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HON. MR. JUSTICE LENNOX. SEPTEMBER 15TH, 1913.

RAMSAY v. TORONTO RW. CO.

5 O. W. N. 20.

Negligence—Street Railway—Death of Pedestrian—Gross Contributory Negligence—Vagueness in Answers of Jury — Non-Suit—Motion for Granted.

LENNOX, J., *held*, that where the plaintiff's case in an action for damages for the death of a person killed by being struck by a street car of defendants, disclosed that the deceased walked diagonally across a street, at a place other than a regular crossing, without looking to see if a car was approaching and with her back to the approaching car, the defendants were entitled to a non-suit, as the facts clearly disclosed that even allowing for negligence on the part of the defendants, the deceased was the author of her own disaster.
Dublin & Wexford Rw. Co. v. *Slattery*, 3 A. C. 1156, followed.
Rowan v. *Toronto Rw. Co.*, 29 S. C. R. 717, discussed.

Action by administrator of Jean Spence who was killed on the evening of the 11th of December, 1911, by coming in contact with one of the defendants' cars as she and her sister Lizzie Armstrong were crossing Bathurst street at a point between St. Patrick and Robinson streets in the city of Toronto.

J. P. MacGregor, for plaintiff.

D. L. McCarthy, K.C., T. Herbert Lennox, K.C., and Keith Lennox, for defendants.

HON. MR. JUSTICE LENNOX:—Lizzie Armstrong was the only witness called to testify as to what occurred immediately before and at the time of the casualty. The other testimony was, in the main, theoretic and speculative, and, more often than otherwise, was based upon assumed or unverified premises. Subject to one or two notable exceptions, the jury accepted the evidence of Lizzie Armstrong; and I can find no good reason why her account of what happened

should not be entirely accurate and decide the issues between the plaintiff and defendants.

At the close of the evidence, the defendants' counsel moved for a non-suit. I refused to withdraw the case from the jury, reserving leave to the defendants to renew the motion for a non-suit. The defendants then decided not to call evidence and a number of questions were submitted to the jury.

I am asked to direct that judgment be entered for the plaintiff for $920 upon the following questions and answers:

1. Was the death of Jean Spence caused by the negligence of the defendants? A. Yes.

2. If you find that the defendants' negligence caused the death, in what did their negligence consist? A. We consider that the car was going at an excessive speed from the fact of the distance the body was thrown, and also the distance the car travelled before it was stopped, and that the motorman gave no warning when approaching the girls.

3. Did Jean Spence, after stepping from the sidewalk, take any precautions for her safety? A. As first brought in—we don't know.

The jury having been instructed to retire and further consider this question and some other questions then unanswered, struck out the answer "We don't know," and said:—

No. 3. From the fact that the witness was in advance of deceased and the night was dark, we don't think that the witness was in a position to know whether the deceased took any precautions for her safety or not.

4. If she did, what precautions did she take? A. Answered by No. 3.

5. If Jean Spence, or her sister, had been on the alert or keeping a look out for cars and vehicles as they crossed the street, would the accident, in your opinion, have occurred? A. It might have.

6. If when the whistle was blown Jean Spence had continued on her course south-westerly across the street, would the accident, in your opinion, have occurred? A. Yes.

7. At the time the whistle was blown had Jean Spence and her sister crossed over the western track? A. Jean Spence was within the western rail of the western track. Lizzie Armstrong was just clear of the western track.

8. If not, where were they, specifying the position of each when the whistle was blown? A. Answered by No. 7.

9. Could Jean Spence by the exercise of reasonable care have avoided the accident? A. We consider that Jean Spence by looking up and down the street before leaving the sidewalk and seeing no car, exercised reasonable care.

10. If your answer is "Yes," in what did her want of care consist? A. Answered by No. 9.

The damages were assessed at $920 and apportioned. It was with great difficulty and only after the jury had been sent back twice, I think, that answers to some of the questions were obtained.

I have come to the conclusion that upon these answers I ought not to direct judgment to be entered either for the plaintiff or the defendants. I am not satisfied with the action of the jury but subject to the question of non-suit later, this would not, of course, justify me in refusing to direct judgment if the answers are sufficient to dispose of all issues raised. Equally, of course, that, in my opinion, the jury have reached erroneous conclusions is not a justification for refusing to give effect to their answers. But the evidence, the Judge's charge, and perhaps, even the argument of counsel, is of consequence in ascertaining what the answers of the jury really mean. *Rowan* v. *Toronto Rw. Co.*, 29 S. C. R. 717, at pp. 731-2-3 and 4. I will have occasion to define the issues, refer to the evidence, and consider what there was to be left to the jury when I come to deal with the motion for nonsuit. This case is in some respects similar to the case just cited. There, however, the question of contributory negligence was submitted without asking the jury what constituted the contributory negligence, if any, they found to exist,—and this was considered of importance in the Supreme Court—here the two questions are submitted; there the whole contest was as to the negligence of the defendants, here the contest was chiefly as to whether the deceased acted with such a want of prudence or ordinary care as to disentitle the plaintiff to recover; there there was a sharp conflict in the evidence upon all material questions; here there was no conflict of evidence, and, of necessity, the question "Could the deceased by the exercise of reasonable car, notwithstanding the negligence of the defendants, have avoided the accident?" and the other questions as to the conduct of the deceased are practically the only matters the jury had to consider and decide. Leaving out of sight then other questions which have not been disposed of as explicitly as I think they ought to be, have the defendants a right to

say that a full and fair trial of this action involves a direct, explicit and non-argumentative answer to the question of contributory negligence. I think they have a right to take this position and, reading some others of the answers in the light of the evidence, I cannot help thinking that the jury were not so much unable as unwilling to answer this question. It is quite a different question from the one left unanswered in *Faulkner* v. *Clifford*, 17 P. R. 363, but the principle is the same. An answer in the affirmative here, as an answer in the affirmative there, would render the other answers favourable to the plaintiff of no effect. In that case, Osler, J.A., delivering the judgment of the Court said:—

"It appears to me very clear that my brother Street was right in refusing to enter judgment for the plaintiffs. . . . A finding in favour of the defendants in answer to the first question would have been a complete answer to the action notwithstanding the other findings in favour of the plaintiffs. There was evidence to support such a finding but the jury have disagreed and have not answered the question. The trial was therefore incomplete and no judgment could be given."

