RECENT DECISIONS.

1. Exchequer Court of Canada.

MACLENNAN, L.J.A. February 8th, 1924.

(Quebec Admiralty District.)

KNOX BROS., LIMITED v. *THE STEAMER HEATHFIELD AND OWNERS.*

Shipping—Charter-party—Discharging of cargo—"Default"—Delay fixed or ascertainable—Lay days—Demurrage—"Running days."

This was an action for damage to cargo of lumber on the voyage from Vancouver, B.C., and Portland, Ore., to Montreal, and counterclaim by defendant against plaintiff for $1,977.84 demurrage for detention of steamer beyond the lay days allowed it under the charter-party. Plaintiff's action was abandoned at trial and action proceeded only on the counterclaim. His Lordship Mr. Justice Maclennan held,

1. That the provision in a charter-party that the discharge of a cargo would be "at the rate of —— feet per day" becomes, once the cargo is ascertained, an undertaking to complete the discharge within a fixed period of time, such period to be computed by days, calculated at the rate fixed in the charter-party, and not by hours. And that if a fraction of a day was required for the completion of the discharge, the charterer was entitled to the whole of that day.

2. That where there is an undertaking to discharge the ship, in a fixed period, such a provision is an absolute and unconditional undertaking by the charterer that the ship will be released at the expiration of the lay days, regardless of the difficulties and obstacles which might be met in the course of such discharge, and that the words "default of charterer" in the charter-party meant not merely default to receive the cargo, but generally as omission or neglect to perform the contract.

3. That "days" and "running days" in computing demurrage mean the same thing, in absence of some particular custom, and refer to calendar days, without excepting Sundays and holidays, and not any period of 24 hours; and in this case "lay days" being completed at midnight on the 13th June, 1923, and the unloading completed on the 18th at 11 p.m., the ship was entitled to five days' demurrage.

MARTIN, L.J.A. February 28th, 1924.

(British Columbia Admiralty District.)

OSTRUM v. *THE SHIP MIYAKO.*

Shipping and seamen—Wages of engineer—Loss thereof by desertion—Jurisdiction.

On the 4th July, 1923, O. shipped on board the defendant steamer as engineer, for the fishing season, lasting four months, at $150 a month.

On the 4th October, it was admitted, there was a balance due him of $134, and on the 25th October he deserted the ship without lawful justification or excuse. He then sued the ship for $286.64, balance of wages due up to the 20th October. It was contended by defendant that all wages earned during the current month, namely, from the 4th October to the time of the desertion, had been forfeited, and, further, that the balance being for a sum under $200, the Court had no jurisdiction. It was held that in this case the wages must be deemed to have been forfeited from the time of the last monthly payment which the contract contemplated, and that as by deducting these from the claim, the sum due the plaintiff was under $200, namely, $134, the Court had no jurisdiction and the action must be dismissed for want thereof.

MARTIN, L.L.A. February 28th, 1924.

(British Columbia Admiralty District.

WINSLOW MARINE RAILWAY AND SHIPBUILDING CO. v. *THE "PACIFICO."*

Shipping—Admiralty law—Claim for work done and material supplied—Interest on claim ex contractu—Time from which to be allowed.

By this action the plaintiff claimed a certain sum against the ship for work and labour done and material supplied. The point raised in this case was as to whether, the claim arising *ex contractu*, interest should or should not be allowed and from what time the same should be allowed, if at all. His Lordship found that by the ancient practice of the Admiralty Court interest had been allowed on claims arising *ex delicto* which still prevails, and furthermore that the Judicature Act had not affected any change as regards allowing of interest. His Lordship following the decision of Sir Robert Phillimore in *The "Northumbria"* (1869), L. R. 3 Ad. & Ecc. 6, held, that the plaintiff was entitled to recover interest upon the amount of his bill from the date of a formal demand of payment thereof, after due completion of the work under the contract.

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2. PROVINCE OF ONTARIO.

LOGIE, J., In Chambers. 13th February, 1924.

REX EX REL. JAQUES v. *MITCHELL.*

Municipal elections—Irregularities at polls—Violation of secrecy of ballot—Consolidated Municipal Act, 1922—Election not "Conducted in Accordance with Principles of Act"—"Other person"—Ejusdem generis rule—Interpretation Act, R. S. O. 1914, ch. 1, sec. 29 (x)—Election declared invalid and new election ordered.

