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HIGH COURT DIVISION.

KELLY, J.; IN CHAMBERS. OCTOBER 19TH, 1914.

REX v. STECKLEY.

Criminal Law—Police Magistrate's Conviction for Kidnapping—Plea of "Guilty"—Admission of Crown as to Nature of Offence—Hasty Proceedings—Quashing Conviction—Costs—Protection of Magistrate.

Motion by the defendants, Arthur Steckley and Gordon Steckley, for an order quashing their conviction by a Police Magistrate for kidnapping.

Shirley Denison, K.C., for the defendants.
Edward Bayly, K.C., for the Attorney-General.

KELLY, J.:—The accused men, father and son, were charged that on the 14th July, 1914, they "did kidnap a girl under age named Blanche Steckley." The girl is the daughter of the elder of the two men and the sister of the younger. The whole proceedings—the information, the issue of the warrant, the arrest, the trial, and the conviction—took place on the day on which the alleged offence was said to have been committed.

The papers returned contain a record by the magistrate that both defendants elected to be tried summarily and pleaded "guilty." On the motion affidavits of both defendants were submitted denying this election and plea of "guilty;" and a further affidavit of the magistrate, confirming his record in that respect, was filed. I do not take these affidavits into consideration in disposing of the application. The charge is a grave one, for which the accused, if guilty, would be liable to a serious penalty.

No evidence was taken before the magistrate from which one may judge of the nature of the defendants' acts which are said to have constituted the offence charged; but it is admitted by counsel for the Crown that whatever offence the accused may have been guilty of, it was not kidnapping; he contends that they are guilty of another and different offence, that of abduction.

Having regard to the expedition with which the proceedings were taken and carried to completion—to say the least of it, they were hasty—and having in mind the gavity of the offence charged, and the Crown's admission, it is not easy to believe that these men, unrepresented by counsel, and it may be, so far as the record shews, without any advice, could have appreciated the character of the charge preferred against them when they pleaded "guilty," if they did so plead. To uphold a conviction under such circumstances, and thus leave the accused subject to the consequences of such conviction, would be contrary to what a sense of justice demands. For my part I am not prepared to take the responsibility of following such a course.

The conviction is quashed, but without costs; and there will be an order of protection to the magistrate; leaving it to the prosecution to proceed on such other charge, if any, as may be advised.

MIDDLETON, J. OCTOBER 19TH, 1914.

RE MORGAN v. BILLINGS.

RE MARTIN v. BILLINGS.

Division Court—Motion for Prohibition — Actions to Recover Fees Paid to Clerk of Municipal Corporation—Resolution of Council—Ultra Vires—Question of Law—Jurisdiction of Judge in Division Court—Right to Review Decision.

Motions by the defendant in two plaints pending in the First Division Court in the County of Carleton for orders of prohibition.

The motions were heard in the Weekly Court at Ottawa.

R. A. Pringle, K.C., for the defendant.

W. L. Scott, for the plaintiffs.

MIDDLETON, J.:—The defendant is the Clerk of the Corporation of the Township of Gloucester. As such Clerk, he collected

to his own use certain sums for the approval and passing of certain plans submitted to the corporation of the township of Gloucester for approval, pursuant to the provisions of the Registry Act.

The following resolution was passed by the Municipal Council of Gloucester on the 12th September, 1910: "Moved by C. Hardy, seconded by O. A. Mayor, that the plans submitted by Dr. Chevrier be examined by the Reeve and Clerk and compared with the original surveys and earlier plans, if any, of these lands in court-house and registry-office, and report next meeting, and, if they deem necessary, advertise in the papers, and that all costs incurred be paid by Dr. Chevrier. That in future all plans be treated in this way, examined, advertised if necessary, and reported on, and all costs be deposited by the applicant when filing plans for approval with the Clerk."

Thereafter Mr. Billings demanded and received $20 upon each plan being submitted for the approval of the council. The fees were paid, and these actions were brought to recover back the money so paid, upon the ground that the municipal council had not authorised the exaction of the fee in question, and that, if the resolution did in fact authorise the exacting of the fee, it was ultra vires.

The learned Division Court Judge, after carefully considering the matter, determined in each case in favour of the plaintiff. It is contended that the Judge erred in all respects in which he was adverse to the defendant, and that he had no right to entertain the actions without the resolution in question having been in the first place quashed.

I do not think that I can enter into any of the questions argued. It seems to me clear that the most which can be said is that the learned Division Court Judge erred in deciding the case as a matter of law. I do not say that this is so; but I cannot entertain an appeal, where none is given by law, in the guise of a motion for prohibition. If the learned Judge has erred, he has erred in determining a matter entirely within his jurisdiction, and I have no authority to review his decision.

The Judge had jurisdiction to determine whether the money was owing, and any error of law was in the course of that inquiry; it is not the case of the Judge giving himself jurisdiction by an erroneous construction of the statute.

The motions fail, and must be dismissed with costs.

MIDDLETON, J. OCTOBER 19TH, 1914.

