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## HIGH COURT OF JUSTICE.

MIDDLETON, J., IN CHAMBERS. JUNE 25TH, 1910.

### GREENHOW v. WESLEY.

*Libel—Slander—Newspaper — Pleading — Security for Costs—Necessary Material upon Application — Nature of Defence—Facts Shewing Good Faith—Publication for Public Benefit.*

Appeal by the defendants from the order of the Master in Chambers, ante 996, dismissing the defendant's motion to strike out paragraph 6 of the statement of claim and for security for costs.

G. H. Kilmer, K.C., for the defendants.

M. C. Cameron, for the plaintiff.

MIDDLETON, J.:—Paragraph 6 of the statement of claim in no way aids the plaintiff's action for libel, but is in itself a count for slander, and cannot be struck out.

It may well be that the defendants have a good defence based upon privilege, but this will not help the defendants so far as the motion for security for costs is concerned. The law only protects newspaper editors and publishers in actions of libel, and has not yet given them privileges and immunities beyond ordinary individuals in actions of slander.

I do not allow the affidavit of J. A. Wesley, not filed upon the motion before the Master, to be now put in. The statute relied upon by the defendants is one passed for the benefit of a class, and confers very special privileges, and those invoking it must comply strictly with the practice.

The material filed by the defendants does not shew what is required by the statute. They state, what they no doubt believe, that they have a good defence, but they must shew the nature of the defence. When they ask that it be found that the libel was published in good faith, they must condescend to give the facts surrounding the publication, so that their good faith may be ascer-

tained by the Court. Different individuals may have different standards of "good faith," and to accept a defendant's own statement of his bona fides would be to make him judge in his own case.

In the same way it is not enough for the defendants to say that there was reasonable ground for their belief that the publication was for the public benefit—they must say why they thought the publication was for the public benefit, and the Court will then ascertain if this was reasonable. The same considerations shew the worthlessness of the affidavit now sought to be filed, "that the publication took place in mistake or misapprehension of facts." This is an essential allegation if a defendant seeks security for costs after publishing a libel involving a criminal charge.

As the action, so far as the count for slander is concerned, cannot be stayed, the defendants have the less cause to regret the failure of the motion.

Appeal dismissed with costs fixed at $20.

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MIDDLETON, J., IN CHAMBERS. JUNE 25TH, 1910.

## REX v. HARVEY.

*Ontario Medical Act—"Practising Medicine"—Oculist Examining Eyes and Furnishing Glasses—Police Magistrate—Stated Case—Forum—R. S. O. 1897 ch. 90, sec. 8—1 Edw. VII. ch. 13, sec. 2.*

Case stated by the Police Magistrate for the town of Renfrew.

The defendant, an oculist, was convicted for a breach of the Ontario Medical Act, R. S. O. 1897 ch. 176, sec. 49, by practising medicine or surgery for gain. He examined the eyes of a person and "prescribed" glasses for him.

The principal question was, whether this was "practising" medicine or surgery.

W. A. Henderson, for the defendant.

W. T. J. O'Connor, for the informant, objected that the magistrate had no power to state a case for determination by a Judge of the High Court.

MIDDLETON, J.:—The effect of the amendment of R. S. O. 1897 ch. 90, sec. 8, by 1 Edw. VII. ch. 13, sec. 2, is to make secs. 761 to 769 of the Criminal Code applicable to proceedings before Justices under Ontario statutes. This answers the preliminary objection.

Whatever meaning may be attributed to the words "practising medicine," they cannot be so enlarged by judicial interpretation as to prohibit an oculist from examining the eyes of his customer and "prescribing" suitable glasses. It may in some cases be hard to draw the line and determine whether a particular case falls within the statutory prohibition, but no such difficulty exists here.

If it is the intention to prevent any one other than a duly licensed physician and surgeon from supplying for gain any of those things which go to make life easier for those who suffer from physical defects, and to grant to the medical profession a monopoly not only of the practice of medicine, as that phrase would be understood in its primary and popular meaning, but also of all kindred and cognate arts, that intention has not been expressed in the statute relied on.

The case would have been different if the defendant had, on examination of the eye, found disease and prescribed a treatment, either medicinal or mechanical, to remedy the disease. Here the defendant, finding defective vision, gave the customer glasses to remedy this defect. He examined the eye to find the nature of the defect, but he did not in any way treat the eye itself. Having found no reason that the vision was poor, he supplied an instrument by which the defect could be overcome.

Giving this answer to question 3, I do not need to deal with the other question.

The magistrate's decision will therefore be reversed, the conviction vacated, and the information dismissed.

The informant will pay the costs of this application, as well as of the proceedings before the Magistrate.

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DIVISIONAL COURT. JUNE 25TH, 1910.

