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HIGH COURT OF JUSTICE.

DIVISIONAL COURT. JANUARY 20TH, 1910.

FARMERS BANK v. BIG CITIES REALTY AND AGENCY CO.

Summary Judgment—Motion for—Affidavit in Reply—Refusal to Allow Cross-examination on—Appeal—Case Remitted to Court below—County Courts Act, sec. 54.

An appeal by the defendants from an order of DENTON, one of the junior Judges of the County Court of York, under Con. Rule 603, allowing the plaintiffs to enter final judgment for the amount of their claim upon a promissory note.

The appeal was heard by FALCONBRIDGE, C.J.K.B., RIDDELL and LATCHFORD, JJ.

T. Hislop, for the defendants.

W. H. Hunter, for the plaintiffs.

RIDDELL, J.:—The action was upon a promissory note purporting to be made by the defendants. The affidavit for speedy judgment is plainly sufficient; and no objection is taken on that ground. Upon the return of the motion, affidavits were filed by the defendants which, unanswered, would entitle defendants to a dismissal of the motion. But an affidavit was filed in reply by the solicitor for the plaintiffs. Counsel for the defendants asked that he be allowed to cross-examine the deponent upon his affidavit, but this the learned County Court Judge refused. This affidavit is recited in the formal judgment as part of the material.

I am of opinion that the defendants should have had an opportunity of disproving, if they could, the statements in the

last affidavit by cross-examination thereon; and judgment should not have been entered against them without such opportunity.

It must not be forgotten that Rule 603 is applied only with caution and in a perfectly plain case.

We should, I think, avail ourselves of the powers given by sec. 54 of the County Courts Act; and, allowing the appeal with costs in the cause to the defendants, send the case back to the County Court Judge for his disposal after the defendants have had an opportunity of fully developing their defence.

FALCONBRIDGE, C.J.:—I agree in the result.

LATCHFORD, J.:—I agree.

CLUTE, J., IN CHAMBERS. JANUARY 21ST, 1910.

REX v. TEASDALE.

Liquor License Act—Conviction for Second Offence—Amendment of sec. 72 after First Conviction—Change in Penalty for First Offence—Effect of—Interpretation of Statutes.

Application by the defendant, on the return of a habeas corpus, for his discharge from custody under a warrant of commitment pursuant to a conviction for a second offence against the Liquor License Act.

The prisoner was first convicted on the 28th July, 1908.

On the 13th April, 1909, sec. 72 of the Act was amended by increasing the penalty for a first offence from not less than $50 besides costs and not more than $100 besides costs, to a sum of not less than $100 besides costs and not more than $200 besides costs. The punishment for a second offence (imprisonment for 4 months) was not changed by the amendment. The Act was not repealed, but the figures indicating the amount of the penalty were changed.

J. B. Mackenzie, for the defendant, contended that, an amendment having been made in the section by increasing the penalty for a first offence, there cannot be a second offence under the same section of the Act, where the prior offence pre-dated the amendment.

E. Bayly, K.C., for the Crown.

CLUTE, J.:— . . . It cannot be supposed that the legislature intended by increasing the penalty to give a clear slate in all cases where a first conviction had been made. The second offence, which calls for imprisonment, is the offence of selling liquor without a license after a previous conviction. There was a previous conviction for an offence against the Act.

Having regard to the nature of the amendment and to the intendment of the statute, as enacted by sec. 101, sub-sec. 6, I am of opinion that the offence for which the prisoner was convicted was a second offence within the statute, notwithstanding the amendment. I am unable to give effect to the objection. See the Interpretation Act, 1907, sec. 7, sub-sec. 46 (d).

The other points raised were disposed of adversely to the defendant on the argument.

Application dismissed.

DIVISIONAL COURT. JANUARY 21ST, 1910.

FINDLAY v. STEVENS.

Building Contract—Penalty for Non-completion of Work by Certain Day—Contractor Delayed by Default of other Workmen—Work not Commenced until after Time for Completion—New Contract—Necessity for Proof of Damage by Delay.

Appeal by the plaintiff from the judgment of the County Court of Wentworth.

Action by a contractor against the executors of one Stevens, deceased, to recover a balance alleged to be due for slating and tiling a roof for the deceased. The defendants counterclaimed for damages, alleging that the work was not done according to the contract. Judgment was given for the plaintiff for $117 with costs on the proper scale, and for the defendants on their counterclaim for $227 and County Court costs, the two amounts to be set off pro tanto.

The appeal was heard by BOYD, C., MAGEE and LATCHFORD, JJ.

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

S. F. Washington, K.C., for the defendant.

BOYD, C., delivering the judgment of the Court, first referred to the provisions of the contract, the most important clause being: "Should the contractor fail to finish the work at the time agreed

upon, he shall pay by way of liquidated damages $1 per day thereafter that the works shall remain incomplete; due allowance to be made for extension of time for additional work or alterations and for delay occasioned by the default of the contractor for other parts of the work, unless the proprietor has proceeded promptly against such other contractor."

It appeared that the carpenter's work was not done upon the roof till the 3rd August, and that the slating and tiling part of the work could not be commenced before the expiration of the time-limit fixed in the contract, which was the 1st August.

The cases shew that the penalty clause (i.e., the $1 per day) is at an end when the contract-limit expires—it is for the specific period only. If the contractor is so delayed by the default of the proprietor or his workmen that he is unable to begin his work till a date after the termination of the time fixed by the contract . . . his delay in the after-prosecution of the work is not to be visited by the imposition of the penalty of so much a day. There is, in effect, a new contract for the performance of the work at the contract price, but without any revival of the penalty clause. On delay in this after-prosecution of the work the contractor may be liable, but only on proof of damage sustained thereby. . . . Moore v. Hamilton, 33 U. C. R. 279, 520; . . . Holme v. Guppy, 3 M. & W. 387; . . . Dodd v. v. Charles, [1897] 1 K. B.

