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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. MAY 7TH, 1918.

CUNNINGHAM v. KELLY.

Mortgage—Security for Advances—Promissory Notes—Mortgage Assigned as Collateral Security—Action on Mortgage—Counterclaim—Declaration of Invalidity of Mortgage and Assignment—Evidence—Findings of Trial Judge—Appeal—Costs.

Appeal by the defendant from the judgment of Britton, J., 13 O.W.N. 342.

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

A. Cohen, for the appellant.

J. D. Falconbridge, for the plaintiff, respondent.

CLUTE, J., in a written judgment, said that the action was upon a mortgage dated the 27th October, 1916, to recover $1,000, and in default of payment for foreclosure. The defendant denied that she was liable upon the mortgage and (by counterclaim) asked for a declaration that the mortgage was invalid and a direction that the registration thereof should be vacated. The defendant also asked that the assignment of another mortgage, called the John Kelly mortgage, for $1,600, by herself to the defendant, should be declared invalid and should be set aside and the registration thereof vacated. She also asked for the delivery up of three promissory notes for $200, $300, and $500 respectively.

The learned Judge said that he was of opinion that the mortgage for $1,000 and the assignment of the $1,600 mortgage were invalid

and never came into effect as securities, and should be set aside and the registration thereof cancelled. These conclusions were reached mainly upon the findings of the trial Judge and the evidence of the plaintiff himself.

The learned Judge set out the history of the transactions between the plaintiff and the defendant, in which one Boehmer was concerned, and made references to and gave extracts from the testimony of the plaintiff.

The plaintiff, the learned Judge said, was not guilty of any fraud or of any conspiracy with Boehmer in the transactions; and, according to the plaintiff's own statement, when the mortgage was taken, his intention was to make the advance. He withdrew from this position, and, when he did so, was bound to regard the whole transaction as at an end and yield up all the security which he had obtained under the assurance that the advance would be made.

The mortgage made by the defendant and the assignment of the John Kelly mortgage were parts of the same transaction, and should stand or fall together. There should be a declaration that the mortgage and assignment were invalid and void, and they should be set aside and the registration thereof cancelled, and this action, and also the action pending in respect of the John Kelly mortgage, should be dismissed. The two promissory notes for $200 and $300 respectively should be delivered up to the defendant to be cancelled. The $500 note made by the defendant, dated the 30th September, 1916, payable to the order of Boehmer and endorsed by him to the plaintiff, should be declared valid and binding upon the defendant for the full amount thereof, and, if he so desired, the plaintiff might have judgment for the amount, less the defendant's taxed costs of her defence of this action and of this appeal and the costs of her defence of the action brought on the John Kelly mortgage.

MULOCK, C.J. Ex., and KELLY, J., agreed with CLUTE, J.

RIDDELL, J., agreed in the result.

Appeal allowed.

SECOND DIVISIONAL COURT. MAY 7TH, 1918.

*MILLER v. TIPLING.

Way—Easement—Right of Way over Adjacent Land—Reservation or Re-Grant in Conveyance—Construction—Ascertainment of Land to which Easement is Appurtenant—Use of Land as Approach to Garages—Injunction.

An appeal by the defendant from the judgment of MEREDITH, C.J.C.P., who tried the action without a jury at Toronto, in favour of the plaintiff, restraining the defendant from making use of the northerly 2½ feet to the depth of 76 feet of the plaintiff's land in Leuty avenue, Toronto, except in connection with the ownership or occupancy of the adjacent premises to the north.

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

C. J. Holman, K.C., and J. H. Bone, for the appellant.

I. F. Hellmuth, K.C., and Alexander MacGregor, for the plaintiffs, respondents.

MULOCK, C.J. Ex., read a judgment, in which he said that the sole question upon the appeal was, whether the defendant was entitled to use or authorise the user of a way 2½ feet wide by a depth of 76 feet, extending westerly from Leuty avenue, as appurtenant to his lands.