CURRY v. SANDWICH WINDSOR AND AMHERSTBURG R.W. CO.

Negligence—Collision between Street Car and Automobile—Derailment of Car—Res Ipsa Loquitur—Attempt to Prove Cause of Derailment—Evidence—Findings of Jury.

Action to recover damages for injury resulting to the plaintiff from a collision of his automobile with an electric street car of the defendant company.

The action was tried with a jury at Sandwich.

J. H. Rodd, for the plaintiff.

M. K. Cowan, K.C., and G. A. Urquhart, for the defendant company.

MIDDLETON, J.:—This action arose out of a collision between an automobile and a street car. The occurrence took place upon Sandwich street, shortly after midnight upon the 28th October, 1913, when the street was comparatively free from traffic. The automobile was going east. It passed the elevation of the Canadian Pacific Railway bridge upon the street railway track. The street car was then going in the opposite direction, and was distant a little over 800 feet. The automobile turned off the street car track and travelled on the south side of the road until it again turned into the track to avoid another automobile standing near the kerb. So far, the accounts substantially agree. The automobile was struck by the front of the street car behind its front wheel, and was very seriously damaged.

The plaintiff's theory is, that the automobile had turned out of the car track again, and that the street car left the rails, running into the automobile. The defendant company's theory is, that, when the automobile attempted to get off the street car track, it skidded, and hit the front of the car, and that the car was derailed as the result of this blow.

So far as developed at the trial, there did not appear to be any physical impossibility in either of these theories being correct. The automobile was a heavy car, weighing, with passengers, 2½ tons, and was said to be travelling at a very high speed. The street car was a light car, weighing about 6 tons, mounted upon a single truck, the overhang at the front being 10 feet.

The plaintiff did not choose to rest his case upon the mere proof of the derailing of the car and the injury to the automobile, but at the trial undertook to assign a definite cause for the derailing of the car. An hour or so after the accident, and after those injured in the collision had been taken away to be cared for, an investigation was made upon the ground. The street car had then been restored to the track. Grooves were found, cut apparently by the car wheels, in the ice upon the road; and at the point where these grooves joined the car tracks a coupling-pin and chain were found in the groove in the rails. It was alleged that this was the cause of the derailing.

The defendant in answer shewed that these grooves were cut when the car was restored to the track, and that the coupling-pin had been used to aid in getting the car back upon the rail, and that it had been accidentally left there.

The jury were asked by the plaintiff to disbelieve this evidence and to find that the car was derailed by the pin, and that the pin had been negligently left upon the rail.

In my charge to the jury, I asked them, when dealing with any negligence they might find, to state clearly what had been done that ought not to have been done or what had been omitted that ought to have been done. After finding the defendant company to blame, the jury answered the question, "In what did the negligence consist?" thus: "It is our opinion that the street car must have left the track before the collision." I then pointed out to the jury that they had not put their hand on any act of negligence; they had not stated why the car left the track. To this the foreman replied: "The decision, your Lordship, was according to the evidence given by the man, the motorman, he being, according to his own evidence, 810 feet of a distance that he had it in his power to stop the car and to prevent the accident, even if he did see that the automobile was in the track, which would be his bounden duty." I then asked the jury if this was the negligence they found, and they all assented.

This means that, in the view of the jury, the motorman ought to have stopped his car when he first saw the automobile over 800 feet away from him, as it crossed the railway bridge. I cannot give the plaintiff judgment upon this finding, for it is not negligence, and, if negligence, it did not cause the accident, as the automobile after this reached a place of perfect safety.

Upon the argument Mr. Rodd quite properly drew attention to the finding of the jury that the car left the track before the collision. He then argued from this that a case was made out

for the application of the maxim res ipsa loquitur, and that, the defendant not having shewn that the car left the track without negligence on its part, the plaintiff is entitled to judgment.

I cannot agree with this contention. Had the plaintiff chosen to rest his case upon shewing the derailing of the car and consequent injury to the automobile, I think the case would have been brought within the rule; but the plaintiff went further and chose to assign a specific cause for the derailing. This, I think, relieves the defendant from the general obligation; and the defendant satisfied the onus resting upon it when it shewed that the accident did not happen by reason of the cause alleged; for the refusal of the jury to find the negligence set up by the plaintiff is equivalent to a finding that it did not exist.

Neither counsel has referred me to any case throwing light on this precise problem; but I find in White on Personal Injuries on Railroads the statement that proof of a derailment of a train, together with the resulting injury from such cause, is generally held to establish a prima facie case of negligence; but this statement is qualified at para. 615, by the statement: "If the evidence of the plaintiff goes further and shews the cause of the derailment, and this developes to be due to a condition which would not render the railroad company liable, then the prima facie case of the plaintiff is overcome, and the same result follows as to a right of recovery based on a specific ground of negligence which the evidence fails to establish." *A fortiori* must this be so where it is shewn that the cause of derailment alleged did not in fact exist.

I think the action fails, and should be dismissed.

A cross-action was brought by the street railway company to recover for the damage done to the street car. This action likewise fails, and I see no reason why costs should not follow the event in each case.

