NOTES.

ARBITRATION—ABANDONMENT—ONTARIO HYDRO-ELECTRIC POWER COMMISSION ACT—FIAT TO SUE.—In the case of *Beach* v. *Hydro-Electric Power Commission*,[1] the Beach Estate, the owners of a power plant at Iroquois on the St. Lawrence River, entered into a contract in the year 1915 to supply power to the Rapids Power Company. This agreement, which expired on the 31st March, 1916, was assigned by the Rapids Power Company to the Hydro-Electric Power Commission. After the expiration of the Rapids Power Company's contract, the Beach Estate continued to supply power direct to the Commission until May 1st, 1919, but no definite agreement was arrived at. The Beach Estate demanded $16.00 per H.P. and the Hydro was willing to pay only $12.00 per H.P. During all this period the Beach Estate rendered bills charging for power on the basis of $16.00 per H.P., and the Commission paid for power delivered on the basis of $12.00 per H.P. The result was that the Beach Estate claimed a balance for power supplied of $8,190.78 over and above the amount the Commission had paid, and for this amount brought an action against the Commission in the Supreme Court of Ontario.

Prior to the plaintiffs commencing their action they obtained a consent, dated the 30th January, 1922, from the Attorney-General, pursuant to the provisions of "The Power Commission Act," R. S. O. 1914, chapter 39, in which the amount in dispute was stated to be the sum sued for.

Before the action came to trial, counsel for the parties signed an agreement to refer the matters in question in the action to Mr. J. M. Robertson, an engineer of Montreal, to determine what reasonable and just price should be paid to the plaintiffs for the power furnished to the defendant. This agreement contained a provision that the plaintiffs should not be prejudiced by any claims made by them in the writ of summons or pleadings in the action. It contained a further provision that the Arbitration Act should not apply.

The arbitrator in due course proceeded with the arbitration and made an award in favour of the plaintiffs amounting with interest to $51,861.75.

The defendant moved to set aside this award on a number of

[1] Reported at first instance in (1924) 4 D.L.R. 995 and 56 O.L.R. 35.

grounds. When the motion came on for hearing counsel for the plaintiffs took a preliminary objection to the jurisdiction of the Court, claiming that as the Arbitration Act did not apply, the defendant could not proceed by way of motion to set the award aside, and that its only remedy was to bring an action for that purpose. Judgment was reserved on this objection and the plaintiffs, without waiting for delivery of judgment, obtained a further consent from the Attorney-General and commenced an action to enforce the award. The writ in this action was specially endorsed for $52,554.25, the amount of the award and interest.

The motion to set aside the award was referred to the trial Judge, and both the motion and action came on for hearing before Mr. Justice Wright, who dismissed the plaintiffs' action to enforce the award, and allowed the defendant's motion to set aside the award on the ground that mistakes both of law and of fact appeared on the face of the award.

An appeal by the plaintiffs was dismissed by the unanimous judgment of the Appellate Divisional Court, which held that the reference to arbitration was ultra vires and the award a nullity.

The Court further held that the consent given by the Attorney-General on the 30th January, 1922, would not justify an action for a larger sum.

The judgment points out:

"It never could be intended that a claimant by setting up a claim for a small sum and obtaining thereby a consent from the Attorney-General to bring an action for that sum could claim at the trial a larger sum as to the propriety of permitting action for which to be brought the responsible officer of the Crown had not given a decision. And the defendants are not entrusted with any power to give a valid and effective assent; not they but the Attorney-General plays the watch-dog's part in this matter. However that may be, the defendants with their strictly limited powers could not have the right to assent to proceedings that would or might result in increasing the amount for which they would become liable."

The Court further held that the nullity of January 30th, 1922, could not be given life by the second fiat "if for no other reason this belated consent allows an action for 'the sum alleged to be due January 30th, 1922,' and that we have seen was $8,190.78 and no more."

The Court in this case further held that even were the submission to arbitration valid the award could not possibly stand; that it was

perfectly obvious that the Arbitrator had approached the consideration of the question from a wrong angle.

Counsel for the plaintiffs has intimated that he intends to appeal from this decision to the Judicial Committee of the Privy Council.

G. F. H.

* * *

ONUS IN NEGLIGENCE—FAULTY HIGHWAYS.—When you sue a public body, search the scriptures diligently. The onus may prove a deceitful thing. *Horsfield* v. *Rural Municipality of Cana.*[1]

One night H. was driving along the public highway on a grade 20 feet wide. Another car approached, and H. obeyed the law and turned into the right half of the road. But, alas, that half of the road was "up," and H.'s car went over the grade to its destruction. It was no fault of H.'s. The grade at that spot had been narrowed from 20 feet to 9 feet without any sufficient warning. The fault lay with the contractor or his employers. Undoubtedly H. had a right to compensation. But from whom?

