The
Ontario Weekly Notes

VOL. IX. TORONTO, FEBRUARY 18, 1916. No. 24

APPELLATE DIVISION.

FIRST DIVISIONAL COURT. FEBRUARY 7TH, 1916.

*COOK v. KOLDOFFSKY.

Mechanics' Liens—Claims of Lien-holders — Claims of Mortgagees—Increased Selling Value—Evidence—Reference — Priorities—Position of Mortgagees as to Portions of Mortgage-moneys — Mechanics and Wage-Earners Lien Act, R.S.O. 1914 *ch.* 140, *secs.* 2 (*c*), 6, 8 (3), 14, 21.

Appeal by E. J. Kaake and James Kaake, mortgagees, from the judgment of an Official Referee in a mechanic's lien proceeding.

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

G. T. Walsh, for the appellants.

W. A. McMaster, for the plaintiff, and S. H. Bradford, K.C., J. H. Campbell, and A. Cohen, for other lien-holders, respondents.

HODGINS, J.A., delivering the judgment of the Court, said that the Referee had found the liens established and had given them priority upon the increased selling value of the land—putting the increase at the exact amount of the liens. The appellants objected to the priority given to the liens; and a counter-attack was made on the appellants' position as to some of the mortgage-moneys.

The evidence satisfied the Court that the appellants had actual notice of the liens when their four mortgages were registered and the moneys advanced thereunder.

The appellant E. J. Kaake retained out of the moneys secured by his two mortgages the sum of $1,618.13 for principal and interest due under an agreement whereby he sold the land

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

to one Rosenfeld; out of the moneys secured by his two mortgages the appellant James Kaake retained $1,050, the amount of what was called a temporary mortgage, which was prior to the four mortgages referred to; and $803.20 was paid to one George Kaake out of the mortgage moneys also.

As to the $1,618.13, the learned Judge said, it was not a "payment or advance" under the mortgages, but its inclusion therein meant that the mortgagee took another security for its payment. When the work began, it formed a prior charge, and the right of the lien-holders in this action to have it so treated could not be modified by the action of the mortgagee, who released his vendor's lien as against the owner of the land; and its satisfaction by the taking of the subsequent mortgages could not prevent it from being, as to lien-holders, a prior charge within sec. 8: see Locke v. Locke (1896), 32 C.L.J. 332.

The allowance as against the mortgagees of the whole amount of the liens as a prior charge on the increased selling value was equivalent to a finding that the selling value was increased to that extent. No claim in this respect was made in any lien or by any statement of claim, but the mortgagees were parties to the proceedings, and the appeal was argued as if the question had been properly before the Referee. No evidence was given, however; and, if the parties desired, there should be a reference back to take the evidence, upon this head.

The learned Judge then referred to and discussed secs. 2(*c*), 6, 8(3), 14, and 21 of the Mechanics and Wage-Earners Lien Act, R.S.O. 1914 ch. 140; he also referred to Kennedy v. Haddow (1890), 19 O.R. 240; Cook v. Belshaw (1893), 23 O.R. 545; McVean v. Tiffin (1885), 13 A.R. 1; and said (1) that the appellant E. J. Kaake must be regarded, as to the $1,618.13, as the holder of a prior charge to that extent; (2) that the same appellant, as holder of two mortgages for the two west houses, had priority, to the extent of $631.87, over all liens other than the Brown lien; (3) that the appellant James Kaake was holder of a mortgage on all the houses for $1,050, or so much thereof as may be proved to have been in fact advanced to or on account of the mortgagor or Rosenfeld, as to which he was prior to all liens; (4) that the same appellant was holder of a mortgage for $1,200 on the two east houses, prior to all the liens except the Brown lien.

Appeal allowed, and judgment below set aside except in so far as it finds the amounts of the liens, which are not disturbed. Reference back to enable the Referee to deal with the claim

made by the lien-holders to have priority on the increased selling value, and with the priority or otherwise of the $1,050 mortgage, and to pronounce the proper judgment. No costs of the appeal.

FIRST DIVISIONAL COURT. FEBRUARY 7TH, 1916.

*ALDERSON v. WATSON.

Landlord and Tenant—Lease—Acceleration Clause — Chattel Mortgage—Assignment for Benefit of Creditors—Landlord and Tenant Act, R.S.O. 1914 *ch.* 155, *sec.* 38(1)—*"During"—Landlord's Preferential Claim for Arrears of Rent —Extent of—Assignments and Preferences Act, R.S.O.* 1914 *ch.* 134.

Appeal by the defendant and cross-appeal by the plaintiff from the judgment of BRITTON, J., ante 90.

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

G. T. Walsh, for the defendant.

E. H. Cleaver, for the plaintiff.

GARROW, J.A., delivering judgment, said that the action was brought by the assignee for the benefit of creditors of James Goodbrand, under an assignment dated the 7th September, 1915, for an injunction to restrain the defendant from selling certain goods and chattels, the property of the assignor, under distress proceedings instituted by the defendant against the assignor two days after the date of the assignment.

The assignor was the tenant of the defendant under an indenture of lease dated the 16th January, 1915, for a term of 3 years from the 1st January, 1914, at a rent of $500 for 1914, $600 for 1915, and $600 for 1916, 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 lease contained a covenant that if (among other things) the tenant made a chattel mortgage, the then current year's, as well as the ensuing year's, rent should immediately become due and payable, and the term thereby granted, at the option of the lessor, immediately become forfeited and void, and that such accelerated rent might be recovered in the same manner as the rent thereby reserved.

On the 11th January, 1915, some days before the date of the lease, but during the term therein mentioned, Goodbrand gave a chattel mortgage, and on the 1st May, 1915, he gave another. The defendant, asserting that, by reason of the acceleration clause, the rent for the last two years of the term (the first having been paid) had become due, distrained for the whole.

