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APPELLATE DIVISION.

FIRST DIVISIONAL COURT. JANUARY 24TH, 1916.

*DUBE v. ALGOMA STEEL CORPORATION LIMITED.

Negligence—Death of Person Operating Derrick—Negligence of Owner of Derrick—Negligence of Hirer—Findings of Jury—Evidence—Contributory Negligence—Master and Servant—Effect of Hiring Crew of Derrick from Owner—Workmen's Compensation for Injuries Act.

Appeal by the defendant the Algoma Steel Corporation Limited from the judgment of BRITTON, J., 8 O.W.N. 513, upon the findings of a jury, in favour of the plaintiff as against that defendant; and cross-appeal by the plaintiff from the same judgment in so far as it dismissed the action against the defendant the Lake Superior Paper Company Limited.

The appeals were heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

A. W. Anglin, K.C., for the appellant the Algoma Steel Corporation Limited.

T. P. Galt, K.C., and E. V. McMillan, for the plaintiff.

W. M. Douglas, K.C., for the respondent the Lake Superior Paper Company Limited.

HODGINS, J.A., read a judgment in which he said that the crane and its attendants were hired by the steel company. The jury had found against the paper company on the ground that they had supplied a machine lacking the proper equipment. But that equipment was necessary only in cases where the crane was used in lifting with a long arm or where the weight was very heavy.

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

If the paper company had been accurately informed as to the work, and had undertaken to supply a machine capable of doing it, there would be a basis for the finding of the jury. But the inquiry made and the answer given were not actually connected with the bargain when made; and (with some hesitation) the paper company cannot be made liable.

The appeal of the plaintiff against the paper company should, therefore, be dismissed with costs.

In dealing with the steel company's appeal, it must be borne in mind that, while the crane and its crew were hired by it, it was only their work and services that were transferred. It was clear upon the evidence that a cranesman, such as Dube was, must have had his hands full in working the levers and attending to the brakes, and could not be expected to supervise the outside work. He could have surveyed the situation; and, if he did so, and considered it dangerous to perform the operation, he could have declined to proceed. In that case the steel company could not have dismissed him, nor could they have compelled him to risk his life or limbs or his master's property in doing what they wished to be done. He had not become the steel company's servant in the sense that his owner had parted with all control or that the steel company had for the time become his complete master. He was not a fellow-servant with the servants of the steel company who were assisting him: McCartan v. Belfast Harbour Commissioners, [1911] 2 I.R. 143 (H.L.) The steel company had a superintendent and foreman on the ground when the accident happened, but they were not in such relation to Dube that he was bound to conform to their orders, as that expression is used in the Workmen's Compensation for Injuries Act.

That, however, was not decisive of the case. Being supplied by the paper company with a machine which might under certain conditions, induced by orders given for its operation, become dangerous in use because not properly equipped, the steel company, through its workmen, undertook an operation in a hazardous way, and gave directions to Dube during its progress without any one in charge who was in fact competent to direct it and carry it out safely. It was the steel company's duty to have so directed or superintended the operation as to provide for the safety of those engaged in it, and to have employed a system which would insure the workmen, no matter whose servants they were, against injury. The jury having absolved Dube from negligence, and there being no finding that

he had voluntarily assumed the risk of the work, the steel company should be held liable.

The steel company's appeal should be dismissed with costs, and the judgment against it for $3,000 should stand, with costs of the action and appeal, including any costs payable by the plaintiff to the paper company.

MEREDITH, C.J.O., and MAGEE, J.A., agreed in the result arrived at by HODGINS, J.A.; but expressed no opinion on the question whether the deceased was, for the purpose of the work in which he was engaged when he met with his death, the servant of the steel company.

GARROW and MACLAREN, JJ.A. (dissenting), were of opinion, for reasons stated in writing by GARROW, J.A., that the appeal of the steel company should be allowed and the action against it dismissed, and that the appeal of the plaintiff should be allowed and judgment go in favour of the plaintiff against the paper company for the damages assessed by the jury.

Judgment as stated by HODGINS, J.A.

FIRST DIVISIONAL COURT. JANUARY 24TH, 1916.

*WADE v. CRANE.

Contract—Sale of Brickyard—Default in Payment—Repossession by Vendor—Conversion of Bricks—Right to Possession of Plant Replacing Plant Sold—Construction of Contract—Purchaser-company — Winding-up Order — Rights of Liquidator—Promissory Notes — Counterclaim — Judicature Act, sec. 126*—Set-off—Mortgage Debentures—Costs.*

Appeal by the defendant from the judgment of MIDDLETON, J., 8 O.W.N. 478.

The appeal was heard by GARROW, MAGEE, and HODGINS, JJ.A., and KELLY, J.

W. M. McClemont, for the appellant.

A. C. McMaster and J. H. Fraser, for the plaintiff, respondent.

GARROW, J.A., delivering the judgment of the Court, said that the trial Judge had reached the conclusion that a fair

sum with which to charge the defendant for the bricks, finished and unfinished, was $6,300, of which sum he directed $3,000 to be paid into Court to abide further order, to meet any claim to be made by one Zimmerman. No sufficient case was made upon this appeal to justify interfering with the learned Judge's conclusions in that respect.

The machines to which the plaintiff, the liquidator of the Excelsior Brick Company Limited, made claim, were a boiler, a four-mould machine, and a wire-cutting machine, all purchased by the Excelsior company and affixed to the land as part of the permanent plant, in substitution (of which the defendant complained) for old machinery in use when the Excelsior company purchased. As to these, the trial Judge dismissed both complaints—a conclusion with which the Court agreed.

