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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. MAY 4TH, 1920.

*WALKER v. GRAND TRUNK R. W. CO.

Railway—Highway Crossing—Engine Striking Motor-car Attempting to Cross Tracks—Injury to and Death of Occupants of Car—Actions for Damages—Negligence—Evidence—Excessive Speed of Train—Signal to "Slow down"—Duty of Engine-driver—Duty of Brakesman of Shunting Train—Findings of Trial Judge—Appeal.

Appeals by the plaintiffs in the above and four other actions, brought by the different plaintiffs against the railway company, from the judgment of ROSE, J., at the trial (without a jury) in Toronto, dismissing the actions.

The actions were all based on the alleged negligence of the defendants, resulting in an accident on the 11th August, 1917, at a railway crossing near the town of Bowmanville, in which the driver of a motor-car and four of the other five occupants were killed and the fifth injured.

The Walker action was brought by the surviving husband of one of the deceased, he himself being the only one who was not killed, to recover damages, under the Fatal Accidents Act, R.S.O. 1914 ch. 151, for the death of his wife, and damages for his own personal injuries. The other actions were brought, under the Act, in one case by the mother and in the other cases by the widows and children of the other deceased persons.

The appeals were heard by MULOCK, C.J. EX., CLUTE, RIDDELL, SUTHERLAND, and MASTEN, JJ.

J. R. Roaf, for the appellants.

I. F. Hellmuth, K.C., and W. A. Foster, for the defendants, respondents.

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

SUTHERLAND, J., in a written judgment, said that at the crossing where the accident occurred four lines of the defendants' tracks intersected the highway. A freight train had reached a point opposite the semaphore to the east of the highway, and one Pidgen, an experienced brakesman and one of the train-crew, had gone back and placed two torpedoes on the rails, in pursuance of one of the operating rules of the defendants for "train movement," rule 99. This was to serve as a signal. As explained by rule 15, the explosion of two torpedoes is a signal to reduce speed and look out for a stop-signal. These rules are to prevent the collision of trains, not for the protection of persons or vehicles at highway intersections. Pidgen saw the motor-car standing 10 or 15 feet to the south of the southerly switching track. The driver of the car spoke to Pidgen, who told him that an opening in the freight train would be made as soon as possible. Pidgen stepped in between two cars to separate the air-hose, and then stepped out again to the south side of the train, and gave a signal to the engine-driver to back, which was done. The driver started the motor-car, and, without Pidgen's knowledge, crossed the southerly main track, and was approaching or had reached the northerly main track, when Pidgen caught sight of the front of the motor-car, and at the same instant heard a passenger train, No. 1, coming from the west at a rapid rate. He shouted, "My God! Look out for No. 1," but the train was immediately upon and struck the motor-car, with the resulting injury and death above indicated.

Walker testified that Pidgen signalled him, by a wave of the hand, to come across. Pidgen said he gave no signal of any kind.

The negligence charged was giving an invitation to cross when there was danger.

The statutory warnings by whistle and bell of the approach of train No. 1 were given, as the trial Judge found. He also found that Pidgen gave no signal to the driver of the motor-car to go forward.

The engine-driver of train No. 1 testified that he was running at a speed of from 50 to 55 miles an hour when the engine ran over the two torpedoes, and he thereupon "answered them and reduced speed somewhat." Neither he nor his fireman saw the motor-car until they were almost upon it.

Evidence was given, subject to objection, that persons had met their death at the same crossing many years ago.

It was argued that, even though there was no duty as to the rate of speed otherwise, when the torpedoes were heard the engine-driver of No. 1 train should have slowed down to a lower rate of speed than he did, and, had he done so, the accident might have

been avoided. He did hear and heed the warning of the torpedoes in so far as it was his duty to do so, namely, until he saw that the freight train was off the main and on to the passing track. When he felt assured of this, he had the right to proceed as usual, which he did—certainly unless he saw some danger ahead in time to do something to avoid it. When the imminence of the accident became apparent, he did all he could, but it was too late.

The duty to respond to the signal of the torpedoes for the purposes indicated, and to which proper response was apparently made, could not be effectually appealed to by the plaintiff so as to make the defendants liable on the score that, if the engine-driver had on account thereof slowed down more, the accident might not have occurred: Walsh v. International Bridge and Terminal Co. (1918), 44 O.L.R. 117.

The learned Judge said that he was unable to see from the evidence that negligence on the part of the defendants could properly be found, and therefore was of opinion that the appeals should be dismissed with costs, if asked.

MULOCK, C. J. EX., agreed with SUTHERLAND, J.

RIDDELL, J., was also of opinion, for reasons stated in writing, that there was no negligence on the part of the defendants, and that the appeals should be dismissed.

MASTEN, J., agreed with RIDDELL, J.

CLUTE, J., read a dissenting judgment. He was of opinion that there was a duty on the part of both Pidgen and the engine-driver of No. 1, which they had neglected. There should be a new trial in the case of Fletcher, and the other plaintiffs should have judgments for damages to be agreed upon or assessed.

Appeals dismissed (CLUTE, J., *dissenting*).

SECOND DIVISIONAL COURT. MAY 4TH, 1920.

*ANTICKNAP v. CITY OF ST. CATHARINES.