Britton, J., held that the defendant was entitled to a preferential lien, but only in respect of one year's rent.

The defendant appealed from that holding; and the plaintiff cross-appealed upon the ground that the allowance should be reduced to six months' rent.

Reference to the statutory provision upon which the case turns, sec. 38(1) of R.S.O. 1914 ch. 155; Linton v. Imperial Hotel Co. (1889), 16 A.R. 337; In re Hoskins and Hawley (1877), 1 A.R. 379; Langley v. Meir (1898), 25 A.R. 372; Baker v. Atkinson (1886-7), 11 O.R. 735, 14 A.R. 409.

The decision in In re Hoskins was not followed in Linton v. Imperial Hotel Co. and Langley v. Meir, and the Court was not now bound to follow it, so far as it could be deduced from it that an acceleration clause such as that in question was ipso facto void as against creditors. So to hold would be to treat as a presumption of law that which was properly a presumption of fact; and, if it was to be regarded as a presumption of fact, the presumption failed because there was no evidence before the Court as to the financial condition of the lessee when the lease was executed. The lessee may have been solvent then, or he may have since discharged all his then obligations.

The word "during" in sec. 38(1)—in the phrase "restricted to the arrears of rent *during* the period of one year next preceding"—should be read as meaning "for." The right to distrain is not taken away; but the lien is reduced to one year's rent, if so much or more is owing, that is, that not more than one year's arrears prior to the assignment, whether the arrears are actual or accelerated, can now be claimed.

It would have been a wise precaution to have had the owners of the chattel mortgages before the Court as parties. The assignee may find that he has really been fighting a battle for their benefit rather than for that of the creditors whom he represented.

The money realised from the sale, less the expenses of the sale, should be paid into Court to abide the further order of the Court.

Subject to this variation, the judgment below should be

affirmed, and the appeal and cross-appeal both dismissed with costs.

MACLAREN, J.A., concurred.

HODGINS, J.A., read a judgment in which he said that he took the view of the majority of the Court in Langley v. Meir, that sec. 38(1) was intended to prevent priority for accelerated rent beyond 3 months from the execution of the assignment—the intention was to restrict, and not to enlarge or accumulate, rights of distress.

On the facts of this case, and on the assumption that the assignee gave up possession, the landlord should be held entitled to a preferential lien for so much of the accelerated rent as did not extend beyond 3 months after the date of the assignment. This would give him the rent from the 1st January, 1915, to 7th September, 1915, and for 3 months thereafter—more than 11 months. This was practically the same period for which GARROW, J.A., thought the defendant entitled; and HODGINS, J.A., agreed in the dismissal of both appeals, and in the direction for payment into Court.

MEREDITH, C.J.O., read a judgment in which he expressed the opinion that the defendant was entitled to distrain for the two years' rent as rent which became in arrear "during" the year next preceding the execution of the assignment; but also the opinion that the acceleration clause was void against the plaintiff, as a fraud upon the Assignments and Preferences Act, R.S.O. 1914 ch. 134—referring to In re Hoskins and Hawley, 1 A.R. 379; Baker v. Atkinson, 11 O.R. 735, 752, per Armour, J.; In re Murphy (1803), 1 Sch. & Lef. 44; Ex p. Mackay (1873), L.R. 8 Ch. 643; Ex p. Barter (1884), 26 Ch.D. 510.

The defendant's appeal should be dismissed, and the plaintiff's appeal allowed.

MAGEE, J.A., agreed that the defendant was entitled to distrain for the two years' rent, but did not agree that the acceleration clause was void. He was, therefore, in favour of allowing the defendant's appeal and dismissing the plaintiff's appeal.

Judgment as stated by GARROW, J.A.

HIGH COURT DIVISION.

FALCONBRIDGE, C.J.K.B. FEBRUARY 2ND, 1916.

MURCH v. CITY OF TORONTO.

Principal and Agent—Solicitor and Client—Authority of Solicitor to Receive Moneys for Client — Compensation for Lands Expropriated by Municipality—Retainer of Solicitor for Proposed Arbitration — Compensation Agreed upon without Arbitration—Solicitor not Intrusted with Deed—Registration of Expropriating By-law — Ratification or Acquiescence—Evidence.

Action against the Corporation of the City of Toronto to recover, with interest, the sum of $3,765, being the balance of a sum of $7,000 which the defendants agreed to pay to the plaintiff as compensation for lands expropriated under an expropriation by-law passed by the defendants.

The defendants paid the whole sum of $7,000 to one Lobb as the plaintiff's solicitor, but without obtaining a deed of conveyance of the land or the discharge of a mortgage registered against the land. Of the sum paid to Lobb, $3,235 had reached the plaintiff's hands or been accounted for by Lobb to the plaintiff; but the balance was misappropriated by Lobb.

There was no express authority from the plaintiff to the solicitor to receive the moneys from the defendants; and the evidence on behalf of the plaintiff was that Lobb concealed from the plaintiff the fact of the receipt of the moneys from the defendants, and pretended to be advancing to the plaintiff and his contractors moneys out of his own pocket.

Lobb, who had left the country, was examined on commission at New York, and deposed that the plaintiff had knowledge of the receipt by him of $2,000 of the moneys in question, but admitted the concealment by him of the receipt of the balance, $5,000, until about 6 weeks before he left the country.

The action was tried without a jury at Toronto.

T. H. Lennox, K.C., and C. W. Plaxton, for the plaintiff.

B. W. Essery, for the defendants, contended that, owing to the expropriation by-law being registered, a deed was unnecessary, and that the plaintiff had acquiesced in Lobb acting as his agent to receive the moneys.

