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APPELLATE DIVISION.

OCTOBER 8TH, 1915.

B. F. GOODRICH CO. OF CANADA LIMITED v. ROBINS LIMITED.

Principal and Agent—Deposit Paid by Principal to Agent on Negotiation for Lease—Payment over to Lessor—Lease not Executed—Action against Agent for Return of Deposit—Evidence.

The defendants carried on a land agency business in the city of Toronto. The plaintiffs asked the defendants to find suitable premises for the plaintiffs' Toronto business. The defendants brought to the plaintiffs' notice certain premises of which one Stedman was the lessee, which Stedman had placed in the defendants' hands for subletting. The plaintiffs paid to the defendants $125 as a deposit upon an agreement for subletting; the agreement was not carried out, the terms of the head-lease not being satisfactory to the plaintiffs; and the plaintiffs sued the defendants, as their agents, for the return of the $125. The action was brought in the County Court of the County of York, and judgment was given for the plaintiffs. The defendants appealed.

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

J. M. Ferguson, for the appellants.

H. E. Rose, K.C., for the plaintiffs, respondents.

MEREDITH, C.J.O., delivering the judgment of the Court, said that the money was paid to the appellants, the agents undoubtedly of the respondents, in order that it should be paid as a deposit to the person from whom an agreement or offer to lease the premises should be obtained. If that were so, and if the deposit was, in the course of the agents' duty, paid over to Stedman, the remedy of the respondents would be against him

if the contract had not been carried out, and not against the appellants.

Upon another question raised, the respondents should not succeed. The premises were satisfactory to Mr. Hamilton, the agent of the plaintiffs at Toronto; he had the head-lease in his possession, and he appeared to have thought that everything was satisfactory. Mr. Gray, the manager of this branch of the real estate business of the appellants, after waiting a considerable time, inquired of Mr. Hamilton whether the transaction had been closed, and inquired of Stedman also, and, according to his testimony, was informed by both that the transaction was closed. The evidence of Mr. Waldie was that he made the same inquiry of Mr. Hamilton and received the same answer. The learned trial Judge did not pass upon that question; he was of opinion that, whether or not that had happened, it was not necessary to pass upon it, because, according to the terms of the written document, the money was not to be paid over until the transaction was closed in accordance with the terms of the agreement.

On both questions, therefore, the judgment could not be supported.

Appeal allowed with costs, and action dismissed with costs.

OCTOBER 12TH, 1915.

*REX v. O'MEARA.

Criminal Law—Keeping Common Gaming House—Conviction—Evidence—Criminal Code, secs. 228, 986—*Game of Chance or Skill.*

Case stated by the Deputy Police Magistrate for the City of Ottawa, on a conviction of the defendant for unlawfully keeping a disorderly house, that is to say, a common gaming house.

The question asked was, whether there was any evidence that the offence charged had been committed.

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

E. F. B. Johnston, K.C., for the defendant.

J. R. Cartwright, K.C., and E. Bayly, K.C., for the Crown.

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

MAGEE, J.A., delivering the judgment of the Court, stated the facts as follows:—

The accused, a tobacconist, kept in his shop a machine known as "Mills Counter O.K. Vendor." Any one depositing an American nickel 5 cent coin in a slot therein would, on pulling a lever, receive, out of the machine, a package of chewing gum, and also so many, if any, brass tokens called premium checks as were indicated upon the machine before he deposited the coin. Each token would entitle him to get goods in the shop to the extent of 5 cents. The indicator might shew that he would not receive any token, or it might shew any one of the 19 numbers from 2 to 20 inclusive. The indicator was made by means of designs upon the edges of three wheels inside the machine, passing close to a narrow opening or slit which allowed one design on each wheel to be seen at a time, thus making a combination of three designs. The combinations would change with the turning of the wheels, which did not all turn in the same direction. A chart shewed the value of each combination in tokens, whether none or 2 or more up to 20. It is not clear whether the values of the combinations remained the same or were liable to change with the contemporaneous turning of a fourth wheel opposite to an opening in the chart. By the pulling of the lever, after depositing the coin, the wheels were set in motion, and on their stopping a new combination would be shewn with its value in tokens to be received by the depositor of the next coin or token. Instead of a coin, one of the tokens might be deposited with the like results, except that no gum would be received. What this next combination would be, the depositor had no means of knowing beforehand. But, so far as appears, he was not limited to one or any number of operations. The very object of the tokens was that he could not be so limited. He being at the machine, no one other than the proprietor, and ordinarily not even he, would have a right to make him stand aside and take from him the opportunity to receive for another coin or token the value of the combination which his pulling of the lever had caused to appear. Hence for his previous deposit of 5 cents he would, in addition to the gum and tokens, if any, which he knew himself entitled to, have the chance of getting, for another 5 cents, or its equivalent token, goods to the value of 10 cents or more up to $1, with other successive chances from new combinations. In other words, he would by his original coin purchase the opportunity of winning one of 19 prizes worth from 5 up to 95 cents, or one of an unknown number of blanks, which such further opportunities

as the new turns of the indicator might again disclose. There was no evidence as to the value of the gum.