MIDDLETON, J. OCTOBER 19TH, 1914.

RE HICKEY.

Will — Construction — Bequest for Benefit of Son and Son's Widow—Death of Son in Lifetime of Testator—Right of Widow—Provision for Abatement.

Motion by the executor and the widow of James Hickey, deceased, upon originating notice, for an order determining a question arising upon the construction of the will of the deceased.

The motion was heard in the Weekly Court at Ottawa.

T. S. Dunlevie, for the applicants.

N. A. Belcourt, K.C., for the widow of the testator's adopted son.

MIDDLETON, J.:—By his last will and testament, dated the 17th March, 1911, James Hickey, who died on the 13th August, 1913, directed as follows: "I give and bequeath to my wife, Margaret Louisa Hickey, the sum of $5,000 (subject to be decreased as hereinafter provided) in trust to invest the same, with power from time to time to vary the investments thereof, and to apply the income arising therefrom in payment of all premiums on the policy of insurance of $1,000 upon the life of my adopted son, Charles Groulx, alias Charles Groulx Hickey, in the Equitable Life Assurance Company of the United States, number 1304853, as and when the same become payable, and to pay the balance of the said income and any portion of the principal which in the discretion of my said wife may be necessary towards the maintenance of my said adopted son, Charles Groulx Hickey, and after his death to pay any portion thereof then remaining unto *his wife, Celina Isabella Hickey,* provided however, as I am at my own expense now maintaining my said adopted son, and as I have estimated the present cost to me of his mainenance to be $400 a year, I therefore direct that for every year I shall live after the date of this my will, the sum of $400 shall be deducted from the said sum of $5,000, and instead of the sum of $5,000 being invested by my wife as aforesaid the said sum of $5,000 shall be decreased by an amount obtained by multiplying the sum of $400 by the number of years transpiring between the date of this my will and the date of my death."

The adopted son, Charles Groulx Hickey, died on the 10th September, 1911, some six months after the date of the will and two years before the death of the testator. His widow, Celina I. Hickey, now claims to be entitled to receive the $5,000. The testator's widow, on the other hand, contends that, by reason of the death of the son during the testator's lifetime, the entire gift fails and the son's widow takes nothing.

I do not so read the will. I think the intention of the testator was to set apart the sum of $5,000 for the benefit of his son and his son's wife, and that upon the death of the son his widow takes the $5,000, subject to the abatement provided for by the testator.

The son's widow contends that this abatement should be limited to $200, being a half year's maintenance of the son.

Clearly, the scheme of the testator contemplated the son outliving him; and for that reason he directed that the $5,000 which he was ready to set apart should be reduced by an amount obtained by multiplying the number of years transpiring between the date of his will and the date of his death by $400, in the expectation that this amount would be used in the meantime for the son's maintenance; but the difficulty is that he has only given the $5,000, less this sum, in this case rightly $800; and I should be adding to his will if I introduced a clause providing that the abatement stipulated for should not apply if the sum was not used for the purpose of maintenance.

In the result, I think the son's widow takes, rightly speaking, $4,200. A more accurate computation may be made if the parties so desire.

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

KELLY, J. OCTOBER 20TH, 1914.

CHESLEY FURNITURE CO. LIMITED v. KRUG.

Principal and Surety—Guaranty—Debt to Bank Paid by Guarantor—Assignment of Securities Held by Bank—Effect of Assignment—Bank Act, R.S.C. 1906 *ch.* 29, *sec.* 88—*Right of Surety to Possession of Principal's Premises and to Carry on Business—Interim Injunction—Terms.*

Motion by the plaintiffs for an interim injunction restraining the defendants from interfering with the plaintiffs' possession of factory premises and goods in the town of Chesley.

G. H. Kilmer, K.C., for the plaintiffs.
W. N. Tilley, for the defendants.

KELLY, J.:—As appears from the affidavit of their secretary-treasurer and manager, the plaintiffs, in the early part of September, 1914, were indebted to the extent of over $34,000 in respect of advances made to them by the Bank of Hamilton, the indebtedness having been guaranteed to the bank by the defendant Krug and one Ankermann. The plaintiffs also gave the bank security under sec. 88 of the Bank Act, R.S.C. 1906 ch. 29, and by collateral agreements given at the same time. The defendant Krug says that on the 8th September, 1914, he paid the bank $34,711.97

for an assignment of the debt and the securities held by the bank in connection with it. Soon after this, he, through his co-defendant Biehm, acting on his behalf, took possession of the plaintiffs' factory and goods, and proceeded to carry on the business, claiming a right to do so by virtue of the securities so assigned to him.

For present purposes the question of the manner by which possession was obtained, beyond the mere mention that it was against the will of the plaintiffs, and the fact of efforts having been made to bring about a settlement, is not material.

