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APPELLATE DIVISION.

FIRST DIVISIONAL COURT. JUNE 8TH, 1920.

MORLEY v. FIDELITY TRUST CO.

Deed—Conveyance of Interest in Land—Deed Alleged to be Subject to Oral Agreement—Failure to Prove—Conveyance to Trust Company—Validity—Administration of Estate—Action—Parties.

Appeal by the plaintiff from the judgment of SUTHERLAND, J., 17 O.W.N. 373.

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

D. L. McCarthy, K.C., and J. A. E. Braden, for the appellant.

J. M. McEvoy, for the defendant company, respondent.

E. W. M. Flock, for the defendant James Morley, respondent.

J. W. G. Winnett, for the defendant Frederick Morley, respondent.

THE COURT ordered that Hester Elizabeth Walker be added as a party defendant, and dismissed the appeal with costs.

SECOND DIVISIONAL COURT. JUNE 8TH, 1920.

*RE HINTON AVENUE OTTAWA.

Highway—Street Shewn on Registered Plan—Closing of Part of Street—Registry Act, R.S.O. 1914 ch. 124, sec. 86—Order of County Court Judge—Owner of Lots Abutting on Street, Sold according to Plan—Necessity for Consent from—Lots not Fronting on Part of Street Closed and Owner not Deprived of

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

Access by Closing—Construction of sub-sec. 4 of sec. 86—Depreciation in Value of Lots—Compensation—Closing of Street for Benefit of Private Corporation without Advantage to Public—Discretion of Judge—Appeal.

An appeal by Thomas McLaughlin from an order of the Judge of the County Court of the County of Carleton, made on the petition of the Ottawa Land Association Limited, under sec. 86 of the Registry Act, R.S.O. 1914 ch. 124, directing that registered plan No. 157 be altered and amended by stopping up Hinton avenue from the north side of Spencer street to the south side of Bullman street, in the city of Ottawa, and that that part of Hinton avenue be stopped up accordingly.

The appeal was heard by MULOCK, C.J.Ex., RIDDELL and SUTHERLAND, JJ., and FERGUSON, J.A.

T. A. Beament, for the appellant.

J. P. Ebbs, for the association, respondents.

SUTHERLAND, J., in a written judgment, said that sales of lots had been made according to plan 157. The plan shewed several streets, one being Hinton avenue, running north and south, and connecting on the north with Scott street, running east and west, and extending south to Wellington street, an important highway.

The association still owned a number of lots on the plan. Three or four years ago, the appellant bought from the association four lots on the east side of Hinton avenue, lot 1290 being the most northerly, abutting on Scott street on the north, and lot 1305 the most southerly, abutting on Bullman street on the south.

Hinton avenue extends from Scott street southerly to a considerable distance, and in its course is met or intersected by cross-streets running east and west, the first of which, Bullman street, begins at Hinton avenue and runs easterly; the next to the south being Spencer street and the next Armstrong street, both of which intersect it.

The association sold the lots on each side of Hinton avenue, from Bullman street to Spencer street, to one Beach, who bought for the purpose of establishing a manufacturing plant thereon. Beach desired to have the land so bought comprised in one block, and for that purpose it was necessary that Hinton street between Bullman and Spencer streets be closed and the land forming part of Hinton street included in the block. The application upon which the order was made was begun by Beach, but was continued by the association, in whom the title was.

Notice was served upon the owners and occupants of the lots between Spencer and Wellington streets; none but McLaughlin objected upon any weighty ground.

McLaughlin's opposition was based upon the ground that the result of closing a part of Hinton avenue would be a reduction in the value of his lots. The evidence as to a possible depreciation was his own testimony only and was of a very meagre kind.

The County Court Judge came to the conclusion that the part of the street-allowance proposed to be closed never was a road within the meaning of sub-sec. 4 of sec. 86. The Judge had jurisdiction to hear and determine the application; but the Court could not agree with his finding that there was no road.

It was contended, however, by the appellant, that no part of the street could be closed without his consent. It was obvious that the part of Hinton avenue on which his lots front was not being closed, and that he had access to cross-streets on the north and south. The part of the street immediately in front of his lots, or any part of the street the closing of which would interfere with his ingress and egress, could not be closed without his consent. But the closing of this part of the street did not require his consent.

But the question arose whether he should not be compensated for the closing of any part of the street, if, upon the evidence offered, his property was depreciated in value. That was a question to be determined by the Judge hearing the application, "upon such terms and conditions as to costs and otherwise as may be deemed just" (sub-sec. 1).

The County Court Judge found that the appellant's property was not depreciated, but the learned Judge sitting in appeal could not agree with that. There was some evidence of depreciation, and it would appear almost obvious that there must be depreciation. There was no evidence at all to the contrary. In these circumstances, the Court was justified in coming to the conclusion that the County Court Judge should have fixed some sum as compensation.

As he had not done so, the Court must fix it, and $400 appeared to be a reasonable sum.

The order should be varied by directing that compensation to the amount of $400 be paid by the applicants to the appellant, and that, upon payment of that sum, the order below be affirmed; costs of the appeal to be paid by the respondents to the appellant.

MULOCK, C.J.Ex., and FERGUSON, J.A., agreed with SUTHERLAND, J.

RIDDELL, J., agreed with SUTHERLAND, J., that the appellant's consent to the closing of the part of the street referred to was not necessary; but was of opinion that the appeal should be allowed (with costs throughout), upon the ground that the County Court Judge's discretion was improperly exercised in closing part of the street to serve the purposes of a private corporation, no public purpose being achieved.

Order as stated by SUTHERLAND, J. (RIDDELL, J., *dissenting*).

SECOND DIVISIONAL COURT. JUNE 9TH, 1920.

*RE PORT ARTHUR WAGGON CO. LIMITED.

*TUDHOPE'S CASE.

*SHELDEN'S CASE.

Company—Winding-up—Contributories—Application for Shares—Allotment—Notice—Acceptance—Special Contract as to Payment—Transfer of Shares not Paid for—Approval of Directors—Liability to Calls—Resolution of Directors—Dominion Companies Act, R.S.C. 1906 ch. 79, secs. 58, 59, 65, 66—"Call" Made upon Directors' Shares only—Invalidity as "Call"—Novation—Powers of Company—Surrender—Compromise.

Appeal by the liquidator of the company from the order of MIDDLETON, J., 45 O.L.R. 260, 16 O.W.N. 65.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, and SUTHERLAND, JJ.

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

W. N. Tilley, K.C., for Tudhope and Shelden, the respondents.

SUTHERLAND, J., in a written judgment, said that he was of opinion that the order of Middleton, J., should be affirmed, for the reasons stated by the learned Judge; but he (Sutherland, J.) would, if necessary, go farther and hold that there was in fact a matter of difference between Tudhope and the company resulting from the latter's dealings and agreement with the Speight company. That agreement would plainly prejudice the agreement which the company had theretofore made with the Tudhope-Anderson Company, the prospective benefit from which

for his company was the ground on which Tudhope had subscribed for shares in the Port Arthur company. These shares were, in a sense, if not in reality, those of the Tudhope-Anderson Company.

