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COURT OF APPEAL.

SEPTEMBER 27TH, 1912.

ZUFELT v. CANADIAN PACIFIC R.W. CO.

Railway—Injury to and Death of Persons Crossing Track—Negligence — Findings of Jury — Damages — Proof of—Quantum—Second Trial—Appeal.

Appeal by the defendants from the judgment of TEETZEL, J., in favour of the plaintiffs for the recovery of $2,000, upon the findings of a jury, at the second trial of the action.

The facts are stated in the report of the judgment of the Court of Appeal, 23 O.L.R. 602, 2 O.W.N. 1063, directing a new trial.

The second appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, and MEREDITH, JJ.A.

I. F. Hellmuth, K.C., and Angus MacMurchy, K.C., for the defendants.

W. M. Douglas, K.C., and G. F. Mahon, for the plaintiffs.

GARROW, J.A.:—The case was in this Court before, when a new trial was directed. It has now been tried again; and, for the second time, upon essentially the same evidence, a jury has found in favour of the plaintiffs, while reducing the damages awarded at the former trial.

The defendants still complain, saying that the verdict is contrary to the evidence and that the damages are excessive.

I do not see how we can properly interfere on either ground.

It cannot, I think, be said that there was no evidence to go to the jury; and, while I may think—as I certainly do—that the preponderance of testimony is in favour of the defendants, I cannot substitute my opinion for that of the jury or

interfere with its conclusions, except upon some error or other substantial ground, which, so far as I can see, does not appear.

No objection was taken to the learned Judge's charge; and, from a perusal of it, I cannot say that the findings of the jury could, in any proper sense, be called perverse. That they are contrary to what I regard as the weight of evidence, is not alone, in my opinion, under the circumstances of the case, a sufficient justification for directing a third trial, which in all probability would afford the defendants no substantial relief.

Nor do I perceive any sufficient ground to interfere upon the question of damages. There was, I think, some evidence upon the subject; and the quantum—within reasonable limits of course, which, I think, have not been exceeded—was very much a question for the jury.

I would dismiss the appeal with costs.

MOSS, C.J.O., MACLAREN and MAGEE, JJ.A., concurred.

MEREDITH, J.A.:—The uncertainty which prevailed after the first trial of this action by reason of the jury not having been polled, or the facts as to how they were divided in their findings not otherwise ascertained, do not now prevail: the jury were polled at the last trial, and in that way it was made plain that the same ten persons were in favour of the plaintiffs in all things essential to a verdict in their favour; that is to say, that, had the jury been composed of those ten jurors only, these would have been unanimously in favour of the plaintiffs upon all the questions submitted to them; so nothing now stands in their way in that respect.

And in regard to negligence in respect of sounding the whistle and ringing the bell, of that negligence being the cause of the disastrous collision out of which this action arises, and of absence of contributory negligence, this jury also has found altogether in the plaintiffs' favour. It may be that such findings, some of them, do not commend themselves to some judicial minds; but that is not the question; the single question really is, whether there was any evidence upon which reasonable men could have so found; and I am bound to say now, as on the former occasion, that there was. The fact that a second jury—a special jury summoned at the instance of the defendants—have so found, may be far from conclusive upon the question; but, when added to that is the learned trial Judge's view that the question was so difficult an one that he was glad that the onus of solving it did not rest upon him, as well as the unquestionable fact that, upon the evidence for

the plaintiffs alone, it would be impossible to argue reasonably that there was no reasonable proof of these things, and equally so upon the evidence adduced for the defence upon these questions if the testimony of the trainmen be excluded, it comes to this, that the charge of unreasonableness rests upon the evidence of men more or less interested, whom the jury, after seeing and hearing them, have discarded—with these things added, as I have said, I find it quite impossible to say that there was no case to go to the jury in these respects; or that the verdict is anything like a perverse one; or that it ought to be set aside, and another trial directed, because against the weight of the evidence. The case was, in my opinion, one for the jury in these respects, and they, as the Judges of fact chosen by the parties, having taken the responsibility of finding as they have found, in the plaintiffs' favour, for a second time, there would be, in my opinion, no legal justification for disturbing such findings now.

