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DIVISIONAL COURT.

BESSEMER GAS ENGINE CO. v. MILLS.

Company—Extra-provincial Corporation—Sale of Goods in Ontario without License — Resident Agent — Action for Price—Dismissal—Costs.

Action in the County Court of Lambton to recover the price of a gas engine sold and delivered by plaintiffs to defendant and accepted by defendant, and the sum paid by plaintiffs for freight and duty.

Plaintiffs were a foreign corporation, having their head office in the State of Pennsylvania, and defendant was an oil operator residing in the township of Sarnia, in the Province of Ontario.

On 6th June, 1903, plaintiffs wrote to one W. H. Fogle, an oil operator residing near defendant, authorizing Fogle to sell their engines at certain prices specified in a price list furnished to him; they agreed to allow him a discount of 10 per cent. from the prices therein set forth, and they asked him to take great care to sell only to responsible persons.

On 10th September, 1903, Fogle sold an engine for plaintiffs to defendant at the schedule price, and wrote to them asking them to send it at once, which they did. After using it for some time, defendant complained of its work, and endeavoured to get plaintiffs to make a reduction from the price, which they refused to do. They then brought the present action, and defendant set up several defences to it. He denied any contract with plaintiffs, and alleged that he had purchased from Fogle; he alleged that the engine had been unskilfully set up by Fogle, and claimed $175 damages by reason of the manner in which it had been set up; he disputed the contract price claimed by plaintiffs; and he set

up that plaintiffs were an extra-provincial corporation, and, not having taken out a license under 63 Vict. ch. 24 (O.), were disentitled from recovering under sec. 14 of that Act.

The jury found in plaintiff's favour as to the price claimed by plaintiffs, and against defendant upon his claim for damages. The County Court Judge found all the other questions in plaintiffs' favour, and directed judgment to be entered for them for $308.17 and costs.

Defendant appealed. His appeal was heard by FALCONBRIDGE, C.J., STREET, J., BRITTON, J.

W. J. Hanna, Sarnia, for defendant.

W. R. Riddell, K.C., for plaintiffs.

STREET, J.—It was not disputed either at the trial or before us that plaintiffs are an extra-provincial corporation, within the meaning of 63 Vict. ch. 24, and that W. H. Fogle is a resident of this Province, and that plaintiffs had not obtained a license.

The bargain between Fogle and defendant was made in the county of Lambton at Fogle's place, and he wrote to plaintiffs to send an engine to him to fill the bargain, and this was done and the engine was delivered by Fogle to defendant at his wells in the county of Lambton.

The 14th section of the Act provides that so long as any extra-provincial corporation remains unlicensed under the Act, it shall not be capable of maintaining any action in any Court in Ontario in respect of any contract made in whole or in part within Ontario, in the course of or in connection with business carried on contrary to the provisions of sec. 6 of the Act.

Section 6 provides that no extra-provincial corporation shall carry on within Ontario any of its business unless and until a license has been granted to it; and no agent or other person shall as the representative or agent of any such corporation carry on any of its business in Ontario unless and until such corporation has received such liecnse: provided that taking orders for or buying or selling goods by travellers or by correspondence, if the corporation has no resident agent or representative, or no office or place of business in Ontario, shall not be deemed a carrying on of business within the meaning of the Act.

I think it is plain from an examination of these sections that the Legislature have forbidden extra-provincial corporations which have not taken out a license, selling their goods in this Province except under the circumstances mentioned

in the proviso to sec. 6. I do not think the facts bring the case within that exception. Fogle, who made the sale, was a resident agent, in my opinion, within the meaning of the proviso; he says in his evidence that he never went out to solicit orders, but took only those which came to him at his place of business. He was clearly authorized in writing by plaintiffs to sell their goods at fixed prices upon commission. There was, therefore, a contract made orally in Ontario and completed by delivery of goods and part payment, contrary to the provisions of the 6th section of the Act, and plaintiffs, having admittedly no license, cannot maintain an action.

Appeal allowed with costs, and judgment to be entered in the Court below for defendant upon the issue upon which he has succeeded, with such costs as he would have been entitled to had that been his only defence. Plaintiffs are entitled to have the other issues found in their favour with the costs of them, and to set off such costs against defendant's costs of defence. The action will be dismissed, but without prejudice to plaintiff's right to bring another action, as permitted by sec. 14 of the Act, in case they shall take out a license under the Act.

BRITTON, J., gave reasons in writing for the same conclusion.

FALCONBRIDGE, C.J., concurred.

MEREDITH, J. OCTOBER 25TH, 1904.

TRIAL.

