage the deliveries of gas in St. Catharines, that all the gas which entered their main pipe from any source would be fed to customers at the other end in St. Catharines, thus leaving only 50 pounds pressure in their pipe as against Waines, and that in fulfilling, as to Waines, the bargain they made with him as to the pressure against which he was to deliver they were bound likewise to perform it for the respondent's benefit. Testing this construction by its practical results, it would mean, in the first place, that the respondents were to be ready with customers in St. Catharines, who would take the gas delivered by the respondents at any pressure, and at any hour and in any quantity at the pleasure of the respondents. In the second place, that while Waines could and was

bound to deliver at a pressure greater than 50 pounds, his gas must be likewise at once consumed or delivered in St. Catharines so as to enable the respondents to deliver it against a pressure only of 50 pounds. I do not see in the contracts any such onerous provision as to finding customers to consume gas delivered under such conditions, and if it was intended it would no doubt have been stated, as it is in the Waines' contract in the form of an absolute obligation to take a specified quantity or to pay for it whether taken or not.

It is further said that in taking the respondent's gas at a pressure of say 70 pounds, or any figure greater than 50 pounds, when the line pressure was only 50 pounds, the pressure would tend to equalize at a point between 70 and 50 pounds, and that unless it was at once reduced by deliveries in St. Catharines it would so remain or rise towards rock pressure, and that, therefore, it was the duty of the appellants to so feed at St. Catharines as to reduce and keep the pressure at or under 50 pounds. A careful perusal of the various contracts does not, in my judgment, warrant the conclusion that the respondents' contentions are correct. The Waines contract makes the appellants liable to pay for a specified quantity of gas, whether they take it or not, and entitles them to take additional gas "to the extent to which the company shall secure customers therefor." By reason of the obligation to take the specified quantity of gas, and also on account of the right to take more, it seems natural that provision should be made as to the pressure of delivery of the Waines gas, and also as to the appellants' own line pressure, which they were bound to preserve in order to create sufficient flow for their customers in St. Catharines. This is further enforced by the provision that Waines should not at any time or times turn in gas into the main nor turn it off without the company's consent being first obtained.

The contract sued on must be read as subject to the prior obligation of the appellants to Waines and Aikens, Lalor & Beck to take all the gas contracted for on the conditions as to pressure specified. Its provisions are not merely limited to pressure. It recites that the respondents desire "to recognize the obligation of the United Gas Company, Limited, binding on it under the Waines contract, in so far as the transmission of the Waines gas"

(*i.e.*, all, whether obligatory or optional) "through its line is concerned, and also to recognize its obligation to the said Aikens, Lalor & Beck to purchase and transmit gas pursuant to the said contract with them."

It then goes on to provide that the respondents have "agreed to sell and deliver to the company at its meter house in the town of Dunnville in the county of Welland, against the line pressure from time to time in the company's line at that point, having regard to the contracts aforesaid."

I think this contract cannot be construed so as to disregard the fact that the pressure against which the respondents were to deliver was the line pressure created by the conditions provided for in the Waines and Aikens, Lalor & Beck contracts, which might, and was specified to be, the delivery at not less than 50 pounds pressure of an agreed quantity of gas, and more, if the appellants had customers for it. To read it as the respondents contend is to require the appellants to find an outlet for all the respondents' gas, whenever delivered and at whatever pressure they chose to give it, notwithstanding the fact that the deliveries of the gas under the prior contracts might create conditions which would, having regard to those contracts, raise the pressure beyond 50 pounds and produce a volume of gas sufficient to feed all that the customers in St. Catharines could take at the time or times in question.

The provision in the contract sued on that the respondents were not "at any time or times" to turn gas into the appellants' main without reasonable notice, nor to turn it off without consent, indicates that the situation in which the appellants might from time to time be, would be such that they could not take the preferred gas, and had the right to require reasonable notice so as to enable them to arrange with the prior contractors.

