THE
ONTARIO WEEKLY NOTES

CASES DETERMINED IN THE SUPREME COURT OF ONTARIO, APPELLATE AND HIGH COURT DIVISIONS, FROM AUGUST, 1917, TO THE 2nd MARCH, 1918.

NOTED UNDER THE AUTHORITY OF THE LAW SOCIETY OF UPPER CANADA.

VOL. XIII.

Editor:

Edward B. Brown, K.C.

1918:
CANADA LAW BOOK CO., LTD.
LAW BOOK PUBLISHERS
TORONTO

91109

CASES NOTED.

(Cases marked * are reported or to be reported in the Ontario Law Reports.)

A.

B.

C.

D.

E.

F.

G.

H.

N.

O.

S.

T.

Y.

CASES CITED.

C.

D.

E.

F.

G.

H.

I.

J.

K.

L.

M.

N.

O.

P.

R.

S.

T.

U.

W.

Y.

Z.

The
Ontario Weekly Notes

VOL. XIII. TORONTO, SEPTEMBER 14, 1917. No. 1

APPELLATE DIVISION.

FIRST DIVISIONAL COURT. AUGUST 25TH, 1917.

CITY OF WINDSOR v. SANDWICH WINDSOR AND AMHERSTBURG RAILWAY.

Street Railways—Extension of Lines upon Streets of City—Operation of Railway—Want of Authority—Ontario Railway Act, 3 & 4 Geo. V. ch. 36, secs. 6, 250, 251—Municipal Franchises Act, 2 Geo. V. ch. 42, sec. 4—Trespass—Declaration of Right—Injunction—Damages—Appeal—Costs.

Appeal by the defendants from the judgment of LENNOX, J., 10 O.W.N. 205.

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

W. N. Tilley, K.C., and A. R. Bartlet, for the appellants.

J. H. Rodd and F. D. Davis, for the plaintiffs, respondents.

The judgment of the Court was read by MAGEE, J.A., who said that the judgment appealed from declared that the defendants were not entitled to use or occupy certain parts of certain streets in the city of Windsor for the construction or operation of a railway thereon, and restrained the defendants from so using or occupying them, and awarded the plaintiffs $900 damages for injury done to the streets.

The learned Judge then made an elaborate statement of the facts, referred to the various statutory provisions bearing on the case, and reviewed the evidence with care.

His conclusion was, that up to the time of the bringing of the action there was nothing to shew that the defendants had accepted the condition which the plaintiffs were requiring in return for the privilege they were willing to grant—that is, there was nothing to shew that the defendants were agreeing to double-track London street and to furnish improved routes and service. No action of the directors of the defendant company in that regard was shewn. The defendants' application to the Ontario Railway and Municipal Board did not indicate more than that they (the defendants) wished to assure themselves that leave would be granted before they accepted the condition. Assuming that the setting up of the plaintiffs' by-law as a defence in this action was an acceptance of its terms, the acceptance was not until after action brought. But setting it up as a justification for previous acts was not the same as accepting it on its conditions. It might well be merely an asserting that it gave permission and did not require acceptance. Until the terms were accepted, the plaintiffs were at liberty to withdraw what was only their own one-sided offer; and, as they did so before acceptance, no agreement was in fact arrived at before action.

The defendants were not shewn to have made any outlay upon the faith of an unrepealed by-law, unless it could be said that the first application to the Board was such. The outlay upon the streets was before the by-law was passed.

The plaintiffs were, therefore, entitled to bring their action, and to the injunction.

The right to damages, however, was another matter. The city council was evidently approving of the action of the defendants in what they did on the streets, as evidenced by its resolution after the action of Mitchell and Dresch v. Sandwich Windsor and Amherstburg R.W. Co. (1914), 32 O.L.R. 594, was begun, by its officers indicating and staking out the position of the tracks, providing places to dump the material removed, using some of the material, widening the roadway, and subsequently passing the by-law. In these circumstances, whether or not the defendants were acting without legal authority, they at least had the license of the plaintiff corporation, and as a corporation the latter were not entitled to assert that they had suffered injury in that to which they were assenting, although themselves assenting to what was premature.

The judgment should be varied by striking out the award of damages, but in other respects should be affirmed; no costs of the appeal to either party.

HIGH COURT DIVISION.

KELLY, J. AUGUST 13TH, 1917.

WANNAMAKER v. LIVINGSTON.