For effect of failure to answer material questions, see also *Bois* v. *Midland Rw. Co.*, 39 N. S. R. 242. But there still remains the question, have they implicitly answered, or eliminated the necessity for answering this question, No. 9, by other answers as was said to be the effect in the *Rowan and Toronto Rw. Case*? I think not, but I cannot say that my mind is entirely free from doubt. It certainly was never intended, or thought of, that an affirmative answer to question No. 1 would be taken as obviating the necessity of answering No. 9, much less of being the equivalent of a negative to this question, yet part of the reasoning in the judgments in that case could, with some force, be applied here. The difference, however, in the issues presented, in the way the case was left to the jury, and in the questions themselves, lead me to think that to hold that question number 9 is in effect answered or dispensed with would be to go beyond the decision in the *Rowan Case*, and that decision goes fully as far as I desire to go. As to the effect of an affirmative answer to a general question of negligence, in *Dublin & Wexford Rw. Co.* v. *Slattery* (1878), 3 App. Cas. 1156, Lord Pensance says at pp. 1173-4:—

"In other words, the only finding upon the first issue under which the second issue could possibly arise, is a find-

ing that the accident did happen by reason of the defendants' neglect, leaving open the further question whether other causes, and among them the negligent conduct of the deceased contributed to it."

On the other hand in *Moore* v. *Grand Trunk Rw. Co.*, 5 O. W. R. 211, Mr. Justice Magee refused to enter judgment, although to the question, "Was the death of the plaintiff's husband occasioned by the negligence of the defendants?" the jury answered "Yes."

I think, too, that the defendants had a right to an answer to the fifth question. See also *Coulter* v. *Garrett*, 14 A. R. 685. I will not direct judgment to be entered for the plaintiff.

The defendants renew their application for nonsuit. I am now of opinion that I should not have allowed the case to go to the jury. Amongst other things, it was strenuously argued at the trial and is now argued again, that there is no evidence of negligence upon the part of the defendants. I have not changed my mind on this branch of the case. If there are any circumstances which could be counted for negligence against the defendants, and there is a *prima facie* case in other respects, then these circumstances must be left for the consideration of the jury. I then thought and still think that there were circumstances deposed to, and theories advanced by the experts from which, although falling far short of what would satisfy my mind, a jury might infer negligence; and, therefore, matters proper to be weighed and pronounced upon by the jury. But in the circumstances of this case, it was not, necessarily, enough that the plaintiff should give evidence of the defendants' negligence; he must shew that the deceased was acting reasonably, or rather, he must at least close his case without disclosing that the deceased was the author of her own disaster.

If, in any case, the only evidence for the plaintiff is that the person injured desired to be injured, or is recklessly indifferent as to whether he is injured or not, knowingly puts himself in the way of the danger, there can of course be no recovery although the defendant is shewn to be negligent as well.

As I said, Lizzie Armstrong is the only witness as to the facts and she discloses not only that she and her sister knew of the danger and that it was increased by the absence of street lighting at that place, but also such a careless and

negligent use of the highway and such an absence of reasonable and ordinary care, or any care, that, in my opinion, they must be held to have brought this trouble upon themselves. Instead of crossing at a regular crossing or at right angles to the sidewalk, and so only be in danger while they crossed over two sections of street of the width of a car and almost inevitably see a car going either north or south, they turn their backs upon the southern bound cars, and without ever looking after leaving the sidewalk, take a course diagonally from the park gate to Robinson street, shutting out the chance of even seeing the cars on the track where the injury occurred, and exposing themselves to contact with vehicles of all kinds for a distance of possibly 20 rods. If they had looked at all, they would have seen, if they had gone directly across the street, they probably would have seen without looking, and if they had crossed in this way, they would have been upon the western sidewalk long before the car came along.

Lizzie Armstrong says:—

"Q. And you were crossing the road in what direction? A. South, crossing angling.

Q. And you were going to Robinson street? A. Yes.

Q. And did not walk down Bathurst street opposite to Robinson street and go across? A. No.

Q. So after you left the sidewalk on Bathurst street, you would be going in a south-westerly direction? A. Yes.

Q. So your back would be pretty well towards? A. The north.

Q. The north? A. Yes.

Q. Now then you did not look to see if there was a car coming after you left the sidewalk? A. No.

Q. That is you just walked in a diagonal direction—that is in the direction right from the sidewalk to where the accident occurred without looking up to see if there was a car coming? That is right, is it not? A. We looked before we started to cross the street.

Q. You looked when you were on the sidewalk? A. Yes.

Q. But from the time that you left the sidewalk until the accident happened, you had not looked to see if there was a car coming? A. No.

Q. So that if you had looked after you left the sidewalk until the time of the accident, you would have seen a car coming? A. I guess we would have seen it.

Q. And am I to understand that you walked across the track where the accident happened without ever looking to see if there was a car near you? A. Yes."

It is suggested that Lizzie might not know of all her sister did. It is enough to say that she is the witness upon whose evidence the plaintiff depends, and she professed to know. Further, if the deceased had looked she would, as Lizzie says, have seen the car and would of course have given the alarm.

In the *Dublin & Wexford Railway Co.* v. *Slattery* (1878), 3 App. Cas. 1156, Lord Hatherly said, "There is in every case a preliminary question which is one of law, viz: whether there is any evidence upon which the jury could properly find the questions for the party upon whom the onus of proof lies; if there is not, the Judge ought to withdraw the question from the jury and direct a nonsuit if the onus is on the plaintiff, or direct a verdict for the plaintiff if the onus is on the defendant, and he quotes Chief Barron Palles as saying: "When there is proved as part of the plaintiff's case . . . an act of the plaintiff which *per se* amounts to negligence, and when it appears that such act caused or directly contributed to the injury, the defendant is entitled to have the case withdrawn from the jury.'" Resuming, Lord Hatherly says: "If such contributory negligence be admitted by the plaintiff, or be proved by the plaintiff's witnesses, while establishing negligence against the defendants, I do not think there is anything left for the jury to decide, there being no contest of fact." . . . And this statement of the law by his Lordship is exceedingly pertinent in this case. "I cannot consider it a proper question," he says, "for a Judge to ask a jury whether a man walking or running across a line of railway on which a train is expected, without looking to see whether a train is in sight, be an act of negligence. As Mr. Justice Montague Smith observed in *Siner* v. *Great Western Railway Company*, "Judges cannot denude themselves of the knowledge of the incidents of railway travelling which is common to all," and again: "I do not think it would be reasonable to infer that a man exercised due caution in walking on a railway at night without looking about him."