FALCONBRIDGE, C.J.K.B., delivering judgment at the close of the hearing, said that his finding, upon the facts and his un-

derstanding of the law, was, that no authority was given by the plaintiff to Lobb to receive the moneys, either expressly or by implication as the result of a general authority such as is given to a solicitor in the conduct of an action. There was no arbitration here—there was merely a view. The plaintiff swore distinctly—and there were several corroborating circumstances—that the retainer or employment of Lobb was simply with reference to a proposed arbitration.

The learned Chief Justice accepted the statements of the plaintiff in their entirety, and preferred them to those of Lobb wherever there was a difference. Lobb, in advance of the commission, said in a letter exhibited that he had no authority.

Whatever might be said with reference to the $2,000, it was not now material, because the plaintiff had received more than that amount. But as to the payment of the $5,000, which depended on the delivery of a deed, and probably on the discharge of a mortgage, it was a singular thing that that sum should be paid to Lobb without the production or delivery of either document. If Lobb had been intrusted with a deed, that would have been a different matter; but no deed was tendered or executed; the defendants chose to pay Lobb, and must take the consequences.

As regards the payments made by Lobb to and on behalf of the plaintiff, the learned Chief Justice accepted the plaintiff's explanation that Lobb, who was then supposed to be a person of means, said that he would make payments for the plaintiff out of his own pocket. At the time when the plaintiff heard that Lobb had got all the money, the loss was irreparable, and the subsequent receipt of $92 did not affect the matter.

Judgment for the plaintiff for $3,765, with interest from the date of the writ of summons, and with costs.

SUTHERLAND, J. FEBRUARY 8TH, 1916.

*HAMILTON v. SHAULE.

Crown Lands—Purchase from Department — Assignment by Locatee—Non-performance of Settlement Duties—Delay in Registration of Assignment—Sale under Execution against Lands of Locatee—Sheriff's Deed — Contest between Assignee and Purchaser—Priorities—Public Lands Act, R.S. O. 1897 *ch.* 28, *secs.* 19, 31, 37; 3 & 4 *Geo. V. ch.* 6, *secs.* 16, 44 (1), 59.

Action for a declaration of the plaintiff's title to two quar-

ter-sections of land in the township of Rose, in the district of Algoma, for damages for trespass and slander of title, to set aside a sheriff's deed thereof in favour of the defendant, and for an injunction.

The action was tried without a jury at Toronto.

Gideon Grant, for the plaintiff.

Grayson Smith, for the defendant.

SUTHERLAND, J., in a considered judgment, said that the plaintiff's father bought the two quarter-sections in 1881 from the Ontario Crown Lands Department, duly paid therefor, and became entitled, on performance of settlement duties, to ask for a patent therefor.

The plaintiff made money advances to her father, in consideration of which he agreed to convey to her his interest in the two lots; and the agreement was carried into effect by the execution by him on the 17th July, 1907, of a quit-claim deed of the property in her favour. The plaintiff attempted to register the deed in the Algoma Land Titles office, but registration was refused. The plaintiff did not register it in the Crown Lands Department, under the Public Lands Act, R.S.O. 1897 ch 28, sec. 19, until the 11th February, 1914.

A creditor of the father, on the 5th September, 1907, obtained a judgment against him; and under execution, issued pursuant to that judgment, against his lands, his interest was on the 10th July, 1914, sold by the sheriff to the defendant, and a deed given on the following day.

The execution was registered or noted in the Crown Lands Department; and the sheriff's deed was subsequently also so noted or registered.

Reference to the Act already referred to, secs. 19, 19(2), 31, 37; Yale v. Tollerton (1867), 13 Gr. 302; Ferguson v. Ferguson (1869), 16 Gr. 309; Bondy v. Fox (1869), 29 U.C.R. 64; Cornwall v. Gault (1863), 23 U.C.R. 46; Peebles v. Hyslop (1914), 30 O.L.R. 511; Ruttan v. Burk (1904), 7 O.L.R. 56; Howard v. Stewart (1914), 50 S.C.R. 311; the Public Lands Act, 1913, 3 & 4 Geo. V. ch. 6, secs. 16, 44(1), 59.

The conveyance to the plaintiff had been made long before the passing of the last-named Act, though the fact had not been brought to the notice of the Department. No case had been cited, and the learned Judge had been able to find none, which determined that, in the circumstances narrated, the purchaser at the sale under the execution should take priority over

the assignee under the deed. It had not been shewn that the plaintiff knew of the existence of the specific debt against her father on which the judgment was obtained and execution issued.

On the evidence, the sale to the plaintiff was bonâ fide and for value. There was no intention on the part of the plaintiff to defeat, hinder, or delay creditors.

As the matter stood, the registration of the sheriff's deed in the Crown Lands Department, after due notice, before the sale under which it was obtained, of the assignment of the interest of her father to the plaintiff, is in effect a cloud upon the title of the plaintiff, and while it stands apparently prevents her from proceeding to perform the settlement duties necessary to enable her to obtain the patent.

It was true that the plaintiff had been guilty of laches with respect to these duties, but the Crown had not seen fit to take advantage thereof, as it might have done—there had been no cancellation of the rights of the purchaser or locatee which she acquired under her deed; and the Department, in a letter of the 27th May, 1914, recognised the assignment to the plaintiff as standing in the way of a good title to any one who might purchase at the sheriff's sale.

Judgment for the plaintiff, with costs, declaring that the two quarter-sections are the property of the plaintiff, subject to the rights of the Crown with reference to the performance of settlement duties, and restraining the defendant from entering upon or cutting timber upon the lands. No damages were proved.