Highway—Nonrepair—Defective Grating in Sidewalk—Injury to Pedestrian—Liability of Municipal Corporation—Claim by Corporation for Relief over against Owner and Tenants of Premises Fronting on Sidewalk—Grating Put in for Benefit of Premises—Liability at Common Law—Negligence—Liability under sec. 64 (1) and (2) of Municipal Act—Duty to Repair—Covenant of Tenants with Owner.

An appeal by the Corporation of the City of St. Catharines, the defendants, from the judgment of the Judge of the County Court of the County of Lincoln dismissing the appellants' claim for indemnity over against one Ingersoll, trustee of the Neelon estate, and Swayze Brothers, brought in as third parties.

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

A. Courtney Kingstone, for the appellants.

J. H. Campbell, for the respondent Ingersoll.

G. F. Peterson, for the respondents Swayze Brothers.

MULOCK, C.J. Ex., read a judgment in which he said that the action was brought to recover damages from the defendant corporation for injury to the plaintiff caused by her foot slipping into an open grating forming part of the sidewalk of St. Paul street, a public highway in the city, the grating being in front of the premises occupied by Swayze Brothers, and owned by the Neelon estate.

The trial Judge found the corporation liable for the condition of nonrepair of the street, and awarded the plaintiff $200 damages and costs, but dismissed the claim against the third parties.

The corporation rested their claim for indemnity chiefly on sec. 464, sub-secs. 1 and 2, of the Municipal Act, R.S.O. 1914 ch. 192.

In front of the building there was (before June, 1913) a sand-stone sidewalk, and in this sidewalk and almost in contact with the building was a grating placed there for the purpose of affording light and ventilation to the basement. The grating consisted of parallel iron bars, about 3½ inches apart. One of these bars became broken and disappeared; it was replaced by a wooden slat. In June, 1913, the corporation replaced the sand-stone sidewalk with a cement sidewalk, not disturbing but firmly cementing the grating in its then position. Such was the condition of the grating when Swayze Brothers became tenants and occupants of the premises under a lease of the 23rd June, 1913, made by Louisa L. Neelon, the owner, to them. Before the expiry of this lease, Louisa L. Neelon made to them another lease for 8 years from the 1st April, 1914. Having entered into possession under the first lease, Swayze Brothers continued in possession. Both leases were made in pursuance of the Short Forms of Leases Act, and contained the statutory covenants to repair.

The accident to the plaintiff was on the 19th May, 1919. The wooden slat had sufficiently served its purpose from June, 1913, until about a week before the accident, when it disappeared. Thereupon Swayze Brothers caused a board to be placed over the

opening in the grating, but in a day or two the board disappeared, and the accident occurred by reason of the plaintiff's foot slipping through the opening formerly occupied by the slat.

Apart from the statute, if the owner of premises leases them when they are in a condition free from a nuisance, and the tenant enters into possession, and than a nuisance is created by the tenant or another, the owner is not liable until he is able to regain possession and thereby become enabled to abate the nuisance: Chauntler v. Robinson (1849), 4 Ex. 163; Gandy v. Jubber (1864), 5 B. & S. 78.

The grating was not constructed by the owner, and was not in disrepair when either lease was made, nor did it fall into disrepair until a day or two before the accident, and it did not appear that the owner became aware of its having fallen into disrepair until after the accident. Thus there was no negligence on his part, and at common law he was not liable. To establish liability under the statute, it must be shewn that the owner "placed, made, left, or maintained" the nuisance, or was guilty of some "negligence or wrongful act or omission" which caused the injury. It did not appear who repaired the grating with the wooden slat, and there was no evidence shewing that the grating was not sufficiently repaired. The disappearance of the slat, not its being placed in the grating, was the cause of the accident. The owner was not liable under the statute.

Upon the question of the tenants' position and liability the learned Chief Justice distinguished Pretty v. Bickmore (1873), L.R. 8 C.P. 401, and Gwinnell v. Eamer (1875), L.R. 10 C.P. 658. For a correct statement of the law he referred to Horridge v. Makinson (1915), 84 L.J.N.S.Q.B. 1294.

To succeed at common law, the corporation must shew that the tenants were guilty of actionable negligence which caused the injury. There was nothing which they were bound to do or had a right to do which would have prevented the slat disappearing. They did not remove the slat, and the removal was the cause of the accident.

The tenants' covenant to repair could not enure to the benefit of the corporation. The corporation had no by-law authorising a frontager to repair a highway. The tenants could not be held to have either laid or maintained the defective grating.

The appeal should be dismissed with costs.

RIDDELL, J., agreed in the result, for reasons stated in writing.

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

MASTEN, J., agreed in the result, for reasons stated in writing.

Appeal dismissed.

SECOND DIVISIONAL COURT. MAY 4TH, 1920.

McDONALD v. DAVIS SMITH MALONE CO. LIMITED.

BLYTH v. DAVIS SMITH MALONE CO. LIMITED.

Negligence—Men Hired by Ice-harvesters to Haul Ice with Horses and Sleighs from Lake to Point of Shipment—Loss of Horses by Falling through Ice—Channels in Ice Cut by Direction of Foreman—Men Hired, whether Servants or Independent Contractors—Findings of Jury—Employment of Competent Foreman—Common Employment—Negligence of Fellow-servant.