The following passage from the learned Master's report indicates an agreement on the part of the respondents with the general view of the contract which I have taken, though not perhaps in its application. He says: "Now, if the gas being delivered by Waines & Lalor, *et al*, created a pressure of 50 pounds to the square inch at the point of delivery of plaintiffs' gas, the plaintiffs could not, and say they would not complain, for it was expressly agreed that

their delivery of gas was subject to the deliveries of gas under the two contracts," etc.

The respondents' pleading in the action makes no charge that the placing of the regulator was a breach of contract, or had that result, but claimed that subsequent contracts were made under which the appellants took gas to the exclusion of that of the respondents. The learned county Judge, however, in his report, allowed an amendment, alleging that the regulator was so operated as to prevent delivery by the respondents.

It is contended that the respondents were only to deliver against the line pressure and not against an obstruction like the regulator. That is true in one sense, but it is the line pressure, having regard to the contracts, under which the maintenance of a greater pressure than 50 pounds would or might discriminate against Waines. Up to 50 pounds pressure, the respondents had, subject to the earlier contracts and to the situation created by them, the right to enter. I cannot agree with the learned County Court Judge that the placing of the regulator was a breach of contract, and there is no evidence that the regulator was out of order or was fixed at more than 50 pounds. Aikens' complaint is that it was so far shut that only the quantity they took could get through.

I cannot help feeling, from an examination of the later events and of the records filed, that the claim is more or less an afterthought. It would appear that no difficulty occurred until April, 1912, although the regulator was on from the beginning in the November previous (p. 51) on the 26th of which month Aikens says delivery began (p. 4), During all the time previous to April, 1912, two lines with regulators, the one under the contract sued on, and one under the earlier Aikens, Lalor & Beck contract, on both of which Aikens was concerned, were being used, and in both cases daily reports are provided for, and the respondents were paid monthly on the basis of these reports. Presumably this was the case with the earlier contract too. Between June 1st and 8th, 1912, Aikens says he directed the turning off of eight wells (out of 15), because the regulator had raised pressure to such a high figure that he thought it better to keep it down for the purpose of safety (pp. 12 and 30). This corresponds with the record of pressure for May, because the average pressure on two days in the respondents' line in that month reached 101 and

was quite high on others. That pressure and the shutting down of the wells brought the matter pointedly to the notice of the respondents. No complaint was then made. Pressure then fell off, and in August, during the first twelve days, the pressure in the respondents' pipes averaged only 15 pounds. (The month's pressure in Ex. 8, given for August is 6, but that is arrived at by excluding these twelve days). It is in August that both parties admit something was said about the gas. Aiken asserts that he said they were not taking gas according to contract (p. 20), but admits that before December 28th, 1912, his previous complaints were more or less of a general character urging the appellants to take more gas (p. 22), and that he cannot recall a request to put more wells in the summer of 1912 (p. 33).

Price, appellants' manager, admits the complaint in August, 1912, Aikens wanting to know if they could not take more gas, and he told him they were taking all they could sell at the time (p. 45). Price says he asked Aikens to turn on more wells during the summer of 1912, and thinks it was in July or August (p. 50). Fuller is more definite and says he interviewed Aikens twice in July or August, 1912, about the shortage of gas and obtained a promise to have more gas turned on (p. 55).

If the records are of any use by way of comparison they indicate that in July and the first twelve days of August the respondents' supply of gas was smaller than in April, May and June, and in the latter part of August and later months, and what is called a complaint on the one side may have been really a request to allow more gas to be furnished, the eight wells having then been shut about six weeks, but just when is not stated. The gas under the Kindy contract was received in August. In September one well of the respondents was turned on, and on November 29th, seven more. On October 29th, 1912, Aikens, Lalor & Smith made a contract with the appellants for supplying all the gas they had or might develop from a field in the township of Dunnville, and reference is therein made to a contract entered into at the request of the contractors and on the same day with Lalor (one of the respondents) to take all his gas from a field in the township of Sherbrooke. Gas under this contract began to be delivered on the 19th December, 1912, and not till after that and on 28th December, 1912, was any formal complaint made that the appellants