The defendant Krug has continued in possession, and has to some extent at least been carrying on the business; he has also made sales of goods of the plaintiffs. The substantial ground of the application is that Krug had no right or power to take possession; that, even if the bank possessed such power, it was not transferable to Krug. Section 88 extends, in favour of banks, in cases coming within its purview, the right to take the security therein specified without requiring registration, which in certain other cases is necessary to give priority over subsequent purchasers, transferees, mortgagees, etc.; and, being a statutory extension of the powers otherwise possessed by banks, the benefit of such enactment should not be extended beyond what the language of the statute in its strictest interpretation confers. The right of a bank, therefore, to assign these securities which it is so privileged to accept must be only such as sec. 88 expressly gives. The rights and powers given by this section must not be confused with the rights arising under other sections of the Act which deal with securities of a different character, and in respect to which the Act specifically gives the bank powers not expressly given in the case of securities taken under sec. 88, and not necessarily incident to the possession of these securities.

The position of the bank holding security under sec. 88 was fully considered by the learned Chief Justice of the King's Bench in Re Victor Varnish Co., 16 O.L.R. 338, in an appeal from the judgment of the Master in Ordinary. It was there held that this security is not assignable by the bank so as to transfer the special lien or security to a third person, and that a guarantor to a bank which holds such a security for the debt guaranteed is not subrogated to the right of the bank in the security on payment of the debt by him.

It was urged by counsel for the defendants that that case has no application here. The facts in the two cases are so nearly identical that I see no such ground of distinction as to justify me in

ignoring the conclusion there arrived at, or in refusing to restrain the defendants from holding possession of and operating the plaintiffs' factory and from carrying on their business. This is altogether apart from the admission of debt on the part of the plaintiffs, or the fact that Krug may be entitled to payment from the plaintiffs. I am dealing only with the remedy which at this stage he is entitled to apply. The application should be granted, and the defendants restrained as asked until the trial.

The defendant Krug says, and it is not denied, that he has paid the bank the amount due by the plaintiffs. As a means of protection to him, and without prejudice to any other rights he may have, the plaintiffs, while the defendants are so restrained, should keep an account of the operations of the business, and pay into the bank from time to time to the joint credit of themselves and Krug the proceeds derived from such operations in excess of what is necessary to pay the workmen and employees. This term is, I understand, acceptable to the plaintiffs; and, in view of what appears in the material, it is not an unreasonable one, though not necessarily following from the granting of the injunction.

Costs of the motion reserved to be disposed of by the trial Judge.

MIDDLETON, J. OCTOBER 20TH, 1914.

LEDYARD v. YOUNG.

Title to Land—Boundaries—Descriptions in Crown Patents—Marsh Land—Sinuosities—Surveys — Agreement — Bonâ Fide Purchasers for Value without Notice—Registry Act—Leave to Amend—Possessory Title—Evidence—Statute of Limitations—Assessment—Declaratory Judgment.

Action for a declaration of the true boundary-line between the plaintiffs' and defendants' lands and for an injunction and damages.

The action was tried without a jury at Sandwich.

F. A. Hough, for the plaintiffs.

E. S. Wigle, K.C., for the defendants.

MIDDLETON, J.:—The action concerns the title to some 22 acres of marsh land in the township of Maldon, in the county of

Essex, and depends in the first place upon the interpretation of the patent of certain marsh lands to William and James Caldwell, in the year 1798, and in the second place upon the contention of the defendants that they have acquired a possessory title.

By the Caldwell grant, 3,053 acres, more or less, of marsh, were conveyed to the Caldwells, and by the subsequent patent of lot 55 it is bounded on the west by the easterly boundary of the lands patented to the Caldwells. This easterly boundary is described in very general language, and runs from a point remote from the lands now in question, "following the edge of the marsh south-easterly according to its different sources and windings till it comes to the shore of Lake Erie."

The contention put forward by the plaintiffs, who have succeeded to the Caldwell title, is, that the true boundary is to be ascertained by following strictly the edges of the marsh through all its sinuosities, even though this involved departure from a south-easterly course and the travelling in other directions so as to surround the heads or inlets of the marsh. This contention is illustrated by the plan prepared by Mr. McColl, exhibit 1 at the trial.

The defendants, on the other hand, contend that a general south-easterly course should be followed, and that the true line should be run from highland to highland, disregarding all the sinuosities of the marsh line, and that these inlets of marsh land are to be regarded as included in the land covered by the patents granted of the territory surrounding the marsh.

By the defence filed it is set up that there was a survey made by Mr. Laird many years ago, and that Mr. Laird laid out a plan which accords with the defendants' present contention, and of which a sketch filed as exihibt 5 is a substantial reduplication. Mr. Laird has recently been again over the ground, and the posts planted by him at the intersections of the north and south lines of lot 55 with the margin of the marsh, and the other posts shewn upon the sketch, are, I am satisfied, substantially in the same place as the posts then planted by him.

It is said that this boundary-line was accepted by the Caldwells as a correct delimitation of the marsh boundary. The plaintiffs are, however, bonâ fide purchasers for value without notice of any agreement, even if such agreement were made out; and the Registry Act, I think, affords them protection against this unregistered agreement. I give leave to amend by setting up the Registry Act by way of reply.