It is right, however, to send the case back, allowing proper amendments, to have the matter of damage for delay in the prosecution of the work ascertained upon proper evidence, as suggested in Hamilton v. Moore, at p. 520.

Costs of appeal to the plaintiff; other costs of action to be disposed of by Judge Monck, to whom the parties agree to have the reference.

CLUTE, J. JANUARY 24TH, 1910.

RE NUTTER BREWERY LIMITED.

Company—Winding-up — Contributories — Dominion Companies Act—Application for Shares—Condition — Non-fulfilment—Absence of Allotment and Notice—Necessity for By-law—Constitution of Board of Directors.

Appeal by the liquidator of the company from the refusal of the local Master at Cornwall to place John Henry Bryant and George Sorgius on the list of contributories in a winding-up of the company.

The company was incorporated under the Dominion Companies Act by letters patent dated the 25th March, 1907, with a capital stock of $500,000.

At the first general meeting of shareholders, held on the 2nd April, 1907, Powell and Hibbard, two of the incorporators, were present in person, and the latter held proxies from Prendergast, Posselin, and Temple, the other three incorporators. These were the only shareholders at the time. Nutter was present, and a resolution was passed electing Nutter (subject to his subscribing for stock), Prendergast, and Hibbard directors. It was then resolved that a block of 500 shares should be allotted to Nutter for his services, goodwill, etc., and that such shares should "rank secondary to stock allotted for cash consideration to the extent of an annual dividend of 10 per cent. and claim upon the company's assets."

Bryant and Sorgius on or before the 8th April, 1907, each signed a letter (dictated by Hibbard and addressed to him) in which it was stated that in the one case Bryant and in the other Sorgius had agreed to subscribe for 100 shares of stock in the company, of the par value of $100 each, payable upon the same terms and conditions as will apply to subscribers in general—"It is understood that my name is not to appear as a subscriber or shareholder in any form whatsoever without my written consent, and that the present letter is given in confidence and to enable you to supply the assurance that the above amount of stock has been bona fide subscribed."

The minutes of a meeting of the directors held on the 8th April, 1907, at which Nutter, Prendergast, and Hibbard were present, contained an entry to the effect that $10,000 of stock was allotted to Nutter; $10,000 to Bryant; and $10,000 to Sorgius.

Nutter's name was not in fact placed upon the stock list until after he had signed an application for 100 shares on the 16th May, 1907; and $10,000 was the only sum for which he was ever placed upon the list, despite the resolution of the first meeting of shareholders as to the block of 500 shares.

Nutter, Prendergast, and Hibbard continued to act as a board of directors down to the 26th May, 1908, when the company had become insolvent.

Neither Sorgius nor Bryant ever paid anything to the company upon their alleged allotment, nor did either of them ever give the "written consent" mentioned in their letters.

Nutter never made any direct payment on his stock, nor was he ever credited by the company with any payment of any kind. He paid out for the promotion and organisation of the company, and

for the purposes of the company after the charter had been obtained, some $4,300.

Calls were made by the directors upon the stock, and notices were sent out to Bryant and Sorgius, who received them and handed them to Nutter; the latter said he would attend to them; and nothing more was done by these men in the way of repudiation.

C. H. Cline, for the liquidator.

G. A. Stiles, for Bryant and Sorgius.

CLUTE, J.:— . . . Referring to the letters signed by Bryant and Sorgius of the 4th April, 1907, the learned Master says: ". . . Even eliminating all restrictions in the letters, they amount, at the utmost, to subscriptions for stock which the company might accept or reject or ignore utterly, bnt to say that complete contracts can be found in them, or that complete contracts must be inferred from their working, are statements in which I fail to recognise any force."

In this view I concur with the Master. See In re Zoological and Acclimatization Society, Cox's Case, 16 A. R. 543.

The report then proceeds: "I have not been able to see how Mr. Hibbard could properly deal with the letters at all. He never had the written consent of these men mentioned in their letters. The bringing of their applications before the board, the attempted allotment of stock to them, and the placing of their names on the minutes of the meeting of directors on the 8th April, 1907, and on the stock list, not only were unauthorised acts on his part, but were done in violation of the terms of these letters. . . . They were, on their face, without a further written consent, not applications to be presented to the directors for acceptance and allotment of stock, to be followed by the registration of names, etc., provided for by sec. 89 of the Act, in a book open to the inspection of shareholders and creditors under sec. 91. The written consent was a condition precedent as much as the understanding in Re Standard Fire Insurance Co., Turner's Case, 7 O. R. 459."

In this view I fully agree.

There is a further difficulty in the appellant's way, that no valid allotment of stock was in fact made and no notice of allotment was given, which would seem to be necessary before these names could be placed upon the list of contributories. See In re Scottish Petroleum Co., 23 Ch. D. 413; Boultbee's Case, 16 A. R. 519; Nelson Coke and Gas Co. v. Pellatt, 4 O. L. R. 481, 489; Re Canadian Tin Plate Co., 12 O. L. R. 594, 599; Twin City Oil Co. v. Christie, 18 O. L. R. 324.