ARMSTRONG v. BRUCE.

Surgeon—Malpractice—Aseptic Surgery—Injury to Patient by Mistake of Nurse in Preparing for Operation—Responsibility of Surgeon for Nurse.

This was an action for alleged malpractice, the plaintiff alleging that defendant, a surgeon, had negligently directed the nurse to fill with boiling water a "Kelly pad," upon which plaintiff was placed while an operation was performed upon him under the influence of anæsthetics by defendant. His back and shoulders were burned by the pad.

At the opening of the case MEREDITH, J., decided to dispense with the jury, following Town v. Archer, 4 O. L. R. 383, 1 O. W. R. 391.

The nurse swore that she had been directed by defendant to fill the Kelly pad with boiling water. This, however, was

denied by defendant and the other two medical men who were present, who all said that the nurse had been directed to place the instruments in boiling water and to fill the Kelly pad with *hot water* in the same way as a hot water bottle. A number of surgeons were called by defendant, who all agreed in saying that when an operation is to be performed aseptically it would be gross negligence for the operating surgeon to touch anything which had not been sterilized, that it is his duty to sterilize his hands with great care, and thereafter to touch nothing which had not been itself sterilized. They all agreed that the proper heat of water to put in a hot water bottle is a matter of familiar knowledge amongst nurses, that that is a matter which they are carefully taught in hospitals, that it would be impossible for the operating surgeon to attend to the details, and that he must trust to the knowledge of trained nurses. One of the witnesses, Dr. Bingham, said, "If I cannot trust my nurse, I must give up aseptic surgery."

Amongst the witnesses examined were Drs. Bingham, Ross, J. Caven, Cameron, Lawson, and Hall; and there was no evidence at variance with the above. It was further proved that it is a matter of the utmost importance in an operation such as this was, viz., strangulation of the intestine advanced to the gangrenous stage, that not a moment should be lost, and that the hope of recovery is practically in the inverse ratio to the length of time taken in the operation.

There had been a charge on the pleadings that the defendant had not been skilful in the operation which was actually performed, but this was practically abandoned; and all the medical witnesses stated that the operation could not have been more carefully or skilfully performed.

T. J. Blain, Brampton, for plaintiff.

W. R. Riddell, K.C., and W. Mulock jun., for defendant.

Perionowsky v. Freeman, 4 F. & F. 977, and Town v. Archer, 4 O. L. R. 383, and the cases therein cited, were referred to.

MEREDITH, J.—Plaintiff sustained a very painful injury, and one which has caused him some loss. These facts do not necessarily entitle him to relief from defendant. In order to have damages in this action he must satisfy the Court that defendant has been guilty of some actionable negligence. Defendant is a skilled gentleman, a gentleman of the medical profession, and what would in an ordinary in-

dividual be but mere negligence would in his case, no doubt, be gross negligence. Had he done that which the nurse testifies that he did, it would, in my judgment, have been gross negligence. Whether I should be obliged to say that the injury which plaintiff sustained was the natural effect of that negligence is another question, and one which I need not determine. What I have now to find is whether plaintiff has affirmatively shewn that there was negligence on the part of defendant occasioning the injury of which he complains.

I am unable to find upon the evidence that the nurse's statement is accurate. She is, I think, quite mistaken as to the direction proceeding from defendant in regard to the filling of the pad. I am satisfied that she has confused that which he said in regard to sterilizing his instruments with that which he said in regard to filling the pad. I have no manner of doubt that if the doctor had said to any experienced nurse that she was to fill that pad with boiling water, it would at once have struck her as an extraordinary thing, and one calling for some explanation. Nothing of that sort took place. It was a thing that could not have been done by Dr. Bruce, unless through a slip of the tongue. He never meant that she should do that which she did. So that the probabilities are altogether against the story of the nurse. And the direct testimony very greatly preponderates in favour of defendant. We have Dr. Bruce's own statement, which is worthy of at least as much credence as that of the nurse. No doubt every one is naturally prejudiced in his own favour in a case of this kind, and Dr. Bruce's action in saving himself against a charge of negligence may be to some extent affected by his interest. On the other hand, the nurse is saving herself from a charge of negligence, and possibly an action for the recovery of damages. They stand upon an equal footing as far as that is concerned. Then there is the testimony of the other two medical gentlemen, who say that the nurse is mistaken. Upon the whole I find that the direction to fill the pad with boiling water was not given, but the direction was given to fill it as if it were a hot water bottle, and, if that be so, plaintiff's case seems to me to fall to the ground. I cannot find any negligence in Dr. Bruce having, under the circumstances, assumed that the nurse would perform her duties properly. I cannot think that upon this branch of the case anything like a case is made out for plaintiff. It is not contended that liability arose by reason of any relationship of master and servant having existed between defendant and the nurse. The facts would not support any such contention. There was no such relationship.