But upon the question of damages I am in favour of allowing this appeal. There was no reasonable evidence of any pecuniary loss to the plaintiffs by reason of the death of either son or daughter killed in this lamentable accident. Two things are indisputable: (1) that recovery can be had, in such an action as this, for pecuniary loss only; and (2) that such loss must be proved so that reasonable men can, upon their oaths, say that the sum awarded is a fair measure of such loss. There was no such proof in this case. According to the evidence, the plaintiffs and their sons and daughters were living as one household upon a farm which was owned by two of the sons, one who was killed and one who yet lives. The death of the two children has not altered that state of affairs, hitherto, in any manner, and there is no evidence whatever that it is likely to. It is said that the young man died intestate and unmarried; and, that being so, not only has the plaintiffs' position in the household not been prejudicially affected, but it has, in a legal sense, been very much strengthened, giving all of the family a legal interest in the farm, where, before, all but the two sons, nominally at all events, had no interest whatever except in the bounty of such sons. And there is no evidence to indicate any less ability in the family to manage and work the farm than there was before.

On this ground, the appeal should, I think, be allowed and the action dismissed; but there should be no order as to any costs. If this point had been raised and relied upon on the former appeal, this action should then have been dismissed, and

subsequent costs saved; therefore, the defendants should pay all subsequent costs, and receive costs down to that appeal: and, setting the one set of costs off against the other, it is reasonable to make no order as to costs and so save further costs.

Appeal dismissed; MEREDITH, J.A., *dissenting.*

SEPTEMBER 27TH, 1912.

SMITH v. GRAND TRUNK R.W. CO.

Railway—Injury to and Death of Servant—Engine-driver—Negligence—Person in Charge—Conductor of Train—Workmen's Compensation for Injuries Act, sec. 3, *sub-sec.* 5—*Rules of Railway Company—Negligence of Engine-driver—Responsibility—Findings of Jury.*

Appeal by the defendants from the order of a Divisional Court, 3 O.W.N. 659, reversing the judgment of BRITTON, J., 3 O.W.N. 379, and directing judgment to be entered for the plaintiff upon the findings of the jury at the trial.

The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

I. F. Hellmuth, K.C., and W. E. Foster, for the defendants.

J. R. Logan, for the plaintiff.

GARROW, J.A.:—The action was brought by the plaintiff, the widow and administratrix of Charles Franklin Smith, to recover damages caused by his death, under circumstances of alleged negligence, while in the employment of the defendants, as a locomotive engineer. The accident in which the deceased met his death occurred about 10.30 p.m. on the 20th July, 1911, at Port Colborne, where the engine on which he was employed was by some one's fault thrown into the Welland Canal through an open drawbridge, and he was killed.

A special, consisting of 35 freight cars, a caboose, and the engine and tender in charge of the deceased, left Fort Erie about 9.45 p.m., proceeding westerly. When it arrived near the drawbridge, the signals were set against the train. The engineer blew the necessary blasts with the whistle, but did not get a signal to advance. He then said to his fireman—the sema-

phore remaining set against him—"We will fill the tank up;" and proceeded for that purpose to the stand-pipe, which is situated between the semaphore and the bridge, thus passing the semaphore, which was still set against him. His duty, according to the printed instructions put in, was to detach the engine from the train when of over fifteen cars, as this was, when about to take water. This he did not do, but, instead, advanced with the whole train until the engine was at the stand-pipe, about 70 feet in advance of the semaphore. While engaged in taking water, and apparently without again looking at the semaphore, he signalled to the conductor—who was some 1,200 feet way, at the rear of the train—"I am ready to proceed;" to which the conductor replied, "All right." The train at once proceeded, and in less than five minutes the catastrophe had occurred.