were not acting reasonably under the contract in question. In that letter it is said: "You are not taking gas according to contract. We have put up with this condition during the summer, and it has now reached the stage that we must be assured that you will either take our gas or free us from our contract." In this letter no claim is made for damages, and it seems to acquiesce in the situation as being a reasonable one during the summer. Point is given to this by the subsequent letter of January, in which it is alleged as a grievance that the appellants "have undertaken to accept delivery of gas from a new contractor" (Aikens himself, Lalor & Smith, see p. 21), "the effect of which is to prevent your accepting delivery under our contract." This letter complains of the regulator as creating an artificial pressure against gas. The complaint as to a subsequent contract is repeated by respondents' solicitors on March 3rd, 1913, but the regulator is not mentioned.

I think it may fairly be said that there was acquiescence until the 28th December, 1912. There was complete knowledge, as payments were made up on monthly statements shewing the pressure, there was the closing down of wells by the respondents in June on account of the non-acceptance of the gas now complained of, there was the non-delivery of the usual quantity of gas in the first twelve days of August, a complaint or a request for more in that month, the turning on of one well on September 8th, and the turning off of three the day after gas had begun to be delivered on the subsequent contract, nor was there any complaint until that had been fairly started, and then in a way which leads to the conclusion that the conditions during the summer had been suffered without any real objection.

But if this were not so I do not think the respondents proved their damage by proper or sufficient evidence. The records relied on as proof are average records only, *i.e.*, the average pressure of the 24 hours, and there is no information given in the exhibits as to whether the pressure in the company's pipe was over fifty pounds, when that in the respondents' was also over fifty, which might occur if the regulator were then closed or whether, which is the inference sought to be drawn, the higher pressure of the respondents' gas occurred when that in the appellants' pipe was below fifty pounds. Average tells nothing as to the exact

facts, but merely that the result of 24 hours' pressure averaged so much. Is this sufficient to shew what the respondents allege, namely, that they were shut out when the pressure was below fifty pounds?

On the whole, therefore, notwithstanding that the appellants' manager admits that the regulator was the bar to admission (and a rightful bar, if used in relation to the earlier contract), I think his point is well taken that an average of 24 hours is not a definite proof of unequal pressures at the same time. Aikens admits (pp. 20 and 26) the irregularity of pressures at specified times during the day and night. Nor is there sufficient proof that the average pressure in the appellants' pipe, though lower than that of the respondents, was not the proper pressure, having regard to that of the gas under the Waines contract and that of Aikens, Lalor & Beck. If as said by Aikens (p. 10), that the regulator was only opened to admit the amount the appellants took, it may have been quite right to allow such a margin as to keep within the terms of the Waines contract. It may be that the amount taken was less than fifty pounds, but we are left in the dark as to whether this was not a reasonable precaution, having regard both to the Waines contract and that of Aikens, Lalor & Beck, under which their gas was to be supplied at a pressure sufficient to enable delivery to be made to the customers.

Nor am I satisfied with the conclusion that all that the respondents claimed was lost to them by suction into the other wells. If the respondents' theory is correct that they were keeping a strong head at the appellants' meter house continually, then the same gas could not be flowing in the other direction at the same time. The density of the gas at the regulator and consequently the pressure, was no doubt increased, but could only be kept up by continued pressure, but if that pressure was constant, the gas would cease to flow toward that point after the density became too great. Under these circumstances, it could not all have escaped as found by the Master, and we have no means of telling how much did so. The records of the Waines wells at Darling road (Ex. 19) shew a higher pressure there than from the appellants' wells, which, according to Mr Aikens, would tend to make the flow from Waines' to the respondents' wells rather than the other way. This is inconsistent with the earlier conclusion.

Aikens admits that his belief in the loss of gas by suction from other wells is not the result of any investigation made (pp. 26, 32).

The evidence given by Aikens as to how he knew they had all the gas claimed ready for delivery during all the time, hour by hour, is rather in the nature of inference than of proof. He says (p. 12): "That the reason he knows we had the quantity as claimed in the statement" in the month of December, the last month of our claim, we delivered up until the 10th day of December, when all our wells were on 6,403,417 feet or a daily average of 337,022 feet;" and (p. 13):-that the last month, December, being the determining month of the quantities "that is why I state that we had the quantities at the end of the period."