The defendant attempted to justify taking and retaining the goods and chattels under the terms of the charge created by the debentures or bonds of which he was the holder. But, out of a total issue of over $100,000, he held only $24,000. The trial Judge was of opinion that the defendant could not so justify; but permitted him to prove before the liquidator pari passu with the other bondholders for the amount of his holdings.

The Court agreed that the attempted justification failed; but pointed out that, in the absence of the other bondholders, who were not represented, the judgment should go no further, especially as the defendant did not require the aid of the Court to enable him to prove upon his bonds. Paragraphs 3 and 4 of the formal judgment should be struck out.

The defendant also set up, by way of defence and counterclaim, certain claims against the Excelsior company—some for debt and others for unliquidated damages. Of these, the claims persevered in at the trial were—in addition to the claim under the bonds—a sum alleged to be due upon an account, damages for the conversion of bricks which the defendant had left upon the premises, damages for injuries to the freehold and the fixtures and machinery, and a sum of $1,925 and interest owing upon two promissory notes made by the Excelsior company.

The trial Judge allowed the defendant's claim upon his account at the sum of $546.05, but held that the amount could not be set off—that it might rank upon the assets in the liquidation. With both conclusions the Court agreed.

Nothing was allowed by the trial Judge upon the two promissory notes, which were given for the price of a machine bought by the Excelsior company from the defendant to replace

an older machine of the same sort, which machine was annexed by the company to the freehold as a permanent fixture, with the result that, when the defendant took possession of the land, upon the forfeiture by the company, he also took possession of the machine so annexed. In another action, the surety contended that he had been discharged because the defendant did not, under the Conditional Sales Act, proceed to sell the machine, but used it as part of the brick-making plant. The circumstance could not afford a legal defence to the claim against the maker of the notes, the Excelsior company.

Reference to Canadian Westinghouse Co. v. Murray Shoe Co. (1914), 31 O.L.R. 11; Utterson Lumber Co. v. H. W. Petrie Limited (1908), 17 O.L.R. 570.

The defendant was entitled to recover against the Excelsior company the full amount due and owing upon the notes, and was, in the circumstances, under no compulsion to sell the machine for which they were given.

The Court was unable to agree with the defendant's further contention that he was entitled to set off the amount of the notes against the plaintiff's claim. The defendant should be declared entitled to rank upon the assets in the liquidation, but not to the set-off asserted.

The claims in both cases were pleaded as counterclaims. That in itself would not be fatal if the correct conclusion should be that the claims, although called counterclaims, are really set-offs: Gates v. Seagram (1909), 19 O.L.R. 216; Judicature Act, R.S.O. 1914 ch. 56, sec. 126; Winding-up Act, R.S.C. 1906 ch. 144, sec. 71. The defendant's difficulty, however, is, that the plaintiff's claim is not a debt, but a claim really, in form at least, of detinue, or for damages. It is not, therefore, a case of mutual debts, and hence not the proper subject of set-off: Eberle's Hotels and Restaurant Co. v. Jonas (1887), 18 Q.B.D. 459; Moody v. Canadian Bank of Commerce (1891), 14 P.R. 258.

The appeal should be allowed to the extent indicated, but without costs. The plaintiff, as liquidator, to have his costs of the appeal out of the estate.

FIRST DIVISIONAL COURT. JANUARY 24TH, 1916.

*COUNTY OF WENTWORTH v. HAMILTON RADIAL ELECTRIC R.W. CO. AND CITY OF HAMILTON.

Highway—Toll Road Acquired by County—By-law—Toll Roads Expropriation Act—County Road—Transfer of Portion to City—Powers of Ontario Railway and Municipal Board—Annexation of Part of Township to City—Contract—Mileage Rate.

Appeal by the defendants the Corporation of the City of Hamilton from the judgment of MEREDITH, C.J.C.P., 31 O.L.R. 659, 6 O.W.N. 685.

The appeal was heard by GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

H. E. Rose, K.C., and F. R. Waddell, K.C., for the appellants.

D. L. McCarthy, K.C., for the defendant railway company.

G. Lynch-Staunton, K.C., and J. L. Counsell, for the plaintiffs, respondents.

GARROW, J.A., read a judgment in which he said that the judgment below rested upon the proposition that the Ontario Railway and Municipal Board had no authority to make an order transferring that portion of the county road in question which passed through the annexed territory from the county corporation to the city corporation. The portion of the order objected to as ultra vires was contained in the last two lines of clause 5, the whole clause being as follows: "5. The City of Hamilton shall pay to the Township of Barton on the 14th day of December, 1910, and thereafter annually during the currency of the good roads debentures issued by the County of Wentworth, the amount which would have been levied upon the said property to be annexed in respect of such debentures if the said lands had remained part of the township . . . and were assessed each year at the amount said lands were assessed for the year 1909, and a rate was struck each year at the same rate as fixed by the township council of Barton for the year 1909, *and all former toll roads purchased by the said county in the annexed territory shall vest in the City of Hamilton.*" The time fixed by the order as that at which it should come into

effect was the 1st November, 1909, and it apparently had been acted upon ever since by the city and township municipalities. So far as the mere words used in clause 5 are concerned, the contention of counsel for the appellants that they are mere surplusage and add nothing to the general provision annexing the territory to the city, which ipso facto transferred the jurisdiction over the highway from the county to the city, is correct.