The learned Judge, continuing, said that, so far as the depositors were concerned, the whole operation was one of pure chance, with no element of skill.

He then referred to sec. 986 of the Criminal Code, as enacted in 3 & 4 Geo. V. ch. 13, sec. 29, which makes the keeping of any means or contrivance for unlawful gaming primâ facie evidence of a disorderly house, in prosecutions under sec. 228; and said that there was sufficient evidence that the accused was the keeper of the premises and interested in the operation of the machine.

The machine was of the same sort as those in question in the Quebec case of Rex v. Langlois (1914), 23 Can. Crim. Cas. 43, and Rex v. Stubbs (1915), 31 W.L.R. 109, 567. The learned Judge did not agree with the conclusion in either of these cases.

The question should be answered in the affirmative, and the conviction affirmed.

OCTOBER 12TH, 1915.

REX v. UPTON.

Criminal Law—Arson—Conviction of two Persons—Evidence to Sustain Conviction by either but not both—No Evidence to Shew which of two Guilty—Conviction Quashed.

Case reserved by the Judge of the County Court of the County of Brant, by whom the two prisoners were convicted of arson.

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

I. F. Hellmuth, K.C., and W. A. Hollinrake, K.C., for the prisoners.

J. R. Cartwright, K.C., for the Crown.

MEREDITH, C.J.O., delivering the judgment of the Court, said that the argument proceeded on the footing that the case was amended so as to raise the question whether there was evidence to support the conviction.

The Court was of opinion that there was evidence which, while not conclusive, warranted a finding that the elder prisoner's house was set on fire either by him or by the other prisoner, his son, but that there was no evidence to warrant a conviction of both of them; and that, there not being (as the Court

thought there was not) any evidence to enable it to be determined by which of the prisoners the offence was committed, the conviction must be quashed.

OCTOBER 12TH, 1915.

HERRINGTON v. CAREY.

Promissory Note—Accommodation Makers — Duress — Agreement to Stifle Prosecution—Failure to Prove—Findings of Fact of Trial Judge—Appeal.

Appeal by the defendants from the judgment of MIDDLETON, J., noted 8 O.W.N. 451.

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

Gordon Waldron, for the appellants.

R. J. McLaughlin, K.C., for the plaintiff, respondent.

GARROW, J.A., delivering the judgment of the Court, said that the difficulty of the defendants was with the facts and not with the law. No one disputed that an agreement not to prosecute as the consideration for the note would be an illegal consideration; nor did any one dispute that such an agreement need not be expressed, but might be implied if the circumstances in evidence warranted such an inference. That there were no such circumstances proved was the opinion of MIDDLETON, J., and with that opinion GARROW, J.A., entirely agreed.

The appeal was a hopeless one, and should be dismissed with costs.

OCTOBER 12TH, 1915.

RE TORONTO GENERAL HOSPITAL TRUSTEES AND SABISTON.

Landlord and Tenant—Lease—Renewal — Rent — Valuation of Premises—Arbitration—Evidence—Possibility of Putting in Railway Siding—Admissibility.

Case stated by arbitrators for the opinion of the Court, under sec. 29 of the Arbitration Act, R.S.O. 1914 ch. 65.

The arbitration was for the purpose of ascertaining the amount to be paid to the trustees as rent upon the renewal of a lease of hospital lands.

The question asked by the arbitrators was: "Can evidence be given before us that a railway siding may be put in which will increase the value of the land and the rental?"

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

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

W. Laidlaw, K.C., for the lessee.

GARROW, J.A., delivering the judgment of the Court, said that the question of the jurisdiction of a Divisional Court to hear and determine such a case as a Court of first instance was not raised, and would not be passed upon.

The point upon which the opinion of the Court was asked arose upon the examination by counsel for the lessors of one Hoidge, a dealer in real estate, who had made a valuation of the property in question, who was asked, what was the basis of his valuation, to which he replied, "I think the property is especially adapted for a wholesale or a factory site." "Q. Now, why is it specially adapted for either of these? A. Well, it has easy access to the up-town centre, and it has the possibility of getting in a siding into the property, which is very valuable." Upon this, objection was made by counsel for the lessee, in this form: "I object to any evidence upon the question of a renewal of a lease and the amount of rent payable on a renewal, based on contingencies. The land . . . must be dealt with as it stands, and not upon any contingencies which may happen." The objection was upheld by the arbitrators.