## RE PANG SING AND CITY OF CHATHAM.

*Evidence—Motion to Quash By-law Regulating Laundries—Affidavits of Applicants—Statement that License Fee and Regulations Prohibitive—Evidence in Answer to Shew Profits—Admissibility—Relevancy upon Question of Validity of By-law—Public Health—Costs.*

Appeal by the Corporation of the City of Chatham from an order of LATCHFORD, J., ante 238, dismissing a motion made on the appellants' behalf for an order for the committal of Ernest Fremlin, the local manager of the Dominion Express Co. at Chatham, for his refusal to produce the books and records of the com-

pany in his possession and control and for his refusal to answer questions put to him on his examination, or, in the alternative, for an order for his attendance at his own expense before the Local Registrar at Chatham and submitting to further examination, and to make proper and sufficient production.

The examination of Fremlin was had for the purpose of answering on the corporation's behalf an application made by Pang Sing, a Chinese laundryman, carying on business in Chatham, to quash a by-law passed by the council of the corporation imposing a license fee of $50 on laundrymen and prohibiting them from carrying on their business in a building having an inside door or other opening or means of communication between the laundry premises and any apartment usually used for eating, living, or sleeping.

In support of the application were to be read affidavits made by the applicant and another Chinese laundryman named Sing Lung. Each of the deponents testified as to his annual income from the business carried on by him and the expenditure incurred in carrying it on, and swore that, if he was compelled to pay the license fee imposed and to live away from his laundry, he would not be able to continue his business, as in that event it would be impossible for him to "make ends meet," and the deponent Sing Lung further testified that there were nine Chinese laundries in Chatham, and that he believed it would be impossible for them to continue in business if the license fee of $50 was exacted from them.

The purpose of the examination of Fremlin was to discover what moneys the applicant and the other Chinese laundrymen carrying on business in Chatham had remitted to China or other places outside of Chatham, through Fremlin's office, during the years 1908 and 1909, and by means of this information to contradict the testimony of the applicant and Sing Lung as to the income derived by them and the other Chinese laundrymen from their business.

The appeal was heard by MEREDITH, C.J.C.P., TEETZEL and SUTHERLAND, JJ.

H. L. Drayton, K.C., for the appellants.

Shirley Denison, for the respondent.

The judgment of the Court was delivered by MEREDITH, C.J.:—It does not, I think, follow as a matter of course that, even if the evidence which the appellants are endeavouring to obtain from Fremlin would be admissible on the issue raised by the affidavits, the order for his committal for refusing to answer the questions put to him should be made. While it may be possible that at a trial

in which there is such an issue as that raised on the motion to quash in this case the facts which the appellants desire to establish might be admissible in evidence, I am of opinion that they have so slight a bearing upon the question of the validity of the by-law as to be practically a negligible quantity.

In view of this, I do not think that the Court should permit the inquiry into the business transactions with the express company of persons not parties to the litigation which the appellants desire to enter upon; and even in the case of the applicant and Sing Lung, though they have made affidavits, and the inquiry, as far as their transactions with the express company are concerned, might tend to shew that their statements as to their income from their businesses are untrue, there is no reason why the same conclusion should not be reached. Besides, the Court should set its face against permitting unnecessarily to be increased the costs of litigation, as they would be if such an inquiry as is desired were to be permitted to be had.

In my view, the question as to what the Chinese laundrymen can earn in their business in Chatham affords no test for determining the validity of the by-law. On the statements of the applicant and Sing Lung, the real complaint is not against the $50 license fee, but against the provision of the by-law which it is said renders it necessary for the laundrymen to live elsewhere than in their laundries. That is a provision passed or assumed to be passed to safeguard the public health, and the question whether, if it is enforced, the Chinese laundrymen will not be able to continue in business, for the reasons assigned by the applicant, has practically no bearing on the issue between the parties.

In my view, the ends of justice will be best served by dismissing the appeal. As the question raised by it is to some extent a new one, it will be proper to make no order as to the costs of the appeal.

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CLUTE, J. JUNE 27TH, 1910.

## RAY v. WILLSON.

*Promissory Note—Incomplete Instrument—Delivery—Holder in Due Course—Bills of Exchange Act, secs. 31, 32—Fraud—Suspicion—Duty to Inquire.*

Action to recover $1,000 upon what was alleged to be a promissory note made by the defendant.

The plaintiffs were private bankers at Fort William, and the defendant lived at Newmarket.

The defendant had purchased certain lands at Port Arthur, upon which were buildings requiring repair. He authorised his agent, one Thompson, residing at Port Arthur, to make the repairs, and appended his signature to a blank form of promissory note, which he gave to Thompson, telling him to fill it up and use it to pay for the repairs, in case he (the defendant) had not the money to send for the repairs. Thompson was to notify the defendant what the expense was, and then, if the defendant had not the money to send Thompson, the latter was to use the blank, but not otherwise. The repairs were never made, but Thompson, without notifying the defendant, filled up the blank note, making it appear to be a note for $1,000 made by the defendant, and gave it to the Union Bank of Canada as collateral security for his (Thompson's) indebtedness to that bank. Being indebted to the plaintiffs in $600, and being pressed for payment, Thompson arranged that the plaintiffs should pay his indebtedness ($100) to the Union Bank, and take and hold the note as collateral security for the plaintiffs' own debt and the $100. This was done. The note was not discounted either by the Union Bank or the plaintiffs, but in each case was held as collateral security. The defendant received no value or consideration.