Allotment is said to have been made at the meeting of the 2nd April, 1907, by the board, then consisting of three members. . . There was in fact no by-law fixing the board of directors when the first election was held. Even if two directors can be said to have been qualified, not having paid for their stock, Nutter was not a shareholder elected, and had no qualification as required by sec. 75 of the Companies Act, and I think it quite clear that what took place in regard to allotting him 500 shares of the stock . . . was wholly illegal and void. . . . Nutter's qualification as director is entered in the minutes as being "subject to his subscribing for stock," and he signed no application for stock until six weeks or so after his election. See In re Alma Spinning Co., Bottomley's Case, 16 Ch. D. 681; Toronto Brewing and Malting Co. v. Blake, 2 O. R. 175.

I am strongly inclined to think that the objection that the board was never validly constituted, because it required to consist of five members, is well taken. . . .

Section 46 of the Companies Act provides that stock not allotted by letters patent shall be allotted at such times and in such manner as the directors by by-law shall prescribe. No by-law . . . was ever in fact passed for that purpose. . . .

No notice of allotment—if any such there was—was ever in fact sent out to Sorgius or Bryant.

I agree with the learned Master that the liquidator's application to have these men placed on the list of contributories must be refused.

The Master thinks that the liquidator was doing his duty in having this matter fully investigated, and in this I also agree with him. The letters . . . were most improper, and could only have been intended for the purpose of procuring their signatures for an improper purpose, namely, to induce others to subscribe for stock on the supposition that they had subscribed for a large amount. While dismissing the appeal, I do not think the respondents should have any costs either of this appeal or before the Master.

BRITTON, J. JANUARY 24TH, 1910.

F. J. CASTLE CO. LIMITED v. BAIRD.

Partnership—Holding out—Estoppel—Joint Liability—Judgment against one Partner—Election.

Action by a firm of wholesale grocers against R. Baird and one Neelin, doing business as partners under the name of "R. Baird,"

to recover the price of goods alleged by the plaintiffs to have been sold to the defendants as a firm, upon the order of Neelin.

Neelin did not defend, and judgment had been entered against him.

Baird set up that he had sold his business to Neelin, and denied that he ever was a partner of Neelin.

J. F. Warne, for the plaintiffs.

W. L. Scott, for the defendant Baird.

BRITTON, J.:— . . . I find that Baird held himself out to the plaintiffs and the public as interested in the business. . . . He represented to the plaintiffs that the business, after Neelin should come in, would be a partnership business, and that he and Neelin would be partners. After that, and with no notice to the contrary, the plaintiffs were right in believing, as they did, that there was a partnership business. I find that the plaintiffs, in good faith and without any want of care or negligence on their part, gave credit to Baird, as the responsible party, upon the faith that he was a partner, and as such was carrying on the business that was in fact carried on in his name. . . .

At the trial counsel for Baird pressed the objection that, if he was liable at all, it was only by estoppel, and that, as the plaintiffs had in this action taken final judgment against Neelin, that was in law an election by the plaintiffs to look to Neelin alone, and so the action against Baird should be dismissed. Scarfe v. Jardine, 7 App. Cas. 345, was cited as authority for this proposition. In my opinion, that case is rather authority in favour of the plaintiffs. . . . Baird is estopped from denying a liability created by his conduct. That is all estoppel has to do with it. Baird and Neelin, being jointly liable, have been so sued. . . .

This, therefore, is not a case of election; it is a case where both are liable, and where the plaintiffs' proceeding in signing judgment against Neelin and proceeding against Baird is regular and in accordance with Con. Rule 605. This is not a case where the action can only be in the alternative against one or the other of the defendants. . . .

Judgment for the plaintiffs against Baird for $1,138.93, with interest and costs.

BRITTON, J. JANUARY 25TH, 1910.

HUBBERT v. HOME BANK OF CANADA.

Promissory Note—Signature to Blank Form—Delivery to Agent for Specific Purpose—Fraud of Agent—Filling up Blanks and Negotiating Note—Holder in Due Course—Payment of Note by Maker's Bankers—Right of Maker to Recover—Bills of Exchange Act, secs. 31, 32, 56, 57.

Action to recover $440.50 and interest, in the following circumstances.

The plaintiff was a depositor in the savings department of the defendants, a chartered bank, and on the 4th December, 1908, had to his credit a sum exceeding $440.50.

About the 1st October, 1908, one Stirton, who represented himself as an agent for an assurance company, canvassed the plaintiff for a life assurance. The result was that a blank form of promissory note was presented by Stirton and signed and indorsed by the plaintiff. The form was:—

$ 190

After date promise to pay to the order of dollars

at

Value received

No. due

The plaintiff thought the form might have been in part filled out when he put his name upon it, but, if so, no more than this:—

$440.50. Oct. 1st, 1908.

December 1st After date I promise to pay to the order of myself dollars

at

Value received.

This paper was left with Stirton upon the understanding and condition that nothing was to be done with it until and unless the plaintiff passed the requisite medical examination for life insurance. If the plaintiff presented himself for examination and was passed, the paper signed by the plaintiff, as representing the first premium upon the life assurance, would be taken up. The plaintiff said he would give his cheque for it, and there was no question that the amount to be paid was $440.50.

The plaintiff did not present himself for examination, but notified Stirton that he did not intend to take the insurance.

The plaintiff omitted to get the paper from Stirton, and Stirton, in fraud of and without the knowledge of the plaintiff, wrote the words "Home Savings Bank, Toronto," as the place of payment, upon the paper, filled in the amount in writing, and on the 6th October disposed of it to the United Empire Bank for value. On the 4th December, 1908, the United Empire Bank, by their agents, presented it to the defendants for payment. The defendants stamped their acceptance upon it, and charged the amount to the plaintiff against his savings bank deposit account. It went through the clearing house, and was subsequently paid by the defendants, the money reaching the United Empire Bank.