SUTHERLAND, J. FEBRUARY 8TH, 1916.

*HOWARTH v. ELECTRIC STEEL AND METALS CO. LIMITED.

*YOUNG v. ELECTRIC STEEL AND METALS CO. LIMITED.

Negligence—Injury and Death by Explosion in Works of Steel Company—Negligence of Servants of Hydro-Electric Power Commission of Ontario—Liability—Power Commission Act, R.S.O. 1914 *ch.* 39, *sec.* 16—*Consent of Attorney-General to Bringing of Actions—Implication therefrom—Damages.*

The first action was brought by Minnie Howarth, mother and administratrix of the estate of Ambrose Howarth, deceased,

against the above-named company and the Hydro-Electric Power Commission of Ontario, to recover damages for the death of her son, from injuries sustained from an explosion on the 17th October, 1914, of the oil-switch in the transformer station of the employers of the deceased, the defendants the Electric Steel and Metals Company Limited, at the town of Welland.

The second action was brought against the same defendants by one Young, also employed by the defendant company, who was injured by the same explosion.

The actions were tried together, without a jury, at St. Catharines.

A. C. Kingstone, for the plaintiffs.

G. Lynch-Staunton, K.C., and G. B. Burson, for the defendant company.

M. H. Ludwig, K.C., for the defendant Commission.

SUTHERLAND, J., examined the facts and evidence at great length, in a written opinion, and stated his conclusion that the explosion occurred through the negligence of the employees of the defendant the Hydro-Electric Power Commission of Ontario, and that this defendant was liable in damages, unless a defence set up by it was available as an answer. That defence was, that, as the Commission is an "emanation from the Crown or an agent of the Crown," discharging duties in the interest of the public and without profit, it cannot be made liable for an act of negligence such as that in question here.

Reference to the Power Commission Act, R.S.O. 1914 ch. 39, and the Interpretation Act, R.S.O. 1914 ch. 1, sec. 27.

In both the original Power Commission Act, 7 Edw. VII. ch. 19, and in the present Act, a Commission is created. Nowhere, however, is it expressly made a corporation or body politic and corporate; but, by sec. 16 of the present Act (sec. 23 of the original Act), "Without the consent of the Attorney-General no action shall be brought against the Commission . . . for anything done or omitted. . . ." In these cases, the Attorney-General had given consent; and in this consent it was implied that, if the Commission should be held liable in the actions, judgment might be pronounced against it. This differentiated these cases from Graham v. Commissioners for Queen Victoria Niagara Falls Park (1896), 28 O.R. 1, and Roper v. Public Works Commissioners, [1915] 1 K.B. 45, and cases therein referred to. Reference also to Re City of Ottawa and Provincial Board of Health (1914), 33 O.L.R. 1.

Damages in the Howarth case assessed at $1,000; in the Young case, at $2,500.

Judgment for each plaintiff accordingly against the defendant Commission with costs.

Action dismissed as against the defendant company without costs.

LATCHFORD, J., IN CHAMBERS. JANUARY 9TH, 1916.

*RE SWAIN.

Lunatic—Application for Appointment of Sole Committee of Estate in Ontario—Proposed Committee Resident out of Ontario—Lunacy Act, R.S.O. 1914 *ch.* 68.

Application for an order declaring Janet Swain a lunatic and appointing her son, John McLellan Swain, sole committee of her estate within Ontario.

J. J. Coughlin, for the applicant.

No one appeared to oppose the application.

LATCHFORD, J., said that Janet Swain had been confined as a patient in the Provincial Asylum for the Insane at North Battleford, in the Province of Saskatchewan, since July, 1915. Evidence indicating that she was suffering from chronic dementia, and that there was no hope of her recovery, was submitted. She was, at the time of the application, possessed of property in Ontario of the value, approximately, of $9,000. Her son resided at North Battleford. Notice of the application was served upon her at North Battleford.

In re Bruère (1881), 17 Ch.D. 775, and In re Hopper (1897), 66 L.J. Ch. 569, distinguished.

The rule laid down by Lord Eldon in Ex p. Ord, In re Shields (1821), Jac. 94, that the sole committee of a lunatic ought to be resident within the jurisdiction, has never been departed from; and the control conferred upon the Court by the Lunacy Act, R.S.O. 1914 ch. 68, in regard to the committee of a lunatic, cannot be exercised beyond the Court's jurisdiction.

Application refused.

MASTEN, J. FEBRUARY 10TH, 1916.

*McDONALD v. LANCASTER SEPARATE SCHOOL TRUSTEES.

Contempt of Court—Disobedience of Judgment — Finding of Fact—Motion to Commit Defendants—Preliminary Objections—Notice of Motion—Failure to Specify Portions of Judgment Disobeyed—Irregularity—Condonation — Rules 183, 184—Cessation from Act Constituting Contempt—Recalcitrant Conduct—Punishment — Imposition of Fine — Locus Pœnitentiæ—Costs.

Motion by the plaintiff to commit the defendants Mederic Poirier and John Menard for contempt of Court in disobedience of the judgment of FALCONBRIDGE, C.J.K.B., 31 O.L.R. 360, affirmed by the Appellate Division, 34 O.L.R. 346.

The motion was heard in the Weekly Court at Toronto.

J. A. Macdonell, K.C., for the applicant.

A. C. McMaster, for the respondents.

J. A. McEvoy, for the Department of Education.

MASTEN, J., said that three breaches of the judgment were alleged: (a) that the respondents had, since the month of July, 1915, employed, as a teacher in the Roman Catholic Separate School for section 14 in the township of Lancaster, one Florence Quesnel, a teacher not properly qualified according to the regulations; (b) that they had directed and allowed the teaching of French as a language in the school; (c) that they had allowed the use of French as the language of instruction or communication in the school, and that such use had not been made permissible under the regulations.