J. E. Swinburne, for the plaintiffs.

H. E. Choppin, for the defendant.

CLUTE, J.:— . . . I find as a fact that the defendant never intended or authorised the paper sued on to be filled up as a promissory note; that the circumstances never arose upon which only the agent Thompson was authorised to fill the same up; that what was done by Thompson was without authority and in fraud of the defendant; and that the paper sued on never in fact by the defendant's authority became a promissory note.

Upon these facts—upon which I entertain no doubt—I do not think the plaintiffs are entitled to recover. . . .

[Reference to secs. 31 and 32 of the Bills of Exchange Act; Smith v. Prosser, [1907] 2 K. B. 735; Lloyd's Bank Limited v. Cooke, [1907] 1 K. B. 794; Baxendale v. Bennett, 3 Q. B. D. 525; Bank of Ireland v. Evans's Trustees, 5 H. L. C. 389.]

The evidence of the defendant in this case shews him to be a most simple minded man, almost in his dotage, I should say. The very fact that he left the blank in the hands of Thompson as he did, resting entirely upon the honesty of Thompson, to advise

him as to the expenses for repairs and the money required therefor, and directing that then only the blank should be filled up, shews him to be at present a man of very little business capacity. . . . But a double crime had to be committed before any one could be deceived; the note had to be fraudulently filled up and fraudulently negotiated, and it was these criminal acts of Thompson, and not the negligence of the defendant's trust in Thompson, which were the proximate cause of the loss suffered by the plaintiffs.

Although not necessary for the decision in this case, upon the view above indicated, I think it proper, in case there should be an appeal, to make this further finding. Thompson had been in straitened circumstances, either insolvent or on the eve of insolvency for some time; he had his account with the plaintiffs, who were familiar with his financial circumstances and standing. From their intimate knowledge of Thompson's affairs, I am of opinion that they had reason to suspect and did gravely suspect the bona fides of Thompson as the holder of this note. They made a very small advance upon receiving it; they gave no notice to the defendant that they held it as collateral until long after the time at which they received it. The result of the evidence upon my mind was to lead me to the conclusion that the plaintiffs, having a suspicion, as I find they had, of the fraudulent holding of Thompson, were guilty of negligence in not making inquiry as to the validity of the alleged note.

Action dismissed with costs.

[See Hubbert v. Home Bank of Canada, 20 O. L. R. 651.]

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DIVISIONAL COURT. JUNE 27TH, 1910.

## *STOW v. CURRIE.

*Contract—Option for Sale of Mining Claim—Acceptance—Incomplete Contract—Uncertainty as to Price—References to Formal Contract to be Entered into—Necessity of Further Provisions to Complete Contract.*

Appeal by the plaintiff from the judgment of LATCHFORD, J., at the trial, dismissing the action.

On the 11th July, 1908, the defendants Currie and Otisse signed a document as follows: "We offer to sell the mining claim . . E. B. 21 . . . to Mr. E. Kenyon Stow, on the following terms: $10,000 in cash to be paid on the execution of a formal agreement; $30,000 on the 1st day of October, 1908; $30,000 on

* This case will be reported in the Ontario Law Reports.

the 1st day of January, 1909; $30,000 on the 1st day of April, 1909; $30,000 on the 1st day of July, 1909; and $20,000 on the 1st day of October, 1909; and the delivery to ourselves or our nominees of 74,000 shares of fully paid non-assessable stock in a company to be organised on the property above mentioned, such stock to be delivered immediately after the formation of the company. This offer is given subject to the option at present existing to Mr. J. Carling Kelly, dated the 19th day of May, 1908, and subject also that acceptance be made on or before Monday the 13th day of July instant at 6 o'clock p.m."

This offer was accepted on the same day by E. Kenyon Stow, the plaintiff, as follows: "I hereby accept the above offer and undertake to complete the purchase and make the payments as above stated when formal documents signed."

On the 18th September, 1908, the defendants Currie and Otisse transferred the mining claim above referred to, to the defendants Warren, Gzowski, and Loring, who subsequently transferred it to the defendants the Otisse Mining Company.

The plaintiff alleged that these transfers were made in fraud of him, and with the knowledge of all the defendants, and asked to have the transfers set aside and to have it declared that the plaintiff was entitled to a transfer under the offer and acceptance above set out, and to compel the defendant company to transfer to him.

The plaintiff also claimed damages against all the defendants for fraud and conspiracy, and against the defendants Currie and Otisse for breach of contract, and other relief.

The defendants Currie and Otisse pleaded that the negotiations of July, 1908, did not form a contract, and, if a contract was made thereby, it was conditional on a formal agreement being executed, and time was impliedly made the essence thereof: that no formal agreement was ever executed; and the defendants never became liable to transfer the claim to the plaintiff.