That, however, does not go quite to the bottom of the objection of the plaintiffs, which is, that they were entitled to notice and to an adjudication by the Board upon any claim they had in respect of the road. The only notice required by the statute in force when the order was made—see 8 Edw. VII. ch. 48, sec. 1—was notice to the adjacent township; and that notice was duly given. By the Municipal Act, R.S.O. 1914 ch. 192, sec. 21, notice to the county must also now be given. The proceedings are purely statutory; and, the statutory notice having been duly given, there is an end to any question going to the jurisdiction of the Board to make the order. It is not like the case of private rights or private litigation. The Board stands in many respects, in such a matter, in the place of the Legislature; and the consequences of the order are to be considered very much as if a statute had been passed making the annexation which the order authorised.

And, if the Board had jurisdiction to make the order, omitting the words objected to, the judgment below cannot be supported. Jurisdiction over a highway locally situated in another municipality cannot be and is not claimed. All that can be claimed is, that the plaintiffs were entitled to some compensation in respect of the portion of the highway in the annexed territory, especially in respect of the money payable under the agreement with the railway company upon which the action is based. That agreement, however, is entirely based upon a mileage rate. The effect of the annexation is to shorten the mileage in the county upon which the railway company agreed to pay; and, unless the annexation itself, which transfers the road from the county to the city, is to be overturned, the plaintiffs cannot recover.

Whatever the nature of the plaintiffs' claim may be, it must be asserted elsewhere. Relief may perhaps be found in the provisions respecting arbitration contained in the Municipal Act: see sec. 58 of the Act of 1903.

The appeal should be allowed with costs and the action dis-

missed with costs. The money in Court should be paid out to the appellants.

MACLAREN and MAGEE, JJ.A., concurred.

HODGINS, J.A., dissented, giving reasons in writing.

Appeal allowed; HODGINS, J.A., *dissenting.*

FIRST DIVISIONAL COURT. JANUARY 24TH, 1916.

*FOSTER v. TRUSTS AND GUARANTEE CO.

Assignments and Preferences—Conveyance of Land in Trust for Erection of Buildings and Payment of Creditors—Expenditure by Trustee in Excess of Sums Received from Property—Mortgage by Trustee to Secure Personal Creditor—Appointment of New Trustee—Action against, for Foreclosure—Trust not within Assignments and Preferences Act, sec. 9.

Appeal by the defendants from the judgment of MIDDLETON, J., 8 O.W.N. 531.

The appeal was heard by GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

J. Jennings, for the appellants.

W. E. Raney, K.C., for the plaintiff, respondent.

The judgment of the Court was delivered by GARROW, J.A., who said that the main contention for the appellants was, that the conveyance in trust to the mortgagor was in effect an assignment for the general benefit of creditors within the meaning of sec. 9 of the Assignments and Preferences Act, R.S.O. 1914 ch. 134, and that the mortgage was, therefore, ineffectual without the consent of the creditors or of inspectors appointed by them.

The appellants also contended that it was not established that the trust estate benefited by the money of the plaintiff, the mortgagee; but they had failed to displace the finding of the trial Judge that the trust owed Mr. Lobb, the original trustee and mortgagor, at least $25,000. With that finding standing, and fraud and bad faith entirely out of the question, it seemed idle to talk about whether or not the plaintiff's money was actually expended upon the trust property. Looked

at fairly, the moneys advanced by the plaintiff went to recoup Mr. Lobb for what had been previously advanced by him.

As to the main point, sec. 9 of the Assignments and Preferences Act was first introduced in the statute of 1895. The need for the amendment was said to have been because it had been held that an assignment of part only of a debtor's estate was not within the statute: see Cassels's Assignments Act, 4th ed., p. 71. There seems to be no case in which its provisions have been considered. It applies to "every assignment for the general benefit of creditors." The controlling idea of the arrangement evidenced by the trust deed clearly was to place in the hands of Mr. Lobb the uncontrolled management of the work of completing and selling the partly finished houses, in which, it was apparently believed, would be found considerable profit—enough, it was hoped, to pay every one in full. That idea could not have been carried out by means of the usual assignment under the provisions of the statute, where the assignee is always completely under the control of the creditors. The creditors were not bound to accept the benefits, if any, intended for them under the trust deed; conceivably, they might even attack it; but what they could not be allowed to do was both to appropriate and reprobate, which was what, by the mouth of the appellants—whose only right to be here at all was derived under the trust deed and the order of substitution—they were trying to do.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. JANUARY 24TH, 1916.

McCAMMON v. WESTPORT MANUFACTURING AND PLATING CO. LIMITED.

Company — Winding-up — Action by Liquidator to Recover Chattels—Evidence—Sale and Transfer of Assets—Minutes of Company—Findings of Fact of Trial Judge—Reversal on Appeal.

Appeal by the plaintiff from the judgment of LENNOX, J., ante 6.