Tudhope might perhaps at the time have set this up in answer to a demand of the company for payment of the shares, and, as it was argued, "litigate it." The directors may have been quite justified in believing, as it must be assumed they did, that it was in the interest of the company to enter into the agreement with the Speight company. They must have been impressed by the fact that the result would be prejudicial to the Tudhope-Anderson Company with respect to their agreement, and that this would be a proper cause of complaint which might lead to litigation. In so far as Tudhope and his shares were concerned, it would be unfair—indeed fraudulent—to hold him to this contract to keep shares which he had been induced to buy by reason of the expected benefits to a company in which he was interested, when those benefits were minimised or destroyed by the entering into a new agreement with another company.

The directors could, and in reality did, enter into a compromise of this claim for relief and restoration made by Tudhope.

The appeal both as to Tudhope and Shelden should be dismissed with costs.

MULOCK, C.J.Ex., and CLUTE, J., agreed with SUTHERLAND, J.

RIDDELL, J., agreed, for reasons stated in writing, that the appeal should be dismissed with costs. He was of opinion that Tudhope was not included in the resolution authorising the "call;" and, assuming that the transaction was wholly ultra vires, the objection remained that Tudhope did not and could not owe on any call, that his liability was a debt only, and therefore he could not be placed on the list of contributories.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. JUNE 9TH, 1920.

*MERRILL v. WADDELL.

Sale of Goods—Contract—Quality of Goods—Action for Damages for Inferiority—Acceptance without Inspection—Inferiority Revealed by Subsequent Inspection—Warranty of Quality—Waiver—Right of Rejection—Estoppel—Laches—Delay in Giving Notice and Making Claim—Damages—Measure of—New Trial.

Appeal by the defendant from the judgment of KELLY, J., 17 O.W.N. 333.

The appeal was heard by MULOCK, C.J.Ex., RIDDELL, SUTHERLAND, and MASTEN, JJ.

F. H. Thompson, K.C., and J. C. Makins, K.C., for the appellant.

W. S. Brewster, K.C., for the plaintiff, respondent.

MASTEN, J., read a judgment in which he said that four questions arose: (1) Was there a warranty, and, if so, what was it? (2) Is a breach of the warranty proved? (3) If there was a warranty and a breach of it by the defendant, has the plaintiff lost his right of action through laches, estoppel, or waiver? (4) The measure of damages.

As to questions (1) and (2), the trial Judge had found, upon conflicting oral evidence, that the defendant expressly warranted that the hay to be supplied by him under the contract should not be inferior to grade No. 2, and had found a breach of that warranty. These findings of an experienced Judge, in a carefully considered judgment, should not be disturbed. They seemed to be supported by the evidence.

As to the third question, the evidence did not establish an estoppel, a waiver, or such laches as precluded the plaintiff from recovering.

Review of the authorities.

As to damages, the case came within the broad general rule stated in Mayne on Damages, 9th ed., p. 188: "Where the article has not been returned, the measure of damage will be the difference between its value, with the defect warranted against, and the value which it would have borne without that defect;" and this must be ascertained at the place of delivery—in this case Brantford—at the time of the delivery, when the plaintiff took possession. In other words, the damages should be measured by the difference between what the hay was actually worth when it arrived in Brantford and what the hay would have been worth at Brantford had it been in the state in which it should have been.

Review of the authorities.

The plaintiff should have established the value of the hay at Brantford at the time of its acceptance there; and, as that was not done, there had been in that regard a mistrial.

The finding of the liability of the defendant ought to be maintained, but the damages had been assessed on a wrong principle.

The appeal in this respect should be allowed, the assessment of damages set aside, and there should be a new trial, limited to the question of the quantum of damages.

There should be no costs of the former trial or of this appeal to either party.

MULOCK, C.J.Ex., and SUTHERLAND, J., agreed with MASTEN, J.

RIDDELL, J., read a judgment in which, for reasons stated, he found that the learned trial Judge had proceeded on the proper principle, and his decision should not be interfered with. The appeal should be dismissed with costs.

Order directing a new trial as to damages only (RIDDELL, J., *dissenting*).

FIRST DIVISIONAL COURT. JUNE 10TH, 1920.

*RE BEAVER WOOD FIBRE CO. LIMITED AND AMERICAN FOREST PRODUCTS CORPORATION.

Arbitration and Award—Scope of Submission—"Any Disputes Arising under this Contract"—Sale of Pulpwood—Award of Damages for Breach of Contract—Jurisdiction of Arbitrators—Evidence—Enforcement of Award.

Appeal by the Beaver Wood Fibre Company Limited from the order of ROSE, J., 47 O.L.R. 66, 17 O.W.N. 437.

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

Everard Bristol, for the appellants.

A. G. Slaght and J. Cowan, for the American Forest Products Corporation, respondents.

THE COURT allowed the appeal with costs and made an order for the enforcement of the award with costs.

FIRST DIVISIONAL COURT. JUNE 11TH, 1920.

BOYER BROTHERS v. DORAN & DEVLIN.

Contract—Building of Houses for Railway Company—Sub-contractors—Provision for Termination of Contract—Right Exercised by Principal Contractors in Good Faith and on Reasonable Grounds—Dissatisfaction—"All Parties Concerned"—Dissatisfaction of Railway Company—Acquiescence of Sub-contractors in Termination.

Appeal by the plaintiffs from the judgment of SUTHERLAND, J., 16 O.W.N. 373.

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

A. Lemieux, for the appellants.

E. P. Gleeson, for the defendants, respondents.

MEREDITH, C.J.O., reading the judgment of the Court, said that the action was brought to recover damages for alleged breaches of an agreement between the parties, dated the 4th July, 1918, for the construction by the appellants of 12 section-houses on the National Continental Railway and for the alleged wrongful termination, by the respondents, of the contract.

The law as to hiring of servants and the necessity of good cause being shewn to justify the dismissal of them has no application where, as in this case, the contract of the parties provides for the termination of it at the will of the employer.

By clause 7 of the contract it was provided that, should the contractors (the appellants), in the opinion of the company (the respondents), not be carrying out their work fast enough, or should they not be carrying out the work to the entire satisfaction of all parties concerned, the company reserve the right to proceed no further with the completion of the house upon which they are then working; and that this contract shall then terminate, and the contractors shall be paid up to the completion of the building on which they were working when such notification was received, and the contractors shall entertain no claim nor bring suit against the company for damages or breach of contract.

The respondents, acting under the authority of this provision of the contract, put an end to it. There was no doubt, as the learned trial Judge had found, that in doing so the respondents acted in good faith; and that conclusion was fatal to the appellants' case.

It was argued that the respondents were not in fact dissatisfied with the progress of the work; but, even if that were the case—and it was not established—it was clear that the railway authorities were dissatisfied; and that was enough to justify the respondents in putting an end to the contract. The words, "carrying out the work to the satisfaction of all parties concerned," were used for the purpose of providing for such a contingency. The respondents were the contractors, and the appellants sub-contractors, and the railway company was, therefore, one of the "parties concerned" in the carrying out of the work that the appellants undertook to do.

This conclusion having been reached, it was unnecessary to decide whether the appellants had not acquiesced in the propriety of the action taken by the respondents in terminating the contract; but the learned Chief Justice, as at present advised, was of opinion that they did acquiesce. They brought an action to recover and recovered the 10 per cent. held back, which was not payable until the completion of the contract, and therefore treated it as completed, which it could not be when any of the houses which they were to build had not been constructed.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. JUNE 11TH, 1920.

COLEMAN v. POWELL.

New Trial—Amendment of Pleadings—Costs.

Appeal by the defendant Powell from the judgment of MASTEN, J., of the 10th December, 1919, in favour of the plaintiff in an action for the recovery of money alleged to have been paid to the defendants the Union Bank of Canada in respect of an option for the purchase of an interest in certain mining claims.