Will — Validity — Testamentary Capacity — Undue Influence — Relationship — Evidence — Action to Set aside Transfer of Property Made by Testatrix in Lifetime — Will Set up in Answer — Jurisdiction — Judicature Act, R.S.O. 1897 ch. 51, sec. 38; R.S.O. 1914 ch. 56, sec. 13 (2) — Parties — Absence of Personal Representative — Costs.

Action by a sister of Elizabeth Simpson, who died on the 7th April, 1916, to set aside and declare void certain dispositions of her assets and property made in her lifetime by Elizabeth Simpson in favour of the defendants, who were: Jane Livingston, another sister of the deceased, and the three children of Jane Livingston. The plaintiff alleged undue influence, absence of consideration, and want of mental capacity on the part of the deceased.

Elizabeth Simpson was unmarried; the plaintiff and the defendant Jane Livingston were her next of kin, and would, had she died intestate, have been entitled to divide her property between them equally.

The defendants (other than the defendant Frankie Detlor, who submitted her rights to the Court) upheld the dispositions made in their favour by the deceased; and, in addition, claimed the property by virtue of a will made by the deceased, in July, 1913, which will had not been proved.

In reply, the plaintiff attacked the validity of the will.

The action was tried without a jury at Belleville.

W. C. Mikel, for the plaintiff.

E. G. Porter, K.C., and W. Carnew, for the defendants Jane Livingston, David B. Livingston, and Minnie Livingston.

G. G. Thrasher, for the defendant Frankie Detlor.

KELLY, J., in a written judgment, after setting out the facts, said that it was contended that the plaintiff was not in a position to prosecute the action because there was no personal representative of the deceased before the Court. The learned Judge was of opinion that the action was not properly constituted for the determination of the question raised by the statement of claim, viz., the validity of the dispositions of her property made by

Elizabeth Simpson inter vivos; but, the defendants having pleaded the will, and the plaintiff's reply having put its validity in issue, that issue was one proper for trial and determination.

By sec. 38 of the Judicature Act, R.S.O. 1897 ch. 51, the High Court (now the Supreme Court of Ontario) has jurisdiction to try the validity of wills, whether probate has been granted or not, and to pronounce such wills void for fraud, undue influence, or otherwise: Mutrie v. Alexander (1911), 23 O.L.R. 396; and, by the Judicature Act, R.S.O. 1914 ch. 56, sec. 13 (2), the same jurisdiction is vested in and may be exercised by a Judge of the High Court Division, in the name of the Supreme Court.

After referring to the evidence the learned Judge said that the deceased did not lack the mental capacity necessary to understand the making of the will; but on the question of undue influence exercised upon her by the defendants other than Frankie Detlor, the evidence was overwhelming. It fairly supported the proposition that the relations between the Livingstons and the deceased at and before the time the will was made were such as to raise a presumption of influence by them over her, and that such influence was exerted and that it induced the will. She had no will in the matter—her act was the expression of the will of the Livingstons.

The learned Judge did not dispose of or entertain the claim to have the transactions inter vivos set aside, though he expressed the view that they might well be set aside upon the same evidence which he considered sufficient to set aside the will.

Judgment declaring that the will set up by the defendants was invalid; the defendants other than Frankie Detlor to pay the plaintiff's costs from the delivery of the statement of defence of these defendants so far as these costs relate to the determination of the validity of the will; Frankie Detlor's costs to be paid by the plaintiff, who will add them to her costs against the other defendants.

KELLY, J. AUGUST 16TH, 1917.

MALOOF v. BICKELL.

Contract—Brokers—Dealings in Grain for Customers—Speculation in "Futures"—Intention of Customer as to Delivery—Knowledge of Brokers—Wagering Contract—Malum Prohibitum—Criminal Code, sec. 231—Order for Purchase of Grain—Agent—Authority—Ratification.

Action by a miner, residing in Sesikinika, in the district of Temiskaming, against a firm carrying on the business of brokers

in grain and stocks, in the city of Toronto, who acted as the plaintiff's brokers in the purchase and sale of grain upon the market, to recover the cash to the plaintiff's credit in the defendants' books on the 23rd August, 1916, and also the profit which the plaintiff would (as he alleged) have made if the defendants had not sold 25,000 bushels of grain on the 28th August, but had awaited and followed his instructions to sell at a later date.

The dealings were in "futures" and "on margin."

The action was tried without a jury at Toronto.