The appeal was heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

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

D. A. McGee, for the defendants, respondents.

HODGINS, J.A., read a judgment in which he said that the company of which the appellant was liquidator was on the 21st March, 1914, ordered to be wound up; and since 1911 the machinery now claimed was in a separate building, in which the insolvent company carried on business until a seizure was made by the sheriff under a writ of fieri facias at the instance of the respondent J. J. McGee. On the 23rd July, 1913, Witcher and W. R. McGee conveyed this machinery by a bill of sale to the insolvent company. In February, 1913, the insolvent company was incorporated, and it bought out the assets of a partnership called the Wood Working Company, owned apparently by Witcher and W. R. McGee. They had in fact been previously acquired by J. J. McGee under an agreement dated the 4th October, 1912. The Wood Working Company partnership, then consisting of one Witcher and one Edey, since deceased, was formed by the respondent company in June, 1911, to take over the wood working business and machinery, as its continued ownership by the respondent company would have violated the agreement with the Corporation of the Village of Westport, under which the village corporation had granted the company a bonus.

The formation of the insolvent company was admitted by the respondent J. J. McGee to be partly due to fear of the village corporation entering suit for violation of the agreement. He now alleged, as his reason for disputing on behalf of the respondent company and of himself the original title of Witcher and Edey to the machinery, that he could find no minutes of the respondent company authorising the sale to those men in 1911.

Certain facts, set out by the learned Judge, were given in evidence to support the title of the insolvent company; and it was pertinent to remark that the evidence of the respondent J. J. McGee that the mortgage of the 1st December, 1913, was intended to cover the assets of both companies, was contradicted by the fact, deposed to by him, that he was not aware till the 21st April, 1914, that the insolvent company did not own, as he believed, the machinery in question.

The facts led to the conclusion that there was an actual transfer of the assets now in question to Witcher and Edey in 1911, either for the purpose of misleading the village corporation in regard to the ownership of the wood working business, or with the bonâ fide intention of transferring them out and out. In the former case, the Court should not assist either of

the respondents to dispute it; and, if the latter be the correct position, the appellant should succeed.

The absence of the minutes is not conclusive against the actual testimony or against the other circumstances which appear in evidence. Three machines were acquired afterwards, the title to which did not depend upon this transfer.

The appeal should be allowed, the judgment below set aside, and judgment entered for the appellant, with costs, for delivery of all the machinery and chattels claimed by him.

GARROW and MACLAREN, JJ.A., concurred.

MAGEE, J.A., agreed in the result.

MEREDITH, C.J.O., dissented, for reasons stated in writing. In all the circumstances, he was unable to say that the conclusion of fact which was reached by the trial Judge was erroneous.

Appeal allowed; MEREDITH, C.J.O., *dissenting.*

FIRST DIVISIONAL COURT. JANUARY 24TH, 1916.

*CRANE v. HOFFMAN.

Sale of Goods—Conditional Sale of Machine—Contract—Provision for Sale upon Default of Payment and Application of Proceeds upon Promissory Notes Given for Price—Liability of Person Endorsing as Surety — Repossession of Machine by Vendor and Use in Business—Action by Vendor upon Notes—Conditional Sales Act, R.S.O. 1914 *ch.* 136, *secs.* 8, 9—*Fixture—Rights where Vendor of Land and Machine same Person—Waiver—Estoppel—Discharge of Surety.*

Appeal by the plaintiff from the judgment of MIDDLETON, J., 8 O.W.N. 500.

The appeal was heard by GARROW, MAGEE, and HODGINS, JJ.A., and KELLY, J.

W. M. McClemont, for the appellant.

S. H. Bradford, K.C., for the defendant, respondent.

GARROW, J.A., said that the action was brought to recover $1,924 and interest due upon two promissory notes made by

the Excelsior Brick Company. The defendant guaranteed payment of the notes. The making of the notes and the giving of the guaranty were not in dispute. The substantial defence was, that the dealings of the plaintiff with the machine for the price of which the notes were given, after they fell due, had the legal effect of cancelling the notes, or at all events of discharging the surety, the defendant.

The judgment of the trial Judge proceeded entirely upon the theory that the plaintiff had taken possession of the machine under the lien given by the notes (they being what are called lien-notes), and that his retention and use of it were inconsistent with his duty—namely, the duty prescribed by sec. 8 of the Conditional Sales Act, R.S.O. 1914 ch. 136, not to sell within 20 days, nor, if a balance is intended to be claimed, without notice in writing of the intended sale. This seemed to ignore entirely the important circumstance that the machine had, before the notes became due, been affixed to the freehold, thereby losing its character of a personal chattel, and, primâ facie at least, becoming subject to the title to the land.

The intention of the person who affixes is to be regarded. The Excelsior company, then the equitable owner of the land under the agreement to purchase, intended the new machine to take the place of the old one and to become a necessary part of the permanent plant.

The mode and extent of the affixing is also to be regarded. The new machine was placed upon a cement foundation specially prepared for it, bolted down to prevent vibration, and connected with the other steam-driven machinery of the plant—and became a fixture: Hobson v. Gorringe, [1897] 1 Ch. 182; Reynolds v. William Ashby and Son Limited (1904), 20 Times L.R. 766; Gough v. Wood & Co., [1894] 1 Q.B. 713, 718, 719; Wake v. Hall (1883), 8 App. Cas. 195.

The affixing, it must be assumed, was done with the full knowledge and consent of the defendant, a director of the company.

When, in March, 1914, the plaintiff took possession, he did so, not under the lien-notes, but as owner of the freehold and by virtue of the forfeiture provided for in the agreement of sale to the Excelsior company. The plaintiff stood upon that title, and there seemed to be no good reason why he might not so stand, and might not also claim payment of the lien-notes from the Excelsior company and the defendant as guarantor.

