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COURT OF APPEAL.

SEPTEMBER 29TH, 1909.

REX v. BLYTHE.

Criminal Law—Conviction for Murder—Nondirection—Intoxication of Prisoner—Manslaughter—New Trial.

The following is a revised report of the judgment of the Court noted ante p. 17.

The judgment of the Court was delivered by Moss, C.J.O. (oral):—We have now considered the case with care, and, I think I may say, with due regard to the gravity of the issues involved, and the importance of the matter to the prisoner, and, after deliberation, we have come to the conclusion, though not without some hesitation on the part of some of the members of the Court, that, looking at the whole case, and regarding the evidence as it went to the jury, a case should be stated upon this question. This result has been reached after as full consideration of the matter as if a stated case was before us.

That being the conclusion, it will follow, from the understanding that was spoken of yesterday at the conclusion of the argument, that the present conviction will be set aside, and a new trial will be granted to the prisoner; and, that being the view the Court has taken of the case, we deem it proper and right, as much in the interest of the prisoner as in other interests, that we should not comment upon the evidence that was before the jury or upon the way in which the case was finally presented to the jury.

It may be said, however, that there can be no reason to suppose for a moment from the case as it presents itself to us, that if the learned trial Judge had been requested to charge the jury in the way in which it is now stated he should have done, he would have refused to do so.

It would have been obvious to him as it now appears to be to every one concerned, that the alleged condition of intoxication and the extent of that intoxication were proper to be considered by the

jury as bearing upon the question of intent. And, no doubt, if his attention had been drawn to it, he would have directed the jury that the presumption that a man intends the natural consequences of his act may be rebutted in the case of a man who is drunk, by shewing that his mind was so affected by the drink he had taken that he was incapable of knowing that what he was doing was dangerous, that it was likely to inflict serious injury; and they would have been asked to pass upon that, having regard to the evidence before them.

Those in charge of the case seemed to be directing their minds to other views of the case, and that view of it was overlooked, or at all events not thought of sufficiently to determine them to ask that it should be presented among the other issues before the jury. The result seems to have been that perhaps the prisoner has not had his case presented to the jury as fully to his advantage as it would have been had the matter been presented on his behalf in that way.

Without entering upon the case further, having in view the new trial, it is only necessary to repeat that this result has been reached after full consideration of the matter, treating it as if a stated case was now before us.

HIGH COURT OF JUSTICE.

MASTER IN CHAMBERS. SEPTEMBER 29TH, 1909.

HAMILTON BRIDGE WORKS CO. v. GENERAL CONTRACTING CO.

Mechanics' Liens—Summary Proceeding to Enforce Lien — Contemporaneous Action to Recover Money in Respect of which Lien Claimed—Motion to Stay Action.

The plaintiffs began a summary proceeding against the defendants under the Mechanics' Lien Act, and also began an action against them to recover the sum of money in respect of which the lien was sought to be enforced.

The defendants moved for an order staying the action.

G. H. Kilmer, K.C., for the defendants, relied on the Judicature Act, sec. 57 (10), and the cases noted in Holmested & Langton's Judicature Act, in loc.

H. M. Mowat, K.C., for the plaintiffs, invoked sec. 28 of the Mechanics' Lien Act, which provides that the taking of any proceedings for the recovery of the claim, or the recovery of any personal judgment for the claim, shall not merge, waive, or destroy any lien created by the Act, unless the plaintiff so agrees in writing; contend-

ing that a plaintiff is at liberty to recover a personal judgment without prejudice to a proceeding under the Mechanics' Lien Act, either contemporaneous or subsequent thereto.

THE MASTER referred to Robertson v. Bullen, 13 O. W. R. 56, and said that, after consideration, he was of opinion that Mr. Mowat was right in his view. The remedies under the two proceedings were quite different. In the personal action there may be a much more speedy recovery, as trials under the Mechanics' Lien Act are often long drawn out, and there may be an appeal to a Divisional Court. The proceedings under the Act are also complicated by the claims of other lien-holders, and it is only after a sale in some cases that a plaintiff receives a dividend on his claim and a personal judgment for the deficiency.