In this he makes no allowance for the shutting down of seven wells from June till November 29th (except one turned on, on September 8th), nor for the fact that he drilled two wells in September (p. 13), nor for the short delivery from 1st to 12th August, when the average daily delivery was only 173,043 feet.

The appellants say that they were not receiving the whole amount contracted for by Waines & Aikens, Lalor & Beck (except as to the latter during one month) from April to December (see Ex. 16), and it seems incredible that they would wilfully reject the gas offered by the respondents at 16 cents per 1,000 feet, when that of Waines would have cost them 20 cents, or if Waines was so short as to cause them trouble with their customers.

The damages are, to my mind, if any were recoverable, assessed upon a wrong principle. They were allowed for at the contract-price, and no deduction is allowed for the cost of production. See *Silkstone, &c., Co.* v. *Joint Stock Coal Co.* (1877), 35 L. T. 668.

It is asserted that the cost of producing this particular gas was nil, or practically nil, because all the expenditure had been gone to previously, but that is not sufficient, I think, to dispose of the question. The wells were closed and opened during that period, two wells were drilled in September, and a proportion of the initial cost of producing must be attributed to this supply. It is only their profit that can be recovered as damages, and no evidence was given on that head, nor was anything said as to

whether they could not have supplied others with the gas meanwhile.

On the whole, I think the appeal should be allowed with costs, and the action dismissed with costs.

HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MACLAREN, and HON. MR. JUSTICE MAGEE, agreed.

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HON. MR. JUSTICE LATCHFORD. FEBRUARY 24TH, 1914.

## REID v. AULL.

5 O. W. N. 965.

*Trial—Application for Hearing in Camera—Action for Declaration of Nullity of Marriage—Illness of Plaintiff — Refusal—Public Policy.*

LATCHFORD, J., *held*, that the Court has no jurisdiction except in certain well-defined cases to direct the trial of a civil action in *camera*.

*Scott* v. *Scott*, [1913] A. C. 417 and *Daubney* v. *Cooper*, 4 B. & C. 237, followed.

Action brought on behalf of Doris Reid, an infant under the age of twenty-one years, by her father as next friend, for a declaration that an alleged marriage between the plaintiff and one Robert Aull, solemnized at Cobourg on the 25th July, 1913, but not consummated, is null and void on the ground that the plaintiff, who was at the time under 18, did not consent to the marriage and was not sensibly and willingly a party to the ceremony, but was induced to take part therein by the fraud, deceit and misconduct of the defendant.

Geo. H. Watson, K.C., moved upon notice for a direction that the trial of this case take place in camera.

In support of the application, Mr. Watson filed an affidavit made by the plaintiff's father, verifying a certificate by Dr. J. F. Fotheringham, and stating that his daughter was ill, and that her examination and cross-examination in open Court would, in his opinion, be attended by serious and possibly fatal consequences.

Dr. Fotheringham, as the result of an examination into the state of the plaintiff's nervous equilibrium, considered

that her evidence could be much more fully and accurately obtained if she were not called upon to give it in open Court, and that if she testified in public there would, in his opinion, be great danger of a nervous collapse, which might be attended with serious consequences.

Defendant was not represented.

HON. MR. JUSTICE LATCHFORD:—It is to be remembered that here, as in England, the law is administered publicly and openly, and its administration is at once subject to, and protected by, the full and searching light of public opinion and public criticism. The openness and publicity of our Courts forms one of the excellences of our practice of the law, and, in the words of Lord Justice Fitzgerald, in *Macdougall* v. *Knight*, [1889] 14 A. C. 194 at 206, admits of exception only in the rare cases of such a character that public morality requires that the proceedings should be in camera in whole or in part. In criminal trials in Canada the right to exclude the public conferred upon the trial Judge by art. 645 of the Code is restricted to cases in which the Court considers the exclusion to be in the interest of public morals.

