CASE AND COMMENT.

MONEY LENT ON SECURITY OF SHARES OF STOCK.—*Young* v. *Croteau*[1]—which will in due course be reported in the Ontario Law Reports—is a very interesting judgment written by Mr. Justice Logie, having to do with a state of affairs which frequently arises, and the legal effect of which is very frequently misunderstood, even by lawyers.

The defendant had loaned to the plaintiff a sum of money, taking his promissory note and certain shares of stock in a company as collateral, there being a short memorandum of agreement, one clause of which was that in the event of the plaintiff not paying the borrowed money on the due date, the shares should, at the option of the defendant, become his absolute property. The plaintiff did not pay the money when due, and the defendant, after waiting a week, had the shares transferred to his own name, notified the plaintiff that the shares had now become his and proceeded to sell them as his own. He did this in good faith, and upon the mistaken theory that he had become the absolute owner under the provisions of the agreement.

It being conceded that the whole transaction was a loan secured by the deposit of the shares, the learned trial Judge, acting upon the principle "once a mortgage, always a mortgage" held that the clause in the agreement, purporting to transfer the ownership of the shares, was a clog on the equity and invalid to fix the shares absolutely in the defendant. He points out that if the share certificate had been deposited as security for the debt without a transfer endorsed thereon in blank, as was the case, the remedy of the lender would have been an order for transfer and foreclosure: *Harrold* v. *Plenty*.[2] The share certificate having been endorsed in blank, and the transfer subsequently completed, the remedy of the defendant would appear to have been a sale after reasonable notice under the power of sale, which the law implies in a case of the kind when no power is expressly given in the agreement itself: *Stubbs* v. *Slater*.[3] The defendant, in exercising this implied power of sale, was not a trustee, except as regards the surplus shares after he had recouped himself, and the Court will not interfere, although the sale is disadvantageous,

[1] 29 O.W.N. 172.
[2] (1901) 2 Chy. 314.
[3] [1910] 1 Chy. 632.

if it appears that the power has been exercised in good faith for the purpose of realizing the debt, without corruption or collusion with the purchaser, unless the price is so low as to be itself evidence of fraud: *Kaiserhof Hotel Co.* v. *Zuber.*[4]

In the result, the defendant was found to be right, up to the point when he had recouped himself by sale of the stock, but he should have stopped then, and was held liable to pay damages to the plaintiff in respect of so much of the stock as was unnecessary for the purpose of recouping himself, he not being in a position to return the stock itself. Applying this result, a reference was directed to ascertain the real value of the stock, if the plaintiff should not be satisfied with the amount actually received for it by the defendant.

G. F. H.

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RAILWAY CROSSING—AUTOMOBILE—DEGREE OF CARE.—*In Freidman* v. *Canadian National Railway Company,* Rose, J., sitting without a jury (October 29th, 1925), held that it is the duty of one travelling in a closed automobile and approaching a railway crossing, when a view of the railway track is obstructed, to take greater care than he would do if there was a clear view of the track, and if he could more readily hear the warning signals by bell and whistle.*

A. M.

* EDITOR'S NOTE.—See *Weir* v. *Canadian Pacific Railway Co.* (1889) 16 O.A.R. 100 and *Royle* v. *Canadian Northern Railway Co.* (1902), 14 Man. R. 275.

* * *

SALE OF LAND—COMMISSION TO AGENT.—*Elliott* v. *Warburton* was a rather interesting case decided in the Second Division of the Court of Appeal on the 16th of November, but is not noted in the Ontario Weekly Notes.

Elliott was a real estate agent in Port Hope, with whom the solicitor for the estate had listed a farm for sale under instructions from one of two executors. Elliott procured a purchaser, but the executors refused the offer and sold to another party for a $500 advance. Elliott sued both executors in the County Court of the United Counties of Northumberland and Durham, and his action was dismissed as against the executrix who had not authorized the listing, but was allowed as against the other defendant, Warburton, personally. The decision of the Court of Appeal turned on the construction of 6 George V., Chapter 24, Section 19, amending the Statute of Frauds by adding the following thereto as Section 13:—

[4] [1912] 46 Can. S.C.R. 651, 9 D.L.R. 877.

(1) "No action shall be brought to charge any person for the payment of a commission or other remuneration for the sale of real property unless the agreement upon which such action shall be brought shall be in writing and signed by the party to be charged therewith or some person thereunto by him lawfully authorized."