After the best consideration I can give to the matter, I find myself unable to agree with the defendants' contention as to the meaning of the patent. The dominant and controlling words in the description are, I think, found in the expression "following the edge of the marsh according to its different courses and windings;" and I think the words "south-easterly" are to be taken as indicating the general course. The point of termination, both in crossing lot 55 and in following the edge of the marsh as a whole, is south-east of the point of beginning.

In the copy produced of the plan of 1796 the boundary of the marsh is shewn as a dotted line, having a general south-easterly course; and I think that this goes to indicate that when the patent of this marsh land was prepared in 1798 the words that I have quoted were introduced for the purpose of giving certainty to this somewhat uncertain and indefinite boundary. The actual edge of the marsh was taken as the criterion.

I am also unable to accept the plaintiffs' contention that a possessory title has been acquired. There has been no enclosure of the marsh land inside the headlands. There has in truth been no open and notorious possession of it. The planting of the surveyor's posts upon the headlands and the planting of one post in the middle of the marsh area, where it remained for a short time, does not, I think, constitute possession of the lands within that line, nor is there any evidence from which it could be held that this was a continuous possession for the required time.

I do not think that any assistance can be gained from the assessment. The patent under which the defendants claim is for 109 acres. They admittedly have, according to Mr. McColl's survey, 128 acres. The assessment is for 134 acres. If the marsh claimed by the defendants is given to them, they will have 160 acres.

In every view, I think that the plaintiffs succeed, and there should be judgment declaring that the true boundary-line between the two parcels is the edge of the marsh, following all its courses and windings, as shewn by Mr. McColl's plan, exhibit 1.

I see no reason why costs should not follow the event.

BOYD, C., IN CHAMBERS. OCTOBER 21ST, 1914.

BECHER v. RYCKMAN.

Account—Action for Account of Partnership Profits—Construction of Agreement—Provision for Account from Time to Time—Postponement of Trial to Obtain Evidence on Commission—Reversal of Order—Evidence not Necessary at Trial—Reference—Discretion of Trial Judge.

Appeal by the plaintiff from an order of the Master in Chambers directing the issue of a commission to take evidence on behalf of the defendants in England and postponing the trial of the action until after the return of the commission.

E. C. Cattanach, for the plaintiff.
H. E. Rose, K.C., for the defendant Ryckman.
R. H. Parmenter, for the defendant Cronyn.

BOYD, C.:—This litigation is based on an agreement made on the 26th February, 1913, by which the defendants give to the plaintiff one-tenth of the net profits in three specified mining claims which may be or may have been received by the defendants. The second clause of the agreement provides that the defendants shall be free to deal with and dispose of the said mining claims as and when they think fit without notice to and free from the control of the plaintiff—but shall account to the plaintiff from time to time, and such accounting shall include all receipts and expenditures upon or in connection with the said mining claims from the 10th November, 1908.

The statement of claim now seeks for an account of the said receipts and expenditures, and consequential relief thereon.

The defence says that there are not and never have been any profits, and further that a sale of the said claims has not been completed so as to render any profits possible.

From the affidavit of the defendants' solicitor it appears that the three claims have been sold, and that £60,000 paid of the price is made up of shares in a company named, and these shares have not been disposed of, and no profit has been made.

The Master has stayed the action going to trial and ordered a commission to issue for the examination of witnesses in England in order to shew that certain payments made relate in part

to other properties than those in question (para. 10 of the solicitor's affidavit).

The appeal from that order is on the ground that the detailed investigation of accounts will not be entered upon at the trial, but will be a matter for reference. It is urged that on the face of the agreement there is primâ facie a right to claim that an account be directed—whatever the outcome may be in the Master's office.

It should be left for the trial Judge to say how far the details are to be entered upon before him or whether at the outset a reference should be ordered. It appears to me obvious that the right course would be to grant relief by directing the accounts to be taken with a view of ascertaining, upon an inquiry before a judicial officer, whether there are divisible net profits or not. This relief the plaintiff asks at his own risk and costs if it proves a fruitless quest.

As I read the agreement, this method is conformable to the expressed understanding of the parties: it speaks of net profits "which may be or may have been received" (i.e., going back to November, 1908): clause 1. In clause 2 the defendants agree to account "from time to time," and that such accounting shall include all receipts and expenditures, etc. I do not read that this accounting is dependent upon a sale being made or that it depends on the pre-existence of net profits. But in fact a sale has been made at an apparently large price, and this is the first application to have any accounting on the part of the plaintiff—though the account is to go back to November, 1908.

The law is rightly stated in Lindley on Partnership, 8th ed., p. 569: "An agreement to pay out of profits confers a right to an account; and servants entitled to a share of profits can maintain an action for an account of them."

The practice in such an action is well-settled. In a suit for an account "the only question at the original hearing is, whether the defendant is an accounting party." At that stage the Court will not load the suit "with an immense mass of evidence relating to the particulars of an account, into the consideration of which the Judge cannot enter at the hearing:" Walker v. Woodward (1826), 1 Russ. 107, 110.