One Atkinson owned a block of land on the west side of Leuty avenue, and erected thereon three houses, Nos. 24, 26, and 28—No. 24 being the most southerly. Houses 26 and 28 were separated from each other by a strip of land, not built upon, 8½ feet in width. The two houses were immediately opposite each other and of the same depth from east to west. In September, 1912, Atkinson sold and conveyed to the plaintiffs' predecessor in title the land upon which No. 26 was situate. House 26 stood 2½ feet south of the northerly limit of the lot upon which it was placed. At the time of the sale and conveyance, Atkinson owned the land adjacent thereto on the north, on which stood No. 28, and he also owned the land adjacent on the west, the two portions together forming an L-shaped piece of land. After the description of the land intended to be conveyed, in the conveyance from Atkinson to the plaintiffs' predecessor, were these words: "together with a right of way for the purpose only of getting in coal or other fuel and for the passage of an automobile over the 6 feet adjoining the

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

premises hereby conveyed to the north to a depth of 76 feet from Leuty avenue and subject to a right of way for the party of the first part and the owners or occupants of the adjacent premises to the north over the northerly 2 feet 6 inches to a depth of 76 feet from said avenue of the premises hereby conveyed."

The 6-feet right of way was over the defendant's land, and the 2½-feet right of way—that in question—was over the plaintiffs' land.

Shortly after the sale of No. 26, Atkinson sold No. 24 to a stranger; and, by deed of the 23rd September, 1915, conveyed to the defendant his remaining two parcels of land—the L-shaped piece—and the defendant erected at the south-westerly end thereof three garages and let them for storage of automobiles. He claimed for his tenants the right of way over the plaintiffs' strip of 2½ feet, basing his claim on the above-quoted words in the conveyance from Atkinson, as creating a right of way over the 2½-feet strip appurtenant to the premises where the garages stood.

The grantee did not execute the conveyance containing the words relied upon, and it could not in strictness be said that there was a re-grant; but, assuming that the instrument contained a re-grant of a right of way, the question was, to what land was such right of way made appurtenant? The defendant contended that the words created a right of way appurtenant not only to the land adjacent on the north to the 76-foot strip, but also to the other lands then owned by Atkinson, namely, that parcel lying westerly and south-westerly of the plaintiffs' land, on the southerly portion of which the garages were erected.

The re-grant here made no reference to the westerly premises, and the conclusion must be that it was not intended to create a right of way appurtenant thereto. That conclusion was fatal to the defendant's contention.

The re-grant must be read as a whole, and its legal effect was to limit the right of way to Atkinson and other owners or occupants of the adjacent premises to the north.

The defendant claimed the right to use the way for the benefit of his westerly premises or to use it as a way to the adjacent premises to the north for the purpose of thereby reaching his westerly premises. He was not entitled to either of such users.

The appeal should be dismissed with costs.

RIDDELL, J., in a written judgment, agreed that the appeal should be dismissed with costs; but said that he was not to be considered as holding that the right of way could not be used at all in connection with the back premises; the only matter under

consideration was the use for a garage which has no relation with the beneficial enjoyment of No. 28.

KELLY, J., for reasons stated in writing, agreed that the appeal should be dismissed with costs.

CLUTE, J., read a dissenting judgment.

Appeal dismissed; CLUTE, J., *dissenting.*

SECOND DIVISIONAL COURT. MAY 8TH, 1918.

SEAGRAM v. KEMISH.

Fraud and Misrepresentation—Sale of Company-shares—Return of Money Paid with Interest—Principal and Agent—Evidence.

Appeal by the plaintiff and cross-appeal by the defendant Kemish from the judgment of SUTHERLAND, J., 13 O.W.N. 321.

At the trial, the plaintiff succeeded as against the defendants Kemish and Burgess, but not against the defendant Gray.

The plaintiff's appeal was against the judgment of the trial Judge dismissing the action as against Gray.

The defendant Kemish gave notice of cross-appeal from the judgment against him, but did not appear to support his cross-appeal.

The plaintiff's appeal was heard by MULOCK, C.J. EX., CLUTE, RIDDELL, and SUTHERLAND, JJ.

George Bell, K.C., for the plaintiff, supported his appeal and asked that the cross-appeal should be dismissed.

The defendant Gray, in person.