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

J. M. Ferguson, for the appellant.

T. R. Ferguson, for the plaintiff, respondent.

MEREDITH, C.J.O., reading the judgment of the Court, said that the case was not in a satisfactory position to be disposed of upon the material before the Court, and should go down for a new trial, with liberty to both parties to amend as they might be advised, and that the costs of the last trial and of the appeal should be costs in the cause to the party ultimately successful, unless the Judge before whom the new trial takes place should otherwise direct.

New trial ordered.

FIRST DIVISIONAL COURT. JUNE 11TH, 1920.

*SPRATT v. TOWNSHIP OF GLOUCESTER.

Municipal Corporations—Drainage—Construction of Works—Statutory Authority—Injury to Land—Action—Remedy by Proceedings for Compensation—Municipal Drainage Act, sec. 98—Municipal Act, secs. 325, 326 (1)—Limitation of Actions—Raising Level of Road—Closing of Culvert—Depth and Width of Drain Exceeding Provision of By-law—Effect of—Remedy.

Appeal by the plaintiff from the judgment of the Drainage Referee dismissing an action to recover damages for injury caused by the flooding of the plaintiff's land, alleged to have been caused by the construction by the defendants, the Municipal Corporation of the Township of Gloucester, of certain drainage works. The action was referred to the Drainage Referee.

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

F. B. Proctor, for the appellant.

F. H. Chrysler, K.C., for the defendants, respondents.

MEREDITH, C.J.O., reading the judgment of the Court, said that all of the works, the effect of which, as the appellant contended, was injuriously to affect his land, were constructed under statutory authority, and no action lay for the recovery of any damages resulting from their construction. Corporation of Raleigh v. Williams, [1893] A.C. 540, was conclusive as to this, and also as to the only remedy of a land-owner whose lands had been so affected being to seek compensation under the statutory provision which is now, though somewhat changed in form, sec. 98 of the Municipal Drainage Act, R.S.O. 1914 ch. 198, and what is now sec. 325 of the Municipal Act, R.S.O. 1914 ch. 192; and any such claim is now barred by sec. 326 (1) of the latter Act.

Another question was, whether the claim of the appellant based upon the raising of the level of the base-line road and the closing up of a culvert, which at one time passed under it, was maintainable.

The ground upon which counsel rested this claim was, that, assuming that the respondents had the right to raise the level of the road, even if the raising of it had the effect of preventing the surface-waters that would otherwise have escaped across the road from taking that course, they had no right to bring down waters from the upper lands by means of their drains and to place what was in effect a dam upon the roadway, and thereby prevent

those waters from escaping and to back them on the appellant's land. It was quite clear that, apart from the question whether more water was brought down by the drains from the upper lands to the appellant's land than would have come there had the drains not been constructed and the effect of the raising of the level of the base-line road, forming a barrier which prevented these waters flowing away, the appellant had no cause of action. The respondents had the right to raise the level of the road and by that means to prevent surface-water that would otherwise have flowed upon it from going there.

The raising of the road by depositing upon it the material removed in digging the drain was part of the drainage scheme as recommended by the engineer; and it followed that, if the appellant sustained damage by reason of waters which would have escaped from his land, had that not been done, being prevented from escaping, his remedy was to claim compensation under the Act; and, for the reasons already given, his claim for compensation was barred by sec. 326 (1) of the Municipal Act.

It was unnecessary to consider the conclusion of the Referee that the appellant had not been injured by the respondents' works, though, as at present advised, the learned Chief Justice saw no reason for differing from that conclusion.

The appellant's counsel had, since the argument, pointed out that the drain passing through the appellant's land was dug deeper and wider than was authorised by the by-law. That was in fact shewn, but it was also shewn that, in digging, a dredge was used, and that it is impracticable when a dredge is used to avoid this; and there was the further difficulty in the appellant's way that there was nothing to shew how far, if at all, this contributed to the damage which the appellant alleged he had sustained. In any case, any claim in respect of this falls within sec. 98 of the Municipal Drainage Act, and, not having been made within two years, was barred.

Rex v. Marshland Smeeth and Fen District Commissioners (1919), 121 L.T.R. 599, is distinguishable and is not inconsistent with the Raleigh case.

Appeal dismissed without costs.

FIRST DIVISIONAL COURT. JUNE 11TH, 1920.

BOWLER v. REDMAN.

Trusts and Trustees—Property and Money Transferred to Person to Keep till Return of Transferor from War—Transfers Absolute in Form—Finding and Declaration of Trust—Breach of Trust—Sale of Property to Third Person with Notice—Judgment for Return of Money and Payment of Value of Property.

Appeals by the defendants from the judgment of the County Court of the County of Peterborough in favour of the plaintiff in an action to recover $855 paid by the plaintiff to the defendants upon what the plaintiff alleged were false and fraudulent misrepresentations.

The judgment appealed from was for the recovery of $300 from both defendants and of an additional sum of $148.49 against the defendant Redman, with costs against both defendants.

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

R. R. Hall, for the defendant Vass, appellant.

G. W. Hatton, for the defendant Redman, appellant.

G. N. Gordon, for the plaintiff, respondent.

FERGUSON, J.A., reading the judgment of the Court, said that the plaintiff was a returned soldier. Before entering upon active service, he transferred to the defendant Redman all his money and property, being a Ford automobile and $228 on deposit in a bank. On his return from overseas, the plaintiff asked the defendant Redman to return him the car and money, also the part of his pay which he had directed the authorities to pay to the defendant Redman while he (the plaintiff) was overseas. The defendant Redman refused, saying that the transfers to her were gifts, and that she had sold the car to the defendant Vass for $300.

The learned County Court Judge found that the transfers were obtained by undue influence, were improvident, and should be set aside; also that the transfers were made on the representation of the defendant Redman that she would keep the moneys and the car for the plaintiff, and return them to him if he should come back from the war; but the learned Judge dismissed the action in so far as the plaintiff claimed the return of his assigned pay.

The plaintiff's testimony, accepted by the County Court Judge, fully justified the plaintiff's allegation that the bill of sale

of his car and the transfer of his money in the bank to the defendant Redman, though absolute in form, were made on the representation and agreement of that defendant that she would keep them for him and return them to him if and when he came back from the war. Had the plaintiff been more astute, or had he had less confidence in the defendant Redman, he would have obtained documentary evidence of the real agreement.

It was clear, on the evidence, that the defendant Vass had full knowledge of the inducements and representations of Redman; according to the plaintiff's story, the transfers were made on Vass's suggestion.

In these circumstances, it was not necessary to set aside the transfers as being improvident or induced by undue influence. It was sufficient to find and declare that the property and moneys in the hands of the defendant Redman were impressed with a trust in favour of the plaintiff, and that the defendant Redman, in spending the money and in selling the car to Vass, did so in breach of a trust, of which the defendant Vass, at the time of his alleged purchase of the car, had full notice and knowledge. That such a finding and declaration can be made, although the bill of sale and transfer are absolute in form, is clear. See In re Duke of Marlborough, [1894] 2 Ch. 133; Rochefoucauld v. Boustead, [1897] 1 Ch. 196; and other cases collected in Phipson on Evidence, 5th ed., p. 549.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. JUNE 11TH, 1920.