The fact that the machine itself, after several months' use

by the Excelsior company, came back to the plaintiff, by virtue of his original and superior title as owner of the land, was not in itself an answer to the claim. The Conditional Sales Act had little or no application. The law of fixtures had been altered by sec. 9, but only to the extent of giving the seller a right to follow the goods, with a corresponding right in the owner of the land to keep them on paying what was unpaid upon them. But the seller here was also the owner of the land—a case not provided for by the statute.

The plaintiff no longer holds the machine as security for the debt. The title to it, as a chattel, merged by the annexation, with the defendant's consent, to the freehold. It stood much upon the same footing as if it had been lost or destroyed without fault on the plaintiff's part: see Goldie and McCulloch Co. v. Harper (1899), 31 O.R. 224.

But, in any event, the defendant, by his conduct, had in advance waived any right to complain: Hollier v. Eyre (1842), 9 Cl. & F. 1, 52; Woodcock v. Oxford and Worcester R.W. Co. (1853), 1 Drew. 521.

The appeal should be allowed, and the plaintiff should have judgment for the amount of the notes with interest and his costs throughout.

MAGEE, J.A., concurred.

HODGINS, J.A., said that the Excelsior company obtained the machine upon giving the agreement which permitted the plaintiff to retake possession upon default and to sell. The company placed it upon its land and attached it so as to make it a fixture, so far as it could do so. This annexation did not, however, determine the case. The annexation was subject to sec. 9 of the Conditional Sales Act. The land was in equity the land of the company; and, while the statute operated, neither the company as owner nor a purchaser from it nor a mortgagee or other incumbrancer, even without notice, could claim the machine as against the seller without paying the price: Joseph Hall Manufacturing Co. v. Hazlitt (1885), 11 A.R. 749. Reference also to Hobson v. Gorringe, [1897] 1 Ch. 182, 192, 195; Stark v. Reid (1895), 26 O.R. 257.

The actions of the plaintiff indicated an intention not to realise his security, according to its terms, but to treat the contract in a way not authorised. His continued use of the machine for his own profit and as part of his own possessions, and his

failure to sell or take any steps to that end, are inconsistent with the position he now desires to take. The basis of the sureties' liability has been changed by him, it is said, to their detriment. But, whether that is so or not, the alteration of their rights discharges them from liability, because they can insist on literal compliance with the contract, the performance of which they guaranteed—notwithstanding that it may work out in a way not contemplated by the vendor when he took their obligation.

Reference to A. Harris Son & Co. v. Dustin (1892), 1 Terr. L.R. 404; Moore v. Johnston (1909), 9 W.L.R. 642; and North-West Thresher Co. v. Bates (1910), 13 W.L.R. 657.

The appeal should be dismissed with costs.

KELLY, J., was also of opinion, for reasons stated in writing, that the appeal should be dismissed with costs.

Appeal dismissed with costs, the Court being divided.

FIRST DIVISIONAL COURT. JANUARY 24TH, 1916.

*RE SOVEREIGN BANK OF CANADA.

*CLARK'S CASE.

Bank—Winding-up—Contributory—Double Liability — Shares Purchased for Infant—Ratification after Majority—Receipt of Dividends—Knowledge—Laches—Acquiescence.

Appeal by Muriel I. Clark from the order of RIDDELL, J., ante 278, affirming an order of an Official Referee placing the name of the appellant upon the list of contributories of the bank in liquidation.

Leave to appeal was given by MIDDLETON, J., ante 328.

There was also an appeal by the liquidator from the order of RIDDELL, J., affirming the order of the Referee refusing to place the name of A. D. Clark upon the list.

The appeals were heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

George Kerr, for the appellant Muriel I. Clark.

J. W. Bain, K.C., and M. L. Gordon, for the liquidator.

Joseph Montgomery, for A. D. Clark.

GARROW, J.A., after stating the facts in a written opinion, said that an infant may by contract become the holder of shares in a bank; and the legal effect of such a contract is the same as that of other voidable contracts of an infant—it is valid until repudiated: Edwards v. Carter, [1893] A.C. 360; Viditz v. O'Hagan, [1900] 2 Ch. 87, 97, 98. And the repudiation must, to be effective, take place within a reasonable time after full age is reached: Holmes v. Blogg (1817), 8 Taunt. 35; In re Constantinople and Alexandria Hotel Co. (1869), L.R. 5 Ch. 302; Lumsden's Case (1868), L.R. 4 Ch. 31.

Miss Clark knew that her father had purchased some shares in her name, as she admitted. And the cheque of the 10th August, 1907, which she endorsed, and presumably read, told her practically the situation. The cheque reads: "Quarterly dividend No. 17. The Sovereign Bank of Canada. Toronto, 10th August, 1907. No. 208. $7.87. Pay to the order of Miss Muriel I. Clark seven 87/100 dollars, being quarterly dividend at the rate of six per cent. per annum upon five and one quarter shares in the capital stock of this bank standing in her name." Having such knowledge, there was not only no evidence of repudiation or disaffirmance by her at any time prior to this application, but there was a distinct affirmation by her of her apparent position of shareholder, by the withdrawal of the money in the Merchants Bank nearly two years after she had attained her majority—money which she must have known represented the accumulated dividends upon the shares in question.

The appeal of Miss Clark utterly failed, and should be dismissed with costs. The appeal of the liquidator should also be dismissed, but without costs.

MEREDITH, C.J.O., and MAGEE, J.A., concurred.