Appeals by the respective plaintiffs from the judgment of the Judge of the County Court of the County of Grey, dismissing the actions, which were brought to recover damages for losses sustained by the plaintiffs respectively, by reason, as they alleged, of the negligence of the defendants.

The appeals were heard by MULOCK, C.J. Ex., RIDDELL, SUTHERLAND, and MASTEN, JJ.

G. W. Mason, for the appellants.

H. J. Scott, K.C., for the defendants, respondents.

MULOCK, C.J. Ex., in a written judgment, said that the defendants were engaged in causing ice in Shallow Lake to be cut and hauled to a near-by railway station, and for that purpose hired neighbouring farmers, each with a team, to do the hauling. The plaintiff McDonald was one of the men so hired. The plaintiff Blyth was also hired and supplied a team, which was driven by his son. Both teams, while engaged in the work, broke through the ice and were drowned, and the actions were brought to recover damages for the loss of the teams.

The defendants employed one Macpherson as their foreman in charge of the operations, and for the purpose of carrying on the work Macpherson had caused two channels in the ice to be cut, whereby the blocks of ice could be floated to the loading points. These channels, running northerly, converged, and at the time of the accident their northerly ends were within 103 feet of each other. The loading was being done at a point near the northerly end of the westerly channel, called No. 2. Each sleigh, when loading, was close to the channel's end, and when loaded was driven off, another taking its place.

While McDonald's sleigh was being loaded, Blyth's team was standing near, within 20 to 40 feet, ready to move to the loading place. When McDonald's sleigh was loaded, he started for the

station, but had proceeded only a few feet when the ice gave way, and at once, almost at the same moment, his team and Blyth's sank into the water and were drowned, and the whole of the ice between the two channels became broken up.

The evidence shewed that the accident was caused by the cutting of the two channels, with the result that the intervening ice, thus detached from the whole field of ice, was insufficient to support the weight imposed upon it.

The jury found that the accident was caused by the defendants' negligence, and that the negligence was, "Foreman cutting channel No. 2 and weakening loading point, and for not remaining to direct work of loading at this point of danger."

The trial Judge, in his charge to the jury, expressed the view that the relation between the parties was that of master and servant, and, in giving reasons for dismissing the actions, so held. He was of opinion that, the accident having been caused, as found by the jury, by the negligence of Macpherson, the defendants' foreman, that negligence was the negligence of a fellow-servant, and the plaintiffs were not entitled to recover. It was not for the trial Judge to determine whether the plaintiffs were servants or independent contractors—that was a material question of fact for the jury.

The evidence would have warranted a finding that the plaintiffs were independent contractors; and if, as independent contractors, the plaintiffs were entitled to recover, a new trial would be necessary in order to determine what was the relationship between the parties. There was no finding that the defendants were negligent in appointing Macpherson foreman.

At the trial the plaintiffs were allowed to amend their particulars of the defendants' negligence by charging that the defendants "did not employ a competent person to conduct the work at the place in question." The Judge instructed the jury that it was the duty of the defendants to exercise reasonable care in the appointment of a competent foreman, that failure to do so would be negligence, and that it was for them to say whether the defendants had in this respect been negligent. The jury, being silent as to such negligence, must be taken to have exonerated the defendants therefrom: Andreas v. Canadian Pacific R.W. Co. (1905), 37 Can. S.C.R. 1.

If the plaintiffs were independent contractors, and if the defendants were not guilty of negligence in the appointment of Macpherson or in his retention as foreman, they were not responsible for the negligence which caused the accident. If the plaintiffs were the servants of the defendants, the defendants would not be responsible for the negligence of Macpherson, who was a fellow-servant. In either case the actions failed.

RIDDELL, J., reached the same conclusion, for reasons stated in writing.

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

MASTEN, J., for reasons stated in writing, agreed in the result.

Appeals dismissed with costs.

SECOND DIVISIONAL COURT. MAY 5TH, 1920.

*ANKCORN v. STEWART.

Will—Discretion of Executors as to Daughters of Testator Sharing in Estate—Married Daughter Deprived of Share—Death before Period of Distribution—Conveyance by Surviving Executor to Son of Testator—Action by Administratrix of Estate of Daughter against Son for Accounting Based on Breach of Trust—Constructive Trustee—Limitations Act, secs. 24, 47—Trustee Act, sec. 37—Right of Husband of Daughter not Accruing until Appointment of Administratrix—Costs.

Appeal by the plaintiff from the judgment of KELLY, J., 17 O.W.N. 411.

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

J. G. Kerr, for the appellant.

O. L. Lewis, K.C., and H. D. Smith, for the defendant, respondent.

MULOCK, C.J. Ex., read a judgment in which, after setting out the facts, he said that the plaintiff attained her majority in 1914; on the 14th July, 1919, letters of administration of the estate of Matilda Sanderson, the deceased mother of the plaintiff, were granted to the plaintiff; and on the 24th July, 1919, she instituted this action, in which she alleged that the defendant had possessed himself of the assets of the estate of Hugh Stewart, the plaintiff's grandfather and the defendant's father, and was accountable to her in respect of the share of her deceased mother.

The questions in issue were, whether Matilda Sanderson was entitled to share in her father's estate, and, if so, whether the defendant was accountable to her by reason of his having acquired the assets from the surviving executor, William Stewart, with notice of Matilda Sanderson's unsatisfied claim.