C. C. ROBBINS INCORPORATED v. ST. THOMAS PACKING CO.

Company—Extra Provincial Corporation—Extra Provincial Corporations Act, R.S.O. 1914 ch. 179, secs. 7, 16—Action Brought by Unlicensed Company—License Obtained pendente Lite—Validation of Contract Entered into in Violation of Statute.

Appeal by the defendants from the judgment of CLUTE, J., 17 O.W.N. 449.

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

John Jennings, for the appellants.

O. L. Lewis, for the plaintiffs, respondents.

FERGUSON, J.A., read a judgment in which he said, after briefly stating the facts, that the appellants confined their appeal to the contention that the contract made by a company in course of business carried on by it, contrary to sec. 7 of the Extra Provincial Corporations Act, was void, and that a license subsequently obtained had only the effect of removing the disability to prosecute an action, and not the effect of validating the contract.

The respondents' contention was, that the statute was a revenue statute, and, read in the light of the object to be attained, should be construed as not affecting the validity of the contract, but as affecting only the right to enforce the contract.

Many cases were cited; but, in the opinion of the learned Justice of Appeal, the recent decision of the Supreme Court of Canada in Honsberger v. Weyburn Townsite Co. (1919), 59 Can. S.C.R. 281, rendered it unnecessary to consider the argument of counsel or the authorities cited; for the question involved in this appeal was involved in and necessary to the decision of that case, and was decided adversely to the contention of the appellants in this case.

The appeal should be dismissed.

MACLAREN and MAGEE, JJ.A., agreed with FERGUSON, J.A.

MEREDITH, C.J.O., read a short judgment in which he said that he agreed that this Court was bound by the decision of the Supreme Court of Canada in the Weyburn case to hold that the contract on which the respondents sued was not void, and that, having obtained a license after action brought, they were entitled to maintain their action. But for that decision, the learned Chief Justice would have doubted the validity of a contract entered into in direct violation of the statute.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. JUNE 11TH, 1920.

*RUSSELL MOTOR CAR CO. LIMITED v. CANADIAN PACIFIC R. W. CO.

Railway—Carriage of Goods—Shipment in Car—Deficiency in Quantity Found in Car at End of Transit—Evidence—Carriers Deprived by Consignee of Possession, Dominion, and Control—Termination of Relationship of Bailor and Bailee—Carriers or Warehousemen.

Appeal by the plaintiffs from the judgment of MASTEN, J., 17 O.W.N. 307.

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

Shirley Denison, K.C., and W. J. Beaton, for the appellants.

Angus MacMurchy, K.C., and J. Q. Maunsell, for the defendants the Canadian Pacific Railway Company, respondents.

J. M. Ferguson, for the defendants the Pere Marquette Railroad Company, respondents.

FERGUSON, J.A., reading the judgment of the Court, said, after stating the facts, that he was of opinion that whatever was in the car when the railway company received it and signed the bill of lading was still in the car at the time the plaintiffs broke the seals and opened the car. The evidence which led to this conclusion also led the learned Judge to doubt the correctness of the finding that 19,636 castings were delivered to the railway company, but was not sufficient to enable him to say that the finding was so much against the weight of evidence that it was clearly wrong and should be reversed. In such circumstances, it must be taken as established that 19,636 castings were delivered to the railway company at Sarnia, and that 19,636 were in the car when the plaintiffs opened it; and the liability of the defendants must be determined on the hypothesis that the loss occurred after the opening of the car.

A carrier is bound not only to carry safely but also to deliver or to afford the consignee a reasonable opportunity to take delivery.

The question was: "Did the plaintiffs, by their own acts in breaking open, entering, and unloading the car, in the absence and without the permission of the carrier, terminate the contract of carriage or free the carrier from the obligation to make any other delivery?" The foundation of the argument for the appellants was, that delivery could not be and was not made till the castings were out of the car.

Delivery implies surrender by the carrier and acceptance, express or implied, by the consignee, of possession, dominion, and control; but it was not necessary for the determination of this case to decide when the surrender and acceptance would have been complete had the consignees chosen to insist on their strict rights under the contract. The plaintiffs did not choose to abide by the contract; but, waiving their own and in breach of the defendants' rights as to time, place, and manner of delivery, they, for their own convenience, without surrendering the bill, without paying the freight, in the absence of the defendants and without their permission, broke open, entered, and unloaded the defendants' car,

and, when not actually employed in the work of unloading, retained possession of the car and of the goods by relocking the car with their own lock.

Possession, dominion, and control lie at the root of a carrier's liability, either as carrier or as warehouseman; and the defendants' liability as bailees would continue only during such time as the plaintiffs allowed them to exercise dominion, possession, and control.

Upon the facts here disclosed, it was not open to the plaintiffs to say that they did not take and exercise possession, dominion, and control of the goods during the time they were actually engaged in unloading; and there was no evidence that they re-committed the goods to the possession of the defendants for the period in which they were not actively engaged in unloading—the evidence was all the other way.

The relationship of bailor and bailee was terminated on the opening of the car, and from and after that time the defendants were relieved from responsibility either as carriers or warehousmen.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. JUNE 11TH, 1920.

*LAZARD BROS. & CO. v. UNION BANK OF CANADA.

Banks and Banking—Assertion by Bank of Lien upon Shares of its own Stock Standing in Name of Customer—Bank Act, sec. 77—Equitable Title to Shares in Creditor of Customer—Knowledge of Bank—Failure to Disclose Lien—Duty—Interest—Silence—Title to Shares—Dividends on Shares—Costs.

Appeals by the defendants from the judgment of MIDDLETON, J., 47 O.L.R. 76, 17 O.W.N. 440.

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

I. F. Hellmuth, K.C., and Hamilton Cassels, K.C., for the defendant the Union Bank of Canada, appellant.

D. W. Saunders, K.C., for the defendant Clarkson, appellant.

Glyn Osler and G. R. Munnoch, for the plaintiffs, respondents.

MEREDITH, C.J.O., reading the judgment of the Court, said that it was not open to question that it was agreed that the moneys advanced by the respondents to Du Vernet were to be secured by 500 shares of the capital stock of the Union Bank of Canada and 500 shares of the capital stock of the Union Trust Company; that the advances made by the respondents to Du Vernet were made on the faith of that agreement; and that the appellant bank was aware of that agreement.

But the Union Bank shares were not transferred to the respondents on the books of the bank; instead, there was deposited with the Union Trust Company a certificate for the shares in the name of Du Vernet, with a power of attorney to transfer them, signed by him. The effect of this was that it was in the power of Du Vernet, who remained the legal owner of the shares, to dispose of them in fraud of the respondents, and, as the appellant bank contended, to leave them subject to its statutory lien upon them for any indebtedness or liability of Du Vernet to the bank; and the question for decision was, whether or not the bank was entitled, as against the respondents, to a lien on the 200 shares which remained of the original 500 for an indebtedness of about $30,000 of Du Vernet to the bank, which existed when the arrangement as to the advances to be made by the respondents was entered into and carried out.

The fact that the respondents left the bank-shares to stand in the name of Du Vernet in order that his position as a director of the bank might not be prejudiced, or even if there was the additional reason that the respondents did not wish to take upon themselves the liability they might incur by becoming shareholders, was immaterial as far as the question that had arisen was concerned. The respondents might be willing to take the risk of Du Vernet dealing with the shares in fraud of them, but it was impossible to suppose that either they or the bank contemplated that the shares would be subject to the bank's lien, which, if asserted, would have wiped out the whole security.