Motion dismissed; costs in the cause, the point being a new one.

RIDDELL, J., IN CHAMBERS. OCTOBER 1ST, 1909.

REX v. VAN NORMAN.

Municipal Corporations—County By-law Requiring Hawkers and Pedlars to be Licensed—Magistrate's Conviction for Breach—Municipal Act, 1903, sec. 583 (14)—Bona Fide Servant or Employee of Manufacturer — Burden of Proof — Finding of Magistrate—Uncontradicted Evidence—Review on Motion to Quash Conviction—Sale to Retail Trader—"Hawkers"—Evidence Disclosing only one Sale—Going from Place to Place—Validity of By-law—License Fees Specified for Certain Classes of Persons—Proviso in Respect of Towns in County—Penalty —Division of—Reward for Securing Conviction—Costs.

Motion to quash a conviction of the defendant.

The defendant and others were tried before a justice of the peace upon informations charging a violation of by-law 726 of the county of Grey by selling stoves and ranges without a pedlar's license.

The by-law was in part as follows:—

1. No person shall within the county of Grey act as a pedlar, hawker, or petty chapman, or carry on petty trades, or go from place to place or to other men's houses on foot or with any animal bearing or drawing any goods, wares, or merchandise for sale . . . without having first obtained a license to do so, in the manner hereinafter mentioned.

Provided always that no such license shall be required for hawking, peddling, or selling from any vehicle or other conveyance any goods, wares, or merchandise, to any retail dealer, or for

hawking or peddling any goods, wares, or merchandise, the growth, produce, or manufacture of this province, not being liquors within the meaning of the law relating to taverns or tavern licenses, if the same are being hawked or peddled by the manufacturer or producer of the goods, wares, or merchandise, or by his bona fide servants or employees having written authority in that behalf; and such servants or employees shall produce and exhibit his written authority when required so to do by any municipal or peace officer . . . ; and provided also that nothing herein contained shall apply or be in force in any town in the county of Grey not separate from such county for municipal purposes while a by-law of such town to carry into effect the purposes or objects of clause 14 of the said section 583 of the Consolidated Municipal Act of 1903 remains in force.

2. Any person desiring a license enabling him to act as a hawker, pedlar, petty chapman, or otherwise, as in sec. 1 of this by-law mentioned, shall first pay to the county treasurer . . . for licenses required under this by-law as follows: the sum of $125 for a license for a person using a two-horse waggon or vehicle; the sum of $100 for a license for a person using a one-horse vehicle; the sum of $60 for a person using a waggon or cart or other conveyance drawn or pushed by the person; and the sum of $50 for a license for a person travelling on foot and carrying a pack, box, bundle, basket, or valise. . . .

7. One-half of every penalty levied under the provisions of this by-law shall go to the informer or prosecutor, and the other half to the county treasurer, unless the prosecution is brought in the name of the corporation of the county of Grey, in which case the whole of the penalty shall be paid to the county treasurer.

8. In the event of there not being sufficient distress out of which the costs of said prosecution can be procured, the county treasurer is hereby authorised to pay to the party securing the conviction the sum of $10, on the certificate of the justice . . . but this shall not apply to the high constable of the county.

The defendant produced a document which he asserted was an agreement with the Western Foundry Co. Limited, of Wingham, and said that he was simply manager and agent for that company; that the others were hired by him as agents for the company; and, as the goods which they sold were the manufacture of the company, he contended that he should not be obliged to take out a license.

The magistrate came to the conclusion that the defendant and the others were actually purchasers from the company, and that the

agreement was not bona fide, and convicted the defendant accordingly.

W. E. Raney, K.C., for the defendant.

W. E. Middleton, K.C., for the informant.

RIDDELL, J., considered the several grounds urged, and held:—

1. That the onus of satisfying the magistrate that the defendant came within the exception in sec. 583 (14) of the Consolidated Municipal Act, 1903, as a bona fide servant or employee of the manufacturer of the goods sold, lay upon the defendant, as provided by 6 Edw. VII. ch. 34, sec. 26 (O.): and, although there was no evidence contradicting the testimony of the document and the oral testimony of the defendant, the magistrate was within his jurisdiction in determining against the bona fides, there being no rule in our law that a Judge or jury or other trial tribunal must accredit any witness, even although not contradicted. [Reference to an article in the Law Notes for November, 1906, p. 147, and to Wigmore on Evidence, secs. 1010, 2035, 2948.]