Florence Quesnel, the learned Judge said, was employed by the respondents as teacher of the school down to the 27th December, 1915; and from July, 1915, until she resigned, she was not properly qualified according to the regulations. The respondents had directed and allowed the teaching in the school of French as a language; but that was not prohibited by the judgment. The respondents had allowed the use of French as the language of instruction or communication in the school in connection with the teaching of the Catechism, which was not permissible under the regulations.

After making these findings, the learned Judge detailed the proceedings upon the motion. It was first argued on the 11th

November, 1915; it was then adjourned until the 14th December, 1915, and again until the 27th December, 1915, when it was re-argued. Judgment was then given on certain phases of the motion; and there was a further adjournment until the 12th January, 1916, with a direction that the applicant should serve a supplimentary notice of motion for that day. A notice was served accordingly on the 3rd January, 1916, and affidavits were filed on behalf of the respondents shewing that they had on the 27th December, 1915, procured the resignation of Florence Quesnel, and notified the solicitors for the applicant.

The motion was finally argued on the 12th January, when counsel for the respondents objected that the notice did not speceify any particular term or clause of the judgment as that which was disobeyed.

As to this, the learned Judge referred to Hipkiss v. Fellows (1909), 101 L.T.R. 516; Taylor v. Roe (1893), 68 L.T.R. 213; In re Seal, [1903] 1 Ch. 87; Halsbury's Laws of England, vol. 17, p. 295; Rendell v. Grundy, [1895] 1 Q.B. 16; Petty v. Daniel (1866), 34 Ch.D. 172; Rules 183 and 184; and said that he overruled the objection and condoned the irregularity, if any such existed.

The next objection was, that, at the date when the supplementary notice of motion was served, the respondents were not in contempt—the services of Florence Quesnel having been then dispensed with.

As to this, the learned Judge expressed the opinion that, where a contempt has been committed, it is not cancelled, obliterated, or purged by mere cessation from the act constituting the contempt. Reference to Oswald on Contempt of Court, 3rd ed., p. 1; Rex v. Newton (1903), 67 J.P. 453.

Apart from this, the objection did not appear to be well-founded upon the facts. There was nothing to indicate that the respondents, even down to the present time, had ceased to employ the French language as the language of instruction and communication in teaching the Catechism.

Adopting the language of the trial Judge, the conduct of the respondents could only be described as recalcitrant and recusant. Obsessed with a rigid and obstinate desire to carry matters on to the last ditch according to their own wishes, they had (whether there was any direct intention to disobey or not) disregarded not only the spirit but the letter of the Court's judgment.

Reference to Stancomb v. Trowbridge Urban District Council, [1910] 2 Ch. 190; Attorney-General v. Walthamstow Urban District Council (1895), 11 Times L.R. 533.

Order directing that the respondents be fined each in the sum of $500 and do pay to the applicant his costs of the motion incurred as and from the 31st December, 1915, and that there be no costs to either party prior to that day; the order not to issue for one month; and if, within that period, the respondents pay to the applicant his solicitor and client costs of all proceedings to commit from the 16th October, 1915, and execute and file an undertaking not to do any act tending towards the using or allowing the use of French as the language of instruction or communication in the school, and to do all that lies in their power to prevent the use of French hereafter contrary to law, the issue of the order is to be perpetually stayed.

SUTHERLAND, J. FEBRUARY 10TH, 1916.

ADAMS v. GLEN FALLS INSURANCE CO.

Insurance—Fire Insurance—Particulars of Loss—False Statements in Statutory Declaration—Claim Vitiated—Statutory Conditions 18 *and* 20, *R.S.O.* 1914 *ch.* 183, *sec.* 194.

Action by a retail clothing merchant, having a store at North Bay, against three fire insurance companies, to recover upon policies issued by the defendants his alleged loss by damage to his stock of goods from smoke which entered his premises in consequence of a fire which occurred on the night of the 11th February, 1915, in the store adjoining his.

The action was tried without a jury at North Bay.

G. H. Kilmer, K.C., and G. A. McGaughey, for the plaintiff.

Leighton McCarthy, K.C., for the defendants.

SUTHERLAND, J., read a judgment, in which, after setting out the facts at great length, he said that under statutory condition 18 in the Insurance Act, R.S.O. 1914 ch. 183, sec. 194, it is incumbent upon an assured, forthwith after loss: (*a*) to give notice in writing to the company; (*b*) to deliver, as soon after as practicable, as particular an account of the loss as the nature of the case permits; and (*c*) furnish therewith a statutory declaration that the account is just and true; and condition 20 provides that "any fraud or false statement in any statutory

declaration in relation to any of the above particulars shall vitiate the claim of the person making the declaration."

Upon the facts in evidence, the learned Judge was quite unable to believe that the plaintiff, with reference to his claim for damage to his goods, gave as particular an account of the loss as the nature of the case permitted. The plaintiff had deliberately prepared and presented a grossly exaggerated claim. It was impossible to believe that the plaintiff's goods were damaged to any such extent as he asserted, or to any considerable extent at all; or that the statement in the plaintiff's second declaration to the effect that the loss claimed therein was a just, true, and correct claim for the loss sustained by him, was a true statement, or that he believed that it was at the time he made the declaration.

The plaintiff also made a claim for $150 for damage to his furniture. No particulars of this were at any time furnished to the defendants; and no satisfactory details were given, even in the evidence at the trial.

In the statement of claim, the plaintiff put his claim for damage to his building at $150. At the trial it appeared that part of this amount was really for repairs done in consequence of a leak in the roof, not caused by the fire.