As a matter of fair dealing, and, in the opinion of the learned Chief Justice, as a matter of law, a duty rested upon the bank to disclose to the respondents the existence of the indebtedness of Du Vernet and the lien for it, if it intended to preserve its lien; and, that not having been done, the bank was precluded from now asserting the lien.

There was no reason for concluding that the respondents were estopped from claiming the dividends on the bank-shares. The dividends were not received by Du Vernet, but were retained by the bank in the exercise of its alleged statutory lien; and, if the right to the lien did not exist as to the shares themselves, it followed that it could not be asserted against the dividends.

If necessary, the judgment below should be amended by providing that, when the respondents' debt should be satisfied, the shares were to be available to satisfy the indebtedness of Du Vernet, for which, as against him, the shares were subject to the statutory lien.

With this variation, the judgment should be affirmed, and the appeal of the bank be dismissed with costs.

The appeal of the defendant Clarkson was dealt with on the argument, by providing that the direction of the judgment as to costs should not prejudice his right to claim indemnity for his costs out of the estate of Du Vernet, and that there should be no costs of his appeal to either party.

Judgment below varied.

FIRST DIVISIONAL COURT. JUNE 11TH, 1920.

MORTIMER CO. LIMITED v. REINKE.

Husband and Wife—Action against, for Debt Incurred in Respect of Business Carried on by Husband—Failure to Establish Partnership between Husband and Wife—Absence of Evidence of Holding out.

Appeal by the defendants from the judgment of HODGINS, J.A., at the trial, on the 16th December, 1919, in favour of the plaintiffs for the recovery of $969.90, for work done by the plaintiffs for the defendants (husband and wife), as the plaintiff alleged, and $100 damages.

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

C. B. Henderson, for the appellants.

A. C. Heighington, for the plaintiffs, respondents.

MEREDITH, C.J.O., reading the judgment of the Court, said that the Court was unable to agree with the conclusion to which the learned trial Judge came as to the liability of the appellant E. Grace Reinke. The proper conclusion upon the evidence was, that she was not a partner of her husband in the business for which the work done by the respondents was performed. There was no reason for doubting the testimony of the wife that the only way in which she was interested in the business was as a creditor of her husband for money which she lent to him for the

purpose of enabling him to buy or to carry on the business which he had purchased from one Dorsey. Her evidence was corroborated by the production of her husband's note for $2,500, dated the 13th November, 1918, and that was the indebtedness in respect of which she was interested in the business, and was the only interest she had in it.

No case of holding out was made, and the respondents could recover only if they had established that the wife was a partner in the business, and that they had not done.

No attempt was made to support the appeal of the husband, and his appeal must be dismissed.

The appeal of the wife succeeded, and the judgment as to her must be reversed, and judgment dismissing the action as against her with costs must be entered. There should be no costs of the appeal either to the appellants or the respondents.

Appeal of one defendant allowed and of the other dismissed.

FIRST DIVISIONAL COURT. JUNE 11TH, 1920.

SCULLY v. SCOTT.

Principal and Agent—Agent's Commission on Sales of Goods—Evidence—Findings of Trial Judge—Appeal.

Appeal by the defendants from the judgment of one of the Judges of the County Court of the County of York in favour of the plaintiff for the recovery of $401.33 and the costs of the action, the claim being for commissions on sales of ice for the defendants. The defendants delivered a counterclaim, which was dismissed at the trial.

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

T. R. Ferguson, K.C., for the appellants.

Gordon Waldron, for the plaintiff, respondent.

MAGEE, J.A., reading the judgment of the Court, said that the plaintiff alleged that he was to have commissions at certain rates and was to be paid his travelling expenses, towards which the defendants had paid him three sums of $50 each.

After a careful review of the evidence, the learned Judge said that he saw no reason for disturbing the judgment of the learned trial Judge as to any of the items in dispute.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. JUNE 11TH, 1920.

*SQUIRES v. TORONTO R.W. CO.

Street Railway—Injury to Person Attempting to Get on Car—Negligence of Conductor—Car Started after Intention Perceived—Contributory Negligence—Moving Car—Emergency—Finding of Trial Judge—Reversal on Appeal.

Appeal by the plaintiff from the judgment of the County Court of the County of York dismissing the action, which was brought to recover damages for personal injury sustained by the plaintiff by reason of the negligence of the defendants' servants operating one of their street-cars, in starting the car as the plaintiff was stepping into it, whereby she was thrown to the ground.

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

T. N. Phelan, for the appellant.

Peter White, K.C., for the defendants, respondents.

MEREDITH, C.J.O., reading the judgment of the Court, said that the trial Judge did not accept the testimony of the defendant as to the position in which she was when the car had started, but accepted that of two passengers on the car, who stated that the appellant attempted to get on the car after it had started.

It was not open to question that it was the intention of the defendant to take passage on the car; that it had stopped at a usual stopping place; and that the conductor of the car knew or ought to have known that the appellant's purpose was to take passage on the car.

According to the testimony which was accepted, the appellant had approached the car at a somewhat rapid pace, and had reached a point opposite the rear vestibule and about 6 inches from it, and was in the act of putting out one of her hands to take hold of one of the bars of the vestibule, when the car was started; that the appellant then attempted to get on the car, which was moving slowly, and in making the attempt was thrown from the car.

If, as had been found, the conductor knew or ought to have known that the appellant's intention was to take passage on his car, he was negligent in giving the signal to start before he had given the intending passenger a reasonable opportunity to get on the car, or until the intending passenger had evidenced the intention not to take passage by it.

The trial Judge, in dealing with the question of contributory negligence, did not, as he should have done, take into consider-

ation the position in which the appellant was placed by the starting of the car after she had put out her hand to take hold of the bar, when she was but a few inches away from the step; and continuing her effort to get on the car did not amount to contributory negligence.

Getting off a car when it is in motion is not necessarily contributory negligence. Everything depends on the circumstances. It is not contributory negligence where the speed of the car is such that a reasonably prudent man, in the circumstances, would have done what the intending passenger did; and the same rule should be applied where a person is getting on a moving car.

In the circumstances of this case, the proper conclusion was, that the appellant was not guilty of contributory negligence. According to the testimony of the witness Smith, the wheels of the car "just turned before she grabbed the car," and he added, "I think the wheels just turned once." The appellant succeeded in getting one foot on the step of the car, and was thrown off owing to the speed being increased. Add to this the fact that she was in a position which required her to judge and act quickly. She had been put in that position by the failure of the conductor to stop long enough for her to get on the car while it was standing still. The principle applied where one is suddenly placed in a position in which he must act quickly—an emergency it is sometimes called—is applicable: Wooley v. Scovell (1828), 3 Man. & Ry. 105; Briggs v. Union Street R. Co. (1888), 148 Mass. 72.

The appeal should be allowed with costs, and judgment should be entered for the appellant for $500, the amount assessed by the trial JUDGE as damages, with costs.

Appeal allowed.

FIRST DIVISIONAL COURT. JUNE 11TH, 1920.

*REX v. POLLOCK.

Criminal Law—Pretending to be Able to Discover Stolen Goods—Criminal Code, sec. 443—"Pretends"—"Skill and Knowledge in an Occult Craft or Science"—Intent to Deceive—Honest Belief in Powers—Communication with Departed Spirits—Evidence—Conviction.