For the defence it was contended that Hugh Stewart, the testator, left it to the discretion of his executors or the survivor to exclude any of his daughters from sharing in his estate, and that such discretion had been exercised against Matilda Sanderson, whereby she took nothing. It was also contended that the plaintiff's claim was barred by the Limitations Act.

The intention of the testator was shewn by his will, the provisions of which might be summarised as follows:—

Upon the youngest of his children, Margaret, Matilda, Janet, and Hugh, attaining the age of 21, his estate was to be sold, and, subject to certain deductions, the residue was to be distributed among the four children, Hugh (the defendant) taking four-tenths and each of the others two-tenths. Then, following these gifts to the four children, there was the proviso that if "at the time of the distribution of such residue of my estate," any of his daughters should have married; the executors might reduce such daughter's share if they should be of opinion that she is "then in comfortable circumstances." In other words, to each of the daughters there was an absolute gift of two-tenths, reducible by the executors if, having regard to the circumstances existing at the time of such distribution, they should see fit so to reduce the same.

Matilda having died before the arrival of the period for distribution, it became impossible for the executors to exercise the discretion given to them by the testator, to cut down her gift.

Where a testator makes an absolute gift to a legatee, and grafts upon such gift a trust which fails, the gift remains absolute: Hancock v. Watson, [1902] A.C. 14.

Applying this principle to the gift of two-tenths to Matilda, that gift became absolute upon her death.

The direction in the will that the whole estate should be sold within one year of the youngest daughter attaining her majority was peremptory and for all purposes, and therefore operated as a conversion of realty into personalty at and from that time: Doughty v. Bull (1725), 2 P. Wms. 320. Thus the plaintiff's cause of action was in respect of personalty.

Matilda was not paid her two-tenths or any part thereof, and the plaintiff, as administratrix of Matilda's estate, now sought to recover it from the defendant, upon the ground that, in fraud of Matilda, he had possessed himself of all the assets of the estate.

A person who knowingly receives and deals with trust property in a manner inconsistent with the trust is personally liable for whatever loss accrues to the trust: Magnus v. Queensland National Bank (1888), 37 Ch. D. 466, 471.

The defendant, as a constructive trustee, was liable to account for the assets come to his hands.

The plaintiff's was a money-claim—for a legacy—payable out of land, and under the Limitations Act, R.S.O. 1914 ch. 75, sec. 24, the action could be maintained "within 10 years after a present right to receive the same accrued to some person capable of giving a discharge." As it was not until the 14th July, 1919, that the plaintiff became administratrix, the claim had not been barred.

Section 47 of the Limitations Act is in Part II., and that Part does not apply to a constructive trust.

Section 37 of the Trustee Act, R.S.O. 1914 ch. 121, does not prevent a cestui que trust from following trust-assets into the hands of a constructive trustee.

It was argued that, as the surviving husband of Matilda was entitled to one-third of his wife's personal estate, and was under no disability, one-third of the plaintiff's claim was barred. But until the plaintiff's appointment as administratrix no one was entitled to bring an action in respect of the legacy or any part of it. The statute did not begin to run against any of those entitled to share in Matilda's estate until the appointment of an administratrix.

The appeal should be allowed, the judgment dismissing the action set aside, and judgment should be entered declaring that the plaintiff, as administratrix of the estate of Matilda Sanderson, is entitled to two-tenths of the testator' estate, and that the defendant is accountable to her in respect thereof to the extent of the value of a two-tenths part of the estate come to his hands.

The defendant was guilty of no moral wrong, but was led into the unfortunate position of constructive trustee by the innocent mistake of the testator's executors that they had extinguished Matilda's claim. The defendant should not be ordered to pay the plaintiff's costs down to judgment, but he should pay the costs of the appeal.

RIDDELL, J., also read a judgment; he agreed that the appeal should be allowed.

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

Appeal allowed.

SECOND DIVISIONAL COURT. MAY 5TH, 1920.

*CITY OF SARNIA v. McMURPHY.

Assessment and Taxes—Local Improvement Rates—Special Assessment of Property-owners for Part of Cost of Tile-drain—Contract—Authority—By-laws of City—Lack of Petition—Fundamental Defect—Local Improvement Act, R.S.O. 1914 ch. 193, secs. 5, 9, 10, 38, 44—Estoppel—Debentures.

Appeal by the defendant from the judgment of the First Division Court of the County of Lambton in favour of the plaintiffs, the Corporation of the City of Sarnia, in an action to recover the amount of a local improvement rate.

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

J. M. McEvoy, for the appellant.

J. Cowan, K.C., for the plaintiffs, respondents.

SUTHERLAND, J., read a judgment, in which he said that the plaintiffs' recovery was only for $17.48 and costs in the Division Court, but this was a test case on the result of which claims against other ratepayers depended, and, pursuant to the Division Courts Act, R.S.O. 1914 ch. 63, sec. 125 (*c*), the parties had, before the trial, filed a written consent that either might appeal.