J. D. Falconbridge, for the plaintiff.

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

BRITTON, J.:— . . . The case terms upon the application of the Bills of Exchange Act. Assuming for the moment that this paper . . . was delivered to Stirton as a note and for the purpose of being used by him as a negotiable instrument, and that it should be issued by him as such, the defence is made out. The United Empire Bank, in that case, were "holders in due course," within the meaning of sec. 56 of the Bills of Exchange Act. . . . The defendants, under sec. 57, have the same rights as the United Empire Bank.

In my opinion, the defendants ought not, without special instructions to pay, to have paid this note. . . . The question, however, is not one of good or bad banking, but what are the defendants' strict rights? Grissom v. Commercial National Bank, 87 Tenn. R., is authority against the defendants, and that case is buttressed by a very considerable amount of American case law. I am not bound to follow that, and I do not, as I am of opinion that, assuming the note to be without taint or suspicion, the defendants may treat the plaintiff's naming the place of payment as authority to pay, even without any general practice. . . . Rymer v. Laurie, 18 L. J. Q. B. 218, is authority in favour of the defendants as to their right to pay and charge up against a depositor's savings bank account.

There remains to be disposed of the right of the United Empire Bank, as holders in due course, to recover, upon the facts presented.

The paper in the hands of Stirton must be treated as if "a simple signature on a blank piece of paper" had been handed by the plaintiff to Stirton. Even if the paper had upon it some writing so that it appeared as above mentioned, it would be harm-

less. No bank would negotiate such paper, and Stirton had no more right, under sec. 31 of the Bills of Exchange Act, to fill in the amount in writing and the place of payment than wholly to fill up a blank piece of paper with only a signature upon it. It had to be filled up before it could be used, and it was filled up by Stirton. It was not delivered to Stirton in order that it might be converted into a note or negotiated as a note.

Sections 31 and 32 of the Canadian Bills of Exchange Act are practically the same as sec. 20 of the English Act. . . . In Smith v. Prosser, [1907] 2 K. B. 735, the language of that section has been dealt with and the sections have been construed. . . . That case governs the present one, and, upsetting as that case may be of the opinions of bankers here as to the true meaning of secs. 31 and 32, I must follow the authority. . . .

What the plaintiff did was not to give to Stirton a promissory note or a paper that could be converted into a promissory note, or that Stirton would have any right or authority to deal with in any way until he should get that authority after the plaintiff's application for insurance had been accepted. In a sense, Stirton was the plaintiff's agent. . . . The plaintiff made him the custodian of the paper with the plaintiff's signature, not as a note or to be negotiated as a note, but as evidencing an amount that the plaintiff would pay, should an examination be passed. . . .

Lloyd's Bank v. Cooke, [1907] 1 K. B. 794, . . . was considered in Smith v. Prosser, and was thought to have no application.

The fact that the note is now in the possession of the plaintiff can make no difference. It is at the defendants' call and for their use. The plaintiff has not, by obtaining it from the bank, in the circumstances given in evidence, and as to which there is no dispute, assented to or confirmed or ratified the use of his money in payment of it.

This action will not in any way prejudice the right of the defendants, if any, against the United Empire Bank.

There will be judgment for the plaintiff for $440.50, with interest from the 4th December, 1908, at 5 per cent. per annum, and with costs.

MEREDITH, C.J.C.P. JANUARY 26TH, 1910.

McLAUGHLIN v. ONTARIO IRON AND STEEL CO.

Master and Servant—Injury to Servant—Workmen's Compensation for Injuries Act, sec. 3 (5)—Negligence of Fellow-Servant—"Person Having the Charge or control of an Engine or Machine upon a Railway."

Action for damages for personal injuries sustained by the plaintiff while working for the defendants, by reason of the defendants' negligence, as alleged.

The action was tried before the Chief Justice and a jury.

J. G. O'Donoghue, for the plaintiff.

W. M. German, K.C., and R. H. Greer, for the defendants.

MEREDITH, C.J.:—The plaintiff was employed in the defendants' manufactory as a foreman moulder, and received serious injuries on the 17th December, 1908, while engaged in his work, owing to a hook—a heavy part of an overhead crane—falling and striking him on the head, causing a fracture of the skull.

The fall of the hook was caused by the breaking of the steel cable by which it was suspended.

The case made by the plaintiff in his pleading is that, "through the negligence of the defendants, their servants, employees, and agents, a portion of an overhead crane, owing to its being out of order through the negligence of the defendants, their servants, workmen, employees, and agents, fell upon the plaintiff, felling him to the ground, and causing such serious bodily injury as to completely incapacitate him from working at his trade."

The jury negatived these grounds of negligence, and found that the appliances used in the defendants' shop for moving the castings were reasonably safe and sufficient for the purposes for which they were being used, but, in answer to a question predicated on such a finding being made, whether the plaintiff's injuries were caused by any other negligence, they found that the injuries were caused by negligence on the part of the man who operated the crane, one McCauley, in hoisting the hook and the sheaf of the crane over the plaintiff's head and letting it come in contact with the drum or something unknown, thereby breaking the cable.

The plaintiff did not confine himself in the evidence which he adduced to the ground of negligence alleged in his pleading, but

the case was tried and went to the jury at large on the question of negligence, and I gave leave to the plaintiff to amend by alleging any ground of negligence which could be supported by the evidence.

McCauley, who controlled the movements of the crane, being a fellow servant of the plaintiff, the defendants are not answerable for his negligence, unless McCauley was a person having the charge or control of an engine or machine upon a railway or tramway within the meaning of clause 5 of sec. 3 of the Workmen's Compensation for Injuries Act, R. S. O. 1897 ch. 160.

Before considering the effect of the legislation referred to, it is necessary to ascertain what were McCauley's duties and the nature and purpose of the appliances with the control of which he was intrusted.