These authorities indicate the proper course, as it seems to me, and, in view of them, I cannot uphold the order of the Master.

I would reverse that order and allow the action to go on to trial in due course. Costs of motion and appeal to be in the cause.

This decision is without prejudice to the renewal of the application before the Judge presiding at the trial, with whose discretion (possibly in the light of further information), I do not desire to interfere.

MIDDLETON, J. OCTOBER 22ND, 1914.

WRIGHT v. CITY OF OTTAWA AND OTTAWA DAIRY CO. LIMITED.

Municipal Corporation — Contract with Company to Supply Water to Citizens—Powers of Corporation, General and Special — 35 Vict. ch. 80 — 42 Vict. ch. 78 — Beneficial Contract—Executed Contract—Absence of Corporate Seal —Municipal Estimates.

Motion by the plaintiff to continue an interim injunction, heard at the Ottawa Weekly Court, and turned by consent into a motion for judgment.

T. A. Beament, for the plaintiff.
F. B. Proctor, for the defendant city corporation.
G. F. Henderson, K.C., for the defendant company.

MIDDLETON, J.:—The plaintiff, as a ratepayer of the city of Ottawa, seeks to restrain payment by the city corporation to the dairy company of the sum of $750, being an amount said to be due by the city to the dairy company for water supplied during the month of July, 1914.

Epidemics of typhoid fever occurring in the city of Ottawa having been traced to the use of impure water supplied by the city, a temporary arrangement was made with the dairy company for the supply of water from an artesian well owned by the company. With the merits of this arrangement the Court has no concern; but it is fair to say that, from the evidence adduced, the contract was not sought by the dairy company but by the city officials. Under this arrangement the dairy company undertook to supply water at a delivery pipe upon the street adjoining its premises, for the price of $750 per month, the arrangement to continue until terminated by notice from either party. This arrangement was understood to be temporary, pending the solution of the very difficult question of a satisfactory permanent water supply that confronted the municipality. The

water has been supplied under this arrangement, and the water supplied was paid for by the municipality until further payment was stopped by the bringing of this action. Partly as the result of this action being brought, the dairy company requested the city to give the necessary notice discontinuing the arrangement, and, this notice having been given, nothing is now involved save the payment in question and the payment for one or two subsequent months.

The plaintiff's action is really based upon three contentions: first, it is said that the municipality had no power to make any such arrangement as that made; secondly, that the contract is not an executed contract so as to bring the case within the authority of Lawford v. Billericay District Council, [1903] 1 K.B. 772; and lastly, that there is no provision in the municipal estimates for payment of the amount.

After giving the matter the best consideration I can, and after paying much attention to the very careful argument made by Mr. Beament, I think the plaintiff's action entirely fails. The tendency of decision and legislation is more and more against any interference by the Courts with municipal government; and, apart from any express statutory provision, it appears to me to be plain that the municipality has, under its general control of municipal affairs, powers to buy and distribute water where this is necessary for the health and well-being of the inhabitants; the emergency arising from what was practically equivalent to a break-down of the system of water distribution undertaken by the municipality.

But, when reference is had to the statutes, it appears to me that the authority is plain. Originally the waterworks system of the city was under the control of commissioners appointed under the special Act 35 Vict. ch. 80. These commissioners had the duty of deciding upon all matters relative to supplying the city of Ottawa with a sufficient quantity of pure and wholesome water for the use of its inhabitants. By later legislation, 42 Vict. ch. 78, the corporation of the city, through its council, is given all the powers of the water commissioners. I therefore think that the council had ample authority to make the arrangement with the dairy company.

Then, again, I think it is plain that this contract is one which was beneficial to the municipality; and the rule laid down in Lawford v. Billericay District Council, supra, has been so enlarged as to be applicable to all contracts, undertaken in good faith, which are beneficial to the corporation, even though not

essential for its purposes: Campbell v. Community General Hospital, etc., of the Sisters of Charity, Ottawa, 20 O.L.R. 467. Here the contract is an executed contract. The water has been supplied. It is true that it has not been supplied to the city itself, but it has been supplied on the direction of the council to those requiring it. There is no foundation for the distinction which Mr. Beament seeks to draw, that the operation of the rule in question is to be confined to cases in which the goods are to be supplied to the municipality itself. The absence of a seal and of any formal contract, therefore, affords no reason why the municipality should not meet its just obligations.

The remaining objection is, I think, based upon a misconception. The estimates do contain a sum of $9,000 for water supplies. This is equivalent to the sum covered by this arrangement, $750 per month. The object of the provision of the statute relied upon is to prevent the council incurring obligation without providing means for payment. Here the means for payment are provided, and it appears to me to be entirely beside the question to suggest that I should enter into any controversy as to whether this is a sum which should be charged against the water-works and water-rates. With these matters neither the dairy company nor the Court has any concern.

In all aspects the action fails, and I think should be dismissed with costs.

MIDDLETON, J. OCTOBER 22ND, 1914.

DUNN v. WABASH R.R. CO.