After setting out the facts, the learned Judge said that by-law No. 916 gave no warrant or authority for the special assessment of the land abutting directly upon the work of the Confederation street drain beyond the $78\frac{4}{5}$ cents per foot therein authorised to be assessed thereon to raise that part of the sum required to be paid by the owners. That by-law provided "that the remainder of the cost of such tile-drain shall be borne by the corporation." The assessable frontage on each side of the drain was 10,307 feet in all. If this be multiplied by $78\frac{4}{5}$ cents per foot, it fixes the total amount to be paid by the owners at a sum slightly less than $8,318.25, the amount mentioned in the engineer's estimate. While that estimate also indicated that the corporation and the owners should each pay a like sum, it was the one-half of a total estimate of $16,636.50. The petition, estimate, and specification would not warrant the by-law in going further than that, and the work to be done at that cost was and could be only the 3-foot drain and the covering thereon to 18 inches, according to the plain construction of clause 2 of the by-law. The $78\frac{4}{5}$ cents per foot to be specially assessed upon the abutting lands of the owners was the provision for raising that part of the money required to be paid by them for the construction of the drain, and the remainder of the cost thereof was to be borne by the corporation at large. In that view also, the work done under the second contract was properly chargeable against the corporation at large, and not, as attempted to be done to the extent of the one-half thereof by by-law No. 1022, by special assessment against the owners.

The learned Judge was, therefore, of opinion that by-law 1022, assuming, as it does, to assess the owners for the half of the cost of the work done under the second contract, is without legal warrant or authority and is void. That work was not done under the

authority of the Local Improvement Act, R.S.O. 1914 ch. 193, at all. The lack of a petition is a fundamental defect which cannot be remedied, despite the scope of secs. 38 and 44: Mackay v. City of Toronto (1918), 43 O.L.R. 17; Fleming v. Town of Sandwich (1918), 44 O.L.R. 514; Anderson v. Municipality of South Vancouver (1911), 45 Can. S.C.R. 425, 446, 461.

The learned Judge does not think that the fact that the defendant was a member of the council at the times when the council took action in regard to the matters now in question, or the failure on his part to attack the assessment or move to quash the by-law, could be deemed to amount to an estoppel. The debentures issued upon the faith of the validity of the by-law, and said to have been sold and disposed of, might be validated under sec. 44 of the Act, in so far as liability or obligation incurred by the corporation to purchasers was concerned.

It was suggested by counsel for the respondents that they could invoke the aid of secs. 5, 9, and 10 or one of them in support of the judgment. Upon the facts it was plain that the work that was done under the second contract, and which was in question in this action, was not done under the authority of any of these sections, and they could not be made to apply.

The appeal should be allowed and the judgment set aside with costs here and below.

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

RIDDELL, J., agreed in the result, for reasons stated in writing.

MASTEN, J., agreed in the result, and with the reasoning of both the learned Judges who had read judgments.

Appeal allowed.

HIGH COURT DIVISION.

ROSE, J. MAY 4TH, 1920.

*SHERLOCK v. GRAND TRUNK R.W. Co.

Railway—Carrier—Loss of Trunk Checked by Passenger—Limitation of Liability—General Order of Railway Board—Powers of Board—Railway Act, R.S.C. 1906 ch. 37, secs. 30 (h), (i), 31, 340 (3)—"Personal Baggage"—Payment into Court—Costs.

Action by a passenger to recover the value of the contents of a trunk checked as personal baggage and lost by the defendants, the carriers.

The action was tried without a jury at Hamilton.

T. H. Crerar, for the plaintiff.

D. L. McCarthy, K.C., for the defendants.

ROSE, J., in a written judgment, said that the question was, whether the liability of the defendants was limited to $100 by General Order No. 151 of the Board of Railway Commissioners for Canada, dated the 8th November, 1915.

The order was duly published in the Canada Gazette on the 28th January and the 5th and 12th February, 1916. Therefore, by sec. 31 of the Railway Act, R.S.C. 1906 ch. 37, if there was power to make the order, it has, while it remains in force, the like effect as if enacted in the Act itself.

There was apparently delivered to the plaintiff a check in form similar to the form which was in question in Spencer v. Canadian Pacific R.W. Co. (1913), 29 O.L.R. 122; but, as in that case, no evidence was tendered to shew that the passenger's attention was drawn to the conditions printed on the back of the check, and no attempt was made to shew that there was really a contract between the plaintiff and the defendants by which the plaintiff agreed to be bound by the printed conditions.

This case, however, did not depend upon the condition printed on the check: the matter was governed by the order of the Board, which was entirely different from the order which was in force when the Spencer case was decided.

The defendants, while pleading that the check was delivered, did not base their case upon the condition, but upon the general order, and that general order appeared to be a complete defence.

Counsel for the plaintiff suggested that the Board had no power to limit the liability of the defendants or to do more than authorise the defendants to enter into a contract limiting their liability. But the Board had ample power to declare, as it did in Rule 3 (b) of Order 151, that the carrier shall not be liable in respect of or consequent upon loss of or damage or delay to any personal baggage, however caused, for an amount in excess of $100 for any such baggage belonging to and checked for an adult passenger, etc. Power was derived under sec. 340 (3) and sec. 30 (*h*) and (*i*).

The trunk in this case was delivered to the defendants and was accepted as containing personal baggage, and there was no suggestion of payment for its carriage. If the articles in the trunk were not personal baggage, properly so-called, no obligation

on the part of the defendants ever arose: Jacobs' Railway Law of Canada, p. 439.