Of course I won't go against a mere contractor when I can get recourse against a public body, said H., and wrote the Rural Municipality saying . . . "If the road is a government road then, of course, this claim will be passed on to the Minister of Highways. On the other hand, if it is a road for which your municipality is responsible I ask you kindly to notify your council of my claim."

The municipality neither at this stage nor at the trial laid any stress on this matter of "Government road." The road was a municipal road, and control was assumed to be in the municipality. As a matter of fact the Provincial Government was paying for the repairs, but the council of the municipality was understood to have given its authority; and, since no specific evidence for or against this assumption was offered, the trial judge said, naturally enough, "Well, the accident certainly occurred on a public road within the municipality; if the municipality will not show me that it was ousted from control, I must decide it was in control; and I decree damages against it."

An appeal on this point went in favour of the municipality. No, said the Court of Appeal; the litigant must bring himself inside the statute: he must by some affirmative evidence connect the negligence with the council; the fact itself won't speak; the statute definitely allows the Provincial Government to enter the municipality to upkeep

[1] 19 Sask. L.R. 378.

the highways; and here the government had temporarily entered, and while it was there the municipality was absolved.

But, because the council had neither before suit nor at the trial laid the blame where it deserved, it had to pay its own costs of both trial and appeal.

Even at that it got off lightly. The innocent man who lost his car and nearly lost his life had to meet his own costs in two courts.

G. C. T.

* * *

LIEN NOTES—REPOSSESSION.—The vendor of an automobile which had owing to it $827 on a lien note has deservedly found itself out of luck,—the penalty of arbitrariness. At first blush the merits were with the vendor. The buyer had abandoned her house and furniture and departed in the car for Vancouver, leaving no known property in Saskatchewan. Not unnaturally the agent of the vendor in Vancouver repossessed the car. "Why?" asked the buyer; "I am not in arrears: I am even willing to pay some of my monthly instalments ahead of time. Release my car!"

But the vendor persisted. It seized (1) because the car had been removed out of Saskatchewan, and (2) because the buyer had broken a condition by disposing of her landed property.

In point of fact the buyer had the verbal permission of the salesman to take the car to Vancouver; and she had "abandoned" a trifling equity in real estate, and not "disposed" of it. Could the vendor excuse itself because it considered the note insecure? It had not declared itself to that effect, and apparently had not given the insecurity, *per se,* a thought. Query: in any case, could a limited company consider a note insecure without some formal resolution? And surely some sort of formal intimation would be needed. Anyhow the grounds of its seizure were mistaken, and the buyer collected adequate damages for inconvenience, humiliation and deprivation. *Harman* v. *Gray-Campbell Ltd.*[1]

G. C. T.

* * *

CRIMINAL PROSECUTION—DELAY—MANDAMUS TO PROCEED WITH TRIAL.—In the case of *Rex* v. *Pepall,* a motion was launched by the accused, returnable by special leave before Mr. Justice Rose for a mandamus to the Crown Attorney of the County of York and to W. N. Tilley, K.C., and McGregor Young, K.C., special counsel assigned for the trial of this case, directing them to proceed with the trial of the accused with reasonable diligence at the general sessions for the

[1] 19 Sask. L. R. 526.

County of York. The motion was argued before Mr. Justice Rose in Chambers on Monday, 12th October, 1925. N. W. Rowell, K.C., and A. G. Slaght, K.C., for the motion. McGregor Young, K.C., for himself and other counsel concerned. Counsel in support of the motion contended that the case was in the Court of General Sessions mainly on the ground that it had appeared on what was alleged to be an official list submitted to the learned County Court Judge, and that in the order for bail the Supreme Court Judge had directed his appearance for trial at the next court of competent jurisdiction. It was also pointed out that all the charges against the accused were within the jurisdiction of the general sessions.

At the conclusion of the argument judgment was delivered dismissing the motion. His Lordship intimated that in his view the case at present was neither before the Sessions nor the Assizes and would not be before either Court until a bill should be presented, and in so far as the motion was based upon that assumption it failed accordingly. The learned Judge also stated that apart from that question he was entirely at a loss to understand in what way a Judge sitting in Chambers had jurisdiction to direct the Crown Attorney, or counsel appointed by the Attorney-General, to proceed with prosecutions generally or in any particular Court. The reference to the next court of competent jurisdiction in the order for bail had no application whatever to the question now before him. Nor was it a question of general gaol delivery as counsel supporting the motion had endeavoured to intimate, and even if it were he did not see how that question could be raised before him. The motion was therefore ill conceived and should be dismissed. A. M.

* * *

WHAT ARE "FIXTURES"?—One branch of the very vexed question as to whether particular chattels which have been attached to the realty, become "fixtures," arose in the recent action of *Murphy Wall Bed Co. of Detroit* v. *Levin*.[1] In that case, the alleged "fixtures" were certain articles known as "wall-beds," which had been placed in an apartment house. Steel plates were screwed to the floor of the bedroom and to the side of a closet door therein. The floor plates had holes or sockets in which the legs of the beds were set, while the plates on the side of the closet door had similar sockets, into which a piece of iron attached to the side of the bed sank when the bed was closed up. The bed might be removed by lifting it out of these sockets. It was held by the Appellate Division, affirming the judgment of the

[1] 57 O.L.R. 105.