No one appeared for the defendant Kemish.

THE COURT dismissed the plaintiff's appeal without costs, and the cross-appeal with costs.

SECOND DIVISIONAL COURT. MAY 8TH, 1918.

*ATTORNEY-GENERAL FOR ONTARIO v. RAILWAY PASSENGERS ASSURANCE CO.

Company—Insolvency of Trust Company Incorporated by Dominion Statute—Winding-up Order—Company Licensed to Do Business in Ontario—Loan and Trust Corporations Act, R.S.O. 1914 ch. 184—Application to Dominion Company—Powers of Provincial Legislature—Question not Open in Action on Bond—Election of Company to Give Bond as Term of Receiving License—Liability of Sureties—Extent of—Amount of Liability of Principal Debtor—Lien—Subrogation—Appeal—Costs.

An appeal by the defendants from the judgment of LATCHFORD, J., 13 O.W.N. 247.

The appeal was heard by MULOCK, C.J. Ex., CLUTE, MIDDLETON, and KELLY, JJ.

W. N. Tilley, K.C., for the appellants.

H. T. Beck, for the plaintiff, respondent.

The judgment of the Court was read by MIDDLETON, J., who said, after briefly setting out the facts, that, as the result of a reference and certain appeals, it had been determined that advances had been made by the Dominion Trust Company, acting as executors of the will of the late Geoffrey Strange Beck, out of capital money of the estate of the deceased, to Helen and Doris Beck, who were entitled only to income. These advances amounted to $2,200.89 each. Helen Beck was entitled to other money to the amount of $2,107.85, which, being set off, left a balance of $93.04 due by her. Doris Beck was entitled to set off $253.55, leaving a balance due by her of $2,064.

The Dominion Trust Company, being liable for these balances of the amounts improperly advanced, was held to have a lien upon the income of these ladies accruing to them under the terms of a trust-deed, and this lien was declared to continue in favour of the liquidator of the trust company.

This action having been brought upon the bond which the trust company procured the defendants to give, the defendants contended that the provisions of the Loan and Trust Corporations Act, R.S.O. 1914 ch. 184, under which the bond was demanded and given, were ultra vires so far as it was sought to apply them to a Dominion company.

As the trust company applied for and obtained registry under the Provincial Act, and as a term of receiving its license gave the bond now sought to be repudiated, neither the trust company nor its sureties could now be permitted to discuss the question sought to be argued. The Province demanded the bond as the price of the license. The bond was given and the license obtained. It was quite beside the mark to say now that the company might have done business in Ontario without a license. Upon this branch of the case, the Court agreed with the trial Judge.

The judgment appealed from gave, by way of assessment, damages in excess of the liability of the trust company in respect of these advances. The amount must be reduced, for the sureties could not be liable for any greater sum than the principal debtor. Upon payment of the proper amount, the defendants, the sureties, would be subrogated to the lien against the accruing income.

With this variation, the judgment should be affirmed. As success was divided, there should be no costs of the appeal.

Appeal allowed in part.

SECOND DIVISIONAL COURT. MAY 9TH, 1918.

YORK SAND AND GRAVEL LIMITED v. WILLIAM COWLIN AND SON (CANADA) LIMITED.

Contract—Formation—Corespondence—Sale of Goods—Delivery and Acceptance—Payment for Certain Deliveries—Evidence—Agency for Another Company—Action for Price of Goods—Appeal—Parties—Leave to Add Principal Company as Defendants—New Trial.

Appeal by the defendants from the judgment of SUTHERLAND, J., ante 89.

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

Shirley Denison, K.C., for the appellants.

H. H. Dewart, K.C., and G. R. Roach, for the plaintiffs, respondents.

THE COURT allowed the appeal, set aside the judgment, and directed a new trial, with leave to the defendants to add the John ver Mehr Engineering Company Limited as defendants.

Costs of the former trial and of the appeal to be costs in the cause.

HIGH COURT DIVISION.

MIDDLETON, J. MAY 7TH, 1918.

PERKINS ELECTRIC CO. v. ELECTRIC SPECIALTY AND SUPPLY CO.