The only question which causes me any trouble is as to the disposition of the costs. That is always more or less a perplexing question. The law, in its wisdom, has placed the disposition of the costs in the discretion of the Judge. I had much rather such discretion did not devolve upon me. Plaintiff certainly has suffered, suffered without any fault on his part. It looks very much as if he has no substantial remedy in respect of his sufferings through the negligence of another, or others. He brought his action relying upon the statement of the nurse that Dr. Bruce had done that which she has sworn to; it was not launched upon any knowledge of his own. He was insensible at the time, unable to preserve himself from the injury which this pad caused, and unable to know what directions were given. Under all the circumstances of the case, I think I am fairly exercising my discretion in making no order as to costs of the action.

The action is dismissed without costs if the case go no further. If it go further, dismissed with costs.

ANGLIN, J. NOVEMBER 10TH, 1904.

WEEKLY COURT.

CITY OF TORONTO v. TORONTO R. W. CO.

Street Railways—Agreement with Municipal Corporation—Construction—Operation of Railway—Right of Municipality to Direct—Service—New Lines—Extension of Municipal Boundaries—Time Tables and Routes—City Engineer—Night Cars—Open Cars—Heating Cars — Specific Performance—Special Case—Costs.

In this action issues were raised which involved the determination of the respective rights of plaintiffs and defendants as to a number of matters affecting the operation of defendants' railway. The solution of many of the questions as to which the parties differed depended upon the true construction of several provisions of the agreement under which defendants acquired the right to operate the railway.

This agreement, including certain incorporated documents, was ratified and confirmed by Act of the Ontario Legislature, 55 Vict. ch. 99, and is to be found printed as a schedule to that statute. To dispose as far as possible of such questions the parties agreed to submit to the Court a special case in the following terms:—

The parties desire, before proceeding to take further evidence in this case, to obtain the opinion of the Court upon certain questions of law arising on the construction of the

agreement on which the action is brought. These questions are:—

Is the city or the railway company, and which of them, on the proper construction of the agreement, entitled to determine, decide upon, and direct:—

1. What new lines shall be established and laid down and tracks and service extended thereon by the company, whether on streets in the city as existing at the date of the agreement or as afterwards extended?

2. What time tables and routes shall be adopted and observed by the company?

3. Whether, if so determined by the city engineer, with the approval of the city council, cars which start before midnight must finish the route on which they have so started, though it may require them to run after midnight?

4. At what time the use of open cars shall be discontinued in the autumn and resumed in the spring, and when the cars shall be provided with heating apparatus and heated?

5. In the event of the decision of the Court being in favour of the city on any of the above questions, is the city entitled to a decree for specific performance as to the matter so decided or in any and which of them?

6. Is the privilege to the city to grant to another person or company, for failure of the company to establish and lay down new lines and to open same for traffic or to extend the tracks and services upon any street or streets as provided by the agreement, the only remedy the city can claim?

C. Robinson, K.C., and J. S. Fullerton, K.C., for plaintiffs.

W. Cassels, K.C., and J. Bicknell, K.C., for defendants.

ANGLIN, J.—In approaching the consideration of the agreement and incorporated conditions, I fully accept the proposition with which Mr. Cassels opened his argument, viz., that to manage defendant company and its undertaking is the right and the duty of its directors. But, inasmuch as this company exists for the purpose of operating the Toronto railway under a public franchise, it must be self-evident that, in regard to matters within their scope, the terms and conditions upon which the franchise itself is held must govern the exercise of the rights which it confers. To these terms and conditions in such matters the management and control of the directorate of the defendant company must conform. To that extent their independence of action is restricted—their right of control is qualified.

The agreement under consideration is in substance the grant for a lengthened term of valuable rights upon the streets of the city of Toronto: the conditions incorporated in it are the terms upon which defendants sought and acquired those rights. These documents must be taken to have been intended adequately to provide for the operation of a street railway in a large and rapidly growing city, and to ensure a service suited to its wants and satisfactory to citizens of reasonable expectations. Consistently with these requirements, it must be assumed that both parties contemplated an arrangement reasonably advantageous to defendants as a commercial corporation. The agreement and conditions must be read in the light of these facts and in a broad and liberal spirit, the particular provisions being construed so as best to effectuate these general purposes, where the language employed fairly permits of such construction.

