damages were then sustained, in the words of the statute. The subsequent death of his mare was merely an additional evidence of the extent of his damages, and in our judgment cannot be held "a sustaining of damage" in the view of the statute.

Mr. Gwynne, in his ingenious argument, admitted that an action might be brought immediately after the accident, and that a recovery would be a bar to all future actions, even if it were erroneously thought that the mare would completely recover, and her subsequent death would give no additional claim.

In a case like this, there is no question of what is called "continuing damage," as in the case of a nuisance, or the diversion of a stream or penning back of water, which from day to day is occasioning injury, and for which a fresh action may be daily instituted. Here all connection between the cause and the injury, all injurious action by defendants against the plaintiff, ceases from the happening of the accident. The plaintiff has sustained the whole of his damages; his mare is fatally injured. The damage is not the less because he does not know its full extent, or because (if he sue before her death) his witnesses may not speak with certainty as to the fatal character of the injury, or because other witnesses for defendants may declare that she will recover, and regain all her former vigour and usefulness.

It seems to us a misconception to speak of the death of the mare, at an interval of three, six, or nine months after the accident, as the "sustaining of the damage" mentioned in the act.

It is quite true that requiring the action to be brought within three months from the cause of action may create more difficulty in duly proving the proper measure of damage. This cannot be avoided. It is a difficulty occurring in numerous cases; for assault and battery, injuries (not fatal) in public conveyances, &c. Contradictory testimony is frequently adduced as to the temporary or permanent character of the alleged injury; but the damage, be it small or great, has been sustained by the plaintiff as against the defendants by the occurrence of the unlawful act of commission or omission. However difficult to prove, it has been sustained; the effects of the injury may be developing themselves very slowly, and perhaps obscurely.

If the view of the court below be law, it will deprive municipalities of the special protection given them by the statute, and extend the period of limitation indefinitely until three months after, not the default causing the injury, but the ultimate development of its effects by the death of the person or animal the subject of such injury.

We think the appeal must be allowed, and the rule to enter a nonsuit, on the leave reserved, be made absolute.

It is not necessary to discuss the question of value.

Appeal allowed.

COMMON PLEAS.

(*Reported by* S. J. Vankoughnet, Esq., M.A., *Barrister-at-Law, and Reporter to the Court.*)

Barnes et al. v. Cox.

Certiorari—Issue, but non-delivery before judgment entered—Procedendo—Practice.

A *certiorari* must not, merely have been issued, but *delivered* to the proper officer, before the entry of final judgment, or, after interlocutory judgment, before the jury have been sworn on the assessment of damages; otherwise, a *procedendo* will be ordered to issue; and that, too, though the record has been returned and filed in the court above.

In this case the *certiorari*, which had been *issued* several days *before*, was not *delivered* to the judge of the County Court until *the day after* the entry of final judgment and issue of *fi. fa.* thereunder:

Held, that the writ, in obedience to which the proceedings had been returned and filed in this court, was *functus* in its execution, and a *procedendo* was thereupon ordered to issue.

An application made to the judge of the court below to set aside the final judgment on the ground that the claim was *unliquidated* in its nature, had been refused because, having complied with the *certiorari*, he had no longer jurisdiction in the cause:

Held, on a similar contention here, and that the judgment, though signed as a final judgment, ought to have been interlocutory only, and that the *certiorari* had, therefore, been served in time, that this question could not be enquired into on the application before the court, and that the subject matter of the suit being within the jurisdiction of the judge of the court below, his judgment could not be reviewed on the proceeding before this court; but,

Semble, that if it appeared on the face of the record that the judgment was final when it ought to have been interlocutory merely, this might be taken advantage of by writ of error.

Semble, that any proceedings in the court below after removal of the cause into this court could not be sustained, the effect of the *certiorari* being to suspend all proceedings there.

Held, also, that after the return of the record, &c., under the *procedendo*, to the court below, the judge there had power to set aside the judgment and let defendant in, upon terms, to plead

Semble, that the more satisfactory course for the judge in the court below to have pursued would have been, instead of striking out defendant's pleas as inapplicable to the declaration, to have allowed plaintiffs to demur, and thus have given defendant an opportunity of appealing to this court in case of a decision in favour of the demurrer.

[C. P., H. T., 1866.]

In Trinity Term last, *C. S. Patterson*, on behalf of defendant Cox, moved for a rule for a writ of prohibition, to be addressed to the Judge of the County Court of the county of Wentworth, to prohibit the further prosecution in that court of a suit wherein Barnes and Wilson were plaintiffs and Cox defendant, and the further proceeding upon an execution issued in said suit, on the ground that the said suit had been removed by *certiorari* into this court. The rule was moved on reading the affidavits and papers filed in chambers and re-filed on this application.

At the same time, *R. Martin*, for the plaintiffs Barnes and Wilson, moved a rule to quash the *certiorari* issued, and for a writ of *procedendo*, addressed to the County Court Judge of the county of Wentworth, commanding the judge and court to proceed in the suit of Barnes et al. against Cox, wherein the judgment and proceedings had been under said writ removed from such court to this court.

From the affidavits and papers filed it appeared, that the suit had been commenced on January 12th, 1865, by plaintiffs issuing a writ out of the County Court of the county of Wentworth against defendant, who entered an appearance thereto by M. C. Cameron, of Goderich, as his attorney; that on the 23rd day of the said month of Janu-