Lord Coleridge, at p. 1194, says: "Now it is admitted that in order to justify a case being submitted to a jury, there must be evidence of negligence on the part of the

defendants, and also that the negligence in fact caused the injury complained of . . . it is as necessary to make out the latter proposition as the former, and, therefore, in order to submit a case to the jury, there must be evidence of both. It is also clear that if the undisputed evidence, or the admissions in the case, negative the latter proposition, the Judge must withdraw the case from the jury, because the plaintiff has not satisfied the onus which lies on him. . . . The plaintiff fails if he fails to shew that the defendants caused the wrong, and he does so fail, if he shews that he caused it, or that the deceased caused it himself."

Lord Blackburn, at p. 1216, says: "If they choose to cross in a way which is *prima facie* negligent—say diagonally, that was such negligence as cast upon the plaintiff the burden of proving that there was something to excuse the failure of the deceased to take that precaution (of looking) and she took some other sufficient precaution. He must satisfy the onus cast upon him.

See also *Skelton* v. *London & North Western Rw. Co.*, L. R. 2 C. P. 631; *Rocke* v. *Kerrow*, 24 Q. B. D. 463, and a case of Myers against these defendants, tried by Mr. Justice Middleton without a jury in April last.

The defendants should not ask for costs and if they should not ask for them, it is some reason why I should not give them. I direct that a judgment of nonsuit be entered without costs to either party.

DIVISIONAL COURT.

APRIL 2ND, 1912.

GREER v. ARMSTRONG.

3 O. W. N. 956.

Conditional Sales Act—Conversion—Evidence—Weight of—Vendor's Lien—Damages—New Trial—Refusal of—Appeal.

DIVISIONAL COURT dismissed appeal from judgment of County Court of Middlesex in favour of plaintiff for $100 damages in an action by a manufacturer for conversion of a cab by defendant upon which plaintiff claimed to have a vendor's lien.

Appeal by defendant from the judgment of the County Court of Middlesex of Dec. 16, 1911, and also a motion for leave to adduce further evidence in an action by plaintiff, a carriage manufacturer, to recover $300 from defendant for the alleged conversion to his use of a cab sold to one

L. W. Grey, subject to plaintiff's lien. At the trial judgment was awarded plaintiff for $100 and costs.

The appeal to Divisional Court was heard by HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., HON. MR. JUSTICE BRITTON and HON. MR. JUSTICE SUTHERLAND.

C. A. Moss, for the defendant.

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

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—In the final analysis, the sole question is, whether, at the time possession was given, the name and address of the bailor or vendor was painted, printed, stamped, or engraved on the cab; R. S. O. ch. 149, sec. 1.

The learned Judge has, on conflicting evidence, found that it was. He does not decide this by the application of the rule as to the burthen of proof, but gives good reasons for the conclusion which he has arrived at.

The Judge finds in favour of the party asserting the affirmative.

In the civil law it was said, *magis creditur duobus testibus affirmantibus quam mille negantibus*—rather an exaggerated statement, one might think. But Sir John Romilly, M.R., in *Lane* v. *Jackson*, 20 Beav. 535, says: "I have frequently stated that where the positive fact of a particular conversation is said to have taken place between two persons of equal credibility, and one states positively that it took place and the other as positively denies it, I believe that the words were said."

The trial Judge's conclusion ought to be affirmed.

Then as to the application for a new trial or re-opening of the case to take the evidence of Grey—none of the recognised requisites for a successful application of this kind exists. It is not newly discovered evidence. The defendant knew of it and could have got a further postponement of the trial on payment into Court of $100 or giving security for $200. He was unable or unwilling to comply with the condition, and went on and took his chances without Grey. I cannot say that his evidence would have probably changed the result.

The judgment is for only $100. I think, with the onerous terms as to costs we should have to impose, it is in the defendant's interest to let matters rest as they are.

The appeal and motion are dismissed with costs.

HON. MR. JUSTICE BRITTON, and HON. MR. JUSTICE SUTHERLAND agreed.

HON. MR. JUSTICE LENNOX. JULY 24TH, 1913.

RE BURRIDGE ESTATE.

4 O. W. N. 1605.

Executors and Administrators—Power to Sell Land—Infants—Application to Court—Vendors and Purchasers Act.

LENNOX, J., *held*, that under the terms of the will of a testator, his executors had power to sell and convey certain lands of the estate.

Motion by all parties interested for an order approving of a sale of land in which infants were interested.

J. R. Meredith, for all parties.

HON. MR. JUSTICE LENNOX:—I am asked to treat the application in this case as one under the Vendors and Purchasers Act. Mr. Meredith represents all interested parties, including the infant and including the proposed purchasers, the Board of Education of the City of London. It appears by the affidavits of Patrick Walsh and Thos. C. Knott, that it will be decidedly beneficial to the estate that the proposed sale should go through. In addition to getting an excellent price for the property, it is stated that the money is required for payment off of mortgages upon the estate. I think the testator, by his will, clearly intended that his executors should have power to convey in a case of this kind.

I therefore declare that the surviving executor and executrix have power to convey the property, and that the Board of Education of the City of London is compelled to accept the title made in this way.

HON. R. M. MEREDITH, C.J.C.P. JUNE 24TH, 1913.

PULOS v. SOPER.

4 O. W. N. 1559.

Chattel Mortgage—Seizure under Execution — Goods Claimed by Chattel Mortgagee—Interpleader Issue.

MEREDITH, C.J.C.P., *held*, that assignee for benefit of creditors of execution debtor should be made a party to issue—Judgment should go in his favour with costs upon admissions at trial that mortgage did not fully comply with provisions of Bills of Sale and Chattel Mortgages Act.

An interpleader issue tried at the Brockville non-jury sittings on the 3rd June, 1913.

See *Skyes* v. *Soper*, 4 O. W. N. 1554; 29 O. L. R.