That both parties had in view a single system of surface street railways for the entire city of Toronto for a period of 30 years is abundantly plain; . . . both, dealing not with the conditions of the moment, but with the privileges to be enjoyed and services to be rendered for a period of 30 years, must be taken to have intended by the words "in the city of Toronto" whatever that phrase might describe at any time during such 30-year period.

I have no doubt that the provisions of this agreement, onerous as well as advantageous, were meant to apply and do apply to extensions of the city during the term of the agreement.

Upon examining the provisions of the conditions with regard to the matters covered by the first and the second questions of the special case, a striking contrast is apparent between clause 14, which, in regard to new lines, not only requires the approval of the city engineer's recommendation by the city council, but also that the period within which such recommendation should be carried out by the company shall "be fixed by by-law to be passed by a vote of two-thirds of all the members of the city council," and clauses 26, 27, and 28, under which the city engineer is to determine certain other matters subject only to "approval by the city council," presumably by a vote of a majority of the members present not being fewer than a quorum. Why this difference? Why such provision at all, if the company is itself entitled to decide what shall be done in respect to matters covered by these clauses?

The city engineer appears to hold, in regard to the parties to this agreement, a position not unlike that held by the

architect between the owner and the contractor under familiar provisions of building contracts. For the protection of the company the agreement makes the recommendation or the determination of the city engineer a pre-requisite to anything being demanded of the company. In the case of new lines and extensions defendants are further protected by the provision that a by-law pased by a vote of two-thirds of all the members of the council shall fix the period within which the company will be required to carry out such recommendation.

Under clause 14, which governs the matters covered by the first question, it is the city council approving, and, by by-law passed by a vote of two-thirds of its members, fixing the time for compliance by the company with, a recommendation of the city engineer, which may "determine, decide upon, and direct what new lines shall be established and laid down and tracks and service extended thereon by the company, whether on streets in the city as existing at the date of the agreement or as afterwards extended."

Question 2 relates to time tables and routes. It is impossible to answer this question categorically. In respect to matters covered by clauses 26, 27, and 28 of the conditions, neither the city nor the company is entitled to "determine, decide upon, and direct." It is the city engineer who has this right and duty; but his determination, before the company can be required to recognize or act upon it, must be approved by the city council.

Reading clauses 26, 27, and 28 of the conditions together, and having regard to the tenor of the whole agreement, I think . . . that both time tables and routes are within their purview. The city engineer cannot satisfactorily or efficiently exercise his right to determine speed, service, and intervals between cars, unless he also possesses power to decide upon and fix routes. His right to determine, with the approval of the city council, the "service" necessary upon all lines is unrestricted, and is quite wide enough to include the power to specify the routes to be established and maintained. Given the routes and the condition (No. 27) fixing the hours of starting and finishing the daily runs, the making of time tables is nothing more than a convenient method of exercising the right to determine speed and intervals. . . . These powers should not be used in an arbitrary or unreasonable manner. Some sound discretion as to what is proper and reasonable may naturally be expected. . . . Upon the fair exercise of that discretion those who were in charge

of the interests of defendants when this agreement was framed, seemed to have been fully prepared to rely.

The 3rd question has caused me some difficulty. Provision is already made, by a judgment of this Court, . . . for transfers from day to night cars and vice versa. Fares on night cars are double the ordinary maximum single rate fares (clause 30). By sec. 17 of the statute . . . "the fare of every passenger shall be due and payable on entering the car . . ." Clause 27 of the conditions provides that "day cars are to commence running at 5.30 a.m. and to run until 12 o'clock midnight." There is nothing to prevent the city engineer, under clause 28, requiring night cars to be provided in such numbers and running upon such routes and at such intervals as may be requisite to carry to their destination all passengers who may be unable to finish their journeys in day cars. He may so arrange his time tables that all day cars will "run in" from transfer points. I can find nothing in the agreement itself, or in the working out of its provisions as to day and night cars, which would enable me to say that it entitles the city to require the company to run, after midnight, any car which, having started as a day car, cannot in due course finish its route by that hour.

This is a matter in respect to which, by the exercise of a little good sense, an arrangement satisfactory to both parties could readily be made. As the fare is, by statute, payable on entering the car, and the company is bound to transfer passengers from day to night cars, an arrangement that all cars on the road at midnight should eo instanti cease to be day cars and, becoming night cars, should as such continue their routes, and that all passengers entering such cars after midnight should pay 10 cent fares, would probably meet the requirements of both parties, and should present no greater difficulty in operation than the practice prevailing in regard to limited tickets. The 3rd question . . . however, must be answered as contended for by counsel for defendants.