Other exceptions occur in the case of wards of Court, in lunacy proceedings and in actions regarding secret processes, where the paramount object of securing that justice be done would be doubtful, if not impossible of attainment, if the hearing were not in camera.

The recent case of *Scott* v. *Scott*, [1913] A. C. 417, in the House of Lords, reversing the Court of Appeal, [1912] p. 241, is remarkable, not only for the strength of the Court composed of Lord Haldane, L.C., and Lords Halsbury, Loreburn, Atkinson and Shaw, each of whom delivered a considered judgment, but for the wide field covered by their Lordships, and especially for the numerous and far-reaching propositions declared to be the law of England regarding the necessity (with the exceptions mentioned) of having all trials open and public.

The neat point for decision appeared to be unimportant. It was merely whether an order to commit for contempt of Court, made because of the publication of proceedings held in camera, in a case in the Court for Divorce and Matrimonial Causes, was a judgment in a "criminal cause or matter," within the meaning of sec. 47 of the Judicature Act, 1873—in which case no appeal lay.

The disposition of what seemed an ordinary matter of practice involved several questions of the utmost public importance. In construing certain sections of the Matrimonial Causes Act, 1857, 20 & 21 Vict. ch. 85, especially secs. 22 and 46, and the practice that had arisen in the Court thereby constituted, it was pointed out that the modern practice of hearing suits for nullity in private arose out of a misconception of what was the actual practice in the Ecclesiastical Courts. Under sec. 22 of the Act of 1857, the new Court was to proceed and act and give relief on principles and rules as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts had previously acted and given relief. Undoubtedly the earlier stages of the proceedings in the Ecclesiastical Courts for annulment occasionally took place in camera. But when the commissioners had taken the evidence, both parties had access to it. This was called "publication." (Lord Haldane at p. 433); but with few exceptions all the subsequent proceedings were public.

Commenting on sec. 22 and on sec. 46, which provides that subject to such rules as the Court might establish under sec. 22, the witnesses in all proceedings before the Court, where their attendance can be had shall be sworn and examined orally in open Court, Lord Shaw says (p. 475): "In my humble opinion, these sections of the Act of 1857 were declaratory in another sense:" (*i.e.*, in addition to declaring that the proceedings were to be in open Court throughout) they brought the matrimonial and divorce procedure exactly up to the level of the common law of England.

I cannot bring myself to believe that they prescribed a standard of open justice for these cases either higher or lower than for all other causes whatsoever. And it is to this point accordingly that the discussion must come. The historical examination clears the ground, so that the tests of whether we are in the region of constitutional right or of judicial discretion—of openness or of optional secrecy in justice—are general tests.

Most apt to the case made by Mr. Watson is the langnage of Lord Shaw when he asks (p. 484) "May not the fear of giving evidence in public on questions of status like the present deter witnesses of delicate feeling from giving testimony and rather induce the abandonment of their just right by sensitive suitors? And may not that be a sound

reason for administering justice in such cases with closed doors? For otherwise justice, it is argued, would thus in some cases be defeated. My lords, this is very dangerous ground. One's experience shews that reluctance to intrude one's private affairs upon public notice induces many citizens to forego their just claims. It is no doubt true that many of such cases might have been brought before tribunals if only the tribunals were secret. But the concession to these feelings would, in my opinion, tend to bring about those very dangers to liberty in general, and to society at large against which publicity tends to keep us secure, and it must further be remembered that in questions of status, society as such—of which marriage is one of the primary institutions—has also a real and grave interest as well as have the parties to the individual cause."

Throughout each of the judgments delivered similar expressions of opinion may be found.

The Law Quarterly Review for January, 1913, p. 9, calls attention to a common law decision on the publicity of judicial proceedings which was not referred to in *Scott* v. *Scott*. It is *Daubney* v. *Cooper* (1829), 4 B. & C. 237. There the plaintiff sued a justice of the peace for throwing him out of the room where he claimed to appear as attorney for an absent defendant on a summons for having a sporting gun without a license. The Court of King's Bench upheld his right on the higher ground that in any case he was entitled to be present as one of the public. Bayley, J., in delivering the judgment of the Court, said (p. 240): "We are all of opinion that it is one of the essential qualities of a Court of Justice that its proceedings should be public."