There were other defences, not necessary to refer to.

The appeal was heard by MEREDITH, C.J.C.P., TEETZEL and CLUTE, JJ.

G. H. Watson, K.C., and W. M. Douglas, K.C., for the plaintiff.

G. F. Shepley, K.C., and R. S. Robertson, for the defendants Currie and Otisse.

I. F. Hellmuth, K.C., and Eric N. Armour, for the defendants Warren, Gzowski, and Loring.

F. Arnoldi, K.C., and D. D. Grierson, for the defendants the Otisse Mining Company.

MEREDITH, C.J.:— . . . The question was, whether or not there was a contract between the respondents Currie and Otisse and the appellant for the sale by them to him of the mining property in question; in other words, whether there was such a contract as the appellant sets up in his pleadings. . . .

[Reference to Winn v. Bull, 7 Ch. D. 29, per Jessel, M. R., at p. 32; Chinnock v. Marchioness of Ely, 4 DeG. J. & S. 638, per Lord Westbury, at pp. 645-6; Rossiter v. Miller, 3 App. Cas. 1124, per Lord Cairns, at p. 1139, and per Lord Hatherley, at p. 1143.]

I am inclined to think that neither the offer nor the acceptance can be said, in the language of the Master of the Rolls, to be "expressed to be subject to a formal contract being prepared," which I take to mean, "is expressed to be subject to the condition that a formal contract is to be prepared;" and that the solution of the question in the case at bar is one of construction, and depends upon whether "the parties intended that the terms agreed on should merely be put into form, or whether they should be subject to a new agreement, the terms of which are not expressed in detail."

In my opinion, the latter is the proper conclusion. The first payment of $10,000 is to be made on the execution of a formal agreement, and the appellant's undertaking is to complete the purchase and make the payments mentioned in the offer "when formal documents signed."

An important part of the consideration is the "75,000 shares of fully paid non-assessable stock in a company to be organised on the property;" and yet nothing is said as to the amount of the capital stock of the company, or the par value of the shares; nor, beyond the somewhat indefinite statement that the company is to be "organised on the property," is there anything to indicate the purposes for which or where or how it is to be incorporated.

It may be that the latter matter is left to the choice of the appellant; but I am unable to agree with the argument of his counsel that the other matters not provided for, which I have mentioned, were also to be left to him—in other words, that he might deliver shares of the par value of one cent, of one dollar, or any other par value, at his will.

Such an agreement might, of course, be made; but it seems to me a much more reasonable view of what the parties intended is that these matters purposely left to be determined when the formal contract should be entered into and the cash payment of $10,000 was to be made.

The case seems to me to fall within what was said by Lord Blackburn in Rossiter v. Miller, 3 App. Cas. at p. 1151. . . .

The price to be paid for the property is, in my opinion, for the reasons I have mentioned, uncertain, and not less so than was the price to be paid by the plaintiff in Douglas v. Baynes, [1908] A. C. 477, and it was in that case held that what was relied on as an agreement could not be specifically enforced because of the uncertainty as to the price to be paid.

Appeal dismissed with costs.

TEETZEL and CLUTE, JJ., concurred, the latter giving reasons in writing.

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DIVISIONAL COURT. JUNE 27TH, 1910.

## LAMB v. FRANKLIN.

*Trusts and Trustees—Purchase of Land by Trustee from Cestui que Trust — Resale at Profit — Action to Recover Profit — Knowledge—Laches—Acquiescence.*

Appeal by the plaintiff from the judgment of FALCONBRIDGE, C.J.K.B., ante 395, dismissing the action without costs.

The plaintiff was the devisee under the will of Thomas Lamb, deceased; the defendant Franklin was the surviving executor and trustee under the will. The lands and certain chattels were devised and bequeathed to the executors, or the survivor of them, and they were directed to collect the debts and pay the legacies, "and, as soon as they consider it advisable and safe, to convey the said lands to my son John Lamb," the plaintiff, "his heirs and assigns." On the 4th April, 1899, the defendant Franklin conveyed the lands in question to the plaintiff, and on the same day purchased the same from the plaintiff for $1,800, although the conveyance was not in fact executed until the 12th April, 1899, and on that day the defendant Franklin sold the property to Thomas Lamb, a brother of the plaintiff, for $2,100.

The action was brought to set aside these conveyances or to recover the profit made.

The trial Judge characterised the evidence of the plaintiff and his wife as unworthly of belief; and he found that the plaintiff was barred by acquiescence and laches.

The appeal was heard by CLUTE, SUTHERLAND, and MIDDLETON, JJ.

H. L. Drayton, K.C., for the plaintiff, contended that, upon the undisputed facts, the plaintiff was entitled to recover; that the defendant Franklin, being the executor of the will, and a trustee for the plaintiff, could not profit out of the estate, and the plaintiff as cestui que trust was entitled to the profit.