If required to say by what test or in what manner the proper authority is to determine when the use of open cars shall be discontinued in the autumn and resumed in the spring, and when the cars should be provided with heating apparatus and heated, I might find it difficult to answer. These, however, are, in my opinion, matters of "service" within the purview of condition 26, and the city engineer is authorized thereby to determine them with the approval of the city council.

With regard to the 5th question, counsel for plaintiffs virtually conceded that, unless I felt at liberty, in view of the decision of the Court of Appeal in England in Wolverhampton v. Emmons, [1901] 1 K. B. 515, to decline to follow the decision of our own Court of Appeal in City of Kingston v. Kingston Electric R. W. Co., 25 A. R. 462, this question must be answered in the negative. That this latter decision is in point could not, I think, be successfully controverted. But for a recent enactment of the Ontario Legislature, I might, upon the authority of Trimble v. Hill, 5 App. Cas. 342, 344, if I thought this case within the principles enunciated in Wolverhampton v. Emmons, have followed that decision. But, in my opinion, sec. 81 of the Ontario Judicature Act (R. S. O. 1897 ch. 51) obliges me to follow the decision of the Ontario Court of Appeal, notwithstanding any later expression of opinion in any English Court except the Judicial Committee of the Privy Council. . . . I answer the 5th question in the negative.

To answer the 6th question affirmatively would be in effect to declare that having covenanted . . . "to establish and lay down new lines and to extend the tracks and street car service as may be from time to time recommended by the city engineer," etc. (condition 14 and clause 12 of the agreement), the company nevertheless may at any time elect, in lieu of performing their covenant, to forfeit their exclusive rights to the extent provided by condition 17. A not improbable consequence would be that the company would from time to time refuse to lay down tracks upon streets in sparsely populated outlying districts. Upon these streets, far distant one from another, no person or company could be found willing to undertake the operation of isolated lines of street railway. No rival system could be established, and, if it could, all the advantages of the single system throughout the city contemplated by the arrangement between the city and the company would be lost to the former. It is impossible to believe that the parties intended that the company should enjoy an option so entirely inconsistent with the manifest object and general tenor of the bargain which they made. Nor do I think any rule of construction requires me to hold that the city relinquished, for such an illusory and shadowy alternative right, whatever substantial redress it would otherwise be entitled to claim for breaches of obligations which may be imposed upon the company under the provisions of condition 14. To question 6 I therefore make answer that "the privilege of the city to grant to another person or company, for failure of the city to establish and

lay down new lines and to open them for traffic or to extend the tracks and service upon any street or streets as provided by the agreement, is not the only remedy the city can claim."

The special case is silent as to costs. To prevent future difficulty, however, so far as Rule 1130 enables me to do so, I direct that the costs of and incidental to this special case be costs in the cause.

ANGLIN, J. NOVEMBER 7TH, 1904.

TRIAL.

MENDELS v. GIBSON.

Mortgage—Action on Covenant for Payment—Attempted Exercise of Power of Sale—Incomplete Sale—Inability to Reconvey—Change in Position of Property.

Action by mortgagee against mortgagor to recover, upon the covenants contained in a chattel mortgage on a cheese factory plant and equipment, the sum of $700, with interest and costs. This mortgage was held as collateral security to a mortgage upon the factory site.

J. A. Allan, Perth, for plaintiff.

R. C. McNab, Renfrew, and J. A. Stewart, Perth, for defendant.

ANGLIN, J.—The defence of the mortgagor rests entirely upon the legal effect of an alleged exercise of the powers of sale contained in both mortgages, and a series of transactions affecting the mortgaged property, which ensued. These defendant puts forward: (a) as a defence to any claim to enforce the covenants in question; (b) as entitling him to credit for the sum at which the plaintiff agreed to sell the mortgaged property.

To make clear the nature of these defences, it is necessary to briefly state the circumstances which accompanied and followed the sale alleged to have been made by plaintiff.

Having previously attempted unsuccessfully to sell, plaintiff in August, 1902, without the concurrence of defendant, entered into an agreement with one Mitchell for the sale to him of the entire mortgage security—site, factory, equipment, and plant—for the sum of $750, payable in instalments, of which the first, amounting to $100, fell due on 1st May, 1903. No cash deposit was required. The purchaser covenanted to pay the purchase money as stipulated, and the

vendor covenanted upon payment to convey. The agreement gave the purchaser the right of immediate possession to continue until default in payment, subject to impeachment for voluntary or permissive waste. Mitchell took actual possession about 1st March, 1903. He subsequently made an oral agreement for sale of the premises and plant to a creamery company, for $1,250, payable $150 in stock of the company and $1,100 in cash, within two weeks. The creamery company paid nothing to Mitchell at the time, nor have they since paid him anything. They, however, caused the plant and equipment of the cheese factory to be taken out and the factory itself to be taken down, and removed the whole to Dacre, a village some six miles distant from Mount St. Patrick, where it still remains. Mitchell swears that he was wholly unaware of this dismantling of the property.