In view of the authorities cited, the direction applied for cannot be given.

HON. SIR JOHN BOYD, C. FEBRUARY 27TH, 1914.

## ASPDEN v. MOORE.

5 O. W. N. 971.

*Vendor and Purchaser—Action for Rescission — Misrepresentation —Materiality—Representation by Words and Conduct—Rescission of Contract—Damages—Occupation—Rent—Set-off—Costs.*

BOYD, C., ordered the rescission of a purchase of certain lands and premises and delivery up of the purchase price where the vendors by words and conduct had made misrepresentations to the plaintiff, on the strength of which he was induced to purchase.

*Walters* v. *Morgan*, 3 De G. F. & J. 724, referred to.

Action against two defendants, husband and wife, for rescission of a sale and conveyance of land by the defendants to the plaintiff, for a return of the portion of purchase-money paid, cancellation of the mortgage given for the balance and for damages by reason of false representations which induced the purchase.

F. D. Moore, K.C., for plaintiff.

T. Stewart, for defendants.

HON. SIR JOHN BOYD, C.:—Further consideration, after a perusal of the evidence, has confirmed the impression I had formed at the close of the trial. I then thought, as I now decide, that the plaintiff should obtain the relief sought.

The plaintiff is a large build of man, badly crippled with sciatica, yet able, aided by a stick, to move about slowly. He was advised by a doctor to move from Toronto and find a house where he would be near the water and where he might amuse himself in a canoe. His physical condition was such that he required in any such house the convenient use of a bathroom and water-closet. Not being able to go personally, he employed a land agent whom he knew to look out a suitable place, and this man, Probert, visited Lindsay for that purpose. He found two houses, Workman's and Moore's, that answered the local requirement; but, as the owner was temporarily absent from Moore's, he could not and did not inspect it. Having reported progress to the plaintiff, he returned next day with Mrs. Aspden, the wife of the plaintiff, in order to be satisfied as to suitability. They found Mrs. Moore, the owner of the house, at

home, and went all through it and were satisfied with it after conversation about bath and sewer with the owner. They visited the other house which had bath-room and conveniences installed, and for this reason the plaintiff's wife liked it better, but the price was higher and it was further from the river than Moore's. She preferred to take the defendant's house because it was closer to the water, and, from what she was told by Mrs. Moore, she believed that the necessary conveniences could be installed there in connection with the sewer, and that the whole outlay would be less than the price asked for the Workman house.

The evidence of the defendant and her husband is of a negative character; according to them, no questions were asked and no conversation was had about closet or bathroom or sewer, and these strangers bought the house as it was. One reason why the defendant sold the house was that from the condition of the sewer she could not have proper conveniences there; so Mrs. Porter reports.

It appeared that the owner of the whole area had put down a drain private main sewer through this part of it draining a row of three detached houses by lateral connection to the river. Moore's house was of the three farthest from the water and Mrs. Porter's nearest to it. The Moores had lived there nine years and knew that the sewer could not be used for bath purposes. It was at the first poorly and cheaply built of field tiles and had become blocked from various causes so that it did not discharge into the river nor was there any through-flow. About two years before this sale, Mrs. Porter had called in a plumber, Hungerford, to have a bath put in her house: he tested the place and reported against its being done, and this result was known to all the neighbours, including the defendant. Upon the evidence I find it was a well-known fact that the sewer was not and could not be used for bathroom and water-closet purposes. It had become clogged up, and was nothing more than a long underground hole or tunnel—a subterranean *cul de sac*, which was being gradually filled up to the ground level, on which the surface closets of the three houses were placed.