R. McKay, K.C., and A. G. Slaght, for the plaintiff.

H. H. Dewart, K.C., and R. T. Harding, for the defendants.

KELLY, J., in a written judgment, said that the plaintiff's operations at the defendants' office began in March, 1916, and continued until the 23rd August, when he "closed out" any pending transactions, except one involving a purchase which he had made, on an order to the defendants on the 21st August, of 25,000 bushels of December corn. At the close of that day (23rd August), the defendants' books shewed this purchase by the plaintiff and a credit in his favour of $2,023.97 as the result of other transactions in grain.

This action arose out of a dispute as to an order said to have been given to the defendants on the plaintiff's behalf by one Symmes, by telephone, on the 26th August, to buy 50,000 bushels of corn. On the 26th August, the defendants, acting on the instructions given them by Symmes, filled the order in the plaintiff's name. On the 28th August, the price of "future" corn was rapidly declining, and the defendants, after sending to the plaintiff at Sesikinika a telegram advising of the price then prevailing and asking for a payment of $2,000—the telegram did not reach the plaintiff till a later date—sold the grain covered by the purchase of the 26th August and the 25,000 bushels to the plaintiff's credit on the 23rd August. The sales resulted in a loss, by reason of the decline in price, of an amount which more than exhausted the plaintiff's credit of $2,023.97. The defendants counterclaimed a balance alleged to be due to them.

The learned Judge, after reviewing the evidence, said that, notwithstanding the plaintiff's denial, it must be found that he instructed Symmes to give the order for him (the plaintiff), and affirmed the order after it was given.

It was unnecessary to determine whether the defendants' course of action on the 28th August was within their power or in pursuance of authority, express or implied, from the plaintiff.

The dealings between the parties were so similar in character to those in Beamish v. James Richardson & Sons Limited (1914), 49 S.C.R. 595, that the learned Judge felt bound to follow the opinion of the majority of the Court in that case, based on the illegality of the transactions: Criminal Code, sec. 231. See also James Richardson & Sons Limited .v. Gilbertson (1917), 12 O.W.N. 160. The circumstances of this case clearly led to the conclusion that the defendants knew that the plaintiff did not intend or expect actual delivery to be made or accepted.

The action should be dismissed with costs, and the counterclaim dismissed without costs.

MASTEN, J. AUGUST 13TH, 1917.

*CURRIE v. HARRIS LITHOGRAPHING CO. LIMITED.

*ATTORNEY-GENERAL FOR ONTARIO v. HARRIS LITHOGRAPHING CO. LIMITED.

Constitutional Law—Extra-Provincial Corporations Act, R.S.O. 1914 ch. 179 — Ultra Vires—Companies Incorporated by Dominion Authority—Power of Province to Require License —Right of Dominion Companies to Hold Land in Province— Mortmain and Charitable Uses Act, R.S.O. 1914 ch. 103— Action by Provincial Attorney-General—Judicature Act, R.S.O. 1914 ch. 56, secs. 16 (h), 20.

Actions brought for the purpose of determining the constitutionality of the Extra-Provincial Corporations Act, R.S.O. 1914 ch. 179, in its relation to companies incorporated by Dominion authority under the Dominion Companies Act, and also the right of a company incorporated under federal authority to hold lands in Ontario without a license.

Special cases were stated by the parties and were heard at a Toronto non-jury sittings.

C. E. H. Freeman, for the plaintiff Currie.

T. H. Barton, for the plaintiff the Attorney-General for Ontario, who intervened also in the first action.

F. W. Wegenast, for the defendant company.

Christopher C. Robinson, for the Attorney-General for Canada, also intervening.

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

MASTEN, J., in a written judgment, said that the second action was maintainable under secs. 16 (*h*) and 20 of the Judicature Act, R.S.O. 1914 ch. 56.

The learned Judge upon the main question referred to John Deere Plow Co. Limited v. Wharton, [1915] A. C. 330; Davidson v. Great West Saddlery Co. (1917), 35 D.L.R. 526; and Harmer v. A. Macdonald Co. Limited (1916), 30 D.L.R. 640; and stated his conclusions as follows:—

(a) In Currie's action.

(1) The provisions of the Extra-Provincial Corporation Act of Ontario, in so far as they purport to apply to the defendant company, are ultra vires of the Legislature of the Province of Ontario.