B. N. Davis and M. M. Brown, for the plaintiff.

J. A. Hutcheson, K.C., for the defendant.

C. C. Fulford, for the sheriff.

HON. R. M. MEREDITH, C.J.C.P.:—In this issue, which came on for trial after the other, counsel for the plaintiff asked that the trial be postponed, because no trial would be necessary if the assignee succeeded in the other issue. But I see no good reason for any further delay.

The assignee should, I think, be made a party to this issue; it is only fair to the parties and to the Courts that the rights of all concerned should, where possible, be determined in the one trial, if that can be done conveniently.

Upon that being duly done, judgment should go in his favour, with costs; on the admissions made, at the trial, that the mortgage cannot be supported by reason of failure to comply fully with the provisions of the Chattel Mortgages Act.

The execution creditors should have, out of the estate, their costs, as between solicitor and client, up to the time that the assignee becomes a party; payment of which should be a condition precedent to the exercise of his right to be made a party, and have judgment in his favour.

HON. MR. JUSTICE LENNOX. JULY 31ST, 1913.

RE MACKAY AND NELSON.

4 O. W. N. 1607.

Vendor and Purchaser—Will—Power of Executors to Sell Land for Payment of Debts—Contract for Sale of Land by Executors—Objection to Title—Application under Vendors and Purchasers Act—Costs.

Motion by vendors for an order, under Vendors and Purchasers Act, declaring that purchaser's objection to title of vendors, upon a contract for the sale and purchase of land, was invalid, and that vendors could make a good title. The vendors were the executors of a deceased person, and the objection was as to the power of the executors to sell, under the terms of the will.

LENNOX, J., made order as sought by vendors.

Re Tanqueray-Willaume & Landau, L. R. 20 Ch. D. 465, followed.

J. M. Langstaff, for the vendors.

A. B. Armstrong, for the purchaser.

HON. MR. JUSTICE LENNOX:—There is here a clear charge of debts, and a specific devise of all the property of the testatrix to the executors for named purposes, and amongst them the payment of debts. A few months only having elapsed since the death of the testatrix there is no presumption that the debts have been paid; and the purchaser has no right to be informed as to them.

It was admitted on the argument that our statutory law relating to the matter is the same as the English law.

The objections to the title fail. All the points are covered by *Re Tanqueray-Willaume & Landau*, L. R. 20 Ch. D. 465.

The executors have power to convey. I have nothing to do with the question of interest. The letters and attitude of the vendors have been somewhat vacillating, and I think it is a case in which each party should pay his own costs.

HON. MR. JUSTICE LENNOX. SEPTEMBER 3RD, 1913.

THERRIAULT v. COCHRANE.

5 O. W. N. 26.

Municipal Corporations — By-law Striking Tax Rate — Refusal to Quash.

LENNOX, J., refused to quash by-law No. 81 of the town of Cochrane fixing a tax rate on property liable for Separate School purposes.

Motion by Louis P. Therriault, merchant of Cochrane, for an order quashing by-law No. 81, passed by the council of the town of Cochrane, on June 19th, 1913, in regard to the tax rate on property liable for separate school purposes, on the ground that rate fixed is greater than may be fixed by it.

F. Day, for applicant.

S. A. Jones, for town.

HON. MR. JUSTICE LENNOX:—I do not think I am called upon to quash the by-law.

The council acted in good faith. They have pursued the same system in regard to the public and separate schools, and the allegation is made that, judged by the experience of other assessments it will take the 23 mills to produce the sum requisitioned. It is barely possible that the council has not

the strict legal power to do what they have done, but I incline to think otherwise, and at all events no substantial wrong will be done by allowing the matter to stand as it is. All that is realized will be paid to the school board, and will enable them to demand less next year. I know the incidence of the tax varies from year to year, but this is a little matter as compared with the inconvenience of quashing the part of the by-law in question. But the applicant is acting in a public capacity, and no doubt in good faith too. It cannot be said that the law is clear. *Grier* v. *St. Vincent*, 13 Grant 512, is no guide to what is here in question. It is not quite easy to reconcile sub-sec. 5 of sec. 55 of The Separate Schools Act and sec. 188 of Assessment Act, particularly since the exception in the new section (188) is not confined to taxes on personal property as formerly. The motion will be dismissed without costs.

HON. MR. JUSTICE LENNOX. JULY 31ST, 1913.

RE MACKENZIE AND HAMILTON.

4 O. W. N. 1606.

Vendor and Purchaser — Contract for Sale of Land—Objection to Title—Outstanding Interest—Vendors and Purchasers Act.

Motion by vendor, under the Vendors and Purchasers Act, for an order declaring that the purchaser's objection to the title shewn by the vendor, upon a contract for the sale and purchase of land, was invalid and that the vendor could make a good title.

LENNOX, J., made the order as sought.

J. A. McEvoy, for the vendor.

H. L. Macdonell, for the purchaser.

HON. MR. JUSTICE LENNOX:—Were it not for the order made by Hon. Mr. Justice Middleton in conection with this same Yates transaction, although referring to different lots, I would be inclined to think that Yates took an interest in the lands in question under the declaration made in his favour by the vendor. I do not, however, see that the circumstances of the application made to me differ from conditions which the learned Judge had to consider when he made an order on the 18th September, 1911, and I presume I ought to follow the decision then come to.

There will be an order declaring that the objection made by the purchaser in reference to the interest of Gordon A.

Yates is not a valid objection to the title to the lands he is purchasing, and that neither the said Gordon A. Yates or his assignee has any interest in the lands in question.

The purchaser will pay the vendor the costs of this application.

HON. MR. JUSTICE HODGINS. SEPTEMBER 15TH, 1913.

RE STRONG AND THE CAMPBELLFORD, LAKE ONTARIO & WESTERN RW. CO.

RE STRONG AND THE ONTARIO & QUEBEC RW. CO.

5 O. W. N. 25.

Railways—Expropriation of Lands—Application for Warrant of Possession — Dom. Ry. Act R. S. C. c. 37, s. 217 — Proceedings Irregular—Defective Material—Dismissal of Motion—Costs.

HODGINS, J.A,. dismissed a motion by a railway for a warrant for possession of certain lands expropriated on the ground that the material filed did not support the application for the warrant.

Costs to the landowner in any event of the arbitration.

Motion for an order under the Dominion Railway Act, R. S. C. ch. 37, sec. 217, for the issue of a warrant for immediate possession of certain lands expropriated for railway purposes.