Railway—Death of Servant—Fireman on Locomotive Engine—Fall from Train on Bridge—Negligence—Cause of Death—Width of Bridge—Fireman Leaning from Train—Evidence—Findings of Jury—Nonsuit.

Action by the widow and infant child of one Dunn, who was killed while in the service of the defendants as a locomotive engine fireman, to recover damages for his death.

The action was tried before MIDDLETON, J., and a jury, at St. Thomas.

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

H. E. Rose, K.C., for the defendants.

MIDDLETON, J.:—Dunn was last seen alive upon the train some time before it crossed the bridge over the Welland Canal feeder. Some 20 minutes after he was last seen by the engine-driver, he was missed, and, upon search being made along the road, he was ultimately found upon the bridge in question, either then dying or dead.

The plaintiffs' theory is that in the discharge of his duty Dunn leaned from the train at the gangway between the engine and tender, or while standing upon the buffer beam of the tender, and that he was struck by the steel girders of the bridge, thrown from the train, and killed. I reserved judgment upon a motion for a nonsuit, and let the case go to the jury. The jury have found that Dunn met his death in the way suggested, and that the defendants were guilty of negligence, as the girders of the bridge were dangerously near the train.

The essential facts are not in dispute. The bridge was constructed many years ago by the Grand Trunk Railway Company. Under an agreement between the Grand Trunk Railway Company and the defendants, the defendants have running rights. At the time the bridge was built, according to the uncontradicted evidence, it was good railway practice to have 4 feet of clearance from the inside of the rail to the nearest upright. In the construction of this bridge the clearance was 4 feet 9 inches. At that time the engines in general use were 7 inches narrower than the particular engine upon which Dunn was riding at this time. Half of this increased width would be on each side of the centre line; so that the clearance would still be $5\frac{1}{2}$ inches more than required by good railway practice. I do not think it was open to the jury to find, in opposition to all the evidence, that the defendants were negligent in the use of a bridge having this clearance.

It also appears to me that the plaintiff fails on another ground. There was some conflict as to the necessity of the fireman leaning from the train at this point. None of the witnesses said that it was necessary to lean from the train beyond a foot, or 14 inches at the most. The clearance between the extreme end of the buffer beam of the tender, the part which projected most, was 2 feet 2 inches. This would leave a clearance of at least one foot. That Dunn fell from the train upon the bridge there can be no question; that his head struck the bridge, I think, admits of little doubt; but there is nothing to indicate that he was thrown from the train by the blow. It may well be that he fell from the train and that he hit the bridge girder as the result of his fall.

Taking as my guide the rule laid down in Evans v. Astley, 11 App. Cas. 674, I cannot find anything pointing to the probability of the plaintiffs' theory being the true explanation of this unfortunate man's death. I do not think there is any evidence which goes to indicate that the fireman would in the course of his duty be so far outside the extreme limit of the buffer beam as to bring his head into contact with the girder. Everything, it seems to me, points to the fact that in some unexplained way this unfortunate man fell from the train.

This leaves another aspect of the case, which, however, it is not necessary for me to consider. It was argued by Mr. Rose with much force that, as all agree that in the discharge of his duty the fireman would not need to be more than a foot beyond the line of the car, the railway company had discharged every possible duty they might owe to him when they gave a clearance of over 2 feet.

While the action fails for these reasons, I do not think I should award costs.

FALCONBRIDGE, C.J.K.B., IN CHAMBERS. OCTOBER 23RD, 1914.

*DUMENKO v. SWIFT CANADIAN CO. LIMITED.

Alien Enemy—Action by, Begun before War—Residence in Hostile Country—Dismissal of Action—Security for Costs—Stay of Proceedings.

Motion by the plaintiffs for an order staying proceedings and cross-motion by the defendants for an order dismissing the action.

O. H. King, for the plaintiffs.
Gideon Grant, for the defendants.

FALCONBRIDGE, C.J.K.B.:—The plaintiffs are inhabiting and commorant (per Lord Ellenborough, C.J., in Le Bret v. Papillon (1804), 4 East 502, at p. 506) in Austria under the allegiance of the Emperor of Austria, between whom and our King a war has been commenced and is now being carried on. The plaintiffs are, therefore, enemies of the King. At the time when they brought

*To be reported in the Ontario Law Reports.

this action, they, as well as the Emperor, were at peace and in amity with our King and his subjects.

On the 31st July, the defendants obtained the usual præcipe order for security of costs. On the 21st September, the Master in Chambers made an order extending the time for the giving of security by the plaintiffs until Monday the 19th October, and further ordering that in default of such security being given this action should stand dismissed.

The plaintiffs now move in Chambers for an order staying all proceedings so long as it may be ordered, or for such further or other orders as may seem meet or just.

The defendants gave notice that on the return of the plaintiffs' motion they would move that the action be dismissed, on the ground that the plaintiffs are alien enemies.

As to the plaintiffs' notice of motion, I cannot see why the plaintiffs ought to be in any better position by reason of their having become alien enemies than they would be under ordinary circumstances; and their motion is therefore dismissed, and the dismissal of the action follows in pursuance of the Master's order.