2. While it was not proved that the sale was not made to a retail dealer, the same provisions of the Ontario Act and the provisions of the Dominion Act 8 & 9 Edw. VII. ch. 9, schedule 2, p. 110, applied.

3. The definition of "hawkers" given in sec. 583 (14) (a) of the Act of 1903 is not exhaustive, as the history of the legislation shews. [Regina v. Coutts, 5 O. R. 644, referred to.]

4. It was said that the defendant made only one sale, and therefore was not within the purview of the by-law. But it was admitted that he went from place to place with horses and conveyances drawing ranges for sale; and, though the admission as to sale and exhibiting was said to cover "just one range on one occasion only," there was no such limitation as to going from place to place, and that was what the statute and by-law covered: Regina v. Rawson, 22 O. R. 467.

5. The by-law may be attacked upon a motion to quash a conviction: Regina v. Cuthbert, 45 U. C. R. 19.

6. Any one desiring to peddle is entitled to a license, and the fees for such license being fixed in the by-law (sec. 2) for certain classes of persons only, the county could not refuse a license to other classes, or require a license fee to be paid therefor. The defendant, too, came within the classes named, and did not complain that he was refused a license.

7. The proviso (sec. 1) in respect of towns in the county not separate for municipal purposes from the county was not precisely

the same as sec. 583 (14) (c); the by-law purported to relieve such a town from the necessity of declaring in a by-law passed by such town that the county by-law was not to be in force; and it might be that the county had no power to make such a provision. If so, the provision was a mere nullity, not affecting the validity otherwise of the by-law; and in any event this was not a case of such a town. Part of a by-law may be invalid without affecting the validity of another part: In re Fennell and Corporation of Guelph, 24 U. C. R. 238.

8. Section 7 of the by-law was complained of as being contrary to sec. 708 of the Consolidated Municipal Act, 1903. Assuming that "the pecuniary penalty . . . levied under this Act" was the pecuniary penalty imposed by a by-law passed under the authority of this Act, the defendant was not advanced. If the clause was valid, cadit quæstio; if not, there was no provision for the division of the penalty, and sec. 708 applied to the full extent. In either case the defendant was not interested; he paid his fine to the justice, and the justice must apply it legally.

9. Section 8 was attacked as being in effect an offer of a reward for "securing" a conviction. In some instances this might be so; and the section might be ultra vires of the county council. [Reference to Cornwall v. West Nissouri, 25 C. P. 9.] But this did not affect the defendant; if sec. 8 were elided, nothing in the present proceedings would be affected.

[Nothing opposed to this decision in Rex v. Little, 1 Burr. 610; Rex v. Buckle, 4 East 346; Johnson v. Hudson, 11 East 180; Regina v. Whelan, 4 Can. Crim. Cas. 277; Regina v. Chayter, 11 O. R. 217; Regina v. Bassett, 12 O. R. 51; or Regina v. Henderson, 18 O. R. 144.]

10. The by-law was not artistically drawn, but it did not so invite a motion that costs should be withheld; the motion had no merits, and should be dismissed with costs.

DIVISIONAL COURT. SEPTEMBER 29TH, 1909.

RE MOORE AND TOWNSHIP OF MARCH.

Appeal to Divisional Court—Right of Appeal—Municipal Drainage Act—Certificate of County Court Judge upon Audit of Engineer's Account—3 Edw. VII. ch. 22—9 Edw. VII. ch. 46—Persona Designata—Leave to Appeal.