The substantial question to be determined by the arbitrators was the fair annual market value of the premises, to be paid by way of rental by the tenant during the ensuing renewal term of 20 years, as provided in the lease. The objection was taken, not to the witness's statement, which was of course a perfectly proper statement, that the premises were suitable for a wholesale or a factory site, but to one of the reasons which he gave for his opinion, namely, the possibility of getting in a railway siding.

The rental value was not, of course, to be ascertained as if the suggested siding was already an accomplished fact; but the fact, if it was the fact, that such a siding could reasonably be obtained, seemed to be a perfectly legitimate element bearing upon the question of the annual value of the property. The whole evidence, when received, might shew that a siding was not reasonably practicable, and that, therefore, the question of siding as an element of value should be wholly excluded; but that was one

of the matters which should be determined by the arbitrators, after they had heard all the evidence, and not in advance.

The evidence was admissible, and the objection should have been overruled.

OCTOBER 12TH, 1915.

BRANDON v. BRADEN.

Contract—Partnership—Affairs in Hands of Receiver—Sale of Book-debts—Action against Purchaser for Price—Incomplete Contract—Assent of Receiver Withheld.

Appeal by the plaintiffs from the judgment of the Judge of the County Court of the County of Halton dismissing with costs an action for $425 which, the plaintiffs alleged, was owing to them on a contract by the defendant to purchase from them certain book-debts. At the time of the alleged contract, the affairs of the plaintiffs, a mercantile partnership, were in the hands of a receiver appointed by the Court. The County Court Judge found that the receiver had not approved of the sale; and dismissed the action because, as he considered, the receiver's approval was necessary.

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

W. Laidlaw, K.C., for the appellants, contended that the evidence shewed sufficient assent by the receiver, and that his actual formal consent was unnecessary.

G. T. Walsh, for the defendant, the respondent.

GARROW, J.A., delivering the judgment of the Court, said that the action was based upon a completed agreement; and, to make the transfer of book-debts complete, the express and formal assent of the receiver, if not also of the Court, was necessary.

The receiver appeared to have withheld his consent largely because the defendant alleged that he had been deceived in the purchase. The deception was, however, set up as one of the defences to the action, and was determined against the defendant at the trial. Possibly it would have been reasonable and proper for the receiver to have approved and carried out the sale—that might be inquired into by the Court whose officer he was—but it could not make the defendant liable as upon a completed contract which was so manifestly incomplete.

Appeal dismissed with costs.

OCTOBER 12TH, 1915.

*HILL v. STOREY.

Mechanics' Liens—Material-men—Conditional Sale—Goods Subject to, Affixed to Realty—Right of Vendors to Benefit of Conditional Sale Contract and also to Mechanics' Lien—Conditional Sales Act, R.S.O. 1914 *ch.* 136, *sec.* 9—*Mechanics and Wage-Earners Lien Act, R.S.O.* 1914 *ch.* 140, *sec.* 16—*Claim of Contractor—Assertion by Lien-holder—Extras—Finding of Fact—Appeal.*

Appeals by the Toronto Furnace and Crematory Company, claimants, and Rastall & Co., lien-holders, from the judgment of an Official Referee, in a proceeding for the enforcement of mechanics' liens.

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

J. F. Boland, for the appellants the Toronto Furnace and Crematory Company.

M. Grant, for the appellants Rastall & Co.

J. M. Ferguson, for the defendant Storey, the owner.

HODGINS, J.A., delivering the judgment of the Court, dealt first with the claim of the Toronto Furnace and Crematory Company to a lien under the Mechanics and Wage-Earners Lien Act, R.S.O. 1914 ch. 140. These claimants had supplied furnaces for the houses erected on the land sought to be charged, but the title to the furnaces remained, as was found by the Referee, in the claimants until payment of the price, by virtue of the Conditional Sales Act, R.S.O. 1914 ch. 136. The rights of the parties must be governed by sec. 9 of that Act, which provides that, where the goods have been affixed to realty, they shall remain subject to the rights of the seller. But for that section, the provisions of the Mechanics and Wage-Earners Lien Act, sec. 16, would apply. These two provisions make a sharp contrast between a chattel which is the subject of a conditional sale, whereby the property does not pass till payment, and the case of material supplied, on which the vendor is given a lien until it is affixed to the realty.

Insisting as the claimants did upon their conditional sale contract, they could not rank as lien-holders and compete with others who had no right against the furnaces; and their appeal should be dismissed with costs.