MACLAREN, J.A., read a judgment in which he said that, in his opinion, the liability of Miss Clark could not be based upon ratification by her withdrawal of a portion of the money to her credit in the bank. The relation of a bank and its customer is purely that of debtor and creditor, and moneys deposited are not ear-marked in any way: Foley v. Hill (1848), 2 H.L.C. 28.

But, considering the lapse of time between her coming of age and the presentation of the petition for winding-up, and the fact that she had not repudiated the shares before the commence-

ment of the actual winding-up, the appeal must be dismissed on the ground of laches and acquiescence.

HODGINS, J.A., agreed with MACLAREN, J.A.

Both appeals dismissed.

FIRST DIVISIONAL COURT. JANUARY 24TH, 1916.

*RE ONTARIO AND MINNESOTA POWER CO. LIMITED AND TOWN OF FORT FRANCES.

Assessment and Taxes—Land of Power Company—Assessment Based upon Special Adaptability and Use for Particular Purpose—Enhanced Value—"Actual Value"—Assessment Act, R.S.O. 1914 *ch.* 195, *sec.* 40 (1)—*Compensation Value in Expropriation Cases—Motion for Leave to Appeal from Order of Ontario Railway and Municipal Board Confirming Assessment—Question of Law—Question of Fact.*

Application by the company for leave to appeal from an order or decision of the Ontario Railway and Municipal Board, dated the 25th November, 1915, respecting the assessment of the real property of the company in the town. The leave was asked only as to the assessment of that part of the land designated as "Water Power Block 2," which was assessed at $400,000. The order of the Board confirmed the assessment.

The application was heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

Glyn Osler, for the company.

G. H. Watson, K.C., for the town corporation.

MEREDITH, C.J.O., read a judgment, in which, after stating the facts, he said that in assessing the lot in question the assessor took into consideration the increased value, beyond that of mere town or agricultural land, which it had by reason of its special adaptability to the use to which it was put, and its having been put to that use, and that was held by the Board to have been proper.

It was argued by counsel for the company that this view was erroneous, and that the "scrap iron" cases were applicable.

In the view taken by the learned Chief Justice, it was un-

necessary to determine whether, in the light of such cases as Great Central R.W. Co. v. Banbury Union, [1909] A.C. 78, and East London Railway Joint Committee v. Greenwich Union Assessment Committee, [1913] 1 K.B. 612, and having regard to the change that was made in the Assessment Act in 1904, the "scrap iron" cases were now binding upon the Court.

After quoting from the two English cases cited, the learned Chief Justice said that in those cases what was to be determined was not the "actual value" of the subject of the assessment, but its "rental value." The principle of the decisions, however, was just as applicable in the one case as in the other. Reference also to what was said by Anglin, J., in Irwin v. Campbell (1915), 51 S.C.R. 358, 372.

The provision of the Assessment Act as found in R.S.O. 1897 ch. 224, sec. 28 (1), was: "Except in the case of mineral lands hereinafter provided for, real and personal property shall be estimated at their actual cash value, as they would be appraised in payment of a just debt from a solvent debtor." The change made in 1904 is now embodied in the Assessment Act, R.S.O. 1914 ch. 195, sec. 40 (1), as follows: "Subject to the provisions of this section, land shall be assessed at its actual value."

With great respect for the eminent Judges by whom the "scrap iron" cases were decided, the learned Chief Justice said, he ventured to think that they placed too narrow a construction on the provisions of the Assessment Act then in force which they had to apply; and he was clearly of opinion that these cases, if still binding, should not be extended to subjects of assessment with which they did not deal. Extraordinary results would follow if they were held to apply to the assessment of buildings.

The Court is not called upon to determine whether the "scrap iron" decisions are now to be followed. The subject of the assessment in them was not land in its ordinary sense; in In re Bell Telephone Co. and City of Hamilton (1898), 25 A.R. 351, it was the poles and wires of a telephone company; in In re London Street Railway Company Assessment (1900), 27 A.R. 83, it was the rails, poles, and wires of a street railway company; in In re Queenston Heights Bridge Assessment (1901), 1 O.L.R. 114, it was a bridge crossing the Niagara river; and in Re Toronto Electric Light Co. Assessment (1902), 3 O.L.R. 620, it was rails, poles, wires, and other plant of electric light

companies and a telephone company erected or placed upon highways.

In none of these cases was the Court called upon to determine the question now before it, viz., whether in assessing land it is proper to take into consideration its special adaptability to such a use as water power block No. 2 is being put to—its use in developing a valuable water power which without it could not have been developed. It was proper, in determining the "actual value" of the block, to consider whether its value as a town lot or as agricultural land was enhanced owing to its being so situated that it was capable of being used in developing the water power which had been developed and to assess it accordingly.

Compare and apply two recent expropriation cases—Cedar Rapids Manufacturing and Power Co. v. Lacoste, [1914] A.C. 569, and Pastoral Finance Association Limited v. The Minister, ib. 1083.

The conclusion must be that the assessor and the Board rightly took into consideration the enhanced value which power block No. 2 had by reason of its adaptability for the use to which it had been put and by reason of its having been put to that use; and the application for leave to appeal must be refused. The question of the amount by which the value of the land had been enhanced was a question of fact for the Board—no appeal lies except as to matters of law: Re Bruce Mines Limited and Town of Bruce Mines (1910), 20 O.L.R. 315; Re Coniagas Mines Limited and Town of Cobalt (1910), ib. 322.