(2) The defendant company is not, by reason of not being licensed under the Extra-Provincial Corporations Act, precluded from carrying out its object and undertakings in the Province of Ontario.

(3) The defendant company is not subject to the penalties prescribed by the Extra-Provincial Corporations Act for carrying on business without being licensed.

(4) The defendant company is incapacitated and prohibited from acquiring and holding lands in the Province of Ontario; but such incapacity and prohibition arise from the provisions of the Mortmain and Charitable Uses Act, R.S.O. 1914 ch. 103. If the defendant company obtained a license under the provisions of the Extra-Provincial Corporations Act, it would thereby receive authority to hold lands in Ontario in accordance with the provisions of sec. 12 of the Act in question. But the Extra-Provincial Corporations Act does not by itself specifically prohibit the defendant company from holding lands, though sec. 7 carries with it a general prohibition.

(b) In the action of the Attorney-General for Ontario.

(1) The provisions of the Extra-Provincial Corporations Act are ultra vires of the Legislature of the Province of Ontario, and none of the provisions of the said Act, as now drawn, are valid.

(2) The defendant company is not precluded from carrying out its objects and undertakings in the Province of Ontario unless and until it shall have been licensed under the Extra-Provincial Corporations Act.

(3) The defendant company is not subject to the penalties prescribed by the Extra-Provincial Corporations Act for carrying on business without being licensed.

(4) The defendant company is incapacitated from acquiring

and holding lands for the purpose of its business in the Province of Ontario by virtue of the Mortmain and Charitable Uses Act. Such incapacity and prohibition do not arise by reason of its not being licensed under the said Act; though, if it were licensed, its incapacity would be removed.

Judgment accordingly. No costs.

KELLY, J. AUGUST 23RD, 1917.

GEROW v. HUGHES.

Contract—Sale of Flour—Failure to Deliver Full Quantity—Monthly Deliveries—Delivery "as Required"—Postponement of Time for Delivery—Acquiescence—Entire Contract—Breach—Damages—Rise in Price of Flour.

Action for damages for non-delivery of flour by the defendant, a flour-dealer, to the plaintiff, a baker.

The action was tried without a jury at Belleville.

E. G. Porter, K.C., and W. B. Northrup, K.C., for the plaintiff.

W. N. Tilley, K.C., and E. J. Butler, for the defendant.

KELLY, J., in a written judgment, said that the contract, made on the 14th October, 1915, was for 1,000 bags of Rose flour at $2.70 and 1,000 bags of Queen flour at $2.45, "delivery as required up to the 1st November, 1916;" and it contained a reference to 35 bags per week. If the contract meant that delivery would be at the rate of 35 bags per week throughout the period from the date of the contract to the 1st November, 1916, the whole amount contracted for could not have been delivered by the latter date. At that rate of delivery, there would at the end of the term have remained undelivered about 100 bags, delivery of which could not be enforced unless the purchaser had the right, then or later, to demand delivery of the remainder, which was considerably in excess of the maximum amount for any one week.

But the contract, though containing an indefinite mention of 35 bags a week, was definite in stating that the sale was of 2,000 bags, "delivery as required up to the 1st November, 1916." That result could be arrived at only by a delivery of more than 35 bags in some week or weeks, or by delivery at the end of the

specified time or later of any undelivered balance of the quantity contracted for.

The contract was not one for separate and distinct weekly deliveries, each one independent of the other—it was one entire contract.

There was no evidence of any express request by the plaintiff to the defendant to delay or defer delivery of the part of the 35 bags of which he did not ask delivery in any week; but such request might well be implied from the manner of dealing. In no case, in any week in which the plaintiff did not require delivery of the full amount of 35 bags, did the defendant assert that the plaintiff, in not asking for the full amount of 35 bags, was thereby waiving his right to receive the portion he did not in that week specify for delivery; but he continued delivery as the plaintiff required from time to time, without protest—in effect postponing the time for delivery of any undelivered portion of the weekly amount.

The plaintiff was in a much stronger position than were the purchasers in Tyers v. Rosedale and Ferry Hill Iron Co. Limited (1875), L.R. 10 Ex. 195.

There was in fact an acquiescence in delay for delivery in this case as in the English case.

The plaintiff's contract called for delivery of 2,000 bags; notwithstanding that he had not asked for or received during the term the full amount of 35 bags per week, he was still entitled to delivery of the undelivered part of what was contracted for. The defendant, having about the end of October, 1916, refused to deliver anything beyond the amount specified for that month, was guilty of a breach of the contract which entitled the plaintiff to his remedy in damages. It was apparent that prices had risen at the end of October, and that the advance had continued after that time.