Appeal by J. H. Moore from a certificate of the Judge of the County Court of Carleton, dated the 28th May, 1909, whereby he

disallowed $896 of Moore's account against the corporation of the township of March for work performed by him as engineer under the provisions of the Municipal Drainage Act, R. S. O. 1897 ch. 226. The total amount of the account was $3,189.74, and it was audited in pursuance of sec. 4 of the amending Act 3 Edw. VII. ch. 22 (O.), by the County Court Judge, who certified that, in his opinion, Moore was entitled to be paid $2,293.74, and disallowed charges to the amount of $896 as being unreasonable. The County Court Judge gave reasons in writing for his finding, from which it appeared that the main ground for disallowing the charges in question was that the engineer had charged for the services of certain persons, to whom he had delegated parts of the work, a larger sum than he had actually paid these persons. (See 13 O. W. R. 692.)

Leave was given to Moore by the County Court Judge to appeal from his decision, and the appeal came on for hearing before a Divisional Court composed of MULOCK, C.J.Ex.D., CLUTE and RIDDELL, JJ., on the 29th September, 1909.

A. H. Armstrong, for the township corporation, objected to the jurisdiction of the Court, on the ground that the certificate of the County Court Judge was not appealable under "The Judges' Orders Enforcement Act," 9 Edw. VII. ch. 46 (O.)

Featherston Aylesworth, for the appellant, contended that an appeal lay from the decision of the County Court Judge as persona designata under sec. 2 of the Act, special leave having been given by him as provided by sec. 4.

The merits of the case were not fully discussed, and at the conclusion of the argument on the question of jurisdiction the judgment of the majority of the Court was delivered by MULOCK, C.J., holding that the certificate was not appealable, as it was not an affirmative order that could be enforced, there being no direction for payment of what the Judge found to be due from the corporation to the engineer.

CLUTE, J., dissented, taking the view that the case came within the purview of sec. 2 of the Act, and that the County Court Judge acted as persona designata, from whose decision, as a declaratory judgment, an appeal would lie, as special leave had been given to appeal under sec. 4.

Appeal dismissed without costs.

MAGEE, J. OCTOBER 6TH, 1909.

FOLEY v. BARBER.

MONTREUIL v. BARBER.

Company—Winding-up — Contributories — Misrepresentations — Actions to Set aside Applications for and Allotments of Shares —Evidence—Incorporated Company Becoming Shareholder—Powers of Company—Manitoba Joint Stock Companies Act—Powers of Vice-President and Manager—Absence of By-law—Resolution.

The plaintiffs in these two actions sought to set aside applications made by them for shares in the Distributors Company Limited, of which the defendant Barber was liquidator, and the allotment of the shares, on the ground of misrepresentation by the company and the co-defendant Carpenter, against whom they also sought damages. The liquidator counterclaimed to have the plaintiffs declared liable to be placed on the list of contributories of the company, in course of winding-up under the Dominion Winding-up Act.

The Distributors Company was incorporated on the 28th September, 1904, the incorporators being H. P. C. Carpenter, H. M. Mulholland, J. L. Birney, S. M. Culp, and T. Oliphant, the objects being, inter alia, to deal in all kinds of fruit, &c., and for such purposes to acquire and take over as going concerns the businesses of Husband Bros. & Co., C. P. Carpenter & Son, and S. M. Culp, and to acquire other businesses. H. M. Mulholland traded as Husband Bros. & Co., and H. P. C. Carpenter as C. P. Carpenter & Son.

E. D. Armour, K.C., and H. W. Mickle, for plaintiffs.

J. A. Macintosh and Britton Osler, for defendant Barber.

H. H. Shaver, for defendant Carpenter.

MAGEE, J., after stating the facts, and referring to portions of the evidence, proceeded:—

I do not think the plaintiffs Montreuil et al. have proved any misrepresentation against the company or the defendant Carpenter such as alleged, and I do not find any reason why they should not be placed on the list of contributories in respect of the 15 shares.

As regards the 5 shares in respect of which also the liquidator asks that they be declared liable to pay, as they never agreed to subscribe for any of them otherwise than as fully paid shares not subject to call, they cannot be made contributories in respect of them.

We then come to the dealings with the plaintiffs in the other actions — Foley, Locke, & Larsen. They are incorporated as a joint stock company, having their chief place of business at Winnipeg, engaged in the grocery and fruit trade.