The motion should be refused with costs—it would serve no good purpose to prolong the litigation by giving leave to appeal.

GARROW, MACLAREN, and MAGEE, JJ.A., concurred.

HODGINS, J.A., also agreed in the result, but did not agree that the same principles should be applied in ascertaining assessed value as in fixing compensation value. In refusing the application, he preferred to place his decision upon the ground that the actual value in this case might properly include the advantageous position of the lot in relation to the other works. Consequently, the propriety of the amount fixed was at best a question of fact.

Motion refused with costs.

HIGH COURT DIVISION.

FALCONBRIDGE, C.J.K.B. JANUARY 26TH, 1916.

McLAUGHLIN v. TORONTO R.W. CO.

Damages—Personal Injuries—Negligence — Street Railway — Injury to Passengers by Falling Sign-board—Direct Impact —Additional Injury from Shock—Assessment of Damages —Evidence.

Action for damages for injuries sustained by the plaintiffs, husband and wife, while passengers upon a night-car of the defendants on the 23rd May, 1915, by a metallic sign-board which was hung up in the car becoming detached and falling upon them.

The action was tried without a jury at Toronto.

E. L. Morris, for the plaintiffs.

D. L. McCarthy, for the defendants.

FALCONBRIDGE, C.J.K.B., said that the case resolved itself into an assessment of damages, as the defendants did not at the trial deny their liability.

The husband received the greater impact, owing probably to the board striking his head first, and he received a severe cut. The wife was also struck, but the extent of her outward injury was a slight swelling on the top of her head, according to the evidence of a medical man to whom they repaired, before they went home, for the purpose of having the husband's head stitched up. The wife was then in a nervous and excited condition. She swore that she was pregnant at the time. The main contest was as to whether she was ever pregnant, and whether certain appearances which the medical man who attended her (the one who stitched her husband's head) described were consistent with a miscarriage produced by the accident, or were attributable to some diseased condition of the uterus.

The learned Chief Justice finds that the injury which she suffered, of whatever nature, it was, was the result of (1) the physical injury and (2) of shock resulting therefrom and (3) of the nervous excitement and shock caused by her being present while her husband's injuries were being attended to; but is unable to determine the respective proportions in which these three elements were contributing causes—he attaches more im-

portance to the first and second than to the third. He also finds that the illness, of whatever nature it was, was caused both directly and indirectly by the impact of the sign-board; but he does not give such large damages as he would have awarded if he had been quite certain of the miscarriage. As to the wife's pregnancy, she and the doctor who examined her were better able to judge than medical men who only theorize, no matter how long their experience.

The case of Victorian Railways Commissioners v. Coultas (1888), 13 App. Cas. 222, has not been adopted or followed in any tribunal which was at liberty to disregard it, and it may be trusted that it received its death-blow in Coyle or Brown v. John Watson Limited, [1915] A.C. 1. But, even if it were binding, there was in the present case the undoubted element of direct impact, which did not exist in the Coultas case.

Damages assessed at $900 for the wife and $75 for the husband; and judgment for the plaintiffs for $975 with costs.

LENNOX, J. JANUARY 28TH, 1916.

*RE FARMERS BANK OF CANADA.

*LINDSAY'S CASE.

Bank—Winding-up—Delegation of Powers of Court to Referee—Winding-up Act, R.S.C. 1906 *ch.* 144, *sec.* 110—*Intra Vires—Exercise of Powers—Validity of Winding-up Order not Appealed against—Contributory—Double Liability of Shareholder—Regularity of Subscription and Allotment—Irregularities in Organisation of Bank—Certificate of Treasury Board—Effect upon Position of Shareholder—Winding-up Act, sec.* 20—*Bank Act, R.S.C.* 1906 *ch.* 29, *secs.* 12, 13, 14, 15, 132, 157.

Appeal by James R. Lindsay from the order of J. A. McAndrew, Esquire, an Official Referee, in a reference for the winding-up of the bank, under the Dominion Winding-up Act, R.S.C. 1906 ch. 144, confirming the placing of the appellant's name on the list of contributories.

The appeal was heard in the Weekly Court at Toronto.

Wallace Nesbitt, K.C., and William Laidlaw, K.C., for the appellant.

J. W. Bain, K.C., and Christopher C. Robinson, for the liquidator, respondent.

The Minister of Justice for Canada and the Attorney-General for Ontario were notified, but did not appear.

LENNOX, J., said that, aside from the merits, the appellant contended (1) that Parliament had no power to enact sec. 110 of the Winding-up Act, which provides that, "after a winding-up order is made, the Court may . . . by order of reference, refer and delegate . . . to an officer of the Court any of the powers conferred upon the Court by this Act:" and (2) that, if sec. 110 was not ultra vires, the powers conferred by it were not properly exercised.

As to the first point, the learned Judge said, Parliament, having power to legislate as to the insolvency and the winding-up of insolvent companies, has power to determine upon the machinery by which they shall be would up, and can say that questions arising in connection with these companies shall be wholly or partly ascertained, adjusted, and determined by the Court, or by an arbitration, commission, board, or any other designated tribunal, and this either with or without reserving a right of appeal to the Courts.