Upon the appeal of Rastall & Co., who were entitled as lien-holders to assert the contractor's rights, it was impossible to disturb the finding of the Referee that the amount claimed as an extra was really part of the contract price.

Both appeals dismissed with costs.

OCTOBER 12TH, 1915.

FITZGERALD v. CANADA CEMENT CO.

Easement—Private Way—Deed—Establishment of Locus—Defined Way—Interference—Damages—Leave to Supply New Way—Judgment—Reference—Way of Necessity.

Appeal by the defendant company from the judgment of FALCONBRIDGE, C.J.K.B., 7 O.W.N. 321.

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

Strachan Johnston, K.C., for the appellant company.

W. C. Mikel, K.C., for the plaintiff, respondent.

MEREDITH, C.J.O., delivering the judgment of the Court, said that the action was brought to recover damages for the interference by the appellant company with a right of way which the respondent claimed over part of the appellant company's farm, which the respondent and another conveyed to the predecessor in title of the appellant company, in 1890; the grantors reserving to themselves, their heirs and assigns, "the right . . . to pass over for cattle, horses and other domestic farm animals for water going to and from Dry Lake."

There had been for many years a well-defined way across the appellant company's land, used for the purpose of the respondent's cattle going to Dry Lake for water, and the same way continued to be used after the conveyance.

The way which the respondent claimed had been rendered useless owing to certain mining operations of the appellant company.

The trial Judge awarded the plaintiff $1,500 damages for the loss of the right of way, subject to a reference to ascertain whether the appellant company could give a right of way to a proper watering place, and, if so, to define the way, and ascertain the damages caused by withholding it, etc.

It was clear, the learned Chief Justice said, that a right of passage to Dry Lake for the purpose of watering cattle was reserved to the grantors by the conveyance; the appellant company had no right to destroy that right or impair its usefulness by the mining operations or otherwise; and there was no reason for interfering with the assessment of damages at $1,500.

There might be some question as to the nature of the easement —whether the way that was in use at the time of the conveyance or a way undefined by the conveyance and to be selected afterwards; but it was not necessary to determine the exact nature of the right—the appellant company being permitted to provide a way over some other part of the land.

The learned Chief Justice was inclined to think that no definite way was reserved by the conveyance, but that, the old way having been used after the conveyance, and its use acquiesced in by the appellant company, it was the way to which the respondent was entitled. The case was analogous to that of a way of necessity, and such a way is the most direct and convenient one: Pinnington v. Galland (1853), 9 Ex. 1. When once the way is ascertained, it cannot be altered: Pearson v. Spencer (1861), 1 B. & S. 571. It was unnecessary to decide this, because the respondent was content with the judgment, which gave him a lesser right.

Appeal dismissed with costs.

OCTOBER 12TH, 1915.

KEMPENFELDT LAND CO. LIMITED v. FOX.

Vendor and Purchaser—Agreement for Sale of Land—Formation of Contract—Offer—Negotiations—Possession Taken by Purchaser—Action for Specific Performance—Incomplete Agreement.

Appeal by the plaintiff from the judgment of MIDDLETON, J., who tried the action without a jury, dismissing it with costs.

The action was brought to obtain specific performance of an alleged agreement between the parties whereby the plaintiff company agreed to sell and the defendant to buy a parcel of land described as part of the south-east quarter of lot 27 in the 11th concession known as block G.

The main defence—and that which succeeded at the trial—was, that in the negotiations which took place the parties had

not arrived at a completed agreement. The Statute of Frauds was also set up.

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

J. W. Bain, K.C., and J. M. Forgie, for the appellant company.

Gideon Grant, for the defendant, respondent.

GARROW, J.A., who delivered the judgment of the Court, described the negotiations between the parties. There was a written offer to purchase the land described as block G. for $2,000, a payment of $100 on account. No acceptance or notice of acceptance was sent by the plaintiff company to the defendant; but the plaintiff company sent to the defendant for execution a contract or agreement upon a printed form, which the defendant neither executed nor returned. This document contained a reservation of a right of way not contained in the written offer. The defendant entered upon the land after the offer (10th June, 1914), cut down some trees, planted others, and erected three small houses, which he occupied on occasions during the summer of 1914. There were further negotiations about the proposed right of way; but the defendant refused to execute any agreement.

The burden of proving a completed agreement was upon the plaintiff company, and that burden had not been satisfied. The main bone of contention was the right of way, its width and location. A road was actually constructed by the plaintiff company in August, 1914; but, before it was completed, the plaintiff company registered a plan of the subdivision, shewing the way of a different width and in a different situation. The defendant said that he would not close until the road question was settled. And until that question was settled, there was not a complete agreement between the parties.