The defendant had delivered 440 bags of Rose flour and 727 bags of Queen flour. On the evidence of the prices at which this flour, or flour of a similar grade, could be purchased at the beginning of November, 1915, the fair deduction was, that there was an advance of about $2.15 per bag on each grade.

The plaintiff had sustained damages of $1,790.95, for which amount, less $53.15, unpaid for flour delivered, there should be judgment in his favour, with costs.

KELLY, J. AUGUST 23RD, 1917.

SIERICHS v. HUGHES.

Contract—Sale of Flour—Failure to Deliver Full Quantity—Monthly Deliveries—Delivery "as Required"—Postponement of Time for Delivery—Acquiescence—Breach of Contract—Damages—Rise in Price of Flour.

Action for damages for non-delivery of flour by the defendant, a flour-dealer, to the plaintiff, a baker.

The action was tried without a jury at Belleville.
E. G. Porter, K.C., and W. B. Northrup, K.C., for the plaintiff.
W. N. Tilley, K.C., and E. J. Butler, for the defendant.

KELLY, J., in a written judgment, said that the written contract was of the 14th October, 1915, for sale by the defendant to the plaintiff of "1,560 bags of Harvest Queen flour, delivery as required, 30 bags week, to be taken out by the 1st November, 1916." Delivery was made from time to time until the 18th or 19th October, 1916, when there was a substantial amount not delivered. Had delivery been made of 30 bags per week for the time of the contract, the whole amount would then have been delivered. The plaintiff then demanded delivery of the undelivered part of the amount contracted for, and this was refused, the defendant saying that he could not deliver—that he had not the flour. It was admitted that 1,077 bags had been delivered.

The only evidence as to what happened in relation to making deliveries was to the effect that the plaintiff stated what he wanted from time to time, and the amount named by him was delivered by the defendant.

In September, 1916, the plaintiff, who was then contemplating the giving up of his business, discussed the suggestion with the defendant. The latter did not then, or at any other time until his refusal in October to deliver, raise any question of the plaintiff's right to delivery of the whole undelivered portion of the amount contracted for. What happened was nothing more than a request for postponement of the time for delivery of the undelivered portion of the 30 bags which in any week the plaintiff did not then ask for, and an acquiescence by the defendant in that mode of delivery. That being so, it was the privilege of the defendant from the time the plaintiff demanded the whole undelivered balance to have required the plaintiff to take deliveries, if not in

amounts of 30 bags per week, in any event in reasonable weekly quantities; but he absolutely refused to make any further deliveries, and therein he committed a breach of the contract.

While the defendant knew that the plaintiff was engaged in business as a baker, neither party had in mind that only such flour as the plaintiff would use in his business up to the 1st November, 1916, was covered by the contract, or that the discontinuance by the plaintiff of the baking business would be a termination of the contract, or that delivery of less than 30 bags in any week discharged the vendor from the obligation to make (later on) delivery of the undelivered portion for that week. In September, 1916, the defendant recognised the contract as one of value to the plaintiff in any agreement he might make for the sale of his business.

The rapid increase in the value of flour brought about a condition unfavourable to the defendant, and this was accountable for the change in his attitude, and his reluctance and refusal to continue to perform his contract.

Reference to Tyers v. Rosedale and Ferry Hill Iron Co. Limited (1875), L.R. 10 Ex. 195.

The plaintiff was entitled to succeed. The question of the amount of damages was to be determined on the value of the flour at the time of the breach of the contract. Evidence of the price at which the same grade of flour could be obtained at the time was submitted; the advance was about $2.15 per bag. The damages should be assessed at $1,038.45.

Judgment for the plaintiff for that sum with costs.

FALCONBRIDGE, C.J.K.B. SEPTEMBER 5TH, 1917.

RE GILLIES GUY LIMITED AND LAIDLAW.

Company—Incorporated Trading Company—Power to Acquire and Sell Land—Title to Land Acquired by Company—Contract for Sale—Objection by Purchaser—Powers of Company under Letters Patent—Ontario Companies Act, R.S.O. 1914 ch. 178, secs. 23, 24—Application under Vendors and Purchasers Act.