In these circumstances and upon these findings, the claim of the plaintiff was vitiated, and his action failed: statutory condition 20, supra.

Action dismissed with costs

CLUTE, J. FEBRUARY 10TH, 1916.

*RE CARPENTER LIMITED.

*HAMILTON'S CASE.

Company—Winding-up — Contributories — Subscriptions for Shares—Allotment — Election of Directors — Non-compliance with Provisions of Part VIII. of Companies Act, 2 Geo. V. ch. 31 (O.)—Rights of Creditors—Cancellation of Applications for Shares.

Appeal by Hamilton and four others from the order of an Official Referee placing the names of the appellants on the list of contributories of a company incorporated as Carpenter Limited, in liquidation under the Winding-up Act, R.S.C. 1906 ch. 144.

The appeal was heard in the Weekly Court at Toronto.

K. F. Mackenzie, for the appellants.

J. A. Macintosh, for the liquidator.

CLUTE, J., set out the facts in an elaborate written judgment. He referred to the Ontario Companies Act, 2 Geo. V. ch. 31, under which the company had obtained its charter, and especially to Part VIII., which, the appellants contended, had not been complied with by the company. He also referred to Re Canadian Tin Plate Decorating Co. (1906), 12 O.L.R. 594; Re Standard Fire Insurance Co. (1885), 12 A.R. 486; Hill's Case (1905), 10 O.L.R. 501; Nelson Coke and Gas Co. v. Pellatt (1902), 4 O.L.R. 481; Oakes v. Turquand (1867), L.R. 2 H.L. 325, 342; Nicol's Case (1885), 29 Ch.D. 421, 426; Hebb's Case (1867), L.R. 4 Eq. 9; Halsbury's Laws of England, vol. 5, p. 173 et seq., paras. 288, 289, 294; Elkington's Case (1867), L.R. 2 Ch. 511; Pellatt's Case (1867), ib. 527; Palmer's Company Law, 9th ed., p. 105; Roussell v. Burnham, [1909] 1 Ch. 127; Finance and Issue Limited v. Canadian Produce Corporation Limited, [1905] 1 Ch. 37; In re National Motor Mail-Coach Co. Limited, [1908] 2 Ch. 228; Burton v. Bevan, ib. 240.

The charter, he continued, having provided for three directors only, six directors could not be legally elected; and, the company having assumed to elect the six directors, the six must be presumed to have acted under that election, and not by virtue of their being directors under the charter: Garden Gully United Quartz Mining Co. v. McLister (1875), 1 App. Cas. 39, 50, 53.

It was said that the proceedings towards election of directors, if entirely void, left the charter directors still in office; but, at the meeting at which the six directors were elected, the charter directors were not present, either in person or by proxy; they never assumed to act; and no valid allotment was ever made of any shares.

The creditors had no just cause to complain; they could easily have ascertained that the company was not authorised to commence business; and they were presumed to have known that any contract made by a company before the date at which it is entitled to commence business, is provisional only, and not binding on the company until that date: sec. 112, sub-sec. 3.

The provisions of the Act apply so as to prevent the recovery, even in winding-up proceedings: In re Otto Electrical Manufacturing Co. (1905) Limited, [1906] 2 Ch. 390; New

Druce-Portland Co. Limited v. Blakiston (1908), 24 Times L.R. 583.

Section 110, sub-sec. 4, of the Act, provides for repayment where the conditions are not complied with; and it seems absurd to say that the shareholder can be called upon to pay the balance due upon his shares, when he is entitled to have returned to him the portion that he has already paid. No statutory meeting having been held, the fact of the company being wound up did not affect the appellants' rights. Their claim to have their applications for shares cancelled was in time.

The appeal should be allowed, the order of the Referee set aside, and an order made declaring that the appellants' applications for shares are cancelled, and directing that their names be removed from the books of the company as shareholders or subscribers for shares, with costs here and below.

LATCHFORD, J., IN CHAMBERS. FEBRUARY 11TH, 1916.

REX v. HEWSON.

Liquor License Act—Magistrate's Conviction of Unlicensed Person for Keeping Intoxicating Liquor for Sale—"Hard" Cider—Seizure on Premises of Accused—Chemical Analysis—Failure to Connect Liquor Seized with Liquor Analysed—Absence of Evidence—Jurisdiction of Magistrate.

Motion by William Hewson to quash his conviction by the Police Magistrate for the Town of Oshawa for keeping intoxicating liquor for sale, without a license, contrary to the Liquor License Act.

Hewson was the keeper of a restaurant, and kept cider for sale. The charge against him was that the cider found upon the premises was "hard," and therefore intoxicating. The cider seized was not sealed up until two hours after the seizure; it was then sent to the License Department for analysis.

D. O. Cameron and J. B. Mackenzie, for the applicant.
J. R. Cartwright, K.C., for the Crown.

LATCHFORD, J., held that there was nothing to connect the liquor that was seized with the liquor that was analysed; and so there was no evidence upon which the magistrate could convict. The learned Judge expressed the opinion that in such a

case a specimen should be given to the accused in order that he might have an independent analysis.

Order made quashing the conviction with costs; the order to contain a clause protecting the magistrate.

FALCONBRIDGE, C.J.K.B., IN CHAMBERS. FEBRUARY 12TH, 1916.

RE ACTON TANNING CO. AND TORONTO SUBURBAN R.W. CO.

Railway—Expropriation of Land—Compensation—Application for Appointment of Arbitrator—Jurisdiction — Forum — Suggested Agreement as to Compensation—Opportunity to Establish—Appointment for Cross-examination of Officers of Claimant Company.