The plaintiff company could not, as was argued, stand upon the original written offer. The defendant was entitled to a prompt and explicit acceptance, and notice of the acceptance; instead of which the plaintiff company merely sent him, as the only evidence of acceptance, a formal agreement for execution, containing an important reservation not in the written offer; and thenceforward all that took place between the parties was of the nature of negotiations, chiefly relating to the way so reserved.

Nor was the plaintiff company's case assisted, as was contended, by the defendant's temporary possession. The Court adjudges specific performance of a parol agreement followed by the delivery to the vendee of possession. But the fact of possession would not in any case supply what was lacking here, namely, an agreement in which as to all its material terms the minds of the parties had fully met. The slight acts of damage by the defendant while in possession, of which the plaintiff company complained, would probably be amply compensated for by saying nothing about the $100 deposit.

Appeal dismissed with costs.

OCTOBER 12TH, 1915.

*LESLIE v. STEVENSON.

Contract—Judicial Sale of Land by Tender—Satisfaction of Liens—Threat of Proceedings to Set aside Sale—Promise of Purchaser to Pay Claim of Lien-holders on Resale—Enforcement—Consideration—Forbearance—Statute of Frauds—Fraudulent Denial of Agreement—Finding of Fact of Trial Judge—Appeal.

Appeal by the defendant from the judgment of BOYD, C., 34 O.L.R. 93, 8 O.W.N. 421.

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

H. J. Scott, K.C., for the appellant.

R. S. Robertson, for the plaintiffs, respondents.

GARROW, J.A., delivering the judgment, stated the facts at length, and said that upon the question of the credibility of the witnesses the Court was bound by the Chancellor's finding in favour of the plaintiffs, and that his conclusion as to the promise made by the defendant could not be disturbed. Adopting that conclusion, the Court had to consider (1) the effect of the evidence or the nature of the contract created, and (2) the question of the Statute of Frauds as a defence.

The only agreement made was that between the plaintiff McNeill and the defendant on the morning after the sale by tender. McNeill stated that, after preliminaries, the defendant said, "I suppose you would be satisfied if you got what is coming to you out of this business;" and McNeill said that he

would; the defendant then said, "I will tell you what I will do." And upon what he told him he would do they shook hands as upon a final agreement. Nothing was expressly said about what should be done in the unexpected case of there being a surplus. All that was demanded by McNeill was the balance of the plaintiffs' claim in the lien proceedings, and that was all that the defendant in any event agreed to give.

Even if it was clear that the agreement offended against the Statute of Frauds, the plaintiffs were, upon the facts, entitled to relief.

The principle that a defendant, in denying an alleged agreement with regard to land and claiming the land as owner, acts fraudulently, and that the Statute of Frauds does not prevent proof of a fraud, is applicable: Ross v. Scott (1874-5), 21 Gr. 391, 22 Gr. 29; Rochefoucauld v. Boustead, [1897] 1 Ch. 196; McCormick v. Grogan (1869), L.R. 4 H.L. 82.

Although the agreement sued upon was not made before the defendant's tender was put in, it was made while the matter was still under control and reconsideration by the Court at the instance of the plaintiffs; and it was only in consequence of and in reliance upon the agreement that the threatened attack upon the sale to the defendant was abandoned.

The appeal should be allowed to the extent of reducing the plaintiffs' recovery to the amount of the balance of their claim in the lien proceedings, to be ascertained by the Registrar; and there should be no costs of the appeal to either party.

MACLAREN, J.A., concurred.

KELLY, J., also concurred, for reasons stated in writing.

MEREDITH, C.J.O., and MAGEE, J.A., were of opinion, for reasons stated in writing by the former, that the finding of fact of the Chancellor should be reversed, and that the appeal should be allowed with costs and the action dismissed with costs.

Appeal allowed in part.

OCTOBER 12TH, 1915.

*J. C. PENNOYER CO. v. WILLIAMS MACHINERY CO. LIMITED.

Promissory Note—Action on, by Endorsee—Defence—Agreement Evidenced by Correspondence—Sale of Goods—Renewal of Note Given for Price—"Bankable Paper"—Transfer of Note—Holder in Due Course—Defect in Title of Transferor—Notice—Negligence in Making Inquiries—Effect of.

Appeal by the plaintiff company from the judgment of CLUTE, J., 8 O.W.N. 279.

The action was brought by the appellant company as endorsee of a promissory note, dated the 8th December, 1913, made by the defendant company, payable to the order of the Bates Machine Company, endorsed by that company in blank, and endorsed by Joseph Winterbotham to the appellant company.