Warburton had not given any instructions as to commission, and the Court held that the instructions to list for sale did not warrant his agent making any agreement for payment of commission, and that the words "thereunto by him lawfully authorized" referred to the words "payment of a commission" and that there was no implied authority to the agent to sign an agreement to pay a commission by reason of the instructions to list. LEX.

* * *

EVIDENCE OF ADULTERY.—The case of *Warren* v. *Warren*,[1] decides a neat point in a divorce proceeding as to the admissibility of evidence of a married person that such person had committed adultery, and holds that such evidence is admissible. *Russell* v. *Russell*,[2] which held that evidence of non-access by either the husband or wife, cannot be given, is distinguished and it is laid down that so long as the evidence offered establishes the commission of adultery and does not go to prove non-access such evidence can be adduced.

S. H. B.

* * *

DOMINION ELECTIONS ACT—RECOUNT OF BALLOTS—JUDGE—PERSONA DESIGNATA.—The decision of Lafontaine, C. J., in the Argenteuil recount case seems to demand consideration.

Section 70 of the Dominion Elections Act provides an expeditious mode whereby a *persona designata* (a Judge of either a County, District or Superior Court, dependent upon the Province wherein the recount takes place) may recount the ballots polled in an election. In contemplation of possible arbitrary or erroneous action, Section 71 of the same Act provides that another judge of a higher court may, within a limited period, review the omission or refusal of the recount judge to proceed with a recount. The procedure is simple and the proceedings are not in Court.

On November 6th, 1925, Counsel for Mr. Legault, the defeated candidate, applied to Judge Cousineau of the Superior Court for an order for recount, which was granted. On November 13th, the day

[1] [1925] 2 K.B. 107.
[2] [1924] A.C. 687.

appointed by the order, counsel for Sir George Perley, the elected candidate, objected to the recount on the ground, *inter alia*, that the affidavits upon which the proceedings were based had not been sworn before any authorized officer. Upon this ground, Judge Cousineau determined that he had no jurisdiction, and made an order rescinding his previous order.

Under Section 71, counsel for Mr. Legault made application to Chief Justice Lafontaine for an order directing Judge Cousineau to proceed with the recount. The application was heard on the 27th November, and on the 30th the learned Chief Justice gave his decision thereon. His judgment, which is lengthy and rather discursive, directed Judge Cousineau to proceed with the recount. It is based chiefly upon the consideration that Judge Cousineau, having made an order for recount and being merely *persona designata*, was bound to proceed therewith, even although the essential requirements of Section 70 had not been complied with. In other words, an order improvidently granted on materials so defective as to exclude jurisdiction cannot be reconsidered by the Judge who issued it. Apparently the learned Chief Justice is of opinion that in such case the only remedy of an elected candidate is to apply under Section 71 to a judge of a higher court, as designated in the Statute.

The learned Chief Justice lays great stress upon the view that Judge Cousineau was not acting as a judicial officer, but only as *persona designata*. Assuming the correctness of this view, it follows that the Chief Justice himself is merely *persona designata* under Section 71.

The conclusion that a judge, when acting as *persona designata* under this statute, is bound to proceed upon an order which he has issued improvidently and without jurisdiction, seems to be novel. If it is correct, the statute apparently needs amendment and the attention of the Chief Electoral Officer might well be directed to the case. The decision, as it stands, would prevent Chief Justice Lafontaine himself from reconsidering an order which he had improvidently granted, and in that case the party injuriously affected would apparently have no remedy.

The learned Chief Justice lays emphasis upon the provisions of the Interpretation Act, which require remedial construction of the statutes. These provisions do not seem relevant unless the learned Chief Justice intended to decide that an applicant failing to comply with the requirements of Section 70 is, nevertheless, entitled to an order for recount. Such a view would hardly gain general acceptance.

AMICUS CURIAE.

PATENT OF INVENTION—IMPEACHMENT.—The case of *Bergeon* v. *De Kermor Electric Heating Company, Limited,* at first instance was noted in our issue for June last. Since then an appeal was taken to the Supreme Court of Canada which has resulted in the judgment of Mr. Justice Audette in the Exchequer Court being set aside and a new trial ordered. The case involved a construction of Rule 16 of the practice of the Exchequer Court of Canada enabling "any person interested" to institute proceedings to impeach a patent for invention by filing a statement of claim in the court. At the opening of the trial the defence asked for a postponement in order to have an opportunity of examining the plaintiff in person under a commission to be executed in Paris. To insure the case proceeding without adjournment, plaintiff's counsel undertook to withdraw certain patents owned by the plaintiff and which might have been relied on as anticipations of defendant's patent. The trial was then proceeded with, and became a very lengthy one. Judgment was reserved, and after taking time to consider the learned trial Judge gave judgment dismissing the action on the ground that by withdrawing the patents above mentioned he had lost his quality of being a "person interested" under Rule 16 and had no *locus standi* to maintain the action.