Contract—Order for Goods—Acceptance—Failure to Deliver—Repudiation of Contract—Specifications—Election—Notice—Damages.

Action by purchaser against vendor for damages for failure to deliver goods purchased.

The action was tried without a jury at a Toronto sittings.

J. H. Spence, for the plaintiff company.

J. R. Roaf, for the defendant company.

MIDDLETON, J., in a written judgment, said that there were two contracts: the first, an order dated the 22nd January, 1916, accepted on the 25th January, for 10,000 key and keyless Freeman electric light sockets, 2,000 "key" and 1,000 "keyless," to be shipped by the 15th March, the balance to be taken by the 1st September, 1916; the second, an order dated on the 4th and accepted on the 7th March, 1916, for 100,000 sockets, "key" and "keyless." These were to be delivered by the 1st October, 1916. These contracts both gave a different price for key and keyless sockets; and it was common ground that the intention was, that the purchaser should elect which kind should be supplied.

Beyond the specification on the face of the earlier order for 3,000 sockets, there was no specification given save in a letter of the 29th February, in which 1,000 key and 1,000 keyless were asked for immediately.

The defendant found itself unable to procure the sheet-brass necessary for the manufacture of the sockets, and never delivered any. The purchaser was most insistent, and apparently the vendor did its best; but in the end, well on in June, acknowledged its failure and in fact sold out its plant and machinery to another concern, which refused to assume the contract. It was admitted that at this time the purchaser was justified in regarding the contract as repudiated and at an end.

It was contended for the defendant company that there was only a liability for damages in respect of the 5,000 sockets for

which specifications were given, and that there was no liability beyond this; for the purchaser had not elected whether it would take "key" or "keyless;" that, until the purchaser elected, there was in truth no contract; there was until then merely an offer, and it did not become a contract until there was a specification which would constitute an acceptance.

The learned Judge did not agree with this at all. He was of opinion that there was a contract; and that, by the contract, the purchaser was bound to elect which article he would accept in satisfaction of the vendor's promise to deliver; and that, before the vendor could be placed in default for non-delivery, the purchaser was bound to give reasonable notice of his election: Vyse v. Wakefield (1840), 6 M. & W. 442, per Parke, B., at pp. 453, 454.

But this did not end the case; for here, before the time for the exercise of the option and giving notice had expired, the promisor was in default with respect to the goods for which specifications had been given, and had repudiated the contract.

On the 22nd June, the day fixed by the defendant as that on which the contract was repudiated, the vendor was in default, and the purchaser was not.

Having regard to the correspondence before that date, it would have been idle for the purchaser to specify further; for the vendor found itself unable to supply what had been called for; and, after that date, the repudiation of the contract relieved the purchaser from any further duty under the contract.

It was argued that this fixed the time when the market value of the goods must be determined. The learned Judge did not agree with that contention—see Roper v. Johnson (1873), L.R. 8 C.P. 167—but accepted the evidence which shewed that the damage was at least 6½ cents per socket or $7,150, for which amount he gave judgment.

LENNOX, J. MAY 7TH, 1918.

AUSTIN & NICHOLSON v. CANADA STEAMSHIP LINES LIMITED.

Contract—Formation—Written Offer to Carry Goods at Named Price—Oral Acceptance—Evidence—Findings of Fact of Trial Judge.

Action for damages for breach of an alleged contract of the defendants to carry 10,000 cords of pulpwood from Michipicoten Harbour to Thorold during the navigation season of 1916.

The action was tried without a jury at Toronto.

R. S. Robertson and J. W. Pickup, for the plaintiffs.

Casey Wood and E. G. McMillan, for the defendants.

LENNOX, J., in a written judgment, said that to establish the contract the plaintiffs relied upon a letter written to them by the defendants' operation superintendent on the 3rd September, 1917, and beginning: "We agree to provide transportation . . . 10,000 cords of pulpwood . . . from the port of Michipicoten to the Ontario Paper Company Limited's plant at Thorold, Ont., for the rate of $2.25 per cord, delivery to commence during the month of May, 1916, and continue thereafter until said contract is completed . . .;" and the acceptance of this proposal, communicated orally to the superintendent by the plaintiffs about the 6th September, 1915.