Either the articles were personal baggage, and the defendants' liability is limited by the order, or they were not personal baggage, and the defendants were under no liability at all.

The defendants admitted liability for $100, and there should be judgment for the plaintiff for that sum. Assuming that the money was paid into Court, the plaintiff should have costs against the defendants down to the time of payment in; the defendants should have costs of all subsequent proceedings against the plaintiff; and there should be a set-off pro tanto.

ROSE, J., IN CHAMBERS. MAY 6TH, 1920.

RE EASTVIEW MUNICIPAL ELECTION.

GLADU v. WHITE.

Municipal Election—Proceeding to Set aside Election of Reeve of Town—Irregularities of Deputy Returning Officers—Finding of County Court Judge that Result of Election Affected—Municipal Act, sec. 150—Absence of Finding that Election Conducted in Accordance with Principles Laid Down in Act—Evidence—Onus—Appeal.

An appeal by W. J. White, the defendant, from an order of GUNN, CO. C.J., in the County Court of the County of Carleton, avoiding the election of the defendant as Mayor of the Town of Eastview.

The motion was heard, as in Chambers, in the Weekly Court, Ottawa.

G. D. Kelley, for the defendant.

Gordon Henderson and H. St. Jacques, for the relator.

ROSE, J., in a written judgment, said that the Judge of the County Court had found, upon indisputable evidence, that there were many irregularities on the part of deputy returning officers, and he had also found that these irregularities affected the result. But most of the failures to comply with the provisions of the Municipal Act were in connection with proceedings subsequent to the close of the poll; and it was argued that—sec. 150 of the Municipal Act, as it now stood and as it had stood since the revision of 1913, 3 & 4 Geo. V. ch. 143, throwing the onus of

proof in this regard upon the relator—the finding ought to have been the other way; that it ought to have been found that the irregularities were not shewn to have affected the result, and, therefore, that the election ought not to have been avoided on account of them. What sec. 150 provides is that the election shall not be declared to be invalid by reason of mistakes or irregularities if (1) it appears to the tribunal by which the validity of the election is to be determined that the election was conducted in accordance with the principles laid down in the Act; and (2) it does not appear that the irregularities affected the result.

Thus, before the question whether the result was affected could become important in the application of sec. 150, there must be an affirmative finding that the election was conducted in accordance with the principles laid down in the Act; and, notwithstanding the change made in 1913 as regards the onus of proof as to the effect or non-effect of the irregularities, it was still for the person invoking the section in support of the validity of the election to satisfy the Court that there was a general adherence to the principles laid down in the Act. Now the County Court Judge did not find that there was a general adherence to such principles—indeed the inference from the whole of his judgment was rather that he would have found the reverse—and the question to be considered before reaching the consideration of the effect of the irregularities was, whether the Judge sitting in appeal ought now to make that affirmative finding which the County Court Judge had not made, but which, it was said, he ought to have made. While the evidence would not support a finding that, so far as the officials were concerned, the election—or so much of it as consisted of the proceedings up to and inclusive of the casting of the ballots—was not conducted in accordance with the principles laid down in the Act, there was really no evidence upon which to base a finding that it was conducted in accordance with such principles; and this case was one in which a Judge sitting in appeal ought not to make the finding without clear evidence upon which to base it.

For this reason, the learned Judge was unable to take the first step towards the application of the provisions of sec. 150, and it was unnecessary to consider whether the finding that the irregularities affected the result could be supported, or whether the County Court Judge was right in thinking that certain corrupt acts were done, and that the person guilty of them was an agent of the successful candidate.

The appeal should be dismissed with costs.

ORDE, J. MAY 7TH, 1920.

*BIRD v. NEW YORK LIFE INSURANCE CO.

Insurance (Life)—Default in Payment of Premium—Lapse of Policy—Reinstatement upon Application of Insured and Payment of Arrears—Untrue Answers to Questions in Application—Findings of Jury—Absence of Fraud—Answers Written by Agent of Company—Conditions of Policy—Canada Insurance Act, 1910, secs. 84, 85, 95 (d), (j)—Authority of Agent—Whether Agent of Insured—Reopening of Question whether Evidence upon which Reinstatement Granted was Satisfactory.

Action to recover $1,000 and interest upon a policy of insurance upon the life of William G. Bird, the husband of Annie Bird, the plaintiff, issued by the defendants.

The defendants counterclaimed for a declaration that the policy was void and for its cancellation.

The action and counterclaim were tried before ORDE, J., and a jury, at St. Catharines.

A. Courtney Kingstone and M. A. Seymour, for the plaintiff.

H. W. Shapley, for the defendants.

ORDE, J., in a written judgment, said that the policy was issued on the 21st August, 1916, upon the application of Bird, made to the defendants through their agent at St. Catharines, one Leeper. The plaintiff was the beneficiary named in the policy. The semi-annual premium was $19.30, payable on the 7th February and August.

The premiums were duly paid up to the 7th February, 1918, but the premium payable on that day was not paid within the 30 days' grace, and the policy accordingly lapsed.