This was the plight of the private "sewer" (so-called) at the time of the sale, and when the agent and the plaintiff's wife visited the place. I see no reason to doubt the account given by the agent and the wife as to what occurred

during their visit. The witnesses were excluded, and slight variations occur in what they recollected, but the general tenor may be well accepted. Probert, on their arrival, told Mrs. Moore that they wanted a house near the river, one with conveniences or in which conveniences could be put; he asked the defendant if a sewer was on the street; she said, "We have a private sewer," and he said that would answer the purpose. She said they had intended to put in a bathroom themselves, but they were going to move to Toronto. She said they had lots of water: three sources, pump water, rain cistern water, and water from the town. He pointed to a little place (closet), and she said, "That is where the sewer is." They then went upstairs, and Mrs. Moore said they were going to put the bathroom in a small room upstairs; then the agent pointed out what he said was a better place in the hall or landing where the pipes could be better connected with the sewer below, and the owner agreed with that suggestion. No examination of the sewer was made.

Mrs. Aspden gives some other details of what was said. Mrs. Moore shewed her where the convenience was—the private sewer—and said it was in good working order; that she had had the inspector in and he found everything all right. When the defendant said the sewer was in good working order, Probert said, "That would suit us, so that all the conveniences could be put in and no bother." She gives the same account of what was said upstairs about the best place to put the bathroom. She says that she would not have taken the house if it lacked such a sewer as was needed for her husband's requirements.

The transaction was closed by the husband when the report of the agent and his wife was made known to him; he was told, in brief, that he could have the conveniences in "right away," as there was a good private sewer in connection with the house.

I think, on this state of facts of what was said and what was suggested and what was left unsaid by the defendant, that the right conclusion is that the plaintiff was misled into the belief that the sewer was sufficient and in order so that a bathroom and closet could be put into the house for his use at a little further expenditure; there was wilful misrepresentation, and substantially the misrepresentation was as set forth in the 5th paragraph of the statement of claim, namely, that the dwelling-house was supplied with

a sewer drain fully sufficient to permit of a bathroom being placed by the plaintiff in the said residence.

To the knowledge of the defendants, this was not the case, and the conduct and words of the owner, Mrs. Moore, led the agents of the plaintiff to believe what was contrary to the fact.

The falsity of the representation was found out by the plaintiff, and verified by testing soon after his occupation of the premises in August, and at the end of the same month they complained and offered the property back, but the defendants refused to hear any complaint, and threatened action upon the mortgage; $900 had been paid when the deed was given and a mortgage given back for the balance, $900.

No repairs are possible to reinstate the sewer and make it efficient to a proper outlet; for the town authorities have forbidden it. The only way of drainage is upon the public street near by, and this is contingent on the frontagers agreeing to call upon council for such relief, and would cost a good sum.

As to the law, I may adapt to this case the language of Campbell, C.; "Simple reticence does not amount to fraud, however it may be used by the moralists. But a single word or a nod or a wink, or a shake of the head, or a smile from the vendor intended to induce the purchaser to believe the existence of a non-existing fact, which might influence the price or induce the sale, would be sufficient ground for equity to refuse specific performance." *Walters* v. *Morgan*, 3 DeG. F. & J. 724.

If the word and the conduct be such as to involve an intention to deceive; if, in other words, the vendor so speaks and acts with knowledge of the real fact as to mislead the other in regard to any material circumstance, and if under that misapprehension of fact induced by that misrepresentation the contract is completed; in such case the Court will undo and set aside the whole transaction if the parties can be replaced in *statu quo*.

The question as to damages *quoad* the defendants (husband and wife) was not discussed, nor was evidence given thereon, though interesting questions may be involved therein: see *Traviss* v. *Hales*, 6 O. L. R. 574, and *Earle* v. *Kingscote*, [1900] 2 Ch. 585.

In the circumstances, the whole transaction should be vacated—the mortgage cancelled, the deed set aside, and the land vested again in the defendant subject to a charge for $900 cash paid.

It is better, all things considered, not to give damages, but to set off claims for occupation rent against these, so that upon payment of $900 the possession is to be given up by the plaintiff; and, subject to what may be said, I would fix the 1st April as the date for this payment and delivery of possession.

The plaintiff is also entitled to costs of action.