The defence was, that there was no contract contemplated, no bona fide proposal made, and nothing to accept.

The learned Judge reviewed the evidence at length, having to determine a question of fact upon conflicting evidence.

He found that on the 18th August, 1915, the defendants' superintendent intimated that the defendants were willing and ready to enter into arrangements to carry 10,000 cords of pulpwood for the plaintiffs to Thorold at $2.25 a cord, in the season of 1916, and to define the terms of the contract for transportation, by letter or memorandum, if and so soon as the plaintiffs could arrange definitely for the sale of the wood to the Ontario Paper Company; that on the 3rd September, 1915, no question of inducing the Ontario Paper Company to purchase existed—complete arrangements for sale to that company had then been made, subject only to the signing of a formal contract, as Deeble, the plaintiffs' agent, and Cowan, the defendants' superintendent, both knew; that the letter of the 3rd September, 1915, was delivered to Deeble for the plaintiffs pursuant to the understanding arrived at on the 18th August, and was intended by Cowan to be acted upon by the plaintiffs and to enable them with safety to enter into a binding agreement for sale to the Ontario Paper Company, and it was relied upon and immediately acted upon by the plaintiffs in that way; that the fact of a sale to the Ontario Paper Company was immediately communicated to Cowan, and that this communication was intended as a final acceptance of the defendants' proposal, and was so understood and treated by both parties to the action.

Judgment for the plaintiffs for $14,000 with costs.

BRITTON, J. MAY 8TH, 1918.

JAYNES v. JAYNES.

Dower—Lump Sum in Lieu of—Calculation upon Value of Land—Deducting Amount of Mortgage—Arrears of Dower—Costs.

Action by a widow against her son for dower and arrears of dower in a farm in the township of Richmond.

The action was tried without a jury at Napanee.

D. H. Preston, K.C., for the plaintiff.

J. L. Whiting, K.C., and John English, for the defendant.

BRITTON, J., in a written judgment, said that the land was in 1890 sold and conveyed to the father of the defendant by one Milligan, for $1,800; a mortgage was made by the defendant's father upon the land to Milligan to secure $1,400, part of the purchase-money. In 1897, the father conveyed the land to the defendant, retaining a life estate. The consideration was the assumption of the mortgage, which had then been reduced to $1,000. The plaintiff did not join in the conveyance. The father died in July, 1913. The plaintiff claimed dower in the whole of the land; but at the trial it was agreed that her claim should be adjusted upon a money basis; and it was admitted that the present value of the land was $1,800.

The question now was, whether the sum of money to be allowed in lieu of dower should be based on the value of the land, $1,800, or on the value after deducting the amount of the mortgage, that is, $800.

The learned Judge was of opinion that the plaintiff's right was limited to $800.

Reference to Re Auger (1912), 26 O.L.R. 402; Morgan v. Morgan (1887), 15 O.R. 194.

The plaintiff was entitled to $15 for arrears of dower from the 1st April, 1917, and to $200 as a lump sum in lieu of dower, based on a value of $800.

Judgment for the plaintiff for $215 with costs on the County Court scale and without set-off.

MIDDLETON, J. MAY 9TH, 1918.

RE GARRETT AND TOWN OF BARRIE.

Municipal Corporations—By-law to Provide Money for Erection of High School Building—Requisition by Board of Education—Disapproval by Municipal Council—Submission to and Disapproval by Electors—Fresh Requisition—Approval by Council—Right of Council to Reconsider—Motion to Quash By-law—Requisitions not Absolutely Identical—High Schools Act, R.S.O. 1914 ch. 268, sec. 38.

Motion by R. F. Garrett for an order quashing a by-law of the Town of Barrie.

The motion was heard in the Weekly Court, Toronto.

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

J. B. Clarke, K.C., for the Corporation of the Town of Barrie.

MIDDLETON, J., in a written judgment, said that the school building of the Collegiate Institute of the Town of Barrie was burned, and $50,000 received for insurance. It then became a question of change of site, and a vote was taken on the question in January last, resulting in the choice by a large majority of electors of a site already owned by the town corporation.