Application by Gillies Guy Limited, an incorporated company, vendors, under the Vendors and Purchasers Act, for an order declaring that an objection to the title to land in the township of Oakland, upon a contract for sale, by the purchaser, William

Laidlaw, one of His Majesty's counsel, viz., that the vendors had not corporate power under their letters patent to buy and sell land, had been satisfactorily answered.

The application was heard in the Weekly Court at Toronto.
F. F. Treleaven, for the vendors.
The purchaser, in person.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that the question of title was, whether, under their letters patent and supplementary letters patent, the company had corporate power to buy and sell land, and give good title in fee simple to a purchaser.

(1) The Murton Coal Company Limited, by letters patent dated the 18th September, 1896, were empowered to carry on the business of wholesale and retail coal-merchants, of storage-warehousemen, and of forwarders, and for the said purposes to acquire the goodwill and assets of the business heretofore carried on under the firm name of "Murton Coal Company."

(2) By supplementary letters patent issued to Gillies Guy Limited, their powers were defined to be:—

(a) To carry on the business of dealers in fuel of all kinds, both wholesale and retail.

(b) To carry on the business of ice-dealers and manufacturers of ice, both wholesale and retail; and

(c) To carry on in all branches the business of warehousing and cold storage and all business necessary or incidental thereto or connected therewith, and for the purposes aforesaid: (1) to construct, hire, purchase, operate, and maintain all or any conveniences for transportation by land or by water; (2) to issue certificates and warrants, negotiable or otherwise, to persons warehousing goods with the company; (3) to make advances or loans upon the security of such goods; (4) to construct, lease, purchase, or otherwise acquire wharves, piers, docks, or works capable of being advantageously used in connection with the business of the company; (5) to deal in builders' supplies; and (6) to carry on or undertake any other business, including that of teamsters, carriers, and general forwarders, which may from time to time seem to the directors capable of being conveniently carried on or in connection with the above, or calculated directly or indirectly to enchance the value of or to render profitable any of the company's properties or rights.

The established rules of the Court on similar motions are stated in the following cases (amongst others): Re Edgerley

and Hotrum (1913), 4 O.W.N. 1434; Re Pigott and Kern (1913), 4 O.W.N. 1580; In re Thackwray and Young's Contract (1888), 40 Ch. D. 34, 40; In re Trustees of Hollis' Hospital and Hague's Contract, [1899] 2 Ch. 540, 555: viz., that the Court will not force a doubtful title on an unwilling purchaser.

Mr. Laidlaw did not appear exactly as an "unwilling purchaser," but states that he was a trustee, and desired to have a title which he in turn could force on an unwilling purchaser.

On the main question, whether the vendors had power, expressly or as necessary, incidental, or connected with the purposes of the company, he cited Baroness Wenlock v. River Dee Co. (1885), 10 App. Cas. 354, at p. 359; In re Bowling and Welby's Contract, [1895] 1 Ch. 663, at p. 668; Stephens v. Mysore Reefs (Kangundy) Mining Co. Limited, [1902] 1 Ch. 745; In re Crown Bank (1890), 44 Ch. D. 634, at p. 644; Attorney-General v. Mersey R. W. Co., [1906] 1 Ch. 811, [1907] A.C. 415.

The vendors' counsel invoked the Ontario Companies Act, R.S.O. 1914 ch. 178, sec. 23 (1) (*a*), (*o*), sec. 24 (1) (*b*), and cited Masten's Company Laws of Canada, p. 93, and Bonanza Creek Gold Mining Co. v. The King (1916), 32 Times L.R. 333, with particular reference to the judgment of Viscount Haldane, at p. 338.

The learned Chief Justice said that he had carefully considered all the cases cited by the purchaser, but was of the opinion that the joint effect of the powers conferred on the company by the letters patent and of the provisions of the Companies Act enabled the vendors to sell this land and give a good title thereto, and the objection had therefore been satisfactorily answered.

No costs.

RE SHIELDS, SHIELDS v. LONDON AND WESTERN TRUST CO.—KELLY, J.—AUG. 11.