Mitchell has paid no part of his own purchase money to plaintiff, and apparently no attempt has been made to compel him to make payment. Though no definite agreement has been come to between plaintiff and Mitchell for the abandonment or cancellation of the contract, Mitchell appears to have no intention of carrying it out, and plaintiff seems to have no idea of endeavouring to compel him to do so, probably because of the financial inability of Mitchell, suggested in argument, but not established by any evidence.

The contract for sale to Mitchell and the giving to him of possession do not amount to an exercise of his power of sale by plaintiff sufficient to extinguish the defendant's equity of redemption: Bank of Upper Canada v. McLeod, 16 Gr. 280. This precludes any disposition of the action on the footing of a completed sale to Mitchell, entitling defendant to credit on a cash basis for its proceeds.

The right of defendant to redeem still subsisting, plaintiff remains mortgagee, and, his mortgages being in default, is, if in a position to reconvey upon payment, entitled to a judgment to enforce defendant's covenant. It is obvious that plaintiff cannot now reconvey the security as it was when he took possession or when he gave possession to Mitchell. Is the plaintiff so far accountable for the present position of the mortgaged premises that his consequent present inability to reconvey should be a bar to his recovery in this action? In my opinion, he is not entitled to recover upon the covenant of the defendant unless within a reasonable time he can put himself in a position to reconvey the mortgaged property substantially restored to its former condition, i.e., with the factory re-erected and the plant and equipment re-installed: Re Thuresson, 3 O. L. R. 271, 1 O. W. R. 4.

There is evidence that the mortgaged property, even if replaced in its former position, will be found much damaged and deteriorated by exposure and want of proper care. This is something which I cannot dispose of at present.

The plaintiff having come to the Court unable to perform a condition, fulfilment of which is necessary to entitle him to the relief he asks, should not expect a judgment more favourable than that which, following Re Thuresson, I feel bound to pronounce.

Judgment will, therefore, go dismissing this action with costs, unless within one month plaintiff brings into the office of the local Master at Perth, to whom there will be a reference for that purpose, evidence that he has put himself in a position, upon payment, to restore to defendant the mortgaged property, substantially as it was when plaintiff took possession. If plaintiff within one month satisfies the Master that he can fulfil this requirement, the Master will proceed to consider what allowance (if any) should be made in respect of deterioration or depreciation of the mortgaged property attributable to the dealing had with it for which plaintiff has been held responsible. The amount of such allowance, and the costs of this action, must then be deducted from plaintiff's claim as stated in the amended statement of claim (subject to the taxation by the said Master of the sum of $107.96 claimed for costs of certain sale proceedings). The Master will report the balance due plaintiff after making the deductions above directed. Costs of the reference and further directions will be reserved.

CARTWRIGHT, MASTER. NOVEMBER 8TH, 1904.

CHAMBERS.

CANADIAN INTERNATIONAL MERCANTILE AGENCY v. INTERNATIONAL MERCANTILE AGENCY.

Security for Costs—Application for Payment out of Court—Foreign Receiver.

Motion by plaintiffs for an order requiring the receiver of defendants to give security for plaintiffs' costs of a motion made by the receiver for payment out of Court of $860 which formerly stood to the credit of defendants in a bank,

and were paid into Court by the bank. The defendants and the receiver were out of the jurisdiction.

Grayson Smith, for plaintiffs, relied on Re Parker, 16 P. R. 392, and cases there cited.

C. S. MacInnes, for receiver.

THE MASTER.—Mr. MacInnes argued that the present case was distinguishable from Re Parker, as there the executrix was herself the actor, and so was properly ordered to give security; but here the receiver should have been made a party defendant to the action, and submitted to be so made now, if necessary.

Mr. Smith declined to go into any such question at present, stating that he was prepared to meet the argument at the proper time.

I think this case is not distinguishable from Re Parker.

The receiver must give security within 10 days, either by bond for $100 or payment into Court of $50. If the security is given, the costs of this motion will be in the cause.

If security is not given, then the costs of this motion will be to plaintiffs in any event.

WINCHESTER, Co.J. NOVEMBER 8TH, 1904.

RE PALMERSTON PACKING CO.

ALLAN'S CLAIM.