As to the defendants' motion, it is quite clear upon the authorities that the plaintiffs, having become alien enemies, ought to be barred from further having and maintaining this action. See Le Bret v. Papillon, 4 East 502; Brandon v. Nesbitt (1794), 6 T.R. 23; Mews' Digest, vol. 8, pp. 210, 211.

The plaintiffs' action is, therefore, on this ground also, dismissed with costs. This dismissal is not necessarily—and I do not mean it to be—a bar to a subsequent action in respect of the same matter after peace shall have been declared: Holmested & Langton's Judicature Act, 3rd ed., p. 636.

FALCONBRIDGE, C.J.K.B. OCTOBER 24TH, 1914.

DENTON v. TOSSY.

Vendor and Purchaser—Agreement for Sale of Land—Escrow—Condition—Consent of Mortgagee—Failure to Notify—Delay—Action for Specific Performance—Discretion of Court—Return of Down-payment—Costs.

Action for specific performance of the defendant's agreement for the purchase from the plaintiff of certain lands in the city of St. Catharines.

The action was tried without a jury at St. Catharines.

A. C. Kingstone, for the plaintiff.

M. J. McCarron, for the defendant.

FALCONBRIDGE, C.J.K.B.:—An action for specific performance. The weight of evidence is, that the agreement sued on was left with A. H. Trapnell, a Division Court Clerk, who drew the document and acted for both parties, as an escrow — not "eschrow," as it is invariably spelt in the statement of defence. Solicitors ought to read over their pleadings after they have been extended by their secretaries. For example, I read in the 3rd paragraph of the statement of defence (sub fin.), "upon certain terms and conditions which were *disgusted* by the plaintiff and defendant and the said Trapnell."

The condition was the consent of the mortgagee, McPherson, and it was plainly intended that the consent should be in writing, for it is endorsed on the agreement.

The plaintiff and McPherson say that they arrived at an agreement about a proposed payment on account of the mortgage and the release of the lots which the defendant was buying. It was not the arrangement contemplated in the agreement sued on, but a different one. It was not reduced to writing, and the plaintiff never took the trouble to notify the defendant or Trapnell of the mortgagee's assent to any arrangement.

The mortgagee says that he is sure he told the defendant, "it may have been a week or two after, or more." His evidence was very unsatisfactory, and I do not accept this statement as against the defendant's positive denial.

Although a payment of $1,900 would have been due on the 20th March and one of $250 on the 1st July, matters were allowed to rest until the defendant thought, as he was justified in thinking, that it was "dead and buried;" and, on his instructions, his solicitor wrote to the plaintiff on the 10th July demanding the return of the $100 down-payment made to the agent of the plaintiff, who suddenly woke up and demanded performance of the agreement. On this ground alone the plaintiff would disqualify himself from claiming a decree for specific performance, which is within the discretion of the Court—of course to be judicially exercised.

In some respects the defendant's conduct was equally unsatisfactory and unbusinesslike; and, while I dismiss the action and give judgment for the defendant for $100 (without interest), I make no order as to costs.

KILBUCK COAL CO. v. TURNER & ROBINSON—LENNOX, J.—OCT. 23.

Contract—Supply of Coal by Brokers to Retailers—Rates Mentioned in Contract under Seal—Subsequent Variation—Evidence — Onus — Consideration — Account — Credits — Reference.]—Action for the price of coal supplied by the plaintiffs to the defendants. The action was tried without a jury at Whitby. The issue was, whether the plaintiffs, who were coal brokers, were to be paid for the coal at rates set out in a contract under seal entered into on the 5th June, 1912, or at higher rates. The learned Judge, after stating the facts at length, said that the contract, though under seal, could be abandoned by mutual consent, or it could be varied, or a new contract could be substituted for it. It was a question of fact whether anything of this kind was done, and—the defendants denying it—the onus was on the plaintiffs. The essential elements of a new contract, including consideration, must be shewn beyond any reasonable doubt, if the original contract was to be superseded. The learned Judge then reviewed the evidence, and stated that, after a great deal of consideration, and not entirely without hesitation, he had come to the conclusion that, in respect of the class of coal specified in the written agreement, the plaintiffs were entitled to recover only at the rates therein set forth. The learned Judge also finds that the defendants are entitled to credit for various sums amounting to $60 in addition to the sums credited in the plaintiffs' account. At the trial the plaintiffs gave no evidence as to the state of the account taken upon the basis of the contract. The learned Judge understands that the parties agree that, if the plaintiffs are entitle to recover at contract rates only, they have been paid in full. Judgment dismissing the action with costs, unless within ten days the plaintiffs give notice that they desire a reference; in which case there will be a reference to the Local Master at Whitby to take the accounts upon the basis of the prices set out in the agreement, with additional credits as above. In the event of a reference, the defendants' costs down to and including the trial will be paid by the plaintiffs, and further directions and costs of the reference will be reserved. W. H. Harris and A. E. Christian, for the plaintiffs. H. L. Ebbels, for the defendants.