C. W. Livingston, for the railway companies.

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

HON. MR. JUSTICE HODGINS:—The notice of this motion and the notice of expropriation, are given on behalf of the Ontario and Quebec Rw. Co., while the affidavit on which the motion is founded is entitled, In the matter of the Campbellford, Lake Ontario and Western Rw. Co.

In the notice of expropriation the land is stated to be required by the Ontario and Quebec Rw. Co. for the purposes of its railway; and in the affidavit in support it is sworn to be required to be taken for the Campbellford, Lake Ontario and Western Rw. Co.

In answer to the motion it is shewn that no plan has been filed in the Registry Office of the county of Lanark, indicating that the land in question is required for the purposes of the Ontario and Quebec Rw. Co. The affida-

vits in answer do not expressly negative the filing of a plan by the Campbellford, Lake Ontario and Western Rw. Co.; and there is a general statement in the affidavit of the engineer of construction of that railway that all statutory and other requirements to entitle that company to expropriate the lands in question have been complied with.

The material is defective, whether one railway company or the other is the applicant; the Ontario and Quebec Rw. Co. having nothing to support their motion for a warrant for lands required for their company, while the other railway company has given no notice for a warrant for possession of lands required in their construction.

The real dispute is whether the land in question is for additional land for a railway already in operation, *i.e.*, the Ontario and Quebec Rw. Co.—as to which sec. 178 would seem to apply, or whether it is required for the right of way of the Campbellford Railway now under construction. It is said that the amount to be paid into Court will be considerably increased if the land to be taken will, in connection with the Ontario and Quebec Railway lands, form a railway yard.

I do not see that I can amend the proceedings; and must dismiss the application; the costs of which will be—following the order of the learned Chancellor, in *Re Kingston and Pembroke Rw. Co. and Murphy*, 11 P. R. 304—to the land owner in any event of arbitration.

HON. MR. JUSTICE LENNOX. SEPTEMBER 15TH, 1913.

BROWN v. THOMPSON.

5 O. W. N. 19.

Statute of Limitations—Charge on Land—Power of Attorney—Laches—Forty Years' Delay.

LENNOX, J., dismissed an action brought upon a power of attorney alleged to form a charge on certain lands in favour of plaintiff's assignor, where no attempt had been made to enforce the alleged charge for over 40 years.

Action for a declaration that plaintiff is entitled to $333.86 of principal money and $840.42 for interest—the principal money purporting to be secured to Robert Laurie and Isabella Bald under a power of attorney executed in

their favour by Caroline Thompson more than 40 years ago, and to have it also declared that this principal money with its forty years' interest is still a lien and charge upon the land mentioned in the power of attorney.

B. N. Davis, for the plaintiff.

G. H. Pettit, for the defendant.

HON. MR. JUSTICE LENNOX:—The power of attorney gave the attorneys or agents therein mentioned power to realize the $333 to which they were entitled out of the rents of certain land and whether it constituted a lien upon the land or not, it was registered against it. The plaintiff claims that Isabella Bald bequeathed this claim to him, but I have not found such a bequest in the will—she bequeathed him $1,000 to be paid when he erected a monument at the grave of her grandfather, but this he has not done. If he became entitled to this money at all his benefactress is dead for over 40 years and he knew within 30 days of the provisions of her will affecting him.

The defendants set up laches, the Statute of Limitations and other defences. The Court has in the meantime, while the plaintiff was sleeping upon his rights, if any he had, made a decree vesting the property in a certain claimant, and it has been dealt with by voluntary conveyance on several occasions. Extensive and permanent improvements have been made from time to time. The plaintiff demanded payment in 1876 but never again until he demanded it in this action.

The plaintiff understood that the money had been collected by certain executors who are dead and he does not know now whether it was in fact paid to them or not. If the property had been charged in the most formal and specific way, as for instance by a mortgage, it would have been relieved of the charge and the mortgage outlawed long ago. Can the informal instrument, now in question, have a longer life?

This is a novel action and the onus is upon the solicitor and counsel who present such a claim, rather than upon the Court, to discover how it is to be supported. I have not discovered, and counsel has not pointed out, any valid reason for a judgment for the plaintiff. There will be judgment dismissing the action with costs.

HON. MR. JUSTICE LENNOX. SEPTEMBER 15TH, 1913.

HUTCHINSON CO. v. McGOWAN.

5 O. W. N. 27.

Contract—Breach—Measure of Damage — Agreement to Purchase Merchant's Retail Stock—Loss on Resale—Misrepresentation — Right to Charge for Stocktaking and Advertising.

LENNOX, J., *held*, that a defendant who failed to carry out his contract to purchase the stock-in-trade of plaintiff, a retail merchant, was liable for any deficiency upon a resale.

Action for damages for breach of contract to purchase the stock-in-trade of plaintiff, a merchant of Alliston.

Walter G. Fisher, for the plaintiff.

W. S. Morden, for the defendant.

HON. MR. JUSTICE LENNOX:—I think the defendant was bound to carry out the contract he entered into with the plaintiffs and should have paid them for the store stock in question about the 20th April, 1912. There was a good deal of puffing in the advertisements of a character which no sensible man would give heed to and there were also some untrue statements which if not fraudulent came very close to the border line of fraud. Some of them arose out of unfounded assumptions made by the agent and as to these there was no actual fraud in fact. But I am not called upon to consider the effect these statements might have under other circumstances as it is not pretended that they induced the defendant to enter into the contract. He is a business man and visited Alliston, saw the stock and the town and upon this and advice he got, judged for himself. He agreed to pay 60 cents on the dollar per invoice prices.

The value of the goods on hand when stock was taken per invoice was found to be $7,615.94. The defendant, therefore, should have paid $4,569.57. The plaintiffs were compelled to re-sell and this sale netted after deducting $77 hereafter mentioned, the sum of $2,588.57, leaving a balance to be paid of $1,981. The deduction is made up as follows: Electric light and rent pending re-sale, $58 and $19 for interest on defendant's purchase-money to date of re-sale; total $77.

In addition, the plaintiffs claimed to charge the defendant with caretaking and stocktaking, $123; advertising, $10, and commission on the re-sale. They would have had to take stock if the defendant had completed his contract — there was no need of expenditure for caretaking, and commission is out of the question. As to the advertising, although there is no evidence that any loss resulted from the change of method adopted, yet I think the plaintiffs should have advertised the second sale in about the same method as they did the first, and I strike off this item. It is true that the defendant knew of the situation and did nothing and made no complaint.