The board of education then asked two things of the council: (1) a conveyance of the site; (2) $58,644, which, with the $50,000 in hand, would cover the cost of the new building.

The board asked the council, "if you deem it necessary to do so," to submit a by-law to the electors.

The council disapproved of this application, and submitted the question to the electors, with the result that the by-law was defeated by a small majority.

In the meantime there had been some trouble over the site, but this was ultimately arranged, and the board of education made another requisition, this time for $59,239—the increased amount representing the cost of removing some buildings from the site as a result of the arrangement made.

This requisition commending itself to the majority of the council, a by-law was passed to raise the money.

This by-law was attacked upon the ground that, when the council has disapproved of the demand of the board of education and has sent the question to the electors, it cannot reconsider its action. But this is not the effect of the statute.

The municipal council and the board of education each in a sense represent the community. Each body has its own functions. Neither is given any power to supervise or control the other, and each in its own sphere is supreme. The only qualification is that found in sec. 38 of the High Schools Act, R.S.O. 1914 ch. 268. This section provides that the board may make requisitions upon the council for money which it requires for the erection of a school, and the council may either approve or disapprove of the demand. If it approves, it must raise the money required. If it disapproves and the board is not satisfied, the board may require the council to submit the question to the ratepayers, and, if the majority favour the application, then the council shall raise the money.

There is no provision which in any way prohibits the council from reconsidering its disapproval either before or after the vote of the electors.

An approval by the council or by the electors would necessarily be final, but it by no means follows that the council may not reconsider its refusal.

Circumstances may change, and the council may well think that the situation calls for action when at an earlier stage they held a contrary opinion.

The council must be the sole judge in this matter—the question is for the council and not for the Court.

Once it is conceded—as it was on the argument—that there may be a second application, and a fresh consideration of that application, the matter is determined, for there cannot be a second reference to the ratepayers unless the council for a second time disapproves of the demand. The right to consider implies the right to approve or disapprove.

The right of appeal to the ratepayers is only given where there is a disapproval. Then the ratepayers may overrule the council. If the council approves, the ratepayers have no voice.

After the council has expressed its disapproval, the board may demand a vote; and, if this is adverse, there is no right on the part of board to compel a reconsideration; but, if the reconsideration is asked and granted by the council, there is no reason to doubt the validity of its actions.

A distinction must be kept in mind between the matters that are important upon a motion to set aside the action of a municipal council—when every endeavour ought to be made to uphold the action taken—and matters that are of importance upon a motion for a mandamus when it is sought to compel an unwilling body to act. The council may well do voluntarily many things that it

cannot be compelled to do against its will. It may waive many things that would be an answer to a motion for a mandamus.

It might be that the demands were not so identical as to preclude consideration as upon a new and different application, when this was the voluntary action of the council—even if there was no right to reconsider a precisely similar application.

In either aspect, the motion failed.

Motion dismissed with costs.

LENNOX, J. MAY 9TH, 1918.

RE STINSON AND TOWN OF FORT FRANCES.

Municipal Corporations—By-law Authorising Occupation of Street by Tramway—Agreement with Companies—By-law not Submitted to Electors—Municipal Franchises Act, R.S.O. 1914 ch. 197, sec. 3 (1)—Quashing By-law—Discretion—Costs—Service of Notice of Motion on Companies.

Motion by Juro Stinson to quash by-law 557 of the Town of Fort Frances, or such parts of it as granted to certain companies rights in or upon a street in the town, known as Front street.

The motion was heard in the Weekly Court, Toronto.

R. T. Harding, for the applicant.

G. F. Henderson, K.C., for the town corporation and for the companies referred to.

LENNOX, J., in a written judgment, said that notice of the motion had been served upon the three companies mentioned in the proceedings, who were parties to the agreement authorised by the by-law, and these companies were represented by counsel.