Limitation of Actions—Ownership of Land—Possession—Evidence—Findings of Master—Appeal.]—An appeal by the plaintiff Andrew J. Shields from a report of the Local Master at London in a proceeding of the administration of the estate of James Shields, deceased. The reference to the Master was, "to try and dispose of the question of the ownership of the property in question in this proceeding." By his report, the Master found that the equity of redemption in the lands in question was vested in Jessie Shields, John J. Shields, the estate of William Shields, and Catharine Leitch, as tenants in common, subject to the dower

interests of Annie Shields, widow of the intestate. The appeal was heard in the Weekly Court at Toronto. KELLY, J., in a written judgment, said that the essential questions were, whether the appellant was out of possession of the property in question for the statutory period necessary to defeat his title, and whether those who had been declared entitled had possession for the requisite time, in such circumstances as to make that possession adverse to his. These questions the learned Judge considered at some length, reviewing the evidence, and ruled that they had been properly decided by the Master against the appellant. Appeal dismissed with costs. W. D. McPherson, K.C., and W. R. Fitzgerald, for the appellant. W. Lawr, for Annie Shields, Jessie Shields, and Catharine Leitch. J. D. Shaw, for John J. Shields. J. C. Elliott, for the London and Western Trust Company, administrators of the estate of William Shields. R. G. Ivey, for the Molsons Bank.

RE MARCHAND AND TOWN OF TILBURY—FALCONBRIDGE, C.J.K.B. —AUG. 15.

Municipal Corporations—By-laws—Motion to Quash—Municipal Works—Payment to Contractors—Delay—Discretion—Mala Fides of Applicant.]—Motion to quash by-law No. 119 of the Town of Tilbury, as amended by by-law No. 123, and also by-law No. 123. The motion was heard in the Weekly Court at Toronto. FALCONBRIDGE, C.J.K.B., in a written judgment, said that, in view of all that had taken place, as detailed in the affidavit of Mr. Odette, and in view of the fact that in entire good faith the contractors for the work had been paid $15,750 on account thereof (the total cost of the whole work excluding the two 15 ft. sections being $16,823), it would be an act of gross injustice for any Court to quash these by-laws or either of them unless constrained by force of law. Fortunately such was not the case. The objections were of the most technical and generally of the most trivial nature. As far as the Chief Justice had gone into them, they were quite untenable, even if the applicant were rectus in curiâ. But, in consideration of the long delay, not satisfactorily accounted for, the Court would in any case have a discretion, which should not be exercised in favour of the applicant, who had not acted and was not acting in good faith. Motion dismissed with costs. J. M. Pike, K.C., for the applicant. O. L. Lewis, K.C., for the town corporation.

McGILL CHAIRS LIMITED v. JONES BROS. & CO. LIMITED—FALCONBRIDGE, C.J.K.B.—SEPT. 1.

Contract—Sale of Goods to be Manufactured—Action for Price—Defects—Counterclaim—Damages—Costs.]—Action for the price of interiors of shell-boxes and also for the amount of a promissory note. The defendants admitted that a balance of $1,878.90 was due to the plaintiffs, but counterclaimed for a sum in excess of that amount. The action was tried without a jury at Cornwall. The learned Chief Justice, in a written judgment, said that the defendants had an order from the Shell Committee at Ottawa to manufacture a certain number of shell-boxes. These boxes consisted of an exterior box with blocks or bridges made to fit in the interior so as to take in the shells to be conveyed overseas without rocking or jarring. A contract was finally entered into between the parties for 20,000 sets of interiors, as set forth in order No. 5103 (6th October, 1915). This order did not contain the whole contract, which was to be gathered from it and from the correspondence up to and inclusive of the letter from the plaintiffs to the defendants of the 11th October, 1915. Order No. 5103 directed the plaintiffs to ship f.o.b. Cornwall; and it was contended by the plaintiffs that the acceptance and approval of the goods should have been at Cornwall. This contention was not well-founded. In the order and in the correspondence it was provided that the blocks were to be subject to the approval of the Shell Committee inspector; that inspector would not pass upon the blocks until they had been fitted or "dropped into the boxes." Several subsequent orders were given by the defendants to the plaintiffs, but the same remarks applied to them. A great many bridges were shipped by the plaintiffs to the defendants which were not of exact sizes according to specifications, and which were in other respects defective. A letter from the defendants to the plaintiffs of the 11th January, 1916, contained four allegations or statements of defects; these were well-founded. The only question was as to the amount of damages which ought to be recovered by the defendants. Their counsel at the trial asked for an amendment of the counterclaim so as to enable them to make a claim for damages which would overtop the plaintiffs' claim by about $1,000. That amendment should not be allowed until it was seen whether the parties, or either of them, would desire a reference as to damages, or would be content with the assessment now made. The Chief Justice finds that the defendants have proved damages for making necessary alterations to the bridges to the amount of the