The defence was that the note was a renewal of a previous one given to the Bates company for the price of a car-load of heaters, which the defendant company permitted to be delivered at its warehouse, pursuant to an arrangement, one of the terms of which was that a promissory note should be given by the defendant company, but the note was to be kept renewed until all the heaters should be sold; that nothing was now payable under the terms of the arrangement; that the appellant company was bound by those terms, and was not a holder of the promissory note in due course.

The trial Judge gave effect to this defence, and dismissed the action.

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

E. F. B. Johnston, K.C., and Gideon Grant, for the appellant company.

G. F. Shepley, K.C., and G. W. Mason, for the defendant company, respondent.

MEREDITH, C.J.O., read a judgment, in which, after setting out the facts, he said that he was unable to draw from the correspondence the conclusion that the agreement which it evidenced was one by which the respondent company was merely a consignee of the heaters, holding them for the Bates company. On the contrary, it evidenced an out and out sale to the respondent company, and an agreement that the Bates company would

accept for the price of the heaters the respondent company's promissory note at four months, and renew at maturity for the amount of the price of the heaters then unsold. And the respondent company was entitled under the agreement to but one renewal. The note in fact was renewed every four months down to the time of the giving of the note sued on, but that fact could not alter or affect the agreement as evidenced by the correspondence, the terms of it being unambiguous.

Reference to Innes v. Munro (1847), 1 Ex. 473.

If the above view were incorrect, and the Bates company was bound to renew from time to time for the price of the unsold heaters, the appellant company was entitled to recover even if not a holder in due course. The notes which were to be given were to be "bankable paper," and the Bates company intended to discount them and use the proceeds. This was inconsistent with the idea that, if that course were taken, the bank or person who discounted them, taking them with notice of the agreement, would be bound by it to renew, and therefore in the position that nothing could be recovered unless the heaters should be sold; and Winterbotham should not be in any worse position than a banker who discounted the notes.

At any rate, the appellant company was a holder in due course. The note was endorsed to Winterbotham, and by him to the appellant company, before its maturity, and in each case for value; and the appellant company had satisfactorily proved this, and that neither it nor Winterbotham had notice of the defect in the title of the Bates company, if defect there was.

Mere neglect, on the part of a transferee of a bill or note, to make inquiries which would have resulted in his ascertaining that the title of the transferor was defective is not enough to prevent him from being a holder in due course—the negligence must be such as to amount to the wilfully shutting of his eyes: Byles on Bills, 17th ed., pp. 147, 185, and cases there cited; Maclaren on Bills Notes and Cheques, pp. 29, 30, 184; Ross v. Chandler (1909), 19 O.L.R. 584; sec. 3 of the Bills of Exchange Act.

The appeal should be allowed with costs, and judgment should be entered for the appellant company for the amount of the note and interest with costs.

GARROW, MAGEE, and HODGINS, JJ.A., concurred.

MACLAREN, J.A., dissented, for reasons stated in writing.

Appeal allowed.

MACLAREN, J.A., IN CHAMBERS. OCTOBER 9TH, 1915.

*RE TORONTO R.W. CO. AND CITY OF TORONTO.

Appeal—Privy Council—Proposed Appeal from Judgment of Appellate Division Affirming Order of Ontario Railway and Municipal Board—Right of Appeal—Privy Council Appeals Act, secs, 2, 3—Ontario Railway and Municipal Board Act, sec. 48(6).

Application by the Corporation of the City of Toronto for an order allowing the security and the applicants' appeal to the Judicial Committee of the Privy Council from the judgment of a Divisional Court of the Appellate Division, ante 62, dismissing the applicants' appeal from an order of the Ontario Railway and Municipal Board.

C. M. Colquhoun, for the applicants.
D. L. McCarthy, K.C., for the railway company.

MACLAREN, J.A., said that the company contended that there was no right of appeal from the judgment in question except by leave of the Judicial Committee, citing E. W. Gillett & Co. Limited v. Lumsden, [1905] A.C. 601; City of Toronto v. Toronto Electric Light Co. (1906), 11 O.L.R. 310; and Canadian Pacific R.W. Co. v. City of Toronto (1909), 19 O.L.R. 663. But, the learned Judge said, the appeals in all three cases were under what is now sec. 2 of the Privy Council Appeals Act, R.S.O. 1914 ch. 54; while the present application came under sec. 48(6) of the Ontario Railway and Municipal Board Act, R.S.O. 1914 ch. 186, and was completely covered by that enactment; and sec. 3 of ch. 54 applied to it as fully as if it had been brought under sec. 2 of that Act.

Order made approving the security and allowing the appeal.

HIGH COURT DIVISION.

BOYD, C. OCTOBER 14TH, 1915.

*MERIDEN BRITANNIA CO. LIMITED v. WALTERS.