J. E. Farewell, K.C., and W. H. Harris, for the defendant Franklin.

CLUTE, J.:— . . . In Lewin on Trusts, 11th ed., p. 562, it is said: "A trustee for sale, that is, a trustee who is selling, is absolutely and entirely disabled from purchasing the trust property. For this proposition numerous authorities are cited; and this is so whether the purchase be made in the trustee's own name or in the name of a trustee for him, directly or indirectly; for it is said that he who undertakes to act for another in any matter cannot in the same matter act for himself. "The situation of the trustee gives him an opportunity of knowing the value of the property, and, as he acquires that knowledge at the expense of the cestui que trust, he is bound to apply it for the cestui que trust's benefit:" Ex p. James, 8 Ves. 348; Smedley v. Varley, 23 Beav. 358; Crosskill v. Bower, 32 Beav. 86. That is the general rule. Lewin, however, points out a few instances where a trustee will be at liberty to become a purchaser. The present case does not seem to fall within any of the exceptions.

Mr. Farewell, in support of the transaction, referred to Downs v. Grazebrooke, 3 Mer. 200; Coles v. Trecothick, 9 Ves. 234; Morris v. Royal, 11 Ves. 355. None of these cases, I think, support the position contended for, or bring the case within those exceptional circumstances where the purchase by a trustee from his cestui que trust has been upheld. . . .

Even if the transaction might have been successfully attacked at an earlier period, the question is now, whether laches and acquiescence and the death of the co-executor and his solicitor, who had knowledge of the transaction, are sufficient to preclude the plaintiff from succeeding. . . .

[Reference to In re Cross, Hartson v. Denison, 20 Ch. D. 109; Bright v. Legerton, 29 Beav. 60, 2 DeG. F. & J. 606.]

In Bright v. Legerton there had been a much longer delay, but I think some significance must be given to the change in the law which reduces the statutory period for the limitation of actions. In regard to equitable claims, other than breaches of trust, a Court of equity, except in special circumstances, will not allow relief to be sought against the very transaction to which the appli-

cant himself was a party: Kent v. Jackson, 14 Beav. 384, and numerous other cases of that class.

In the present case the plaintiff had entered into a solemn agreement to sell the land in question to his brother, under conditions which might or might not have proved more favourable than the sale to the defendant Franklin. The lands were subject to an annuity of $100 during the lifetime of the mother. She, as a matter of fact, lived only two years after the transaction in question; but, had she lived for the ten years for which the annuity was provided, the proposed sale would not have been as beneficial as the present one. While the agreement was still standing, the plaintiff entered into the arrangement with the executor for the sale to him. Upon the view the trial Judge has taken of the evidence, it cannot be doubted that the plaintiff had a full knowledge of the facts, and understood perfectly well what he was doing. It was not a case where he was acquiescing in a transaction by the trustee of which he did not have full knowledge. He himself was a party to the act, not only not finding fault with what was done, but rather taking advantage of an opportunity to get rid of what he thought was an undesirable contract into which he had entered.

Upon the special circumstances of this case and the findings of the learned trial Judge upon the evidence, I agree with the conclusions arrived at by the trial Judge.

Appeal dismissed with costs.

SUTHERLAND, J.:—I agree.

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

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BOYD, C. JUNE 29TH, 1910.

## BOURGON v. TOWNSHIP OF CUMBERLAND.

*Municipal Corporations—By-law Limiting Number of Liquor Licenses in Township—Time for Going into Operation—Coming License Year—Restriction to Taverns—Oral Proof that no Shop Licenses Existing—Liquor License Act, secs. 20, 32—Delay in Attacking By-law.*

Action for a declaration that a certain by-law of the defendants limiting the number of licenses in the township was void and of no effect.

F. B. Proctor, for the plaintiff.

A. E. Fripp, K.C., for the defendants.

BOYD, C.:—Re Wilson and Town of Ingersoll, 25 O. R. 439, cited to shew that this by-law is bad because it does not shew for what year it was to be applicable, has not been favourably commented on in later decisions: see per Osler, J.A., in Dwyre v. Ottawa, 25 A. R. 121, at p. 128; Re Kelly and Town of Toronto Junction, 8 O. L. R. 167; and Re Dewar and Township of East Williams, 10 O. L. R. 467. I do not think it is binding upon me, so that I could hold this by-law to be ineffective because of indefiniteness as to its time of operation.

This by-law was passed on the 11th January, 1909, and enacts "that the number of licenses for the sale of spirituous liquors be limited to three." I take it that its plain and obvious meaning is that that restriction should begin to operate for the next license year, beginning on the 1st May ensuing—and so on until it was altered or repealed.

The by-law previously in force, passed on the 3rd February, 1890, restricted the issue of tavern licenses to seven for the township, and it continued in force till superseded by the by-law now attacked. I think the opinion given by the chief officer of the license department at Toronto is correct, in which it is said: "It is not absolutely necessary to repeal the previous by-law in terms, but, if a subsequent by-law is passed which is inconsistent with the former by-law, it will have the effect of repealing the former."