The signals from the engine were given by whistling; those from the conductor by means of the lit-lantern which he carried.

The drawbridge was properly open for the purpose of passing a boat upon the canal.

The rules of the defendants were put in, and Nos. 22, 52, 59, 60, 213, 232, and 233 were specially referred to at the trial and before us.

Rule 22, under the heading "Conductors, Baggageman and Brakemen," says: "The train is entirely under the control of the conductor, and his orders must be obeyed except where they are in violation or conflict with the rules and regulations, or plainly involve any risk or hazard to life or property, in each of which cases all participating will be held alike accountable."

Under the heading "Engine Men," rule 62 says: " . . . they must obey the orders of the conductor of the train in regard to starting, stopping, and switching cars, speed, and general management of the train, unless they endanger the safety of the train or require violation of the rules." Rule 59: "They must obey all signals given, even if they think such signals unnecessary. When in doubt as to the meaning of a signal, they must stop and ascertain the cause; and, if a wrong signal is shewn, they must report the fact to the conductor." Rule 60: "They must always keep a sharp look-out ahead, noting carefully the position of switches, semaphores, and other signals . . ."

Under the heading "Movement of Trains," rule 43 says: "All trains must approach stations, the end of double track, junctions, railroad crossings, at grade, and drawbridge prepared to stop, and must not proceed until the switches or

signals are seen to be right, or the track is plainly seen to be clear.''

Rule 232 says: ''Conductors and engine men will be held equally responsible for the violation of any of the rules governing the safety of their train, and they must take every precaution for the protection of their trains, even if not provided for by the rules.''

And rule 233 says: ''In all cases of doubt or uncertainty take the safe course and run no risk.''

The printed ''special instruction'' as to detaching the engine before taking water reads as follows: ''Freight trains of more than fifteen cars in taking water must stop before reaching the water-tank or stand-pipe, and the engine must be cut off before water is taken. The brakes must not be released on train until the engine is again coupled on and ready to proceed.''

At the trial, as appears from the charge of the learned Judge, the plaintiff's case was rested entirely upon two acts of negligence, viz., the act of the conductor in giving the signal to go ahead and the acts of the bridge-tenders after they saw that the train had passed the semaphore and was proceeding towards the bridge.

The learned Judge reserved the defendants' motion of nonsuit, and submitted certain questions to the jury, which, with the answers, are as follows:—

1. Was the conductor, McNamara, who was in charge of the train on the engine of which the deceased C. F. Smith was engineer, guilty of any negligence by reason of which the engineer, C. F. Smith, lost his life? A. Yes.

2. What was that negligence? and answer that question fully. A. Having passed the semaphore, if the conductor had full authority in the running of the train, he, McNamara, should have signalled the engineer to back up the train again until the semaphore was lowered.

3. Was the deceased, the engineer, guilty of contributory negligence: that is, could the engineer, by the exercise of reasonable care, have avoided the accident? A. Yes.

4. In what respect was the engineer, Smith, so guilty? A. By passing the semaphore without permission.

5. Apart from what may be said of negligence on the part of the conductor or the engineer, was there any negligence on the part of the defendants which occasioned the death of the engineer? (Referring to the bridge tender.) A. No.

6. If so, what negligence do you find these bridge tenders were guilty of? A. Nothing.

The jury upon the question of damages said they were of the opinion that the amount of such damages would be $3,600, but they would only allow one-half of that sum, or $1,800.

Britton, J., afterwards delivered judgment dismissing the action without costs. The view taken by the learned Judge is expressed in the following extract from his judgment: "It is argued that the death of the engineer was caused by the negligence of the person in charge of the train within sec. 3, subsec. 5, of the Workmen's Compensation for Injuries Act. The defendants' rule 22 puts the train entirely under the control of the conductor, and his orders must be obeyed except where they are in conflict with the rules and regulations or plainly involve any risk or hazard to life or property, in either of which cases all participating will be held alike accountable. Rules 52, 60, 213, and 232 were also cited. In view of these, and inasmuch as the deceased knew that the semaphore was up, and not lowered for the train of the deceased, he must be held equally responsible with the conductor; and so I must dismiss this action."