Motion by the Acton Tanning Company, claimant for compensation, to set aside an appointment for the cross-examination of the president and vice-president of the claimant company; and (2) for the appointment of an arbitrator to determine the compensation or damages.

H. M. Mowat, K.C., for the claimants.
W. N. Tilley, K.C., for the railway company.

FALCONBRIDGE, C.J.K.B., said that at the present stage of the proceedings, and on the material presented, the attempt to cross-examine the officers of the claimant company as to a supposed agreement between the deceased president of the claimant company and the president of the railway company, which agreement was not sworn to, but was merely suggested in correspondence, would be entirely irregular and an abuse of the process of the Court. The appointment should, therefore, be set aside.

To the motion for the appointment of an arbitrator, the railway company objected that it should have been made before a County Court Judge. The learned Chief Justice, however, was of opinion that he was properly seized of it.

In view of the suggestion that there was an agreement which, if it existed, might oust the operation of the Railway Act, the learned Chief Justice withheld his judgment on that branch of the case for 10 days, to enable the railway company to bring an action to establish the agreement suggested and for specific

performance thereof. If an action is not commenced within that time, the motion will be disposed of.

HENROTIN v. FOSTER—SUTHERLAND, J.—FEB. 7.

Contract—Transfer of Mining Claims — Consideration — Action to Set aside Agreement—Company-shares.]—Action by Charles M. Henrotin, a mining engineer, against Clement A. Foster, also a mining engineer, Henry Cecil, a promoter, and the Burnside Gold Mines Limited, a company incorporated in England, having a charter to carry on business in Ontario. The action arose out of dealings with mining claims Nos. L-1821, Label, and L-1822 and L-1823, Teck, in Ontario. The plaintiff's claim was to set aside an agreement made on the 9th May, 1913, between the plaintiff and the defendant Cecil, and to have the mining claims mentioned restored to the plaintiff, on the ground of total failure of consideration; or, in the alternative, for $150,000 damages and the delivery of 30,000 shares in the defendant company and the payment of the loss sustained by the plaintiff or that will be sustained by him by the non-delivery of the shares at the time of the incorporation of the company, and an accounting for all shares in the defendant company, or in any other company, and for all moneys received for the transfer of the mining claims aforesaid. All the defendants defended and set up counterclaims. The action was tried without a jury at Toronto. The learned Judge stated the facts and reviewed the evidence, in a written opinion of great length; he made certain findings of fact, upon which, he said, the action might be dismissed. As arising, however, out of the issues raised in the pleadings and the evidence at the trial, he thought that he might properly find and determine, as he did, that, owing to the default in payment of the defendant Foster of the instalments due under the agreement of the 22nd January, 1914, that contract had been put an end to, and the plaintiff restored and relegated to his rights under the agreement of the 16th April, 1913, against the defendants Foster and Cecil and the defendant company as the assignee of the claims with notice of these rights; and that the plaintiff was entitled to his proportionate share of the 7½ per cent. of all stock, if any, received by the defendants Foster and Cecil or to be received by them or of other consideration received by them, or either of them, in lieu of stock. If the plaintiff is content to take a judgment so deter-

mining, he may have it, without costs. If not, the action will be dismissed without costs and without prejudice to any further action the plaintiff may see fit to bring under the agreement of the 16th April, 1913, alone or in association with Loring and O'Connell, against the defendants or any of them. The counterclaims of the defendants will also be dismissed without costs and without prejudice to their rights to set them up in any future actions. W. N. Tilley, K.C., and J. Lorn McDougall, for the plaintiff. I. F. Hellmuth, K.C., for the defendants.

LAMBERT v. CITY OF TORONTO—MULOCK, C.J.Ex.—FEB. 9.

Indemnity—Negligence — Covenant — Agreement between Municipal Corporation and Electric Company.]—Action by the administratrix of the estate of one Kenneth Lambert, deceased, against the Corporation of the City of Toronto and the Interurban Electric Company Limited, to recover damages for the death of Lambert, caused, it was alleged, by the negligence of the defendants. The action was tried with a jury at Toronto. On the findings of the jury, the learned Chief Justice directed judgment to be entered for the plaintiff against both defendants for $2,700 and costs. The defendant city corporation contended that, by virtue of a memorandum of agreement, bearing date the 15th October, 1901, made between the Corporation of the Township of York and the Humber Power and Light Company, and a certain other agreement, bearing date the 3rd April, 1905, made between the York corporation and the Stark Telephone Light and Power System, the Toronto corporation was entitled to be indemnified by its co-defendant, the Interurban Electric Company Limited, in respect of the damages recovered by the plaintiff. The learned Chief Justice said that, according to the finding of the jury, the negligence of the city corporation, in not having properly insulated its guy-wires, was one of the causes of the accident which led to the death of Lambert. The indemnity covenant did not indemnify the city corporation against its own negligence; and, therefore, the city corporation was not entitled to indemnity from its co-defendant. B. N. Davis, for the plaintiff. C. M. Colquhoun, for the defendant city corporation. D. Inglis Grant, for the defendant company.

PRATT v. TORONTO AND YORK RADIAL R.W. CO.—MULOCK, C.J.EX.—FEB. 9.

Costs—Action Removed into Supreme Court from County Court at Instance of Defendant—Costs Awarded to Defendant on Supreme Court Scale.]—This action was commenced in a County Court, the plaintiff claiming as damages a sum of money beyond $500; and the defendant company disputed the jurisdiction because of the amount thus claimed. Thereupon the case was transferred to the Supreme Court of Ontario, and proceeded to trial, which resulted in a dismissal of the action by MULOCK, C.J.Ex., who said that the defendant company was entitled to costs, and the question was, what costs? The company was within its right in objecting to the trial being had in the County Court, nor was it unreasonable that it should require the trial, which involved so large a sum as that claimed, to be had in the Supreme Court. There was no reason why the company should not have costs on the higher scale, and not merely County Court costs; and it should be so adjudged. F. M. Field, K.C., and T. N. Phelan, for the plaintiff. T. H. Lennox, K.C., for the defendant company.