Case stated by the Judge of the County Court of the County of Huron upon the trial and conviction before him, in the County Court Judge's Criminal Court, of Margaret Pollock, the defendant, upon a charge, under sec. 443 of the Criminal Code, that she did

"unlawfully pretend, from her skill and knowledge in an occult and crafty science, to discover where and in what manner certain goods and chattels, to wit, certain grain and oats supposed to have been stolen from one John Leonhardt, could be found."

The questions stated were: "(1) Was there sufficient in the evidence, as a matter of law, to justify the conviction, in the absence of any evidence on the part of the Crown shewing that the statements made or information given by the accused was false? (2) The accused being possessed, as I have found, of an honest though deluded belief in her alleged power of communication with spirits, was I right, as a matter of law, in convicting her of the offence charged?"

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

C. Garrow, for the defendant.

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

ORDE, J., reading the judgment of the Court, said that counsel for the defendant contended that, in order to constitute an offence under that part of sec. 443 of the Code upon which the conviction was based, there must be upon the part of the accused an intent to deceive, and that, if she honestly believed, as found by the County Court Judge, that she really possessed the power which she professed to exercise, she could not be found guilty.

The defendant did profess, by certain means or from certain powers which she claimed to possess, to discover where or in what manner certain goods supposed to have been stolen might be found. Was her profession of a power enabling her so to discover the stolen goods a "pretending," and did the means which she claimed to use or the power which she claimed to possess constitute an alleged "skill or knowledge in an occult or crafty science?"

Leonhardt, whose oats were stolen, consulted the defendant, and she professed to give him, by the means of communication with the spirit of a deceased person, some information about the stealing, for which he paid her 50 cents.

In ascertaining what is "an occult or crafty science" reference must be had to the original of sec. 443 of the Code, viz., the English Witchcraft Act, 9 Geo. II. ch. 5, imported into Canada by the Act of Upper Canada, 40 Geo. III. ch. 1.

Discussion of the English Act and the meaning of the expressions used therein.

The profession of a power or faculty to communicate with or receive communication from the dead is, in the opinion of the

learned Judge, the profession of a skill or knowledge in an occult science within the meaning of sec. 443.

Reference to Rex v. Marcott (1901), 2 O.L.R. 105; Rex v. Monsell (1916), 35 O.L.R. 336; Rex v. Stephenson (1904), 68 J.P. 524; Davis v. Curry, [1918] 1 K.B. 109; Regina v. Entwistle, [1899] 1 Q.B. 846; and other cases.

The word "pretends," in the Witchcraft Act of 1736 and in sec. 443 of the Criminal Code, is used in the sense of "professes" or "claims" or "undertakes."

By the use of the words "pretends, from his skill or knowledge in any occult or crafty science, to discover," Parliament intended to make it unlawful for any person, whether he really possessed any such skill or knowledge (assuming it to be possible to possess it) or honestly believed that he possessed it (whether possible to possess it or not), or dishonestly professed to possess it, to claim to be able to discover where any lost or stolen goods might be found.

There is no law to prevent the defendant from communing with departed spirits, but the Criminal Code says that she shall not profess with their aid to be able to discover lost or stolen property.

The learned County Court Judge rightly found the accused guilty of the offence charged, and both questions in the stated case should be answered in the affirmative.

In view of the novelty of the offence and the evident good faith of the accused, the suggestion that sentence might be suspended, upon the accused entering into the usual recognizances, might well be carried out.

Conviction affirmed.

FIRST DIVISIONAL COURT. JUNE 11TH, 1920.

*FOSTER v. BROWN.

Land—Excavation in—Withdrawal of Lateral Support from Land of Neighbour—Failure to Maintain Retaining Wall—Subsidence of Neighbour's Land—Liability of Owner Acquiring Land after Excavation Made.

Appeal by the plaintiff from the judgment of the County Court of the County of York dismissing the action as against the defendant Albert E. Brown.

The action was brought in the County Court against Walter J. Brown and Albert E. Brown for damages for injury to the

plaintiff's land by excavating done by the defendants or one of them on the adjoining land, whereby the plaintiff's soil was deprived of lateral support.

The County Court Judge gave judgment for the plaintiff against the defendant Walter J. Brown for $200 and costs, but dismissed the action as against the defendant Albert E. Brown.

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

W. A. McMaster, for the appellant.

J. M. Ferguson, for the defendant Albert E. Brown, respondent.

Grayson Smith, for the defendant Walter J. Brown.

MEREDITH, C.J.O., reading the judgment of the Court, said that Albert E. Brown, the respondent, and the plaintiff, the appellant, were the owners of adjoining lots, and the action was brought to recover damages caused by the appellant's land having subsided and fallen into an excavation made by the defendant Walter J. Brown, the predecessor in title of the respondent, in his land, extending to the boundary-line between his land and the land of the appellant.

It was established by the evidence that, after making the excavation, a kind of retaining wall was built by the defendant Walter J. Brown for the purpose of providing support to the land of the appellant. The wall got out of repair and failed to answer the purpose for which it was built, and from time to time, as a result of this, a subsidence of the appellant's land occurred, and the soil fell into the excavation. Owing to the condition of the wall, this occurred after the respondent became the owner of the land of Walter J. Brown.

The contention of the respondent, to which effect was given in the Court below, was that a subsequent owner of land was not answerable for the consequences of an excavation, made in it by a previous owner, which has the effect of withdrawing from his neighbour's land the lateral support to which it is entitled, with the result that his land subsides and the soil falls away into the excavation.

In support of this contention, Greenwell v. Low Beechburn Coal Co., [1897] 2 Q.B. 165, and Hall v. Duke of Norfolk, [1900] 2 Ch. 493, were cited.

The learned Chief Justice quoted from the judgments in these cases, and explained the effect of them.

He then referred to Attorney-General v. Roe, [1915] 1 Ch. 235; Gale on Easements, 9th ed., p. 382; Halsbury's Laws of England, vol. 11., p. 325, para. 634; Banks on the Law of Support, p. 5; Mitchell v. Darley Main Colliery Co. (1884), 14 Q.B.D. 125;

Darley Main Colliery Co. v. Mitchell (1886), 11 App. Cas. 127; and Corpus Juris, vol. 1, p. 1221.

Continuing, the learned Chief Justice said that he shrank from holding that the law was as laid down in the two cases relied on, which were decided respectively by Bruce, J., and Kekewich, J.; and he saw no reason why, if a person who is in possession of land in which is an excavation which is a source of danger to the public, although not made by him but by a predecessor in title, is liable for the consequences of permitting the dangerous condition to continue, the same rule should not be applied where a lateral support has been withdrawn by a predecessor in title, and the condition so caused has been permitted to remain and to cause injury to his neighbour, the owner of the land at the time the injury occurs should not be liable for it.

Upon the whole, the learned Chief Justice said, he had come to the conclusion that, in the circumstances of the case at bar, the respondent was liable for the damages which the appellant had sustained; and, if that conclusion was inconsistent with the decisions of Bruce, J., and Kekewich, J., he declined to follow them.

The appeal should be allowed with costs, and there should be judgment for the appellant against the respondent for the damages assessed, with costs.

Appeal allowed.

FIRST DIVISIONAL COURT. JUNE 11TH, 1920.

REX v. COUNTY OF LENNOX AND ADDINGTON.

Highway—Nonrepair—County Corporation—Conviction—Penalties—Orders of Court of General Sessions—Irregularity—Jurisdiction—Motion for Direction to Inferior Court to State a Case—Undertaking not to Enforce Penalties—Costs.

Motion by the defendants for a direction to the Court of General Sessions of the County of Lennox and Addington to state a case for the opinion of the Court.