In August, 1905, Mulholland and Carpenter went to Winnipeg to make arrangements for sales of fruit there. After several interviews with T. H. Locke and other officers of Foley, Locke, & Larsen, an arrangement was come to which resulted in an agreement under the seals of the two companies dated the 19th August, 1905, and an application of the same date by Foley, Locke, & Larsen to the Distributors Co. for 150 shares, on the terms of the prospectus, to be paid for, $5,000 on 1st November, 1905, $2,500 on 1st January, 1906, and balance on call, no call to exceed 33 1-3 per cent. in any one year. This application was accepted by the Distributors Co., and the shares allotted. Foley, Locke, & Larsen, concurrently with the application, gave their notes for the first two payments, and those notes were duly paid at maturity, but the remaining $7,500 has not been paid. They here seek to be relieved from liability therefor. Two grounds are put forward: (1) that the application was obtained by misrepresentation; and (2) that the transaction was not one which Thomas H. Locke, who signed the application, or the board of directors, had authority to enter into for the company, and which was beyond the powers of the company, in the absence of a proper by-law confirmed at a general meeting expressly authorising it.

By the agreement of 19th August, 1905, the Distributors Co. appointed Foley, Locke, & Larsen its exclusive agents in Manitoba, Saskatchewan, and Alberta for sale of all fresh fruits, &c., coming from Ontario, and agreed to pay them a commission of 18 per cent. on sales, and to deliver to them 50 fully paid shares in the Distributors Co., the consideration for which was the rebate of 3 per cent. which thereby Foley, Locke, & Larsen, in consideration of the appointment and the 50 shares, agreed to make to the Distributors Co., on the gross sales of all fruit coming from Ontario originally or from any one in Ontario. Although the 50 shares were thus stated to be given in consideration of the rebate on sales for other customers, as well as on those from the Distributors Co., T. H. Locke speaks of them as a bonus. He is an experienced business man. His company had been incorporated to take over, and had taken over, the business of his own previous firm of Locke Bros. He does not even pretend that he supposed that the paid-up shares in the Distributors Co. all represented tangible assets. He does say that he was within 48 hours sorry for and ashamed of this transaction, and that he took steps to conceal it from his co-owners and

fellow-directors. His evidence is inconsistent with the fact, sworn to by Mulholland and not denied, that later on in the season, when the Distributors Co. was objecting to the course of the business, he became angry and insisted on the agreement and threatened suit to enforce it.

Messrs. Foley, two of the proprietors who reside in St. Paul, Minnesota, say they had no knowledge of the transaction till February, 1908, although this action had been commenced some months previously. It is very singular if it was not discovered by their auditor appointed by them from their own office at St. Paul.

I am not satisfied with Locke's statement that it was concealed.

. . .

As to the other question of the powers of the company and of Locke, we find that the letters patent incorporating Foley, Locke, & Larsen are dated 9th February, 1903, and issued under the Manitoba Joint Stock Companies Act, which then was ch. 30 of the Revised Statutes of Manitoba of 1902. The objects of the company petitioned for and granted are therein declared to be, inter alia, to buy, sell, and deal in goods, wares, and merchandise, including groceries, fruit, produce, &c., and act as agents for others therein, and to make advances on consignments, and generally carry on the business of wholesale grocers, commission and produce merchants, and agents, and to engage in packing and cold storage and manufacture and to engage in any business transaction and to do or perform any acts which may be incident or conducive to the interests of the company, to acquire, sell, and deal in real estate, and, subject to sec. 70 of the Manitoba Joint Stock Companies Act, to acquire, own, and hold shares in the capital stock of other corporations, and to use its funds in the purchase of stock in other corporations, and to lend money on mortgages, stocks, debentures, &c.