As appears in the learned Judge's charge, he had presented to the jury for their consideration the contention of the plaintiff that the result was brought about solely by the negligent signal to advance given by the conductor, and that any negligence of the engineer in passing the semaphore had then ceased to be operative, and the opposing contention of the defendants, which is thus described by the learned Judge: "It is said in argument, in reference to him, that his signal only meant, and it would only be understood by the engineer, that it was all right at his end of the train. 'You are on your engine drawing this train. It is for you to see that it is all right for you.' Using the wording of rule 213, 'it has to be plainly seen by you that the track is clear to go upon the bridge and to cross over the bridge, and assuming it is your duty and that that is all right, then it is all right for you to go ahead.' That is the meaning, it is said, so far as this conductor is concerned, in answering from the rear end of the train the signal that was given to him by the engineer. Now, it is for you to say whether this conductor, in your opinion, was guilty of the negligence which caused the engineer, under those circumstances, to go forward with his train."

The Divisional Court adopted the plaintiff's contention and allowed the appeal.

I am, with deference, of the opinion that the view taken

by the learned trial Judge was correct. He might very well, in my opinion, even have granted the motion for nonsuit made by the defendants at the close of the plaintiff's case—all the undisputed facts upon which his final judgment was based having then appeared.

But, assuming that the case was one proper to be passed upon by a jury, I am quite unable to agree with the Divisional Court that it was permissible to ignore the finding of the jury as to the engineer's contributory negligence. There is no evidence that they did not fully understand and appreciate the exact situation. The charge had fully instructed them as to the opposing contentions of the parties. Under that of the plaintiff, there was no contributory negligence causing or helping to cause the accident. Under that of the defendants, the engineer's original negligence in passing and ignoring the semaphore continued, while the action of the conductor was a mere incident in bringing about the result.

It is, I think, impossible to regard the findings as a whole as having in any way attributed the advance to the signal of the conductor. On the contrary, the jury's idea of the conductor's negligence is not that he gave that signal, but that he should have given an order to the engineer to back up until the semaphore was lowered. And that the jury were convinced that the engineer was in fault is decisively evidenced by their very unusual method of dealing with the damages.

I would, for these reasons, allow the appeal and affirm the judgment of the trial Judge. And the defendants should have, if they ask, the costs of the appeal to the Divisional Court and to this Court.

MEREDITH, J.A., reached the same result, for reasons stated in writing.

MOSS, C.J.O., MACLAREN and MAGEE, JJ.A., concurred.

Appeal allowed.

SEPTEMBER 27TH, 1912.

*RE SOLICITORS.

Solicitors—Taxation of Costs against Clients—Quantum of Fees and Charges—Discretion of Taxing Officers—Appeal—Bills of Costs—Entries in Solicitors' Books—Estoppel—Services of Solicitors in Selling Company's Stock and Bonds—Services as Directors and Officers—Remuneration—Commission.

Appeal by the clients, the Cobalt Power Company Limited, B.C. Beach, and Beach Bros., and cross-appeal by the solicitors, from an order of a Divisional Court, 3 O.W.N. 194, affirming in part and reversing in part the order of BRITTON, J., 2 O.W.N. 1421.

The appeal was heard by GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A., and LENNOX, J.

R. A. Pringle, K.C., for the clients.

F. E. Hodgins, K.C., for the solicitors.

GARROW, J.A.:—As will be seen, the Divisional Court reversed the judgment of Britton, J., in part, upon the cross-appeal, and allowed the items charged by the solicitors for attendance as directors and officers of the Cobalt Power Company, Limited. Riddell, J., in his judgment says of this item: "This was work done for the clients; and, while there would be difficulty in the solicitors compelling the company to pay them, I can see none in the way of charging the clients Beach Bros."