The crane was an overhead one operated by electrical power, and was used for the purpose of raising and moving from place to place heavy castings. McCauley sat in a cage which ran upon rails, and from it he regulated the movement of the crane, and, when the crane was brought to the place where it was to be used, it was lowered and raised according to the direction of the foreman, who stood on the ground below near the casting which was to be moved.

At the time of the accident the crane had been in use where the plaintiff was working, and he had told McCauley that he did not require it any more, and, while McCauley was moving it away, it was raised above the plaintiff's head, and the cable parted, and a hook weighing 250 pounds, which was attached to the cable, fell and struck the plaintiff on the head, while he was stooping to examine his moulds.

It was argued by counsel for the plaintiff that the cage with its appliances was an engine or a machine upon a railway or tramway, within the meaning of clause 5.

As clause 5 stood in the first Ontario Act, 49 Vict. ch. 28, it read, as did the fifth sub-section of sec. 1 of the English Act 43 & 44 Vict. ch. 40, "who has the charge or control of any signal points, locomotive, engine or train upon a railway," except that in the English Act there is a comma between "signal" and "points" and no comma between "locomotive" and "engine," while in the Ontario Act there is a hyphen between "signal" and "points" and a comma between "locomotive" and "engine."

If clause 5 had remained in that form, the case of Murphy v. Wilson, 48 L. T. N. S. 788, would be decisive against the plaintiff. In that case the accident was caused by the negligence of a person having the charge or control of a steam crane travelling

upon rails, and it was held that the case did not come within sub-sec. 5 of sec. 1, the view of the Court being that "locomotive engine," especially having regard to the company in which it was found in the sub-section, meant a machine to draw trucks or trains upon a railway.

Clause 5 of sec. 3 of the Ontario Act was, however, amended in the consolidation of the Act respecting Compensation to Workmen in certain cases, 55 Vict. ch. 30, and it now reads, "who has the charge or control of any points, signal, locomotive, engine, machine or train upon a railway, tramway or street railway."

This amendment has, I think, very much widened the scope of the enactment, and the word "machine" was probably introduced to meet such cases as, according to the views of the Judges who decided Murphy v. Wilson, did not come within its provisions.

It will be seen that, besides this, the position of the words "signal" and "points" was changed, and the clause as amended reads "points, signal," and the comma between "locomotive" and "engine" remains, the latter indicating that not one thing, a "locomotive engine," but two things, a "locomotive" and an "engine," were intended.

In my opinion, therefore, Murphy v. Wilson does not apply, and McCauley should be held to have been a person having the charge or control of an engine or a machine upon a railway within the meaning of clause 5, and the plaintiff is entitled to recover.

Doughty v. Firbank, 10 Q. B. D. 358, is not, I think, opposed to the view I have taken, but, even if it were, the amendment made by 55 Vict. ch. 30, in my opinion warrants the wider meaning I would give to the word "railway." . . .

TEETZEL, J. JANUARY 27TH, 1910.

McMULKIN v. COUNTY OF OXFORD.

Municipal Corporation—Repair of Highway — Construction of Watercourses—Flooding Land Adjoining Highway—Absence of By-law—Right of Action—Remedy by Arbitration—Damages—Injury to Land—Injunction.

The plaintiff alleged that the defendants, in repairing a highway, wrongfully constructed certain grades and ditches along and certain culverts through the highway so as to divert water

from the highway, and from an adjoining highway over which they had not assumed control, and from other lands, into and upon the plaintiff's farm, for which he claimed damages and an injunction.

The defendants passed a by-law, No. 558, adopting a scheme of road improvement in the county, which was confirmed by 7 Edw. VII. ch. 81, sec. 1. Section 2 enacted that the highways described in the schedule to the by-law (including the highway in question) "shall hereafter be maintained and kept in repair by said corporation," etc. In assuming compliance therewith the corporation proceeded to do the work the result of which the plaintiff complained of. The work consisted of raising the grade of the highway along the plaintiff's farm, deepening ditches on either side, and extending them to gather water from a township highway, and putting in two culverts.

J. C. Hegler, K.C., and W. T. McMullen, for the plaintiff.

S. G. MacKay, for the defendants.

TEETZEL, J.:—I cannot find that raising the grade in any way increased the flow of water upon the plaintiff's farm; but I do find that, as a result of deepening and extending the ditches and putting in the two culverts, considerably more surface water is discharged upon the plaintiff's land than would naturally flow upon it before the work was undertaken.

Until the culverts were put in, none of the water which would fall on the far side of the highway, except such as might soak through the highway, would get upon the plaintiff's farm. The water is not directed into a natural watercourse. The plaintiff's land upon which it flows is a swamp . . . In a state of nature this swamp extended on both sides of the highway, which was built through it. The greater part is on the plaintiff's farm. It is surrounded by high ground and has no natural outlet, and . . . the expense of making an outlet would be very considerable.

No by-law was passed authorising the making of a watercourse, and for that purpose to take or use the plaintiff's land under sec. 554 of the Municipal Act, 1903; nor were the provisions of the Ditches and Watercourses Act, R. S. O. 1897 ch. 285, invoked by the defendants.

I find as a fact that from an engineering point of view the work done by the defendants was necessary for the proper maintenance and repair of the highway, and that it was properly and not negligently done; and, therefore, unless the defendants were acting wrongly in making the watercourse and in using the plaintiff's

land as a receptacle for the water, without having first passed a by-law in that behalf, the plaintiff would not be entitled to bring an action, but would be driven to an arbitration for his damages under sec. 437 of the Municipal Act, 1903.

This was the chief defence relied on by . . the defendants.