RE LEWIS.

Contempt of Court—Newspaper Article Dealing with Matters in Question in Pending Action Relating to Municipal Affairs—Absence of Tendency to Interfere with Fair Trial and Due Course of Administration of Justice—Dismissal of Motion to Commit Editor of Newspaper.

Motion by the plaintiff company for an order directing that one Lewis, the editor of a newspaper published in the city of Hamilton, be committed to gaol for a contempt of Court in commenting editorially in his newspaper upon the matters in question in this action, on the day after the action was begun.

The action was brought by the plaintiff company, on behalf of itself and other ratepayers of the City of Hamilton, for a declaration, injunction, and other relief in respect of the payment of rates by the plaintiff company for a pavement constructed as a local improvement, and said to have been made of bad material. The defendants were the Mayor and a Controller of the City of Hamilton and also the city corporation.

The motion was heard by BOYD, C., in the Weekly Court at Toronto.

E. F. B. Johnston, K.C., for the plaintiff company.

C. J. Holman, K.C., and J. A. Soule, for the defendants and the respondent Lewis.

THE CHANCELLOR said that the power to punish for contempt of Court was not to be exercised for the purpose of vindicating the dignity of the Court, but to prevent undue interference with the administration of justice: Helmore v. Smith (1886), 35 Ch. D. 449, 455; Guest v. Knowles, Re Robertson (1908), 17 O.L.R. 416; In re Clements (1877), 46 L.J. Ch. 375, 383.

The article in question described the nature of this action, impugned the motives which caused it to be begun, and said that it would be utilised for the purpose of discrediting the Mayor, the defendant Walters.

This publication, a day after the writ issued, had no reference to the outcome at the trial, which might not take place

during the municipal year. The evident object was to commend the Mayor and to deprecate any use being made of the charges to affect the mind and votes of the local electorate. The trial would be without a jury, before a Judge of the Supreme Court of Ontario, who would probably not see or hear of the newspaper discussion at all. What was complained of could not, in any event, tend to interfere with the due course of judicial determination of the controversy. There could be no suspicion that any of the parties would be prejudiced or benefited before the Court by what had appeared in the public prints.

The newspapers have the same right as the citizens to discuss matters of municipal administration. It is within the purview of journalism to deal with such matters, to take sides thereon, to inform and direct the local electorate; and, so long as the articles do not unduly interfere with the action of the Courts, the members of the Press have a free hand.

The plaintiff company's objection was, that the article made misleading and incorrect statements as to the facts involved in the case, and suppressed important and material facts, and commented on the case adversely to the plaintiff company's claim—such matters as are invoked in actions for newspaper libels, but not pertinent to the determination of the question whether there had been a contempt of Court in disturbing and hampering the due course of trial and the due administration of justice.

Reference to Skipworth's Case (1873), L.R. 9 Q.B. 219, 230, 235, per Blackburn, J., quoting from Lord Cottenham, L.C.; In re "Finance Union" (1895), 11 Times L.R. 167, 169, per Wright, J.

Motion dismissed with costs.

MIDDLETON, J., IN CHAMBERS. OCTOBER 16TH, 1915.

RE BAEDER AND CANADIAN ORDER OF CHOSEN FRIENDS.

Life Insurance—Benefit Certificate Issued by Ontario Society—Designation of Preferred Beneficiaries—Change of Domicile of Insured—Alteration of Designation by Change to Beneficiary of same Class—Will Executed in Place of New Domicile—Effect of Law of Domicile—Trust — Insurance Act, R.S.O. 1914 *ch.* 183, *secs.* 178 (2), 179—*Effect of Judicial Decisions—Motion Referred to Appellate Division.*

Motion by the society for an order for leave to pay insurance

moneys into Court and determining who are the persons entitled to share therein.

The insured, Jacob Baeder, who died on the 30th March, 1915, originally was domiciled and resided at Guelph, Ontario. While so domiciled, in July, 1890, he became a member of the Canadian Order of Chosen Friends, a life insurance or benefit society organised in Ontario, and obtained a beneficiary certificate for $2,000, which provided that this sum should, upon his death, be paid to Charles, Minnie, and Henry Baeder, equally. Subsequently, the insured changed his domicile to Rochester, in the State of New York; and, by his will, made there on the 24th February, 1915, he gave all his life insurance to his grandchild Caroline Wagner. The rest of his estate he directed to be divided among his children.

Lyman Lee, for the society.

S. F. Washington, K.C., for the three children, contended that, although the certificate was issued by an Ontario society in Ontario, the law which governed the operation and effect of the will upon the policy, was the law of New York; and, according to the law of New York, beneficiaries in an insurance policy cannot be changed by will. He referred to Lee v. Abdy (1886), 17 Q.B.D. 309, and Toronto General Trusts Co. v. Sewell (1889), 17 O.R. 442.