Section 70 of the Manitoba Joint Stock Companies Act then in force (now sec. 68 of the present Act, R. S. M. 1902 ch. 30) declared that "no company shall use any of its funds in the purchase of stock in any other corporation unless expressly authorised by a by-law confirmed at a general meeting." It is said this company has no such by-law, and therefore could not acquire the stock. But under sec. 4 a charter may be granted to persons who petition therefor, and now under sec. 6 the petition may ask for the embodying in the letters patent of any provision which otherwise under the provisions of the Act might be embodied in any by-law of the company when incorporated, and by sec. 19 all powers given to the company by letters patent shall be exercised subject to the provisions and restrictions in the Act contained. The effect of embodying in the letters patent the power to acquire shares seems to be that the

negative provision that no company shall use its funds in acquiring shares, unless authorised by a by-law, is changed into a positive one that this company may do so if so authorised, and, if such a by-law is passed, such an acquisition becomes part of the ordinary business and objects of the company. Were it not for the reference in the letters patent to sec. 70, it would seem that a by-law would be unnecessary, the authority of the letters patent taking its place.

I must, upon the evidence here, take it as proven that no by-law was in fact passed. But I also find that the Distributors Co. had no knowledge of the non-existence of a by-law, and they believed that Locke had authority to act for and bind his company.

When the papers were signed by him, according to the testimony of Mulholland, which I accept, though in a manner contradicted by Locke, the latter was told that the agreements would have to be approved of by the directors of the Distributors Co., and he replied that he did not have that sort of nonsense, but signed them himself. His statement of his powers is not controverted in any way by the minute book or by-laws produced. He is vice-president and manager. He and his brother, who was not called as a witness, are resident in Winnipeg, and the others in Minnesota. The whole business seems to be left to his control. Only one business transaction is referred to in the minute book during five years. The directors were to have held quarterly meetings, but "no quorum" was the most frequent entry when an entry appears. So far as the book shews, directors did not direct. It throws no light whatever on the business of the company. It is proved that a business was purchased, lands were bought, a factory, involving outlay of $200,000, established, large purchases of goods made, as much as $150,000 at once, and not a minute of it at any directors' meeting. The by-laws give no definition of his duties or powers and place no restriction upon him. The inference is fairly that Locke was allowed by his fellow-directors practically unlimited powers. His instructions, as he says, were to make money. A by-law, No. 17, declared that the officers were to perform the duties provided for them by the directors by resolution from time to time. No such resolution appears in the minute book, and, if there were resolutions, they seem to have been verbal. Locke says his instructions were verbal.

The Joint Stock Companies Act, sec. 30, gives the directors power to administer the company's affairs, make or cause to be made any contract which the company may by law enter into, and make by-laws to regulate, inter alia, the duties of all officers and the conduct in all other particulars of the company's affairs. Section 62 (now sec. 64) declares that every contract, agreement, engagement, or bargain made on behalf of the company by any agent, officer, or

servant of the company in general accordance with his powers as such agent, officer, or servant, under the by-laws of the company or otherwise, shall be binding upon the company, and in no case shall it be necessary to have the seal of the company affixed to any such contract, agreement, engagement, or bargain, or to prove that the same was made in pursuance of any by-law or special vote or order, nor shall the party so acting as agent, officer, or servant of the company, be thereby subjected individually to any liability to any third party therefor.

As to the responsibility of the company, despite the absence of a by-law, the decision of the Exchequer Chamber in Royal Bank v. Turquand, 6 E. & B. 327, affirming the judgment in 5 E. & B. 248, is in point. . . . That case was cited with approval in the opinion of the Judges in Mahoney v. East Holyford Mining Co., L. R. 7 H. L. 869, and was referred to by the Privy Council without dissent in Irwin v. Union Bank of Australia, 2 App. Cas. 366; and by the Supreme Court of New York in Connecticut Mutual Insurance Co. v. Cleveland, &c., R. R. Co., 41 Barb. at p. 26.

I see no difference in principle between a resolution by the shareholders and their by-law. Then I find that the execution of the contract by Locke, the vice-president and manager, was within the wide general powers of management allowed by the directors to be exercised by Locke, if not actually expressly conferred upon him, and that Foley, Locke, & Larsen are bound by his act.

Under the various assignments all the interests in the amounts unpaid upon the shares became vested in the liquidator, and there is no reason why the plaintiffs in both cases should not pay him the amounts for which they may be liable as contributories.

Both actions will be dismissed as against both defendants, with costs, and Montreuil and his partners will be placed upon the list of contributories for $1,500, and Foley, Locke, & Larsen for $7,500, the counterclaims being allowed to that extent with costs.