The by-law speaks from its promulgation, and applies to the coming license year for which the municipalities have power to prescribe limitations; and these limitations will continue into future years unless its operation is confined by the language used: Re Brewer and City of Toronto, 19 O. L. R. 411.

The most formidable objection is that it is vague because it does not specify that it applies to taverns only or to taverns in particular. As it stands, it is warranted by sec. 20 of the Liquor License Act, R. S. O. 1897 ch. 245: but it is said it may be enacted under sec. 32, which applies to shop licenses. The answer is, on the facts as proved at the trial, that there are no other licenses relating to spirituous liquors in the township except tavern licenses. This state of facts the corporation and the ratepayers were cognizant of, and so no one interested could mistake the scope and operation of the by-law. The maxim id certum est may be invoked to overcome this objection.

No other points were discussed, and as against these—even though the applicant had moved promptly—the by-law should be supported.

Action dismissed with costs.

BOYD, C. JUNE 29TH, 1910.

## BRENNAN v. ROSS.

*Party Wall — Contract—Construction—Breach—Addition to Wall —Openings or Windows.*

Action for damages for trespass and for a mandatory injunction to compel the defendants to remove a wall.

J. F. Orde, K.C., for the plaintiff.

J. I. McCraken, for the defendants.

BOYD, C.:—I think the proposition of law applicable to this case may be succinctly stated thus; if the wall which has been added to or built upon the original party wall can be called an external wall, then there is the right to put windows in it; if the extension or addition has the character of a party wall and is to be so designated, then the windows are a derogation from that method of construction. Now the character of this raised wall has been settled by the parties in the agreement. The original wall was built by the Blythes on the dividing line between their own land and the land sold by the plaintiff in such wise that it should be of brick or stone 16 inches thick—8 inches being on each side of the centre line of the lots—to such height as the Blythes might require, and when erected "the said wall shall be a party wall." That was the original wall, upon which, by further provision, should either party desire to build higher, that might be done, the party so desirous to build at his own cost, and the other party to be at liberty to use without compensation "any additions to said wall when constructed as a party wall." That is to say, the said original wall, when it has been built and completed as a party wall, and being a party wall, may be afterwards built upon and added to by a further party wall, which may be used by the party who does not build it as a party wall. But, whether he elects to use it or not, the addition to the party wall is in the contemplation of the parties to retain its character of a party wall, and to attach any other character to it by constructing it with openings or windows is in violation of the meaning of the contract as I read it.

I follow what was decided by myself in Sproule v. Stratford, 1 O. R. 339; see also Day v. Avery, [1896] 2 Q. B. 271; and Knight v. Russell, 11 Ch. D. p. 415.

The plaintiff should have judgment with costs.

BOYD, C. JUNE 29TH, 1910.

## MERCHANTS BANK v. THOMPSON.

*Promissory Note—Liability of Accommodation Makers—Pledge after Maturity to Bank by Payee as Collateral Security for Indebtedness—Right of Bank to Recover to Extent of Amount Due by Payee—Trustee for Payee for Balance—Bills of Exchange Act, secs. 54, 70—Parties—Further Litigation.*

Action on a promissory note for $2,000 and interest.

J. F. Orde, K.C., for the plaintiffs.

Travers Lewis K.C., for the defendants.

BOYD, C.:—The defendants are sued upon a promissory note for $2,000, made on the 1st July, 1907, by Living and the two defendants, jointly and severally, to C. H. Fox, and now held by the bank, the plaintiffs. The note was given to answer the price of one-half interest in the manufacturing agency of Fox. It is disputed as to the exact effect of the agreement made in respect of this purchase, which is dated the 19th March, 1907, and I do not think it needful to discuss the legal situation of the parties thereto on the present record.

Fox borrowed from the bank, and left this note with the bank on the 12th September, 1907, as collateral security and also for collection. It was not discounted, and the amount lent to Fox was some $500. The note fell due on the 4th October, and was not paid. The defendants were notified that the note was falling due, but it was not protested, the bank not being aware or not being informed of the fact that the defendants were only sureties for Living. Fox owed the bank $800 at the date the note matured. On the 29th January, 1908, the Fox liability to the bank was cleared off. He became again indebted to the bank, and this was cleared off on the 31st March.