The substantial objection to the by-law was, that, by sanctioning the agreement, it provided in effect that the town corporation would permit the three companies to construct a dyke and standard gauge steam tramway on such portions of Front street as might be required to construct the same, according to a plan of location attached to the agreement between the town corporation and the companies, and thus gave the companies an easement and right of way over such portions of Front street as might be occupied by the tramway, for so long as it should be so occupied, and

that the by-law was passed without being assented to by the municipal electors of the town, as required by sec. 3 (1) of the Municipal Franchises Act, R.S.O. 1914 ch. 197.

This by-law was not submitted nor assented to, and the portions of it referred to were consequently invalid. There was no limit of time in the by-law or agreement.

It was urged that the action of the Court is discretionary; that the companies, as a matter of fact, do not contemplate using any part of Front street; and that the by-law should be allowed to stand, as it was proposed to obtain Dominion legislation to empower the Dominion Board of Railway Commissioners to exercise jurisdiction not now possessed; and that, when jurisdiction is obtained, the by-law will be available as evidence of the assent of the municipality.

The learned Judge said that he did not think the by-law, in any legal or proper sense, evidence of consent—the only consent was the assent provided for by the Act; and it would not be right to allow the by-law to stand for such a purpose. The council might pass a resolution expressing an opinion as to what action should be taken. The discretion as to quashing or not quashing the by-law would be best exercised by acting so that the rights of the electors shall not be ignored.

Order quashing so much of the by-law as purports to confer upon the companies the right to construct the tramway upon or along Front street or to occupy it or exercise a right of way thereon, with costs against the municipality, including the costs of serving notice upon the companies, which was a reasonable and prudent thing to do.

MIDDLETON, J. MAY 10TH, 1918.

CROMPTON CORSET CO. v. CITY OF TORONTO.

Municipal Corporations—Drains and Sewers—Claim for Flooding of Premises—Failure to Prove that Flood Came from Municipal Sewer—Foundation of Liability—Sewer Becoming Inadequate by Reason of Growth of City—Damages—Remoteness.

Action for damages for injury said to have resulted from the flooding of the plaintiffs' premises by water backing from the defendants' sewer through the plaintiffs' drain connected with the sewer.

The action was tried without a jury at Toronto.

Shirley Denison, K.C., for the plaintiffs.

Irving S. Fairty, for the defendants.

MIDDLETON, J., in a written judgment, after setting out the facts at length, said that the action failed for want of proof that the flood came from the city sewer or was caused by anything the defendants did or were responsible for.

The legal foundation for liability on the part of the municipality in cases such as this is far from clear. Where there is negligence in the construction of a sewer in the first place, there is liability; and where there is negligence in the maintenance of a sewer, there is liability; but where a sewer is adequate in every sense at the time it is built, and becomes inadequate by reason of the growth of the city, the foundation of liability is not so clear. What is the duty of the defendants of which there has been a breach? The construction of adequate sewers to afford drainage and to take care of surface-water is not a duty cast upon the municipality by the Act; the construction of the sewer in each case is based upon a legislative and not an administrative act. When a sewer is constructed under the local improvement system, each lot served has a proportion of the cost charged to it, and the owner of each lot has a right to use the sewer as a drain for his lot; there does not appear to be any way in which an owner could be refused the right to use the sewer simply because it was running full from the contributions of others.

There may be a duty to warn the applicant for construction of the condition of affairs and let him make connection at his own peril. Or it may be that in cities where there is a general by-law requiring sewers to be built on the local improvement system, the only thing the land-owner can do is to construct a larger sewer under that system.

The learned Judge stated his views as to damages, to meet the event of an appeal. The sum of $3,000 was claimed by the plaintiffs. The largest item was the cost of building a dining-room for the plaintiffs' employees—or rather the cost of changes in the buildings to enable that to be done—instead of having a dining-room in the basement. The damage was too remote.

The actual clearing-up after the flooding cost $5 at most.

If the water wet the barrels of steel as suggested, that could have been remedied by wiping and oiling the steel at a cost of $100.

The other items did not depend on disputed evidence, and could be readily dealt with if there was a right to recover.

Action dismissed with costs.

LATCHFORD, J. MAY 11TH, 1918.

ROBINSON v. ROBINSON.