The only difficulty I have felt in deciding this case is to determine what amount the defendant should be compelled to pay. After careful thought I have come to the conclusion that he should pay the difference between the amount he was to pay and the sum realized upon a re-sale—the evidence being that the stock had of course to be re-sold and the best possible price was obtained.

There will be judgment for $1,981, with interest from the 24th of May, 1912, and costs.

HON. MR. JUSTICE KELLY. SEPTEMBER 12TH, 1913.

ITALIAN MOSAIC AND MARBLE CO. v. VOKES.

5 O. W. N. 15.

Building Contract—Action by Sub-contractor—Variation in Plans—Tender—Disregard of Specification—Progress Certificates—Condition Precedent to Payment — Action Brought Prematurely—Costs.

KELLY, J., *held*, that where plaintiffs, contractors, did not prove that they had obtained architects' certificates shewing themselves entitled to payments according to the terms of the contract, their action was premature.

Action by plaintiffs, sub-contractors, for materials furnished and work done for defendants, contractors, upon the Toronto General Trusts Corporation Building, Toronto.

G. Wilkie, for the plaintiffs.

G. Osler, for the defendants.

HON. MR. JUSTICE KELLY:—Defendants were the contractors for the tile and mosaic work in the erection of the building known as the Toronto General Trusts Corporation Building in Toronto.

Plaintiffs were the sub-contractors under the defendants for the terrazzo and mosaic work.

The chief item in dispute is a charge of $612.54 for marble and mosaic flooring on the second floor of the building.

Plaintiffs, on October 27th, 1909, tendered to the architects, Miller & Co., for ceramic floor and setting tile wainscotting, and also, by separate offer, for furnishing and laying terrazzo floors, Roman marble mosaic, and furnishing and setting window sills. On November 10th, 1909, they sent in another tender for furnishing and laying complete terrazzo floor, terrazzo base, marble mosaics, and setting window sills, according to plans, specifications and designs; and therein they cancelled their previous proposal. These tenders were not accepted, and the contract above referred to, was let to the defendants. Defendants and the architects were desirous of having the mosaic work done by the plaintiffs, and accordingly, on March 15th, 1911, plaintiffs submitted to defendants a written tender as follows: "In reference to terrazzo and mosaic work for the Toronto General Trusts Corporation Building, we are pleased to give you our price for all the work according to specifications and plans as they were originally when we figured on this job," and then they named the price. Prior to this tender, plaintiffs' manager accompanied Mr. Vokes to the architects' office and there examined the plans and read the specifications.

Defendants, on March 29th, 1911, accepted plaintiffs' tender "for your supplying and applying, according to plans and specifications and details as shewn you, and to the satisfaction of the architects, all marble mosaic and terrazzo work as contained in such plans and specifications," etc.

No exception was taken to the terms of this acceptance, nor was any question raised as to the tender not including the "public space" on the second floor, until several months later when defendants called upon plaintiffs to do that part of the work. The plaintiffs set up that their tender did not include this particular work; they proceeded to do it, however, expressly reserving their right to claim payment for it

as extra work. The misunderstanding in relation thereto arose largely from the fact that the architects' working plans as originally drawn, designated the "public space" on the second floor as "ceramic mosaic flooring." After the preparation and colouring of the plans, the word "ceramic" was struck out. Plaintiffs contend that this change was not made until after they had prepared and submitted their tenders in October and November, 1909, and they place reliance upon the form of their tender of March 15th, 1911, where it was said the work was to be "according to specifications and plans as they were when we originally figured on this job"; and they argue that this, taken with what they maintain was the condition of the plans when they tendered in October, 1909, excludes the disputed work from their last tender.

According to the evidence of the architect, Miller, the plans were prepared prior to October, 1909, the specifications for the mosaic and tile work were engrossed and in his hands as early as October 13th, 1909, and immediately afterwards he gave instructions to have them coloured; and he says they were coloured, and the word "ceramic" was struck out before the tenders were called for. There is other evidence also upon this point, and the conclusion on the whole evidence is reasonable, that this change was made prior to the time that plaintiffs submitted their first tender to the architects.

On other grounds as well, I think plaintiffs' claim as to this item is not sustainable. Their tender of October 27th, 1909, to the architects, was made "according to plans and specifications furnished by you"; their next tender on November 10th, 1909, was "according to plans, specifications and designs." Though they say they had not examined or seen the specifications until after that time, the form of their tenders recognized the existence of specifications, and they must be taken to have tendered and to have intended to contract with reference thereto and subject to their terms and conditions. Moreover it is shewn beyond doubt that the specifications for this very work were in the hands of the architects before the tenders were submitted.

The specifications relating to the floor and wall tiling contain the following: "2nd Floor Plan: The public space will be laid with marble mosaic tile with borders approved (see coloured plan shewing floor space to be tiled)."

The general specifications provide that "the specifications and drawings are intended to co-operate, so that any work or works exhibited on the drawings and not mentioned in the specifications, or mentioned in the specifications and not exhibited on the drawings, are to be executed as if they were mentioned in the specifications and set forth on the drawings to the true intent and meaning of the specifications and drawings without any extra charge whatsoever."

If plaintiffs, knowing as they must have known, of the existence of the specifications, neglected to examine them and tendered with reference to them, they cannot expect to be relieved from the terms which were thus imposed upon those tendering. They took their chances and must pay the penalty of their neglect. On the whole evidence I think they fail as to this item.

This action was commenced on June 7th, 1912. On January 24th, 1913, defendants made a payment to plaintiffs of a sum which they contend was in full of their liability. This payment, on plaintiffs' own admission, is in full of the remaining part of their claim, except as to two items—one $15 and the other $20. The former of these is a charge for some tiling work ordered by defendant, to be delivered on request, and which plaintiffs prepared and laid out in their own premises to await instructions for delivery. Delivery was not asked for, the work not having been required or used in the building; and plaintiffs charged this sum, which was only a part of the price agreed to be paid for the work when completed. The charge is not unreasonable for the work done, and it should be allowed to the plaintiffs.