On the other hand, the plaintiff's contention is, that the construction of the watercourses and incidental use of the plaintiff's land as a receptacle for the water discharged through them, could not be legally done without a by-law being first passed.

The first question for determination is, therefore, whether such a by-law was necessary. . . .

[Reference to secs. 437 and 451 of the Municipal Act, 1903; Preston v. Corporation of Camden, 14 A. R. 85; Pratt v. Town of Stratford, 16 A. R. 5.]

While, therefore, it is clear that the defendants have the right, without passing a by-law, to improve or raise or lower their highways, notwithstanding that such improvements may injuriously affect lands of adjoining owners, the only remedy in such a case being arbitration, I think such right is subject to the condition that in doing the necessary work the municipality must not take or use any part of the adjoining land, and if, properly to do the work or improvement or repair, it becomes necessary to take, encroach upon, or use adjoining land, then I think a by-law for that purpose is necessary before the work can be legally done; and, if no such by-law is passed, an action lies by the owner whose lands are taken or used. . . . .

[Reference to Ostrom v. Sills, 24 A. R. 526, 539, 28 S. C. R. 486; Rowe v. Township of Rochester, 29 U. C. R. 590; McGarvey v. Town of Strathroy, 10 A. R. 631; and cases cited in Biggar's Municipal Manual, p. 650.]

The plaintiff has suffered and will suffer some damage by the use the defendants are making of his land as a resting place for the additional water discharged upon it by the defendants through the watercourses constructed by them; and, no by-law having been passed authorising the making of them and using the plaintiff's land for the purposes thereof, under sec. 554 of the Municipal Act, 1903, the case is, I think, governed by City of New Westminster v. Brighouse, 20 S. C. R. 520. . . . See also Van Egmond v. Town of Seaforth, 6 O. R. 599, at p. 610.

If the above view is correct, it is not necessary to determine how far in any case the defendants' right to insist upon arbitration may be displaced under the authority of Saunby v. London Water Commissioners, [1906] A. C. 110; and, if it should become necessary to determine that question, I would find as a fact that

the defendants proceeded with the works after objection thereto by the plaintiff, and a notice by him that he would sue for damages, and also that at no time did the defendants give the plaintiff an opportunity of agreeing with them upon his claim for compensation, within sec. 437 of the Municipal Act.

The evidence as to damages was conflicting, but I think there can be no doubt that the excess of water discharged on the plaintiff's land does cause some loss and inconvenience to him, and will have a depreciating effect upon the value of his farm.

In lieu of an injunction, I would fix the plaintiff's damages, past and future, at $450, and I direct judgment to be entered in his favour for that sum with costs.

MULOCK, C.J.Ex.D. JANUARY 27TH, 1910.

HAGLE v. LAPLANTE.

Innkeeper—Neglect to Provide Fire Escape in Bedroom—R. S. O. 1897 ch. 264, sec. 3—Death of Guest in Fire—Evidence as to Cause of Death—Liability—Statutory Duty—Penalty.

Action by the widow of George Hagle against the proprietor and keeper of the Windsor Hotel in the town of Cornwall at the time of its destruction by fire on the night of the 23rd March, 1909, to recover damages for the death of Hagle, who was a guest at the hotel on the night in question, and lost his life in the fire, in consequence, as the plaintiff alleged, of the hotel not being provided with the appliances required by R. S. O. 1897 ch. 264, "An Act for the Prevention of Accidents by Fire in Hotels and other like Buildings."

R. A. Pringle, K.C., and R. Smith, for the plaintiff.

G. I. Gogo and J. G. Harkness, for the defendant.

MULOCK, C.J.:—On the night in question the deceased occupied an interior room (No. 11), which opened upon a hall running northerly to the north end of the building. On the opposite side of the hall were bedrooms, the most northerly one being a corner room, No. 15. The fire completely destroyed the floorings of the building, and on the day following two bodies were found in the basement, apparently under what had been room 15; and

the evidence fully satisfies me that one of these bodies was that of the deceased, which, with contents of room 15, had fallen into the basement. . . .

The deceased had been a lodger at the hotel for some time, occupying room 11, and . . . retired to bed shortly before midnight. The fire occurred a couple of hours later. It is clear that the deceased was not smothered in his own bed, but must have proceeded from his room to the hall, and thence northerly towards room 15. There was a fire escape outside the building at the north end of the hall, and the inference is that the deceased was endeavouring to reach this. . . . Although the witnesses described the body as being found under room 15, it may not have fallen from that room; it did undoubtedly fall from a point near the fire escape, but could not possibly have fallen from room 11.

Sub-sections 1 and 2 of sec. 3 of the Act enact as follows:—

"(1) The keeper of every hotel shall, where the same is more than two storeys in height, provide and keep in each of the sleeping apartments or bedrooms which are situate above the ground floor, a fire escape for the use of guests occupying the same."

[Sub-section 2 defines a sufficient fire escape.]

The evidence shews that the building in question exceeded two storeys in height, and that room 11, in the third storey, was a bedroom, and was not provided with a fire escape. . . . . If it had been so provided, the fair inference would be that the deceased would have endeavoured to descend by such fire escape; and I think the evidence warrants the conclusion that its absence compelled him to seek some other means of escape, and that in the effort he lost his life. Thus, the defendant's failure to perform his statutory duty of providing room 11 with a sufficient fire escape was the direct cause of the deceased's death.

The defendant's counsel contended that the death might have been caused by suffocation in bed, and not by the absence of a fire escape; and, but for the circumstance of his body having been found elsewhere than under his own bedroom, there would have been no evidence to shew the actual cause of death.