F. W. Harcourt, K.C., for the grandchild, an infant, did not dispute the assertion as to the law of New York, but contended that the insurance money was to be regarded as a trust fund subject to the law of Ontario, which in effect defined the terms of the trust; and that the will was operative, and the grandchild took.

MIDDLETON, J., said that he favoured the contention made on behalf of the infant. By the Insurance Act, R.S.O. 1914 ch. 183, sec. 178 (2), the policy and declaration in favour of a preferred beneficiary created a trust in favour of that beneficiary, subject to the powers conferred by sec. 179, enabling the insured, either by declaration or will, to change the beneficiary to some other person of the preferred class; and a will executed in accordance with the laws of Ontario must be regarded as an appointment or declaration within the terms of the statute. In no conceivable way can the statute-law of the country where the insured happens to be domiciled be deemed to be grafted upon the statutory deed of trust.

A will in accordance with our laws is a proper exercise of a

power of appointment, even though it be not valid according to the law of the domicile: Murphy v. Deichler, [1909] A.C. 446.

The learned Judge referred to the two cases cited by counsel for the children, and said that the English case was not ad rem; and that the Ontario case, while it decided that the law of Ontario governed, seemed to be placed upon the ground that in the English case it was decided that the validity of the declaration depended upon the law of the domicile.

The question was manifestly one of importance; and the motion should, therefore, be adjourned before a Divisional Court of the Appellate Division, where the reasoning upon which the Sewell case was founded can be reconsidered and reviewed.

Motion adjourned accordingly.

ALDERSON v. WATSON—BRITTON, J.—OCT. 15.

Landlord and Tenant—Assignment by Tenant for Benefit of Creditors—Landlord's Claim for Future Rent—Claims of Creditors—Distribution of Insolvent Estate—Priorities—Landlord and Tenant Act, R.S.O. 1914 *ch.* 155, *sec.* 38—*Damages—Costs—Injunction—Judgment.*]—Motion by the plaintiff to continue an interim injunction restraining the defendant, his bailiff, servants and agents, from proceeding by distress and sale of the goods and chattels which were the property of one Goodbrand, who was the tenant of the defendant. The plaintiff was the assignee of Goodbrand, under a general assignment for the benefit of creditors, dated the 7th September, 1915. The lease from the defendant to Goodbrand was for the term of three years from the 1st January, 1914, making the rent payable, $250 on the 1st October, 1914, $250 on the 31st December, 1914, $300 on the 1st October, 1915 and 1916, and $300 on the 31st December, 1915 and 1916. The rent for 1914 had been fully paid before any seizure was made. The defendant seized for the full amount of rent for 1915 and 1916. The defendant asserted his right to do this by reason of what his tenant did in giving chattel mortgages and other things in violation of certain covenants contained in the lease. The defendant contended that, not only as against his tenant, but against the plaintiff, the assignee, and notwithstanding sec. 38 of the Landlord and Tenant Act, R.S.O. 1914 ch. 155, he was entitled in priority to the full two years' rent down to the end of 1916. BRITTON, J., said that all the

facts were fully set out in the affidavits and papers filed; and, he being of the opinion that the defendant was wrong in his contention, the proper thing was to treat this motion as a motion for judgment; and he therefore gave judgment restraining the defendant from proceeding with the distress and sale of the goods and chattels of the tenant; the defendant to withdraw from seizure, and all the goods and chattels seized as the goods and chattels of Goodbrand to be delivered by the defendant to the plaintiff—to be dealt with by the plaintiff as assignee for the benefit of creditors of Goodbrand. As the plaintiff was willing to concede to the defendant his right to priority to the extent of one year's rent, that is, for 1915, being for rent which fell due on the 1st October, 1915, and which would, had there been no seizure, and no alleged breach of the covenants contained in the lease, fall due on the 31st December, 1915, the plaintiff should recognise the defendant's claim to the extent of one year's rent, in priority to the claim or claims of creditors; but this to be without prejudice to any claim the defendant might establish for damages by reason of any alleged breach of covenants in the lease—such claims, if established, not to have priority, but to be claims to rank pro rata with other unsecured claims against the Goodbrand estate. The defendant should pay costs of these proceedings, fixed at $50, including costs of the action and motions. The plaintiff should pay to the defendant, out of the proceeds of the sale of Goodbrand's goods and chattels, the sum of $600, in priority to payment of any amount to unsecured creditors. E. H. Cleaver, for the plaintiff. G. T. Walsh, for the defendant.