The $20 claimed is an amount which defendants deducted when making payment to the plaintiffs, on the ground that the work it represented was included in the plaintiffs' contract and was performed not by them but by the defendants. I am not satisfied on the evidence that the contract included this work, and I think it should not have been charged to plaintiffs. They are entitled to payment of the $20.

As to the costs of action, the contract between the parties provided that payments thereon should be made at the same rate and times as those made by the architect (for the proprietors) to defendants. These terms called for the rendering of an account and the obtaining of the architects' progress certificate and that the payment was properly due.

The evidence does not establish that this requirement had been complied with at the time the action was commenced.

Looking at all the terms of the contract, my opinion is that the action was brought prematurely. In that view defendants and not plaintiffs are entitled to the costs of the action.

FIRST APPELLATE DIVISION. SEPTEMBER 15TH, 1913.

Re OLMSTEAD AND EXPLORATION SYNDICATE OF ONTARIO, LIMITED.

5 O. W. N. 8.

Mines and Minerals—Boundary of Claim — Boundary as Shewn on Claim Filed to Govern — Boundary on Mining Recorder's Map Immaterial—Mining Commissioner—Appeal from.

SUP. CT. ONT. (1st App. Div.) *held*, that the boundaries of a claim which a staker acquires under the Mines Act are delimited by the claim as filed and the fact that the claim as shewn upon the map in the office of the Mining Recorder shews more extensive boundaries does not extend the area of the claim.

Judgment of Mining Commissioner reversed.

Appeal by George Olmstead from the decision of the Mining Commissioner, dated 18th February, 1913; the controversy being as to what is the eastern boundary of the mining claim of the respondents.

The claim as applied for was shewn by the sketch which accompanied the application to be rectangular in form; and the "length of the outlines" of it was stated to be 20 chains by 20 chains, and the easterly boundary, as shewn on the sketch, was a straight line from number one post to number two post.

It was contended by the respondents that the easterly boundary is not this straight line but that it is the westerly margin of the east branch of the Montreal River, called in the application "Lady Dufferin Lake," which is but a short distance easterly of the straight line; and the Mining Commissioner adopted that view, being of opinion that the application and sketch, and the work on the ground, indicate that the applicant intended to include in the claim he was making the land lying between the straight line and the margin of the river.

The reasons which led the Commissioner to that conclusion were: (1) that the claim is stated in the application

to be "north-west side of Lady Dufferin Lake"; (2) that the application was loosely drawn, and although it described the claim as being 20 chains by 20 chains, it was clearly indicated by one of the stakes that the distance from number two to number three was 25 chains; (3) that the Mining Recorder treated the claim as extending to the river, and so marked it on his office map; aud (4) that the line from number one to number two post was not blazed.

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.

L. McDougall, for appellant.

W. R. Smyth, K.C., for respondents.

HON. SIR WM. MEREDITH, C.J.O.:—I am, with respect, of opinion that the Commissioner came to a wrong conclusion, and that the true eastern boundary of the respondents' claim is a straight line drawn from number one post to number two post.

In addition to the statement in the claim that it is 20 chains by 20 chains, and the fact that the sketch which accompanied it shews it as a rectangular figure, there is the cogent circumstance that so far from the sketch shewing that the river or lake is the eastern boundary it shews the contrary. It was supposed by the staker that there was a bend in the river extending into the rectangular figure, and it is plain that he intended that the claim should include that part of the river which lay within the figure. The fact that instead of there being a bend, the land extended some distance to the east of the rectangular figure, is immaterial on this point of the case, viz., what the application and sketch shewed was intended to be included in the claim. These circumstances, in my opinion, are much stronger against the respondents than are the circumstances relied on by the Commissioner.

As I understand the Mines Act, the foundation of the right which a staker acquires or may acquire is the claim which he files with the recorder; assuming of course that he has complied with the Act as to discovery, staking, etc.; and therefore the fact that on the map in the office of the re-

corder the claim is shewn as extending to the river cannot give a right to land not included within the claim as filed.

For the same reason the granting of the certificates of record does not assist the respondents. It is final and conclusive evidence of the performance of all the requirements of the Act except working conditions in respect to the mining claim, up to the date of the certificate, and thereafter the mining claim is not, in the absence of mistake or fraud, liable to impeachment or forfeiture except as expressly provided by the Act.

It will be observed that the certificate contains no description of the claim, but refers to it only by its number. In order to ascertain what the area of the claim is, reference must therefore be had to the application and sketch; and it is the claim as shewn on them, and that only, in respect of which the provisions of sec. 65 can be invoked by the appellant.

I would therefore reverse the judgment or decision of the Commissioner, and substitute for it a declaration that the eastern boundary of the respondents' claim is a straight line drawn from number one post to number two post, and I would make no order as to the costs of the appeal.

HON. MR. JUSTICE MACLAREN:—I agree.

HON. MR. JUSTICE HODGINS, and HON. MR. JUSTICE MAGEE agreed and referred to the former Commissioner's views as expressed in *Re Green*, p. 293 Mining Commission Cases.

HON. MR. JUSTICE LENNOX. JULY 17TH, 1913.

CANADA CARRIAGE CO. v. LEA.

4 O. W. N. 1594.

Solicitor—Bill of Costs Taxed and Unpaid — Moneys in Court — Lien on.

LENNOX, J., ordered that certain moneys in Court to the credit of a client be paid out to his solicitors where it appeared that the latter had a taxed and unpaid bill of costs against the former for a larger sum than the moneys in Court.

Motion by solicitors for an order for payment out of the moneys in Court to the credit of the Durant, Dort Carriage Co.

T. H. Peine, for the applicants.

HON. MR. JUSTICE LENNOX:—It appears that the moneys in Court to the credit of Durant, Dort Carriage Company are the fruit and result of professional services rendered by Messrs. Cahill & Soule, and Carscallen & Cahill, and that their bill of costs has been taxed and allowed at $855.84, and that these moneys in Court do not amount to so much as is owing to the solicitors, the applicants. Notice of this application has been duly served; and the Durant, Dort Carriage Company have not appeared.

There will be an order issued in the terms of the notice of motion.

HON. MR. JUSTICE LENNOX. AUGUST 8TH, 1913.

REX v. GILMOUR.

5 O. W. N. 14.

Intoxicating Liquors — Liquor License Act—Conviction for Selling without License—Motion to Quash—Notice of Trial—Conviction in Absence of Accused—Service of Notice of Appeal—Severity of Sentence.