Some evidence was given of conversations or understandings between Fox and Living, which are differently given by these two, and which do not, in my opinion, on the present evidence, amount to a definite agreement to give further time for the payment of the $2,000 as between Fox and Living. I may just state the substance of this evidence, which is of the approximate date of the 10th April, 1908. Living told Fox he could not sell some land, but he expected to do so soon and would pay the note. Fox said that Living would have to pay such interest as it would cost him, Fox, during the delay, and that Living agreed to pay 8 per cent. Living's account does not accord; he said Fox reproached him for not pay-

ing the note, and Living said he had several thousand dollars in the business, and that Fox was willing to apply that on the note. It was agreed that the business was to go on, and he was to work off the note in that way. Living says further that in July, 1908, he was wrongfully excluded from the business by Fox, and for that reason he should not be called on to pay the $2,000, as the consideration thereby failed. Fox denies that the purchaser Living was so excluded, but says that for good cause and breach of fidelity he ended the engagement as to carrying on the business. These things between Fox and Living were not made known in any way to the bank, who had the note in their possession all along. On the 24th November it appears that Fox was not under direct liability to the bank, but afterwards became indebted, so that on the 1st March, 1909, his total indebtedness was $1,046.90, and the writ was issued on the 2nd March, claiming $2,140.54 and interest.

The bank sue on the promissory note and hold it for value so far as Fox is indebted to the bank, and can recover to this extent under secs. 54 and 70 of the Bills of Exchange Act. There is no equity attaching to the note, though it may be regarded as repledged to the bank after it was overdue. Whatever collateral matters may arise as between Fox and Living which may enure to the discharge of the sureties quoad Fox, they are not open for discussion on this record. To the extent of the bank's claim, judgment should be given for payment with costs; as to the residue of the note, the bank hold it as trustees for Fox, and the right thereto should be litigated in some proceeding to which Fox and Living are parties. This may be ingrafted on the present record—or, what is perhaps better, a new action may be instituted in respect of it, in which the interests of Fox and the three makers of the note may be properly considered and adjudicated on.

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DIVISIONAL COURT. JUNE 29TH, 1910.

## WAGNER v. CROFT.

*Sale of Goods — Refusal to Accept Part—Action for Price of Whole—Contract—Shipment in Instalments—Late Shipment —"About"—Evidence to Shew Intention—Correspondence — Remedy in Damages.*

Appeal by the defendants from the judgment of the County Court of York in favour of the plaintiff in an action to recover $697.92, the balance of the price of goods sold and delivered. The

defendants refused part of the goods, which were shipped from Spain, and were late in arriving. By order given the plaintiff was to import and ship to the defendants at Toronto "about February, from Montreal," the goods in question.

The appeal was heard by MEREDITH, C.J.C.P., TEETZEL and MIDDLETON, JJ.

A. McLean Macdonell, K.C., for the defendants.

T. P. Galt, K.C., for the plaintiff.

The judgment of the Court was delivered by MIDDLETON, J., who, after setting out the facts, said:—

Three defences are set up: (1) the order did not contemplate shipment in instalments; (2) the goods were not shipped in time; (3) the remedy is damages for refusal to accept, not an action for the price.

(1) The first defence is not well founded. The plaintiff was to purchase, import, and forward the goods. This he did, and the fact that some packages were sent forward earlier than others was no breach of the contract. There was no stipulation in the contract upon the subject, and none can be implied. The plaintiff acted reasonably in forwarding the goods as early as possible, even if the entire order had not then come to hand.

(2) "About" is a relative and ambiguous term, the meaning of which is affected by circumstances, and evidence may be received to shew the intention of the parties in the light of surrounding circumstances: Harten v. Loeffler, 212 U. S. 397. The correspondence prior to the contract in this case supplies the necessary explanation, and shews that what the parties meant was that the plaintiff should at once forward the order to Spain, so that the goods might reach Montreal for shipment to Toronto in February, or as near thereto in point of time as possible. Time was not of the essence of the contract, but was not immaterial; and the word "about" was used to give some latitude and to allow for the contingencies of the voyage and land transit to Montreal. February was not meant to be the limit, but "about" gave a margin of delay beyond that month: Sanders v. Munson, 17 Fed. R. 649.

The cancellation of the contract was premature and unauthorized.

(3) The contract was not simply a sale of goods by a merchant to a customer.

The defendants authorised the plaintiff to import and ship to him the goods in question, and agreed to pay the price. By refusing to accept the goods which had been shipped in accordance with

the contract, the defendants cannot, upon a contract of this kind, avoid its obligation to pay.

The old rules are to some degree relaxed, and, as is said by an English Judge, "People can contract to do anything" (per Fletcher Moulton, L.J., Perry v. National Provincial Bank of England, [1910] 1 Ch. 464, 476); and it is now entirely a question of the intention of the parties to the contract: Clergue v. Vivian, 41 S. C. R. 601.

The appeal fails and should be dismissed with costs.

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DIVISIONAL COURT. JUNE 29TH, 1910.

## *RE DALE AND TOWNSHIP OF BLANCHARD.

*Municipal Corporations — Money By-law—Voting on — Voters' List—Assessment Roll—Municipal Act, 1903, secs. 348, 349—Amending Acts—Proper List not Used—Inquiry into Right to Vote of Persons Named in List—"Freeholders"—Municipal Act, sec. 353—Equitable Interests in Land—Disallowance of Votes—Quashing By-law.*

Appeal by William Dale from the order of MULOCK, C.J.Ex.D., ante 729, dismissing a motion made by the appellant to quash a by-law granting $20,000 in aid of a railway.