In a case where there is a total destruction of the evidence, it would be impossible to prove the cause of death; and it seems to me that . . . the Act might properly be amended by casting the onus upon the proprietor of proving that the death was not caused by his negligence. . . .

It was further argued that the only penalty because of non-observance of the defendant's statutory duty . . . is that provided by sec. 6, which declares that, in the case of neglect to

observe any of the provisions of the Act, the proprietor shall . . incur a fine. . . .

It is clear that the object of this Act is the safety of the guests of hotels in case of fire. If it had not provided a penalty for contravention of its provisions, there can be no doubt that a person injured because of the proprietor's breach of the statutory duty imposed upon him would have had a cause of action because of such omission. Does, then, sec. 6 take away a cause of action otherwise given by the statute? . . .

In construing the statute it is necessary, as pointed out by Kelly, C. B., in Gorris v. Scott, 2 Ex. D. 41, to consider for whose benefit the Act was passed, whether in the interests of the public at large or of a particular class of persons. If in the interests of the latter, then the cause of action is not taken away because the person neglecting the statutory duty may also be liable to a penalty. . . .

[Reference to Groves v. Wimborne, [1898] 2 Q. B. 414.]

The object of the Act in question being to benefit the occupants of hotels and other buildings, in my opinion, the cause of action arising from the breach of the statutory duty imposed by the Act is not taken away by the penalty to which the proprietor is also subject. I therefore think the plaintiff entitled to recover.

Judgment for plaintiff for $2,500 (to be apportioned between her and her children) with costs.

REX v. LEONARD—CLUTE, J., IN CHAMBERS—JAN. 21.

Liquor License Act—Conviction—Amendment—Sec. 105.]—Motion to quash a magistrate's conviction for selling intoxicating liquor contrary to the Liquor License Act. The conviction, as originally drawn up, did not state, nor did the information, that the unlawful selling was without the license therefor by law required. After the motion to quash had been launched, the conviction was amended so as to cover the objection, and the amended conviction was returned and filed. CLUTE, J., held that, having regard to the amendment made and to the provisions of sec. 105 of the Act, the objection failed. Motion dismissed with costs. J. Haverson, K.C., for the defendant. J. R. Cartwright, K.C., for the Crown.

REX v. SCIARRONE—MEREDITH, C.J.C.P., IN CHAMBERS—JAN. 21.

Criminal Law—Summary Trial—Election before Magistrate—Foreigner.]—Motion on the return of a habeas corpus for the discharge of the prisoner, on the ground that he was not given the opportunity to elect whether he would be tried by the magistrate or by a jury, on a charge of extorting money by threats. He was tried, under the provisions of sec. 452 of the Criminal Code, by the police magistrate for the town of Sudbury, and convicted and sentenced to imprisonment. It was found necessary to have an interpreter, the prisoner being a foreigner. The magistrate made an affidavit that he told the interpreter to ask the prisoner whether he would be tried summarily or by a jury, and that he understood the interpreter to say "summarily." The prisoner on affidavit swore that the interpreter did not ask him this question; and it was contended that he had not a fair trial. MEREDITH, C.J., after hearing the cross-examination of the prisoner on his affidavit, was of opinion that no case was made for his discharge on the only ground urged, that the police magistrate did not inform the prisoner of his right to be tried by a jury. T. J. W. O'Connor, for the prisoner. E. Bayly, K.C., for the Crown.

GARVIN v. EDMONDSON—DIVISIONAL COURT—JAN. 22.

Contract—Evidence of—Negotiations—Company—Promoters.]—Appeal by the plaintiff from the judgment of TEETZEL, J., 14 O. W. R. 435, dismissing the action without costs. The action was upon an alleged contract, which the trial Judge found to be proved against two of the defendants, but he was unable to give the plaintiff any relief, in the view he took of the law. RIDDELL, J., delivering the judgment of a Divisional Court (FALCONBRIDGE, C.J. K.B., RIDDELL and LATCHFORD, JJ.), said that he was unable to find from the evidence that there was anything but negotiation not ripening into contract; but he was not to be taken as assenting to the proposition that, if the contract had been proved, the plaintiff would have had no relief. Appeal dismissed with costs. A. P. Poussette, K.C., and S. H. Bradford, K.C., for the plaintiff. R. McKay, for the defendants.

SINGLEHURST v. WILLS—MACLAREN, J.A., IN CHAMBERS.—JAN. 22.

Appeal—Removal of Stay of Execution in Part—Con. Rule 827 (2).]—Motion by the plaintiff under Con. Rule 827 (2) to remove in part the stay of execution consequent upon the defendant having given security for the costs of an appeal to the Court of Appeal from an order of BOYD, C. A referee made a report in favour of the plaintiff for $7,327.33 cash and 25,470 shares of a certain mining company, the flotation of which formed the subject of the action. On appeal and cross-appeal to the Chancellor the amount of cash to be paid to the plaintiff was raised to $8,344.45. The plaintiff contended that, as the defendant, by his reasons of appeal, did not dispute the fact that in any event the plaintiff was entitled to $739 and interest, the stay of execution should be removed to that extent and as to the amount of the costs awarded to the plaintiff. MACLAREN, J.A., said that, in his opinion, Rule 827 (2) was not meant to apply to a case like the present, but to cases where special circumstances might be shewn. Motion refused with costs to the defendant in any event of the appeal Glyn Osler, for the plaintiff. G. Gallagher, for the defendant.

CRANE v. MOORE—EAMES v. MCCONNELL—MASTER IN CHAMBERS —JAN. 24.