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

E. G. Porter, K.C., for the defendants.

W. S. Herrington, K.C., for the prosecutor.

MEREDITH, C.J.O., reading the judgment of the Court, said that the defendants were indicted and convicted for not repairing a highway which it was their duty to keep in repair.

Various objections were raised to the regularity of the proceedings in the General Sessions, and it was also objected that the Court had not jurisdiction to impose the penalties which were imposed.

The case was fully argued on these objections, and the members of this Court were of opinion that the conviction and the orders of the Sessions could not stand.

The private prosecutor was content that the conviction and orders should be quashed; and the only question was as to the costs.

The reasonable course to be taken would be that the prosecutor should undertake not to enforce the penalties; and, if he so undertakes, there should be no costs to either party in the Court below or of this motion.

If the prosecutor should be unwilling to give the undertaking, or if the defendants should not be satisfied with the disposition suggested, there should be a direction for the stating of a case, without costs of the motion to either party.

FIRST DIVISIONAL COURT. JUNE 11TH, 1920.

SPARKS v. CANADIAN PACIFIC R.W. CO.

CANADIAN PACIFIC R.W. CO. v. SPARKS.

Railway—Carriage of Goods—Injury and Loss in Transit—Failure to Shew Negligence—Want of Proper Care—Freight and Demurrage Charges—Notice to Consignee—Bill of Lading—Storage Charges—Account—Reference.

Appeals by Sparks from the judgments of SUTHERLAND, J., 17 O.W.N. 336, in the two actions.

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

C. A. Seguin, for the appellant.

W. L. Scott, for the railway company, respondents.

FERGUSON, J.A., reading the judgment of the Court, said, after stating the facts established in the action brought by Sparks, that the findings of the learned trial Judge, which were supported by the evidence, made it unnecessary for the Court to deal with the meaning and effect of the terms of the bill of lading. It was sufficient for the disposition of the appeal that the Court should agree in the findings of the trial Judge. The appeal of Sparks

in his own action should be dismissed with costs.

The claim of the railway company in the second action was $3,551.54 for freight and demurrage—by far the greater part being for demurrage.

Between the 9th March and the 6th April, 1918, Sparks shipped over the railway 16 cars of hay, consigned to his own order at Toronto, with instructions to notify M. & M., Toronto. The cars arrived in Toronto between the 20th March and the 12th April, and as they arrived the railway company notified M. & M. The bills of lading were atttched to drafts drawn on M. & M. and discounted by a bank. These bills and drafts were, in due course, presented by the bank for payment, but acceptance and payment were refused.

On the 23rd April, M. & M. notified both the railway company and Sparks that they would not take the hay.

By notices dated the 25th April, the railway company advised Sparks that they intended to sell all the hay.

The railway company sold the hay from two of the cars, but the price realised was not sufficient to pay the charges. On the 21st May, they unloaded, stacked, and covered the remainder of the hay. The stack was partly burned, and what was left was sold. The railway company claimed demurrage down to the 21st May.

The learned Judge said that he was unable to agree with the contention of Sparks that notice to M. & M. was not notice to him. The bill of lading was on a printed form, approved of by the Railway Board, and the direction to notify M. & M. meant that notice of arrival might be given to M. & M.; and therefore the railway company were entitled to demurrage on the tariff scale from 48 hours after notice either to Sparks or M. & M. of the arrival of the cars until the cars ceased to be held for or by the consignor or until they were released, but not until they were unloaded.

Reference to Hite v. Central R.R. Co. of New Jersey (1909), 171 Fed. Repr. 370.

The railway company's claim had been calculated and allowed on an improper basis.

The appeal should be allowed, the judgment appealed from set aside, and judgment should be entered directing a reference to the Local Master at Ottawa to take the accounts and report.

The accounting should be on the following basis: the company should be allowed their carrying charges, also demurrage on the cars between the time notice was given to either Sparks or M. & M. of arrival and the 26th April; the demurrage charges to be calculated according to the schedule provided by Rule 9; the company to be allowed a reasonable sum for storing the hay between

the 26th April and the 21st May, and then unloading it; Sparks to have credit for the net amount realised from the sale of the hay that was stored; the company not to be allowed anything for charges on the hay sold from the cars beyond the amount realised from the sale.

Further directions and costs, including the costs of the trial and reference, should be reserved until after the report.

Sparks should have the costs of this appeal.

Appeal in first action dismissed, in second allowed.

FIRST DIVISIONAL COURT. JUNE 11TH, 1920.

RICHARDSON v. HIBBERT.

Sale of Goods—Milking Machine—Representation—Condition for Return if not as Represented—Action for Price—Verdict of Jury—Evidence—Rejection of—Judge's Charge.

Appeal by the plaintiffs from the judgment of the Judge of the County Court of the County of Perth, upon the verdict of a jury, dismissing an action for the price of a milking machine alleged to have been sold and delivered by the plaintiffs to the defendant.

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

J. C. Makins, K.C., for the appellants.

W. R. Meredith, for the defendant, respondent.

FERGUSON, J.A., reading the judgment of the Court, said that the plaintiffs' agent in his evidence admitted that the sale of the milking machine was subject to a condition that the machine would do "what was claimed for it" and if it did not that it might be returned. The machine was in the defendant's possession for 3 months and 10 days, during which period he used it 12 times. His evidence was that the machine was unsatisfactory, particularly in that the cups dropped off the teats of the cows. The plaintiffs' evidence was directed to shewing that this was the result of the unsatisfactory working of the gasoline engine used by the defendant; that the defendant did not give the machine a fair test, in that he did not persist in the use of the machine long enough to accustom his cattle to the use of it. The plaintiffs did not

attempt to prove that it was a part of the agreement or understanding between the parties that the machine would not work satisfactorily until after the cows had been made accustomed to it—the defendant testified that there was no such term in the agreement.

The plaintiffs sought to adduce the testimony of users of other machines made by the plaintiffs that these had worked satisfactorily; that it was necessary to persist in the use of the machine until the cows were accustomed to its use; and that, unless this was done, the machine could not be said to have had a fair trial. This evidence was rejected. The learned trial Judge did not instruct the jury that, if the defendant's dissatisfaction was real and unfeigned, honest and not pretended, it would be a sufficient answer to the plaintiffs' claim. On the contrary, he instructed the jury as if the sale had been made on a warranty by the plaintiffs that the machine would do what it was represented to do.

The jury at first found "that Richardson & Co. take back the Omega Milking Machine which they installed owing to the unsatisfactory way in which it was working."

The jury were asked by the Judge to reconsider their answer, and he redirected them, whereupon they retired and came back with a verdict for the defendant.

The plaintiffs were not in any way prejudiced by the refusal of the trial Judge to admit the evidence which was tendered and rejected.

The defence might have been presented to the jury in a more favourable light than it was. If believed, the witnesses for the defendant made out a case on which the jury might have found that though the machine was capable of doing what it was intended to do, and what the plaintiffs represented that it would do, yet, as it did not work to the satisfaction of the defendant, and his dissatisfaction was honest and bona fide, the defendant was entitled to a verdict.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. JUNE 11TH, 1920.

JACOB v. MUSHOL.

Evidence—Action against Administrator of Estate of Deceased Person—Money Transactions between Plaintiff and Deceased—Counterclaim for Money Received by Plaintiff for Deceased—Defence that Plaintiff Received it in Payment of a Debt—Testimony of Plaintiff—Corroboration by Facts and Circumstances Disclosed—Evidence Act, R.S.O. 1914 ch. 76, sec. 12—Finding of Trial Judge—Appeal.