Sheriff—Seizure of Company's Property under Execution—Interruption by Winding-up Order—Right to Fees and Poundage—Rule 1190.

The sheriff of the county of Wellington made a preferential claim upon the assets of the company in liquidation of $16.47 for fees, mileage, seizure, etc., and $108.70 for poundage on $2,623.26, total $125.17, in an action of Brown v. Palmerston Pork Packing Co.

The claim came before WINCHESTER, Co.J., acting as a special referee under an order made pursuant to the Dominion Winding-up Act.

H. M. Mowat, K.C., for claimant.

D. Henderson, for liquidator.

WINCHESTER, Co.J.—It appears that on 3rd April, 1903, under a writ of execution issued in Brown's action, the sheriff seized part of the personal estate of the defendants at Palmerston, at the request of plaintiff's solicitor. A bond was given by two of the directors of the defendant company for the safety of the goods seized, and thereupon the sheriff went out of possession.

Nothing further has been done in the matter owing to the liquidation of the company.

A petition for an order under the winding-up Act was duly served upon the company on 10th March, 1903, and from time to time enlarged at the request of the parties interested until 29th December, 1903, when an order for the winding-up of the company was made.

The sheriff at the time of the seizure was informed that liquidation proceedings had been taken against the company.

Counsel for the claimant contends that he is entitled to be paid at least a quantum meruit under Rule 1190, which provides that "where the personal estate, except chattels real, of the judgment debtor is seized or advertised on or under an execution, but not sold by reason of satisfaction having been otherwise obtained, or from some other cause, and no money is actually made by the sheriff on or by force of such execution, the sheriff shall be entitled to the fees and expenses of execution and poundage only on the value of the property seized, not exceeding the amount indorsed on the writ, or such less sum as the Court or a Judge may deem reasonable;" and a number of cases were cited in which the sheriff was held to be entitled to be paid certain sums for poundage; and that sec. 66 of the Winding-up Act provided for the payment of such costs.

Counsel for the liquidator contends that the sheriff made seizure after the petition for liquidation was presented, and did nothing further, and that therefore he is not entitled to make a claim.

Section 66 of the Winding-up Act provides that there shall be "no lien or privilege for the amount of any judgment debt by the issue or delivery to the sheriff of any writ of execution or by levying upon or seizing under such writ the effects or estate of the company, but this section shall not affect any lien or privilege for costs which the plaintiff possesses under the law of the Province in which such writ was issued." Had the proceedings for the winding-up been taken by virtue of the writ in question, there can be no doubt that the costs in connection therewith would be payable out of the estate, but such was not the case—the proceedings had

been taken before the writ was acted upon—and, had the sheriff not withdrawn, the Court would have, no doubt, restrained him from proceeding under sec. 13 of the Act. Section 17 provides that "every attachment or execution put in force against the estate or effects of the company after the making of the winding-up order shall be void." In Royle v. Busby, 6 Q. B. D. 171, it appears that the sheriff seized goods of a company on 31st July, 1879, and a petition to wind up the company was presented on 26th July, 1879, an order made on 7th November following, ordering the company to be wound up, and the sheriff's officer continued in possession until 17th November, when he was served with a copy of the winding-up order; it was held that he was not entitled to any fees, the execution proving abortive. It was contended that until the winding-up order was made there was always the chance of the petition being dismissed, and therefore the levy and possession, at all events up to the date of the winding-up order, were beneficial to the creditors, in the sense that they conferred on them the chance of reaping the fruits of their fi. fa., but Lord Selborne, at p. 176, said: "In the present case the judgment debtor was a joint stock company, against which there was pending, when the execution issued, a petition to wind-up, on which a winding-up order was afterwards made. The effect of that winding-up order was to defeat the execution, by the operation of sec. 163 of the Companies Act, 1862." See also the judgment of Mr. Justice Osler in Shaver v. Cotton, 23 A. R. at p. 435.

In my opinion, Rule 1190 does not apply to entitle the claimant to poundage on the execution in question. His other fees will no doubt be paid by the execution creditor and added to the claim. I therefore disallow the claim without costs.

NOVEMBER 12TH, 1904.

DIVISIONAL COURT.

RE VILLAGE OF SOUTHAMPTON AND COUNTY OF BRUCE.

Municipal Corporations — County By-law — Alteration of Boundaries of Local Municipalities — Misdescription — Petition—Notice—Waiver—Arbitration and Award—Motion to Quash By-law—Application by Minor Municipality.

Appeal by corporation of village of Southampton from order of MACMAHON, J., 3 O. W. R. 729, 8 O. L. R. 106, dis-

missing motion to quash by-law No. 480 of the county of Bruce, detaching from the village of Southampton certain lands forming part thereof, and annexing them to the adjoining township of Saugeen.