Husband and Wife—Grain and other Chattels Seized on Wife's Farm under Execution against Husband—Claim by Wife—Interpleader Issue—Finding in Favour of Wife as to Grain Grown on Farm—Finding in Favour of Execution Creditor as to other Chattels—Costs.

Interpleader issue to determine whether the defendant or her husband is the owner of certain live stock, grain, implements, and vehicles, seized in execution by the Sheriff of the County of Bruce at the instance of the plaintiff, who had recovered damages against the defendant's husband for the seduction by him of his cousin, the plaintiff's daughter, a girl but seventeen years of age.

The issue was tried without a jury at Walkerton.

D. Robertson, K.C., for the plaintiff.

A. E. Klein, for the defendant.

LATCHFORD, J., in a written judgment, said that the farm operated at the time of the seizure by the defendant's husband was undoubtedly owned by her. The produce was applied for the joint benefit of herself and her husband. The live stock, implements, and vehicles were purchased by the husband in precisely the same manner as when he was the owner of a farm or farms. His wife at times became jointly liable with or a surety for her husband in such purchases, in continuance of a practice which had prevailed when he himself owned a farm. His wife was known to be well-to-do, or to have expectations from her father—realised even before his death—and her name was sought and used to support her husband's credit.

The evidence of husband and wife, if fully credited, would result in extablishing the defendant's claim. Certain facts appearing from it, however, with the documents filed, led the learned Judge to reject much of what they deposed to, and to conclude that, while the defendant had established her claim to the grain grown upon her farm, she failed as to the other chattels seized. They were owned by the husband, and were, at the time of the delivery of the writ of execution to the sheriff, exigible under the execution of the plaintiff.

As the plaintiff had succeeded except as to a relatively small part of the goods seized, he was entitled to his costs throughout.

MIDDLETON, J. MAY 11TH, 1918.

DINGLE v. WORLD NEWSPAPER CO.

Libel—Newspaper—Notice before Action—Libel and Slander Act, R.S.O. 1914 ch. 71, sec. 8 (1)—Notice not Addressed to Defendant—Dismissal of Action.

Motion by the defendant company for an order dismissing the action on admissions contained in the examination of the plaintiff for discovery.

The motion was heard in the Weekly Court, Toronto.

K. F. Mackenzie, for the defendant company.

D. J. Coffey, for the plaintiff.

MIDDLETON, J., in a written judgment, said that the action was brought to recover damages for a libel published in the defendant company's newspaper. It was admitted that the only notices served were addressed "To the Editor of the World."

The Libel and Slander Act, R.S.O. 1914 ch. 71, sec. 8 (1), provides that "no action for libel contained in a newspaper shall lie unless the plaintiff has, within six weeks after the publication thereof has come to his notice or knowledge, given to the defendant notice in writing," etc.

It was contended that the notice relied on was not sufficient, as it was addressed to the editor, and not to the defendant company.

The matter was concluded, in favour of this contention, by the decision of Sir William Meredith, C.J., in Burwell v. London Free Press Printing Co. (1895), 27 O.R. 6, and Benner v. Mail Printing Co. (1911), 24 O.L.R. 507.

According to these decisions, the statute means what it says, and requires a notice to the defendant, and it is not enough to give a notice to some one else, even if that person is an officer of the defendant.

The notice to the defendant may be served in the manner pointed out in sec. 8 (1).

Order dismissing the action with costs.

O'DELL v. CITY OF LONDON—BROWNLEE v. CITY OF LONDON—MIDDLETON, J., IN CHAMBERS—MAY 10.

Particulars—Statement of Claim—Negligence—Discovery.]—An application was made by the defendants in each case, to the Master in Chambers, for an order for particulars of the negligence alleged in the statement of claim. The Master dismissed the applications without prejudice to renewal after examinations for discovery. The defendants appealed from the Master's order to MIDDLETON, J., in Chambers. The learned Judge, in a brief memorandum, said that, on consideration, he agreed with the Master that orders for particulars at this stage would be oppressive and improper. Appeals dismissed with costs to the plaintiffs in any event. E. C. Cattanach, for the defendants. H. S. White, for the plaintiffs.