Interpleader—Payment into Court—Stay of Action.]—Motion by some of the defendants in the two actions for an interpleader order or to consolidate the actions. Both actions were in respect of the right to a commission of $50,000. The applicants did not dispute their liability, and were prepared to pay to the person or persons entitled. The Master thought it a proper case for interpleader, referring to Molsons Bank v. Eager, 10 O. L. R. 455, 6 O. W. R. 595. An order was made staying the second action and allowing the defendants to pay the money into Court in the first action, from which the defendants McConnell et al. to be dismissed; the first action to proceed as an action between the plaintiffs on the one side and Moore, Jeffery, and Eames, as the defendants. The defendants McConnell et al. to have their costs out of the fund, which, with all other costs, are to be costs in the cause as between the parties in the continuing action. J. G. Gibson, for the applicants. R. McKay, for the plaintiffs in the first action. H. E. Rose, K.C., for the plaintiff in the second action.

RE JONES TRUSTS—FALCONBRIDGE, C.J.K.B.—JAN. 24.

Trusts—Appointment of New Trustee—Undertaking.]—Petition for the appointment of a new trustee of a settled estate, in lieu of one who has become insane. Order made, the circumstances being exceptional, granting the prayer of the petition, and appointing S., who was out of the jurisdiction. The order to provide for an undertaking by the trustees as to the appointment of new trustees like that in In re Freeman, 37 Ch. D. 148. Eric N. Armour, for the petitioners. N. F. Davidson, K.C., for K. A. Jones. F. W. Harcourt, K.C., for infants.

STOW V. CURRIE—MASTER IN CHAMBERS—JAN. 25.

Security for Costs—Increased Amount.] — Motion by the defendants for increased security for costs, the action having been tried and dismissed with costs, but the plaintiff having set down an appeal to a Divisional Court. The Master held (citing Exchange Bank v. Barnes, 11 P. R. 11, Small v. Henderson, 18 P. R. 314, and Standard Trading Co. v. Seybold, 6 O. L. R. 379) that there is power to order increased security at this stage; that the Master in Chambers has jurisdiction to make such an order; and that the Master has power to direct a stay of proceedings until security be given. Order made that additional security be given for such amount as a taxation may shew to be reasonable, and staying proceedings until such security be given. Costs in the cause. F. Arnoldi, K.C., R. F. Segsworth, and Eric N. Armour, for the defendants. T. P. Galt, K.C., and Grayson Smith, for the plaintiff.

TITCHMARSH V. GRAHAM—CLUTE, J., IN CHAMBERS—JAN. 25.

Parties—Trespass and False Imprisonment—Crown Attorney.] —Appeal by W. H. McFadden, Crown Attorney for the county of Peel, from an order of the Master in Chambers, ante 367, adding him (upon terms) as a defendant to an action for trespass and false imprisonment. CLUTE, J., allowed the appeal and set aside

the order with costs here and below. W. E. Middleton, K.C., for the appellant and the defendant Graham. J. B. Mackenzie, for the plaintiff.

BEARDMORE v. CITY OF TORONTO—DIVISIONAL COURT—JAN. 25.

Constitutional Law—Contract—Hydro-Electric Power Commission.] — A Divisional Court (MULOCK, C.J.Ex.D., MAGEE and SUTHERLAND, JJ.), following Smith v. City of London, ante 280, affirmed the judgment of the Chancellor, ante 278. J. S. Lundy, for the plaintiff. H. Howitt, for the defendants.

FORSTER v. FORSTER—DIVISIONAL COURT—JAN. 25.

Alimony.]—The judgment of RIDDELL, J., ante 93, dismissing an action for alimony, was affirmed by a Divisional Court composed of BRITTON, MAGEE, and SUTHERLAND, JJ. R. S. Robertson, for the plaintiff. W. Mulock, for the defendant.

GUNNS LIMITED v. COCHRANE—MASTER IN CHAMBERS.—JAN. 26.

Summary Judgment—Account — Reference — Counterclaim.] —Motion by the plaintiffs for summary judgment under Rule 603 in an action for a balance of the price of goods sold to the defendant in 1908. The defendant did not deny his liability, but said that he was not prepared to admit the correctness of the account, and that he had a good counterclaim against the plaintiffs for malicious prosecution, arising out of this very matter. For this the defendant had recently begun an action. The Master made an order under Rule 607 to ascertain the amount due to the plaintiffs (unless the parties should agree as to this in a week.) Further directions and costs reserved, so that nothing may be done thereunder without the leave of the Court until the action for malicious prosecution is determined: Central Bank v. Osborne, 12 P. R. 160. A. J. Anderson, for the plaintiffs. J. King, K.C., for the defendant.

PURSE v. GOWGANDA QUEEN MINES CO.—BOYD, C.—JAN. 26.

Company—Shares—Subscription — Liability.]—Action for a declaration that the plaintiff's subscription for 5,000 shares of the capital stock of the defendants is not binding upon him and to compel the defendants to remove his name from the register. Counterclaim for calls. The Chancellor finds that the plaintiff signed an agreement to take shares in the company to be formed, and to pay calls thereon, first upon allotment, and then at defined periods afterwards; that he signed deliberately and without any fraud being practised in what was told him; that he acted upon his own judgment of the matters set forth in writing in a paper shewn to him; and that afterwards the company was formed, the shares allotted to the plaintiff, and calls made. Held, therefore, that the plaintiff had not made out a case for being discharged from the consequences of his signature to the agreement to take shares. Reference to Ridwelly Canal Co. v. Raby, 3 Price 93, quoted in Patterson v. Turner, 3 O. L. R. 104. No order as to counterclaim. Action dismissed with costs and without prejudice to such further steps for attack or defence as the plaintiff may be advised to take. R. S. Robertson, for the plaintiff. W. R. Smyth, K.C., for the defendants.