AUGUSTINE AUTOMATIC ROTARY ENGINE CO. v. SATURDAY NIGHT LIMITED—MASTER IN CHAMBERS—FEB. 11.

Libel—Discovery — Defences — Justification — Fair Comment—Particulars—Limitation of Discovery — Examination of Officer of Plaintiff Company.]—Motion by the defendants for an order directing the president of the plaintiff company to attend for re-examination at his own expense and to answer the questions which he refused to answer on advice of counsel in the course of the examination already had, and in default for an order dismissing the action. The action was for libel. See 34 O.L.R. 166, 8 O.W.N. 426, 462, 503. The defendants in their defence pleaded that, if they did publish the words complained of in the statement of claim, the words, in so far as they consisted of allegations of facts, were true in substance and fact, and, in so far as they consisted of expressions of opinion, were fair and bonâ fide comment made in good faith and without malice upon the facts, which were matters of public interest, and the publication of the same was for the public benefit. Particulars of the defence were ordered, and the order had been complied with. The Master said that it was well settled by the authorities that in libel actions, where the defendants furnish

particulars of their plea, the issue to be tried is limited to the matters referred to in the particulars. The defendants' right to have discovery was limited to the facts set out in the particulars: see Yorkshire Provident Life Assurance Co. v. Gilbert & Rivington, [1895] 2 Q.B. 148. The defendants were not entitled to any further discovery, and the motion should be dismissed with costs. G. M. Clark, for the defendants. W. J. Elliott, for the plaintiffs.

POULIN v. CITY OF OTTAWA—SUTHERLAND, J.—FEB. 11.

Highway—Object Likely to Frighten Horses Left at Side of City Street—Injury to Person in Vehicle Drawn by Horse—Nuisance—Liability of City Corporation—Findings of Jury—Evidence—Damages—Costs.]—Action for damages for injuries sustained by the plaintiff by being thrown from his "rig," when travelling upon one of the highways of the defendants, a city corporation, by reason, as the plaintiff alleged, of his horse taking fright at a road-roller placed by the defendants upon the highway, close to the travelled portion thereof. The roller was covered with white canvas, and it was said that the canvas, when inflated by the wind, presented a startling appearance, and caused a loud flapping likely to frighten horses. The plaintiff, not having given the notice required by the Municipal Act, admitted that he could not succeed on the ground of nonrepair; but he alleged that the placing of the roller on the highway was a nuisance for which the defendants were responsible. The action was tried with a jury at Ottawa. The jury found, in answer to questions: (1) that the roller was calculated to frighten horses; (2) that the plaintiff's injuries were caused by the horse taking fright; (3) that the sight and sound of the flapping of the canvas on the roller caused the horse to take fright; (4) that the injuries of the plaintiff were not caused by the slippery condition of the street; (5) nor by the drop or slope of the road; (6) nor by any negligence on the plaintiff's part; and they assessed the damages at $250. SUTHERLAND, J., said that evidence was given at the trial to shew that the horse drove well and quietly, and was not apt to take fright unnecessarily. In the light of the evidence, the effect of the jury's finding was, that the roller as covered was an object calculated to frighten horses of ordinary gentleness: Roe v. Village of Lucknow (1893), 23 A.R. 1, 7; McIntyre v. Coote (1909), 19 O.L.R. 9, 16; Knight v. Goodyear's India Rubber Co. (1871), 38 Conn. 438. There was evidence upon which the jury could properly

find as they did; and judgment should be entered for the plaintiff for $250, with appropriate costs. J. R. Osborne, for the plaintiff. F. B. Proctor, for the defendants.

SHAW v. UNION TRUST CO. LIMITED—RIDDELL, J., IN CHAMBERS —FEB. 12.

Discovery—Examination of Officer of Defendant Trust Company—Relevancy of Questions—Validity of Objections—Motion to Compel Answers—Costs.]—After the decision of RIDDELL, J., noted ante 378, the defendant McWhinney, as general manager of the defendants the Union Trust Company Limited, attended again for examination; and upon such examination refused, on the advice of counsel, to answer certain questions; whereupon a motion was made in Chambers, on behalf of the plaintiff, for an order determining the validity of the objections to the questions. RIDDELL, J., said that the defendant McWhinney refused to answer a number of questions directed to bringing out the true relation between the Union Trust Company Limited and the Financial Securities Company of Canada Limited—both companies being defendants; the defendant McWhinney asserted that the sole relation between the companies was that of lender and borrower. The plaintiff was entitled to know what the relations between these two companies actually were, and was not bound to take the manager's word for it. Another class of questions referred to the state of accounts between the two companies. The information sought by these questions was of no importance to the plaintiff. A question directed to finding out whether all the money which went into the railway matter was advanced by the trust company, was not relevant. The question whether there were any minutes of meetings of the shareholders or directors dealing with the Richmond undertaking or the advances made in connection with it, was relevant. A question directed to finding out who were the individuals who opposed or favoured certain acts of the trust company, was wholly inadmissible. The plaintiff was entitled to information as to the sale of bonds by the trust company. He was not entitled to know whether the various contracts were considered by the trust company. Order accordingly. The plaintiff, having substantially succeeded, should have half his costs, without set-off, payable forthwith by the defendant McWhinney. E. B. Ryckman, K.C., for the plaintiff. G. H. Watson, K.C., and W. B. Raymond, for the defendants.