This was an appeal by the relators who applied to the Judge of the County Court of the County of Essex for an order declaring that the municipal election for the City of Windsor held on the 3rd day of December, 1923, was invalid, and directing that a new

election be held. The County Judge found that in many instances the provisions of the Consolidated Municipal Act, 1922, designed to protect the secrecy of the ballot, were transgressed. But, because no evidence was submitted that any official had violated his oath of secrecy, or that the manner in which any voter cast his vote was actually disclosed, he held that there was no such breach of the Act as to render the election invalid. He therefore dismissed the action. Mr. Justice Logie entirely disagreed with this finding, pointing out that the specific directions of the statute to secure secrecy had been openly and flagrantly disregarded by several deputy returning officers. He found that compartments were not provided in some cases, that voters were permitted to take their ballots into a separate room and there mark them, that a number of deputy returning officers and poll clerks failed to take the oath of secrecy, that a deputy returning officer allowed an illiterate voter to vote in the voting compartment in the presence of the poll clerk who had taken no oath of secrecy, that persons alleging that they were illiterate had their ballots marked for them, without first taking an oath that they were illiterate, as required by sec. 109 of the Act, that one deputy returning officer opened his box at an improper time and that the city clerk also improperly opened ballot boxes.

The learned Judge said that while the validity of the ballots was preserved by sec. 116 of the Act, the violation of secrecy was not in any way condoned.

Held, that the irregularities were substantial and not mere informalities, and did affect the result of the election, and that therefore the saving clause in sec. 150 was not applicable and the election was declared invalid and a new election was directed to be held.

The learned Judge referred to *Re Hickey and Town of Orillia* (1908), 17 O. L. R. 317, 328, 342, and *Re Rickey and Township of Marlborough* (1907), 14 O. L. R. 587, 590.

Held also, that the County Court Judge should not have added the City Corporation as a party under section 172 (1) (*a*) of the Act, which gives him power at any stage of the proceedings to "add the returning officer or any deputy returning officer or other person as a party to the proceedings." By the Interpretation Act, R. S. O. 1914 ch. 1, sec. 29 (*x*), "Person includes any body corporate or politic," but the *ejusdem generis* rule applies, and the city corporation therefore does not come within the words "other person" in paragraph (*a*) of section 172 (1) of the Act.

SECOND DIVISIONAL COURT. 8th February, 1924.

SUTTON v. *FORST.*

Contract—Joint adventure—Purchase and sale of property—Division of profits—Whether partnership—Agency—Misconduct of partner—Liability to account for moneys retained for his own use—Whether disentitled to share of profits.

This was an appeal by the defendant from the judgment of Denton, Jun. Co. C. J. of the County of York.

The plaintiff had an option to purchase a building for $3,500, and hav-

ing no money, approached the defendant, who, being advised that if wrecked the building would produce $7,500, agreed with the plaintiff to pay to him one half of the profits to be made on the purchase and sale of the building over and above the money put into the purchase by the defendant, and ten per cent. interest thereon. The defendant gave the plaintiff $3,500 and the plaintiff paid $3,000 for the property, which was conveyed to the defendant.

The transaction resulted in a large profit, but the defendant having discovered that the plaintiff had made a secret profit of $500 not only insisted that the plaintiff must account for that sum, but contended that by reason of his dishonesty he had disentitled himself to any share in the large sums received by the defendant.

Held, that this was not an ordinary case of principal and agent, but a joint adventure, that the defendant's contention could not prevail, and the appeal was dismissed without costs.

Mr. Justice Middleton, delivering the judgment of the Court, said:—"To say that because one partner proves false to his duty towards the partnership, and seeks to make a secret profit for himself, he loses all his share in the common assets, is going far beyond anything yet decided. Such misconduct gives a right to dissolution of the partnership, as well as renders the partner liable for the money received (Halsbury's Laws of England, vol. 22, p. 69); but there is no hint of the forfeiture of the delinquent's share in the partnership. The agency cases depend upon a principle inapplicable to partnership or joint transactions. The agent must account for all money that he receives by way of secret profit because he is an agent—that fact alone makes the money his principal's. The reason why he cannot recover the remuneration agreed upon for services rendered is that he did not in fact render the services.

Reference to *Andrews* v. *Ramsay & Co.* [1903] 2 K. B. 635, 638; *Manitoba and North-West Land Corporation* v. *Davidson* (1903), 34 Can. S. C. R. 255, 259.

SECOND DIVISIONAL COURT. 8th February, 1924.

UTILITIES EQUIPMENT CO. LIMITED v. *BRANTFORD RAILWAY COMMISSIONERS.*

Contract—Sale of electric cars and spare parts—Formation of contract—Errors in description occurring in correspondence—Defect not discoverable upon inspection — Recovery of breach of warranty not precluded by acceptance—Counterclaim treated as claim for set-off—Costs.

This was an appeal from the judgment of Denton, Jun. Co. C. J. of the County of York, by the plaintiff and a cross-appeal by the defendant.

The defendant had purchased from the plaintiff two second-hand cars, together with certain spare parts. The action was brought by the plaintiff for freight which it was admitted defendant had to pay, and also for the price of a spare armature delivered. The defendant counterclaimed for the price of another armature, which ought to have been and was not supplied, and also for damages for breach of warranty, the plaintiff having warranted that the electrical equipment was in working order.