The appeal was heard by MEREDITH, C.J.C.P., TEETZEL and MIDDLETON, JJ.

C. C. Robinson, for the appellant.

J. S. Fullerton, K.C., and J. W. Graham, for the township corporation.

The judgment of the Court was delivered by MEREDITH, C.J.:—. . . In the view we take, it is unnecessary to express an opinion upon any of the grounds urged against the by-law except two, viz.: whether (1) the voters' list upon which the voting took place is, by force of sec. 24 of the Voters' Lists Act, or for any other reason, conclusive as to the right of the persons named in it to vote on the by-law; and whether (2), if it is not conclusive as to their right to vote, the appellant has succeeded in establishing that a sufficient number of unqualified persons voted to overcome the majority which was cast in favour of the by-law.

* This case will be reported in the Ontario Law Reports.

The voters' list, which sec. 24 makes upon a scrutiny final and conclusive evidence that all persons named therein and no others were qualified to vote, is the voters' list which was, or was the proper list to be, used at the election.

The voters' list with which the Act deals is made up in three parts, the first containing the names of all male persons entitled to vote at both provincial and municipal elections; the second, the names of all other male persons and of all widows and unmarried women appearing by the assessment roll to be voters at municipal elections, but not at provincial elections; and the third, the names of all other male persons appearing by the assessment roll to be voters at provincial but not at municipal elections.

The voters' list to be used when a vote is being taken on a money by-law is provided for by secs. 348 and 349 of the Consolidated Municipal Act, 1903, and this list the clerk of the municipality is to prepare from the last revised assessment roll, and the only use he is required to make of the voters' list prepared under the Voters' Lists Act is to see that every person entered on his list is named or intended to be named on the voters' list.

All the municipal electors are not entitled to vote on a money by-law, but only those of them who are mentioned in sec. 353, which deals with freeholders, and sec. 354, which deals with leaseholders, and it is not, as has been seen, from the last certified voters' list, but from the last revised assessment roll, that the clerk is to prepare a list of those entitled to vote.

Section 348 was amended 8 Edw. VII. ch. 48, sec. 4, by striking out the reference to schedule C., and sec. 354 was amended by 9 Edw. VII. ch. 73, sec. 10, by adding the following proviso: "And provided further that he has, at least ten days next preceding the day of polling, filed in the office of the clerk of the municipality a statutory declaration stating that his lease meets the above requirements, and the clerk shall insert or otherwise designate the names of such tenants in the voters' list prepared in accordance with the provisions of sec. 348 of this Act, and the notice required by sub-sec. 3 of sec. 338 of this Act shall also contain a statement that the names of leaseholders neglecting to file such a declaration shall not be placed on the voters' list for such voting."

The certified list mentioned in sec. 24 of the Voters' Lists Act was not the list used or proper to be used in taking the vote on the by-law, but the list to be used was that prepared by the clerk from the assessment roll, and the first question must therefore be answered in the negative.

As to the second question, we are bound by the decision of the Court of Appeal in In re Flatt, 18 A. R. 1, to hold that B. F. Doupe, Wesley Shier, and Richard Selves were not qualified voters.

Assuming everything in favour of the respondents, the highest position of these three men was that of persons who were in possession of the land, as freeholders of which they voted, under parol agreements with the owners entitling them on doing something which had not yet been done to a conveyance of the land, and such persons were held by the Court of Appeal not to be freeholders within the meaning of sec. 9 of the then Municipal Act, R. S. O. 1887, ch. 184. . . .

The vote of R. C. Hunter is clearly bad. He had no estate in the land in respect of which he voted. It belonged to a company, in which he was a shareholder, and that was his only interest in it; and Homer Doupe's vote was admittedly bad.

The by-law was carried by a majority of four only, and, these five votes being bad, it follows that it did not receive the assent of the majority of the voters and must be quashed.

The appeal will, therefore, be allowed, and there will be substituted for the order of the learned Chief Justice an order quashing the by-law with costs, and the respondents must pay the costs throughout.

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GILLIES v. MCCAMUS—MASTER IN CHAMBERS—JUNE 22.

*Jury Notice—Motion for Leave to File — Delay — Judicature Act, sec. 203.*]—Motion by the plaintiff for leave to file a jury notice. The cause had been at issue for two years, and no steps had been taken to bring it to trial. The plaintiff's claim was for cancellation of a promissory note given on the 11th October, 1906, by the plaintiff to the defendants and for recovery of the proceeds of certain shares of stock transferred as security for payment of the note, which were sold by the defendant when the note matured and was not paid. Held, that the motion failed, for the reasons given by Riddell, J., in Hall v. McPherson, 13 O. W. R. 929, 931. Even if it was doubtful whether sec. 103 of the Judicature Act applied, the delay had been too great. It did not seem to be a case which a Judge would try with a jury. Motion dismissed; costs to the defendants in the cause. C. J. Holman, K.C., for the plaintiff. R. McKay, for the defendants.