plaintiffs' claim. The goods were the subject of war-orders and were required for as prompt delivery as possible, and it was not in the interest of either the plaintiffs or the defendants to return them to be altered. In estimating the amount and value of time and labour expended upon these alterations, the defendants had a right to the allowance which they claimed for "factory overhead expenses," being about 92 per cent. of productive labour. They should not be allowed the commercial expense of 15 per cent. nor the profit of 5 per cent. nor the price of the motor. Claims made on both sides for damages for delay in output should be disallowed. Judgment for the defendants with costs both of action and counterclaim. There was no contest or evidence as to the plaintiffs' claim. G. A. Stiles, for the plaintiffs. Shirley Denison, K.C., for the defendants.

ALGOMA PRODUCE CO. v. CANADIAN PACIFIC R. W. CO.—FALCONBRIDGE, C.J.K.B.—SEPT. 8.

Railway—Carriage of Goods—Negligence—Damage by Freezing—Finding of Fact of Trial Judge.]—Action to recover the value of 325 bags of potatoes said to have been frozen, by reason of the defendants' negligence, in course of carriage to Crain Hill, Ontario, and for the freight paid by the plaintiffs thereon. The action was tried without a jury at Sault Ste. Marie. The learned Chief Justice, in a written judgment, referred to the evidence, and, with some doubt, concluded that the freezing was the result of the defendants' negligence in allowing one of the heaters in the car in which the potatoes were, to go out when the weather was very cold—this notwithstanding the evidence of the defendants' witnesses as to the sufficiency of one burner. Judgment for the plaintiffs for $720.35, the value of the potatoes, plus $67.50 paid for freight—$787.85 in all—with costs. J. E. Irving and U. McFadden, for the plaintiffs. W. H. Williams, K.C., for the defendants.

COUNTY COURT OF THE UNITED COUNTIES OF STORMONT DUNDAS AND GLENGARRY.

LIDDELL, JUN. CO.C.J. JULY 27TH, 1917.

RE BELL TELEPHONE CO. OF CANADA AND VILLAGE OF LANCASTER.

Assessment and Taxes—Telephone Company—Income Assessment—Village Municipality—Assessment Act, R.S.O. 1914 ch. 195, sec. 14 (1)—Amendment by 5 Geo. V. ch. 36—Income Derived from Outside Stations.

An appeal by the company against the decision of the Court of Revision of the Village of Lancaster confirming the income assessment of the company in that village at the sum of $2,500.

G. I. Gogo, for the appellant company.
G. A. Stiles, for the respondent village corporation.

LIDDELL, JUN. Co.C.J., in a written judgment, said that the gross receipts of the appellant company, including the receipts from outside stations, for the year 1916, amounted to $5,230.22; the actual receipts from the village business proper were $1,222.73 —from outside $4,007.49. The appellant company contended that their assessment should be 60 per cent. on $1,222.73, i.e., $733.63; whilst the village corporation maintained that the assessment should be 60 per cent. on $5,230.22, the total gross receipts of the company in that municipality.

Section 14 (1) of the Assessment Act, R.S.O. 1914 ch. 195, provides that "every telephone company carrying on business in a city, town, village, or police village, in addition to any other assessments to which it may be liable under this Act, shall be assessed for 60 per cent. of the amount of the gross receipts belonging to the company in the city, town, village, or police village, from the business of the company for the year ending on the 31st day of December next preceding the assessment."

In 1915, by sec. 1 of 5 Geo. V. ch. 36, sec. 14 (1) was amended by striking out all the words after "gross receipts" and inserting "from all telephone and other equipment belonging to the company located within the municipal limits of the city, town, village,

or police village, for the year ending on the 31st day of December next preceding the assessment."

The Assessment Act makes no provision for the assessment of the receipts of a telephone company in a township; but in townships, by sec. 14 (2), telephone companies are liable to a mileage assessment on their wires.

The sum of $4,007.49, the amount derived from the outside business—income derived from the use of the Lancaster exchange—was not income from telephone and other equipment belonging to the company located within the limits of the village municipality. Only a portion of that equipment, viz., the exchange office, was within the municipal limits; and that piece of property or equipment would be perfectly useless, as a revenue-producing property, without the connecting lines reaching out to the outside stations.

The appeal should be allowed and the appellant company's assessment reduced to $733.63.