In the course of his opinion Mr. Justice Duff, who delivered the judgment of the Supreme Court, said:—

"It is not seriously disputed that had the patents respecting which the appellant had undertaken, in the circumstances already mentioned, to offer no evidence, been put in evidence, no question could have arisen as to the appellant's status. The appellant's undertaking not to give such evidence was proposed solely with the purpose of meeting the respondent company's complaint that in fairness to him the trial ought not to proceed without giving him an opportunity to meet the evidence afforded by these patents as bearing upon the issue of priority of invention; it was, as all parties must have understood, proffered solely with a view to meeting this objection by excluding the patents as evidence upon that issue. Had it been suggested that the appellant's *locus standi* was attacked, the undertaking would unquestionably have been qualified or restricted by permitting the admission of these patents as evidence establishing such status or, more probably, by an admission of the appellant's status by the respondent company. In these circumstances, it seems to be quite clear that effect ought not to have been given to the respondent company's objection without, at all events,

first giving the appellant an opportunity of producing these patents as evidence to meet it. The appellant's undertaking, which was given *alio intuitu,* could not have been regarded as standing in the way.

"There is another ground, however, upon which the appeal should succeed. At the time of the trial, it is unquestioned that the appellant had a status to impeach the respondent company's patent, in virtue of the patent granted after the commencement of the action. It may be assumed, without deciding either point, that status at the date of the trial only is not sufficient, and that, for the purpose of conferring status, the patent in evidence ought not to be considered as relating back to the application for it, which, as already mentioned, was presented before the commencement of the action. But, these assumptions made, the facts seem to be amply sufficient to establish the interest of the appellant at the critical date. The appellant, admittedly, is and was when the action was commenced, "engaged in the design and manufacture of electric steam generators or water heaters" and a trader in articles similar to the alleged invention which is the subject of the patents attacked. It is not suggested, and could not be suggested, in face of the correspondence in evidence, that the application (which, as already mentioned, had been granted before the trial), was a merely frivolous one, or that it was presented *mala fide* for the purpose of acquiring a colourable standing to impugn the respondent company's patent. Indisputably, the existence of the patents attacked was calculated directly to affect him prejudicially in his business as a manufacturer and trader, and both in the prosecution of his application and in respect of the protection to be afforded him by his patent if his application for a patent should be successful. In these circumstances, there seems little room for doubt that the appellant possessed a sufficient "interest," within the meaning of Rule 16, to qualify him to maintain the action, and the appeal should therefore be allowed. A new trial is a regrettable necessity. The respondent company must pay the costs of the appeal forthwith. The appellant's costs of the abortive trial will abide the event of the new trial, while the respondent company's costs of the abortive trial will be borne by the respondent company in any event."

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HABEAS CORPUS.—In a note upon a recent case in British Columbia in which the question whether an application for writ of *habeas corpus* by a prisoner charged with an indictable offence is a

civil or a criminal proceeding was discussed, a variety of authorities from various sources was cited as bearing upon the point at issue. It is interesting to note that in a Quebec case, *Rex* v. *Labrie*,[1] a clear and succinct statement of the principle for which Martin, J. of British Columbia contended in *Rex* v. *McAdam*[2] was made by Greenshields, J. in the course of his judgment. The following passage from that judgment contains the expression of opinion to which we refer.

"The writ of *habeas corpus* is essentially a civil prerogative writ, and the expression *habeas corpus* in criminal matters is without meaning except, and to this extent, that it may be that the judge before whom a writ of *habeas corpus* is being heard, may discover, by the return or otherwise, that the petitioner seeking release is detained as a result of criminal proceedings, which proceedings terminated in conviction and sentence. Or he may discover that the petitioner's detention was brought about in a civil process. Many instances will occur to any one who gives the matter any thought. On the other hand, a petitioner for a writ of *habeas corpus* may be illegally detained without that detention proceeding from any legal process whatsoever. In neither the first, second or last case is the nature of the writ changed. It only makes to the cause of the detention."

[1] 35 C. C. C. 325.
[2] (1925) 3 W. W. R. 257; (1925) 4 D. L. R. 33.