The County Court Judge allowed the undisputed claim for freight, but dismissed the claim for the armature supplied, and he allowed the defendant on its counterclaim $300 as the price of the armature not delivered, but dismissed its claim for breach of warranty.

The Appellate Court agreed with the finding of the trial Judge that the plaintiff was bound to supply the two spare armatures, holding that they were included in the price. But held that the acceptance of the cars without complaint, there being opportunity for inspection, was not an answer to the defendants' claim for damages for breach of warranty. The defect was not one discoverable at the time, because the cars were in a barn, and were not in a condition to operate when delivery was taken; but, apart from that, although the acceptance of the cars would preclude the defendant from entirely repudiating the transaction, it would not prevent a claim based upon the express condition of the contract, which, though in the form of a condition, was in truth a warranty.

Mr. Justice Middleton, in delivering the judgment of the Court, said that there was a wide difference between the attitude of the Court towards errors and defects in a contract arrived at by correspondence where the goods have been delivered, and there was unquestionably some contract, and the Court is merely endeavouring to ascertain what the contract in truth was, and the attitude of the Court in a case in which damages are sought for the breach of an executory contract, and there is a real question as to whether the parties were ever *ad idem.*

The Court also gave the defendant the costs both of the claim and counterclaim, although the trial Judge had only given the defendant the costs of the counterclaim, Mr. Justice Middleton saying that the rights of the parties depend upon the substance and not upon the mere form of pleading, and when the counterclaim is one which is in truth a set-off the appropriate result as to costs ought to follow: *Cutler* v. *Morse* (1888), 12 P. R. 594.

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3. New Brunswick.

PROVINCIAL SECRETARY-TREASURER OF NEW BRUNSWICK v. *ROYAL TRUST COMPANY, ADMINISTRATOR OF THE ESTATE OF ANNA M. FERGUSON, DECEASED.*

Succession duty—Mortgage—Specialty debts—Situs.

This is another decision on the Succession Duty Act of New Brunswick. The defendant was the administrator *cum testamento annexo* of Anna M. Ferguson, who, at the time of her death, was a resident of and domiciled in the City of Chicago, Illinois. Among her assets were mortgages amounting to $54,000, on real estate in the Province of New Brunswick. Bonds had been given by the mortgagors to the decedent and the mortgage instruments, as well as the bonds, were at her death in the possession of her agents in the City of Chicago. The mortgages had been registered in the proper registry office in New Brunswick, but no duplicates were in this province. The Crown claimed that succession duty was payable by the estate in respect of such assets as being property within the province.

It was held (following *Walsh* v. *The King*, 1894, 63 L. J. P. C. 52, and *Toronto General Trust Corporation* v. *The King*, 1917, 56 S. C. R. 26) that notwithstanding the rule that specialty debts are deemed to have had a situs where they actually were at the time of the death of the owner, the property in question was property in New Brunswick, and that succession duty was payable accordingly.

MANTLE LAMP COMPANY OF AMERICA, INC., v. *NIXON.*

Sale of goods—Guarantee—Fraud—Estoppel.

In an action brought on a guarantee covering the price of goods to be sold by the plaintiff to a third party, the defendant, who was illiterate, pleaded that the guarantee had been obtained by the fraud of the debtor, and that in signing he believed that the document, which was not read over to him, was a recommendation of the debtor as a salesman. The jury found that the defendant was not aware that he was dealing with a guarantee, but that the circumstances of the signing were such that a reasonable man would have ascertained the nature of the document executed. Subsequently, a letter was received by the defendant from the plaintiff, which was read over to the defendant, and which stated that in view of the defendant's letter of guarantee, the plaintiff was extending credit accordingly. No action was taken on this letter by the defendant.

Held, that these facts constituted an estoppel against the defendant, and that although this plea was not specifically set up, as all of the evidence was before the Court, an amendment would be allowed.

BOOKS AND PERIODICALS.

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A Treatise on the Law of Bills of Exchange, Promissory Notes, Bank-Notes and Cheques. By the Right Honourable Sir John Barnard Byles, late one of the Judges of Her Majesty's Court of Common Pleas. 18th Edition with Colonial Notes by Walter J. Barnard Byles and A. W. Baker Welford. London: Sweet and Maxwell, Limited. The Carswell Company, Limited, 1923.

The most important recent decision within the sphere of the subject-matter of this *vade mecum* for the commercial lawyer is the case of *The London Joint Stock Bank* v. *MacMillan*, (1918) A. C. 777. There, as the editors of the present edition point out, the House of Lords upheld the much criticized decision in *Young* v. *Grote*, (1827) 4 Bing. 253, and incidentally confirmed the correctness of the view expressed by the editors of the last edition of Byles. We are informed that owing to the greatly increased cost of production since the date of the last edition, it has been found necessary to restrict the size of the book. Material