An appeal by the defendant from the judgment of the Judge of the District Court of the District of Thunder Bay, in favour of the plaintiff, for the recovery of $145 and costs.

The plaintiff's claim was against the defendant, as administrator of the estate of Elias Benjamin, deceased, for $765.58, the amount of the plaintiff's claim as filed against the estate, which the defendant had refused to pay. The items of the claim were: $78.43, the amount of a bill paid by the plaintiff for hospital accommodation of the deceased; $92.15, undertaker's bill; $300, the amount of a promissory note made by the deceased in favour of the plaintiff; $295, remittances from time to time made by the plaintiff to the deceased while in ill-health.

The defendant set up that the moneys sued for were the moneys of the deceased, and counterclaimed for $500 alleged to have been expended by the deceased in building a house for the plaintiff and for $200 owed by one Werda to the deceased and said to have been paid by Werda to the plaintiff.

The County Court Judge allowed the plaintiff the items of $300 and $295, disallowed the items of $78.43 and $92.15, and allowed the defendant's counterclaim for moneys expended in building the house at $450, but disallowed the counterclaim for $200 paid by Werda.

The plaintiff did not appeal; the defendant's appeal was on the ground that his claim for the $200 should have been allowed.

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

W. A. Dowler, K.C., for the appellant.

W. Lawr, for the plaintiff, respondent.

FERGUSON, J. A., reading the judgment of the Court, said that the plaintiff admitted the receipt of the $200, but said that it was received in payment of a debt. His testimony was that, before the giving of the note for $300, and before the loan for which the note was given, the deceased was indebted to the plaintiff in another sum of $237; that the plaintiff asked the deceased for a note, but the latter refused to give one, saying that Werda owed him $200, and that he would go with the plaintiff to Werda and direct Werda to pay him, and that he (the deceased) would pay the difference, $37, in cash; that both of these things were done; that the plaintiff accepted this arrangement instead of the note; that the $200 was paid by Werda after the deceased had gone away and after the date of the $300 note. The only evidence in support of the defendant's counterclaim for the $200 was the admission of the plaintiff, qualified in the way indicated.

For the appellant it was argued that the plaintiff, having admitted the receipt of the $200, must be found to have failed to establish that it had been received in payment of a debt, unless his testimony as to the existence of a debt was corroborated, as required by sec. 12 of the Evidence Act, R.S.O. 1914 ch. 76.

The trial Judge believed the story of the plaintiff, and concluded that the facts and circumstances adduced in evidence in support of this item, and the other items of the plaintiff's claim and the defendant's counterclaim, and the nature of the transactions and relationship between the plaintiff and the deceased, disclosed by such facts and circumstances, were sufficient corroboration of the plaintiff's evidence: Green v. McLeod (1896), 23 A.R. 676.

The learned Judge was right: see Mushol v. Benjamin (1920), ante 175.

Appeal dismissed with costs.

FIRST DIVISIONAL COURT. JUNE 11TH, 1920.

YATES v. WRIGHT & CO.

Contract—Builder—Preparation of Plans for Proposed Building—Project Abandoned—Payment for Plans—Implied Agreement—Evidence.

Appeal by the plaintiff and cross-appeal by the defendants from the judgment of the Senior Judge of the County Court of the County of Wentworth in favour of the plaintiff in an action for the recovery of $820 for preparing plans of a building which the defendants were contemplating putting up.

The action was tried without a jury. The judgment was for $340 and costs.

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

A. W. Langmuir, for the plaintiff.

R. C. H. Cassels, for the defendants.

MEREDITH, C.J.O., reading the judgment of the Court, said that the plaintiff was a builder and contractor and had draftsmen in his office staff. The defendants sent for the plaintiff's manager and told him that they thought of erecting an addition to their factory, told him what kind of an addition they wanted, and either asked him to prepare plans for it or acquiesced in his suggestion that he would prepare them. Plans were prepared by

the plaintiff's draftsmen, and were submitted to and approved of by the defendants; but, upon the price at which the plaintiff was prepared to undertake the construction of the building being stated, it was found that it was more than the defendants were willing to expend; suggestions were made that a less expensive building might be erected, and plans of such a building were prepared and submitted to and approved of by the defendants; but again, upon the plaintiff putting before the defendants a statement of the price at which he would undertake to erect it, it was more than the defendants were willing to expend; and the idea of erecting the building was abandoned.

It was conceded by the plaintiff's manager that, if the plaintiff had obtained the contract, no charge would have been made for the plans; and, doubtless, the plaintiff, in making his tender, included an item for overhead expenses, one of which would be the cost of the preparation of the plans.

In the learned Chief Justice's view, there could not, on the facts of the case, be implied an agreement to pay for the plans. What was in the contemplation of both parties was that the plaintiff should be given the contract to erect the building if the price at which he was willing to erect it was satisfactory to the defendants; and what was done in preparing the plans was a necessary, or at all events an important, step towards enabling the plaintiff to get the contract.

It would be a startling proposition that a builder, who, at the request of one who contemplates building a house, makes a sketch of the building and an estimate of the cost, with a view to his getting the contract to build it, is entitled, if he does not succeed in getting the contract, to be paid for the work which he had to do in order to submit his sketch and estimate.

In this case something more elaborate than a sketch was prepared; but that made no difference. What the plaintiff did was to prepare the plans as part of the steps to be taken to obtain the contract; and, unless there was an express agreement that he was to be paid for them if he did not succeed in getting the contract, he was not entitled to be paid for them.

The plaintiff's appeal should be dismissed, the defendants' appeal allowed, and the action dismissed, but there should be no costs to or against either party of the action or of the appeal.

Plaintiff's appeal dismissed; defendants' appeal allowed.

HIGH COURT DIVISION.

CHARBONNEAU v. JEWELL—ROSE, J.—JUNE 10.

Contract—Share-certificates Pledged by Defendant—Redemption by Plaintiff—Agreement between Plaintiff and Defendant—Issue as to Ownership of Certificates—Payment or Equivalent of Payment by Defendant of Sum Paid by Plaintiff—Findings of Fact of Trial Judge.]—An interpleader issue directed to be tried for the purpose of determining the ownership of two certificates, each for 50 shares of the capital stock of Cecil Investments Limited, deposited by the plaintiff on or about the 20th October, 1916, with a stakeholder, who, pursuant to an order made in Chambers on the 9th January, 1920, had deposited the certificates in Court. The issue was tried without a jury at Ottawa. ROSE, J., in a written judgment, set out the facts and his findings thereon, and said that the defendant had not satisfied him that anything had been done by which the defendant was now entitled to have treated as equivalent to a payment of $3,000 by himself to the plaintiff. The shares were originally the plaintiff's, and were pledged by him for a particular purpose; the plaintiff paid $3,000 to the pledgee and obtained the certificates, which he transferred to the stakeholder. There was a dispute as to the terms of the agreement between the plaintiff and defendant. The defendant not having paid the $3,000 nor done anything equivalent to payment, the plaintiff was entitled to call upon the stakeholder to retransfer the shares to him. The issue should be found in the plaintiff's favour; and the plaintiff's costs, including such costs as he paid to the stakeholder pursuant to the order in Chambers, should be paid by the defendant. McGregor Young, K.C., for the plaintiff. T. A. Beament, for the defendant.