Leeper called once during the 30 days at the Birds' house to remind them that they should not let the period of grace expire without paying the premium. On the 5th April, 1918, he called and received payment of the overdue premium, and at the same time obtained from Bird an application for the reinstatement of the policy. This application was approved by the defendants, and the policy was reinstated. The premiums were duly paid thereafter, and on the 10th February, 1919, Bird died.

Upon application for payment being made, the defendants refused to pay, on the ground that the statements and representations made upon the application for reinstatement were not full, complete, and true, that Bird was not then in good and sound health, but was suffering from carcinoma of the stomach, from

which he afterwards died, and that he had on account thereof consulted and had been treated by a physician before and at the time of the application for reinstatement, and had concealed these facts from the defendants. The company tendered to the plaintiff the amount of the premiums paid at the time of and since the reinstatement with interest.

The three questions which, the defendants said, were answered falsely and the written answers thereto were as follows:—

"4. What illnesses, if any, have you had since the date of the above policy? A. None."

"6. What physicians have treated you or have you consulted since the date of the above policy? A. No.

"7. Are you now in sound health? A. Yes."

The jury, in answer to questions, found that the written answers to questions 4 and 7 were not in fact untrue and were not material, but that the answer to question 6 was untrue and was material, and that all three answers were acted upon by the defendants. They further found that Bird disclosed to Leeper all the information necessary to enable Leeper to have written truthful answers; that Leeper obtained from Bird full knowledge of all material facts for the purpose of the reinstatement application before Bird signed it; that Bird did not make to Leeper any statement which Bird knew to be false; that Bird was not guilty of any fraud; that Bird was induced by the statements or representations of Leeper to sign the application in the form in which he signed it; that Bird signed it without understanding its full meaning and effect; and that his failure to understand was due to the statements and representations of Leeper.

In accordance with secs. 84 and 95 (*d*) and (*j*) of the Canada Insurance Act, 1910, 9 & 10 Edw. VII. ch. 32, the policy contained these provisions:—

"The policy and the application therefor, copy of which is attached hereto, constitute the entire contract. All statements made by the insured shall, in absence of fraud, be deemed representations and not warranties, and no such statement shall avoid the policy or be used in defence to a claim under it, unless it be contained in the written application and a copy of the application is endorsed upon or attached to this policy when issued.

"At any time within 5 years after any default, upon written application by the insured and upon presentation . . . of evidence of insurability satisfactory to the company, this policy may be reinstated . . . upon payment of . . . arrears of premiums with . . . interest . . . ."

It was argued for the plaintiff that, the jury having negatived fraud, the defendants could not rely upon the application for

reinstatement or anything contained in it, because a copy of the application had not been attached to the policy.

The learned Judge said that the "application" referred to in the policy, from the context, meant the application for the policy itself, and not an application for reinstatement. In his opinion, the application for reinstatement and its acceptance did not constitute a new contract; and what had to be determined was whether or not the condition as to reinstatement contained in the policy was fulfilled according to its terms. The defendants did in fact reinstate the policy, upon evidence which they considered satisfactory.

When the condition for reinstatement is worded as it was in the policy here, the defendants cannot be permitted, in the absence of fraud, to reopen the question whether or not the evidence upon which they acted in reinstating the policy was satisfactory.

Even if Leeper exceeded his real authority in writing untruthful answers to any of the questions, that did not make him Bird's agent. Apart from the provisions of sec. 85 of the Insurance Act, there is ample authority for holding that Leeper, acting as he was with real authority to obtain from Bird the application for reinstatement, must be deemed to have been clothed with full authority, short of fraud on Bird's part, for everything that he did: Hastings Mutual Fire Insurance Co. v. Shannon (1878), 2 Can. S.C.R. 394, and other cases.

The jury's findings in regard to question 6 in the application and Bird's answer thereto would be difficult for the plaintiff to overcome if the answers written by Leeper had been the real ones made by Bird, and if Bird had concealed from Leeper the truth as to his having consulted a physician; but, in view of the findings of the jury that Bird was not guilty of fraud, that he signed the application in the form in which it was drawn up as the result of Leeper's statements and representations and without understanding its full meaning and effect, and that such misunderstanding was also due to Leeper's statements and representations, the findings of the jury in regard to question 6 were immaterial.

There should be judgment for the plaintiff for $1,000 with interest and costs, and the counterclaim should be dismissed with costs.

ROSE, J. MAY 8TH, 1920.

GETZLER v. DOMINION FOUNDRIES AND STEEL LIMITED.

Contract—Remuneration for Services—Employment of Plaintiff in Regard to Particular Matter—Employers Taking Matter out of Hands of Plaintiff—Excuse—Agreement to Pay one Half of Refund of Overpayments Made to Employers—Preventing Plaintiff from Obtaining Refund—Interference—Damages for Breach of Implied Contract.

Action to recover remuneration for the plaintiff's services under an agreement with the defendants.

The action was tried without a jury at Hamilton.
George Lynch-Staunton, K.C., for the plaintiff.
H. A. Burbidge, for the defendants.

ROSE, J., in a written judgment, said that the plaintiff carried on business as an expert adviser of shippers in matters pertaining to contracts with transportation companies for the carriage of goods; and the defendants were large shippers of goods carried by rail.

In May, 1917, the plaintiff and the defendants entered into an agreement, the terms of which were set forth in two documents signed by the defendants.