Dealing with the second objection, the learned Judge referred to secs. 64 (1) and 65 of the Judicature Act, R.S.O. 1914 ch. 56; secs. 2, 48, and 109 of the Winding-up Act; Shoolbred v. Clarke, In re Union Fire Insurance Co. (1890), 17 S.C.R. 265, 268, 269, 278, 279, 280; S.C., sub nom. In re Clarke and Union Fire Insurance Co. (1889), 16 A.R. 161. The winding-up order was clearly within the powers conferred by the statute, and was providently made; but, if it were otherwise, a Judge had no jurisdiction to set aside the order or judgment of a Judge of co-ordinate jurisdiction, which he would have to do if effect were to be given to the second objection. Even if the order was made without jurisdiction, it could not be treated as a nullity, and would, unless and until discharged on appeal, be binding on the creditors and contributories of the company, although not upon strangers: In re London Marine Insurance Association (1869), L.R. 8 Eq. 176, 193. An appeal to the Appellate Division from the order would lie—the time for appealing being limited by sec. 104—but no appeal had been taken. The order thus standing is authority for the Referee to proceed, and is binding upon the Judge hearing an appeal from

the Referee's order in the reference: In re Arthur Average Association (1876), 3 Ch.D. 522, 529.

Upon the merits, the learned Judge referred to the bank's Act of incorporation, 4 Edw. VII. ch. 77 (D.); 4 & 5 Edw. VII. ch. 92 (D.); 6 Edw. VII. ch. 94 (D.); secs. 12 and 16 of the Bank Act, R.S.C. 1906 ch. 29; and said that on the 9th June, 1906, the appellant subscribed for 5 shares of the capital stock of the bank, and then or thereafter paid therefor, in full, $500. The 5 shares were allotted to him on the 4th July, 1906; he had notice of the allotment, and received and retained a certificate shewing that he was the holder of 5 shares.

The appellant's contention was, that he, although in fact a holder of shares under a completed contract entered into in the terms of the bank's charter and in strict conformity with sec. 12 of the Bank Act, was not a "shareholder," and was not liable to be listed as a contributory, by reason of irregularities in connection with the organisation meeting of the 26th November, 1906, and the manner in which the certificate of the Treasury Board was obtained.

The learned Judge referred in detail to the evidence bearing upon these alleged irregularities, and cited secs. 13, 14, and 15 of the Bank Act. He was clearly of opinion that the appellant was and is a "shareholder," in the sense of sec. 20 of the Winding-up Act, and was properly placed upon the list of contributories.

Reference to Cass v. Ottawa Agricultural Insurance Co. (1875), 22 Gr. 512, 517; secs. 132 and 157 of the Bank Act; Halsbury's Laws of England, vol. 5, p. 131, para. 211; Oakes v. Turquand (1867), L.R. 2 H.L. 325; Morrisburgh and Ottawa Electric R.W. Co. v. O'Connor (1915), 34 O.L.R. 161; Re Faulkner Limited, City of Ottawa's Claim (1915), ib. 536; In re Irish Provident Assurance Co., [1913] 1 I.R. 352; Re Standard Fire Insurance Co. (1885), 12 A.R. 486; Page v. Austin (1884), 10 S.C.R. 132, 170; Dominion Salvage and Wrecking Co. v. Attorney-General of Canada (1892), 21 S.C.R. 72; In re Ontario Express and Transportation Co. (1894), 21 A.R. 646; Sinclair v. Brougham, [1914] A.C. 398; Bank of Hindustan v. Alison (1871), L.R. 6 C.P. 222; Peel's Case (1867), L.R. 2 Ch. 674; In re Nassau Phosphate Co. (1876), 2 Ch. D. 610.

Appeal dismissed with costs.

LAURIN v. ST. JEAN—CLUTE, J.—JAN. 24.

Contract—Promise to Pay Large Sum—Evidence—Forgery—Scheme to Defraud.]—Action to recover $15,000 under an agreement in writing, dated the 18th March, 1915, purporting to be signed by the plaintiff and defendant, whereby the defendant promised to pay that sum to the plaintiff at the plaintiff's residence, in the city of Toronto. The defendant expressly denied that he executed the agreement or any agreement to pay the plaintiff any sum whatever. The plaintiff's case was based in part upon a receipt for $300, also alleged to have been signed by the defendant. The action was tried without a jury at Toronto. The learned Judge, after an exhaustive review of the facts and evidence, concludes that neither of the documents put forward by the plaintiff is genuine—that both were forged as part of a scheme to defraud the defendant. Action dismissed with costs. T. N. Phelan, for the plaintiff. M. K. Cowan, K.C., for the defendant.

ALLIN v. ALLIN—FALCONBRIDGE, C.J.K.B., IN CHAMBERS—JAN. 24.

Husband and Wife—Action for Alimony—Discovery—Examination of Husband — Relevancy of Questions as to Estate and Effects.]—Appeal by the defendant from an order of the Master in Chambers requiring the defendant, in an action for alimony, to attend for re-examination for discovery and to answer questions as to his estate and effects. The learned Judge said that a trial Judge ought, in his opinion, to be able to fix the amount of alimony, should the plaintiff be held entitled, without putting the parties to the expense of a reference. He himself had always pursued that practice. In this view, the discovery of the defendant's estate and effects was material. The cases cited by the defendant had no application—the plaintiff had her status as the defendant's wife. Appeal dismissed; costs in the cause to the plaintiff in any event. Harcourt Ferguson, for the defendant. J. M. Godfrey, for the plaintiff.

CORRECTION.

In REX v. MONSELL, ante 377, on p. 378, line 9, insert "not" before "acted upon."