County Court of Essex, that the articles were not part of the realty. The Court distinguished the decision of Mr. Justice Smith in *Hoover-Owens-Rentschler Co.* v. *Gulf Navigation Co.*,[2] upon the ground that the articles in question in the latter case, namely, cylinders built into an engine of a ship, had become part of the ship. The case also involved certain questions under "The Conditional Sales Act," which it is not necessary to discuss. For other recent cases dealing with the effect of the latter Act on the question of fixtures, see *Liquid Carbonic Co.* v. *Roundtree*, 54 O. L. R. 75; *Dominion Bridge Co.* v. *B. A. Nickel Co.*, 56 O. L. R. 288, and *Agricultural Development Board* v. *De Laval Co.*, 29 O. W. N. 142.

The above decision seems to be inconsistent with that in *McCarthy* v. *McCarthy*.[3] In the latter case, one of the articles in question was a hay-fork, which was part of a plant consisting of a track, a truck, pulleys, a rope and the fork. The track was fastened with bolts or screws to the barn roof, and the truck was propelled along it. All the other articles were necessary to a complete operation of the hay-fork, but none of them except the track were fastened to the building. It was held by the County Court of Perth, that the hay-fork was a "fixture," and that the circumstance that it could be used elsewhere in connection with a similar plant did not deprive it of that character. A brief note at the end of the report states that an appeal to a Divisional Court was dismissed on March 6th, 1900, but it is not otherwise reported, and it was not referred to in the *Levin* case. The judgment of the County Judge purports to follow the decision in *Gooderham et al.* v. *Denholm*.[4] In that case it was held that certain tools ordinarily in use for the purpose of operating machines in an iron foundry, were "fixtures," and certain other tools were not. As these comprised 27 different articles, all of which are adjudicated upon separately, it is not practicable to deal fully with that decision.

The latest work on this subject is "The Law relating to Fixtures" by B. W. Adkin and David Bowen, which was published in England in 1923, by a corporation called "The College of Estate Management," as one of its series of textbooks. It deals very fully with the various kinds of fixtures, and points out clearly the difference between what are known as "tenant's fixtures" and "landlord's fixtures," as well as the difference in the law applicable thereto. No reference is made to this book in the *Levin* case. Since it was published, an important decision has been given in England in the case of *Boswell* v.

[2] 24 O.W.N. 614.
[3] 20 C.L.T. 211.
[4] 18 U.C.R. 214.

Crucible Steel Co.,[5] and which is referred to in the *Levin* case. It was held on appeal in the *Boswell* case, over-ruling the previous decisions, that the term "landlord's fixtures" applies only to chattels which are brought by the landlord to the premises and affixed to the structure, but do not form part thereof. It was further held that plate glass windows, which were fixed in steel beadings and not made to open, formed part of the structure of the house, and consequently were not "landlord's fixtures." M. J. G.

* * *

BUILDING CONTRACT — INSURANCE ON BUILDING EFFECTED BY OWNER—SUIT BY BUILDER TO RECOVER.—The case of *Smith* v. *Dawson*,[1] seems at first sight to offend against justice. The plaintiffs were builders and agreed to build a house for the defendant for $6,464. Until completed the building was at the plaintiffs' risk as to fire, and they did not insure it. The defendant however did insure it and (on the building while in course of erection being destroyed) she received $2,150 from the insurance company to cover her loss. The plaintiffs were bound under their contract to complete the work but the defendant verbally promised if they did so, to give them the $2,150. They completed the work and sought to recover $2,150 to recoup their loss occasioned by the fire but their action was dismissed, the Court holding that the promise to proceed with the work which under the contract they were bound to do, did not constitute any consideration for the alleged promise to pay the $2,150, and therefore the plaintiffs could not succeed. Thus it would appear that the defendant was entitled both to the $2,150 and also to have the building as originally contracted for, but it must be remembered that insurance is an indemnity and the insurance company was entitled to recover from the defendant any part of the $2,150, which was more than sufficient to cover the loss she actually sustained; and therefore if she had paid the $2,150 to the plaintiffs it might have resulted in her also having to pay it back to the insurance company as well. See *Darrell* v. *Tibbits*;[2] *West of England Fire Ins. Co.* v. *Isaacs*.[3] In the circumstances the agreement to pay the $2,150 to the plaintiffs was an improvident one, and it was fortunate for the defendant that it was unenforceable at law. G. S. H.

[5] (1925) 1 K.B. 119.
[1] 53 O.L.R. 615.
[2] 5 Q.B.D. 560.
[3] (1896) 2 Q.B.D. 377; (1897) 1 Q.B. 226.