LENNOX, J., refused to quash the conviction of defendant for selling liquor without a license, although made in his absence, holding that he had ample opportunity to be present.

Motion to quash defendant's conviction for selling liquor without a license.

S. S. Mills, for defendant.

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

HON. MR. JUSTICE LENNOX:—I regret that I cannot do anything for him. I am inclined to believe that the technical objection taken that "service" includes service upon the Clerk of the Peace, and that the appellant's proceedings were too late, is a valid objection, but I prefer to dispose of the case upon the merits, and upon the merits there is no ground here upon which I can give relief. I am not well pleased with the action of the magistrates, but they acted within their jurisdiction, and although the appeal was very ably and strenuously argued, I cannot say that in proceeding to dispose of the matter on the 16th of June, in the absence of Gilmour, the Justices acted "contrary to natural justice." The case was set for the 11th of June, as Gilmour knew, and it was then adjourned until the 16th because Mr.

Tiffany, his legal adviser—whether counsel for the trial or not—could not be present. There was no valid excuse for his not being represented when the case actually came on for hearing if he wanted to be.

Still, if I had power to quash the conviction I would do so, not because I would then be doing complete justice, but because, in my opinion, it would be a nearer approach to justice than a fine of $500. Leaving out the suggestion of a previous conviction, and in my opinion it clearly was not left out in fixing this penalty, I can see no reason why the fine should not be reasonably close to the minimum. There is no evidence distinguishing it from other cases of violation to justify the magistrates in saying that "Gilmour has flagrantly defied the law." Mr. Cartwright states that Angus McDonald, the inspector, is an exceptionally good officer. That may be, but the evidence he gave as to a previous conviction was unfair and should not have been given. The same is true as to the last sentence of Grant's evidence. There is no doubt this had an effect upon the magistrates and they in effect deal with the matter as a second offence. But it is a question for the administration, not for me to deal with. McDonald is their officer, and if, inadvertently, he has been the means of causing too heavy a penalty to be inflicted, the department can mitigate this. I sincerely trust the Department will give the matter consideration.

The motion is dismissed with costs.

HON. MR. JUSTICE LENNOX. JULY 17TH, 1913.

LAIDLAW LUMBER CO. v. CAWSON.

4 O. W. N. 1595.

Interpleader—Order of Directions — Claimant Made Plaintiff—Dismissal of Appeal.

LENNOX, J., dismissed an appeal by a claimant in an interpleader issue from an order making her plaintiff in such issue.

Appeal by claimant from an order of the MASTER-IN-CHAMBERS directing that she should be plaintiff in an interpleader issue.

C. M. Hertzlich, for the claimant.

G. F. McFarland, for the execution creditors.

R. S. Maclennan, for the Sheriff of Toronto.

HON. MR. JUSTICE LENNOX:—The motion will be dismissed with costs. It would perhaps prejudice the trial of the interpleader issue were I to go minutely into my reasons for thinking that the learned Master-in-Chambers was not wrong in making Mrs. Brent plaintiff in the proceedings. The way in which the property was acquired, was dealt with, and was found, to say nothing of the circumstances of a lady in Mrs. Brent's position investing in two automobiles, I think quite justifies the order made.

HON. MR. JUSTICE LEITCH. SEPTEMBER 5TH, 1913.

RE BARTHELMES AND CHERRY.

5 O. W. N. 27.

Vendor and Purchaser—Satisfaction of Objection to Title—Right of Way—Conveyance—Costs.

Motion for an order declaring that the objection to title of vendor to land in question has not been satisfactorily answered by vendor and that same constitutes a valid objection to the title.

A. Singer, for the purchaser.

G. Ritchie, for the vendor.

HON. MR. JUSTICE LEITCH:—The only difficulty now outstanding seems to be the right of way. I think this is cured by the conveyance from Cranfield to Barthelmes.

No costs.

HON. MR. JUSTICE KELLY. SEPTEMBER 18TH, 1913.

LECKIE v. MARSHALL.

5 O. W. N. 29.

Master—Sale by Court—Default in Completion — Re-Sale—Reserve Bid—Action for Deficiency—Costs.

KELLY, J., *held*, that where a mining property had been sold at a Court sale and the purchaser had defaulted in completing the purchase, the same should be again offered for sale, subject again to a reserve bid to be fixed by the Master.

Motion by plaintiffs for order directing sale of mining properties in question, giving directions for conduct thereof, etc., excepting direction to sell property subject to reserve bid.

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

G. Bell, K. C., for defendants Marshall and Gray's Siding Development Co.

J. A. Worrell, K.C., for Royal Trust Co.

HON. MR. JUSTICE KELLY:—The parties all agree that the property should again be offered for sale and that the order or direction to that effect made by the Master-in-Ordinary on July 28th, 1913, and the advertisement in pursuance thereof for sale on October 1st, 1913, should be confirmed, except as to the provision that the sale shall be subject to a reserve bid, to which term plaintiffs take exception.

The necessity for a re-sale arises from the party who, at the sale by the Master on July 8th, 1913, was declared the purchaser having made default in payment on the required deposit and in complying with the other terms of the sale.

Following upon so much delay in bringing about the sale, I think it proper that the order or direction of the Master for another sale, as well as all proceedings in pursuance thereof, should be confirmed, and the sale proceeded with accordingly. This includes the term that the sale shall be subject to a reserve bid.

I cannot agree with the plaintiff's contention that owing to what took place at the attempted sale on July 8th, the coming sale should not be made subject to such reserve. I cannot disregard the views held by the Court of Appeal in the judgment of March 6th, 1913 (24 O. W. R. 513). The fact that the reserve bid fixed by the Master for the sale on July 8th has been divulged does not interfere with that view. The Master will fix a reserve bid for the coming sale; whether the amount thereof will be the same as at the sale on July 8th or more or less is for him to determine on the facts before him and the knowledge he possesses of the matter.

That part of the application which asks judgment against Sullivan and Alrich for any deficiency at the coming sale I leave to be disposed of after the sale on October 1st, and after notice to them of the result thereof and of the application to hold them liable for any deficiency; such notice may, without further order, be served upon them in the same manner as was directed for the service of notice of the present application.

The vendor's costs of this application are to be allowed as part of the costs of the sale.