By the first, called "Forward Year Form," the defendants subscribed $200 for the services of the plaintiff for one year, and agreed to pay one cent for each freight bill audited by the plaintiff; and the plaintiff agreed that, should the overcharges shewn by him not equal the fee of $200 and audit charges one cent each bill by the expiration of this contract, he would audit the defendants' future freight bills free of charge until the overcharges should equal the fee and audit costs. By the second document, called "Special Back Year Form," it was recited that this document, in connection with the "Forward Year" document, covered the auditing of the defendants' freight bills from the 1st January, 1913, to the 28th May, 1917, for which the defendants agreed to pay one cent for each freight bill audited. They also agreed to pay 50 per cent. of the refunds received by them after deducting the $200 and the one cent audit charge from the total refunds.

Working under this agreement, the defendants sent to the plaintiff, to be audited, some 18,000 or 20,000 bills paid by them for incoming and outgoing freight. These were examined and reported upon by the plaintiff, and certain claims were, as a result, presented

to the carriers. Some of the claims so presented were paid, and the defendants duly paid the plaintiff his 50 per cent. of the amounts received by them.

Then the plaintiff took up the matter of a great number of shipments of steel-bars carried by the Canadian Pacific Railway Company, under a classification which the plaintiff said was not the proper one. The plaintiff first "constructed an overcharge" in respect of two or three small shipments of goods of the class in question; the defendants presented this to the railway company, and it was paid. Then the plaintiff, with the concurrence of the defendants, "constructed" a large overcharge, $6,881.46, and presented it. The railway company denied liability, and also made a claim upon the defendants for the return of the amount refunded in respect of the small shipments.

The plaintiff then applied to the Board of Railway Commissioners for a ruling as to the tariff rate applicable to the shipments in question. While the question was before the Board, the defendants demanded from the plaintiff the return of all the papers relating to the claims in question, and instructed the Board to disregard the application for a ruling, the reason alleged by the defendants being that these freight accounts were the property of the Imperial Munitions Board, and that it was the intention of that Board to apply for a reduction in rates. The result of this action on the part of the defendants was that the Railway Board made no ruling. The plaintiff was sure that the ruling would have been in his favour.

His claim in this action was to be paid $3,440.73, either as his half of the sum which he says would have been recovered from the railway company if the defendants had not prevented the recovery, or as payment for his services in connection with the audit of the bills and the prosecution of the claims.

The first defence—that the plaintiff was not retained to "construct" the overcharges in question or to present the claims to the railway company—entirely failed upon the facts.

The second defence was that, even if the plaintiff was retained, the defendants had not failed in the performance of any duty towards him arising out of the contract or otherwise.

As to this the plaintiff's contention was that the defendants, having sent him the bills, and having caused him to do the greater portion of the work which he had contracted to do in respect of them, were under an obligation to him to leave the bills with him and to refrain from any act which would prevent his carrying his work to completion and gaining his reward.

The defendants had failed in the performance of their legal obligation.

Reference to Kohler v. Thorold Natural Gas Co. (1916), 52 Can. S.C.R. 514, and cases there cited.

The defendants, having delivered the bills to the plaintiff, and having caused him to expend time and money in an effort to procure a refund from the carriers, came under an implied obligation to leave these bills in his hands and to refrain from obstructing him in proceeding to do what he still had to do in order to complete his contract and establish his right to remuneration.

The defendants could not escape the consequences of a breach of their implied contract by shewing that some one with a better right to the bills had taken them away.

The defendants' breach of contract had made the exact ascertainment of damages impossible. They could not complain if, in the absence of proof that the plaintiff would not have succeeded, the plaintiff's view that he was bound to succeed was adopted, and be given the amount which he would have earned if there had been no interference by the defendants and the Railway Board had ruled in his favour.

There should be judgment for the plaintiff for $3,440.73 with costs.

RE LEWIS—LEWIS v. STOKES—KELLY, J., IN CHAMBERS—MAY 6.

Administration Order—Application for—Small Estate—Trifling Disputes—Costs of Proceedings.]—An application for an order for administration of the estate of the late Lillie Ann Lewis. KELLY, J., in a written judgment, said that the total value of the estate to be administered was small, and the differences which stood in the way of what should be an amicable arrangement were trifling in comparison with the expense of carrying administration proceedings to a conclusion. Notwithstanding these facts, a careful consideration of the material filed suggested the conclusion that the parties were unwilling to come to terms of settlement without litigation. On the argument, the learned Judge expressed the hope that the solicitors would point out to their clients the costs involved in the proceedings, and that an unreasonable attitude assumed by any party might well be considered in the final disposition of the costs of the proceedings; and also that they should make every reasonable effort to arrange their affairs without further litigation. Decision was withheld awaiting the result. It now appeared that the suggestion was without effect. It was regrettable that the applicant, either by herself or through her solicitor, had not seen fit to entertain as a

basis for negotiating a settlement some such proposal as was made to her solicitor in the letter of the defendants' solicitors of the 18th March. The learned Judge pronounced the usual order for administration, with a reference to the Local Master at Guelph; but it was directed that the order should not issue before the 15th May to enable the plaintiff further to consider a settlement along the lines suggested in the letter of the 18th March above referred to. R. L. McKinnon, for the plaintiff. C. W. Plaxton, for the defendants.