D. Robertson, Walkerton, and G. H. Kilmer, for the village corporation.

J. H. Scott, Walkerton, for the county corporation.

W. E. Middleton, for the corporation of the township of Saugeen and certain individuals made respondents.

The judgment of the Court (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.), was delivered by

STREET, J.—Under sec. 18 of the Municipal Act, 3 Edw. VII. ch. 19, when an application is made to a county council to detach a portion of one municipality and annex it to another, the county council is not confined in its powers to the boundaries of the lands mentioned in the application, but may detach any lands it may deem proper from the one municipality and attach them to the other, subject, in case of the dissent of the municipality the area of which is reduced, to the award in the 2nd sub-section mentioned. It would, therefore, be no objection to a by-law of a county council detaching two parcels of land from one municipality and adding them to another, that the petition for the by-law described only one of the parcels and asked to have that parcel detached, for the council, being once set in motion, may, in the exercise of its discretion, detach all, or less, or more, than the territory described. The municipalities affected, however, have a right to require that there shall be a real exercise of discretion before the power is acted upon, it being judicial in its nature.

In the present case two petitions were presented to the county council: one for the detaching of the military reserve, a tract of 600 acres, concerning which, had it stood alone, no question could have arisen; the other being that of John Leadbetter and others, saying: "The portion we wish cut off is from a portion of land adjoining Norfolk street from Peel street on the south to Albert street on the north."

Some of the petitioners attended the committee of the county council and explained that the land intended by the petition was a block bounded on the west by Norfolk street, on the east by the Goderich and Saugeen gravel road, otherwise called Carlisle street, on the south by Peel street, and on the

north by Albert street, and the committee appear to have intended to recommend that the prayers of both petitions should be granted, and the county council adopted their report. The by-law, however, through some misconception on the part of the person who drew the description of the land to be detached, had the effect of detaching from the village of Southampton a very considerable piece of land, approximately about three-quarters of a mile long and 12 to 15 chains wide, lying west of Norfolk street and bounded by Anglesea street on the west, which no petitioner had asked the county council to detach, and which they never intended to detach. It is plain from the recital in the by-law and from the evidence of the persons concerned, that the insertion in the by-law of a description covering this piece of land was simply a mistake.

The by-law recites that the petitions included all the land detached; upon this by-law being laid before the council of Southampton they passed a by-law appointing an arbitrator to act for them under it. They afterwards discovered that there was no petition covering the portion of the land to which I have referred, and they protested, when the arbitrators met, against the validity of the by-law, and, although they did not withdraw from the arbitration proceedings, which seem to have lasted for the remainder of the day, after their protest had been overruled, they launched the present motion.

The by-law of the county council, in my opinion, was bad when passed because it altered the limits of the village of Southampton without intending to alter them to the extent actually affected, and without considering the expediency of so altering them; and the objection was not waived by the act of the Southampton council in passing a by-law appointing their arbitrator, because they were misled by the untrue recitals in the county council's by-law that the petitioners covered the whole of the lands detached. They should not be held to have waived an objection going to the root of the by-law, of which they were not aware: in the face of the recital, they were not obliged to verify it before acting as they did.

It is contended, however, that the matter being before the arbitrators, who have power to make any alterations they think proper in the boundaries fixed by the by-law, the error in the description contained in the by-law is immaterial, and may properly be left to the arbitrators to correct. That, however, would be taking an extremely loose view of the respec-

tive duties of the county council and the arbitrators. The county council acts as a judicial body in altering the boundaries; the arbitrators sit in some respects as an appellate tribunal in regard to the boundaries; and the municipality from which it is proposed to take away territory is entitled to the judgment of both bodies.

I think, therefore, that the by-law, for this reason, cannot stand, and that it must be set aside.

It may, perhaps, be well to point out that notice of the application should have been given to the Southampton council before the county council acted upon the petitions. It seems to be the intention of sec. 18 of the Municipal Act of 1903 that the by-law of the county council should provide for the reference of boundaries to the arbitrators only where the municipality from which territory is detached opposes it, and notice to that municipality is necessary for the purpose of ascertaining whether it opposes or agrees to the proposed alteration of its boundaries. That objection, however, was apparent on the face of the county by-law in the present case, and was, therefore, I think, waived by the appointment of an arbitrator.

It was objected that this was not a case in which one municipality could apply to quash the by-law of another, but I think it is manifestly within sec. 378a of the Municipal Act.

Appeal allowed with costs and by-law quashed with costs.