The view of Britton, J., is thus expressed: "When these services as directors and officers were rendered, they were rendered as part of the whole work being carried on by Beach et al. and the solicitors; and it was not in contemplation of Beach et al. that any special and separate charge for these services by solicitors, qua directors and officers, should be made over and above the day-by-day work being charged, as shewn by the bills."

It would, I think, be dangerous to encourage the idea that, under any circumstances, a solicitor acting for a client may as such become a director upon the board or act as an officer of a joint stock company, and be at the same time in the pay of the client for the services so rendered to the company.

*To be reported in the Ontario Law Reports.

Whether or not the company is what is called a one man company, can make no difference in the principle. Such a company is an entity, and is subject to the general law respecting joint stock companies, the policy of which seems to be entirely against such a practice. The rule, or, as it might perhaps better be called, the presumption, in the case of directors, is, that the services as director are to be gratuitous. See per Bowen, L. J., in Hutton v. West Cork R. Co., 23 Ch.D. 654, at p. 672. Although, of course, by observing the formalities prescribed by the statute, provision may lawfuly be made for payment. See the Ontario Companies Act, 1912, sec. 92.

There is certainly no evidence of an express promise to pay for these services; and I agree with Britton, J., in thinking that the circumstances do not justify the necessary inference of an implied promise by the clients, for which reason I agree with Britton, J., that the item should not be allowed, and that the judgment of the Divisional Court should to that extent at least be reversed.

Then as to the main question. The clients contend that, notwithstanding the large amount already taxed off, the bills are still grossly excessive in several particulars, a contention so far not acceded to either by Britton, J., or in the Divisional Court. The contention is, therefore, one under the circumstances not easy to maintain in this Court. None of the members of this Court, nor of any of the Courts who have passed upon the matter, can or will pretend to either the knowledge or experience of the learned senior Taxing Officer, universally acknowledged to be an exceptionally capable and competent official. And, if the matter could properly be regarded as it evidently was, both by Britton, J., and in the Divisional Court, as not involving any principle, but merely a question of amount —in other words of "more or less" under some stated or acknowledged principle, I for one would not think of interfering. Britton, J., in his judgment said: "Re Solicitor, 12 O. W.R. 1074, is binding upon me. In that case the authorities are cited and the conclusion reached that 'where the Taxing Officer has not made any mistake in principle, and where the amount is not so grossly large or small (as the case may be) as to be beyond all question improper, the Court ought not to interfere with the discretion of the Taxing Officer.'" Riddell, J., in delivering the judgment of the Divisional Court, refers to the same case, which was a judgment of his own, and uses practically the same language. And the language itself correctly expresses what, after looking at a number of cases upon

the subject, I take to be the law in such cases. But what I cannot understand is the "principle" which both the learned Judges seem so satisfied is not being violated, and that, therefore, the whole question is one of amount. I could understand the use of the term as applied to items governed by an authorised tariff; but it is conceded that the items complained of are not tariff items; and the only principle applicable to them, so far as I am aware, is, that the solicitor shall recover the value of his services—in other words, he shall recover as upon a quantum meruit. What the value of the services is is a question of fact to be determined as in other cases by proper evidence, which means, of course, here, the evidence of experts of experience—the Taxing Officer being, of course, at liberty freely to apply his own special knowledge and experience in addition. And his result or conclusion in such a case must on principle be just as open to review as that of any other judicial officer dealing with a question of fact, just as, for instance, an assessment of damages by a Judge at a trial without a jury, for it would certainly be odd and not reassuring to the public that, while this Court may, as it constantly is called upon to do, review the findings of a trial Judge, or even of a Divisional Court, upon a question of the quantum of damages, it is powerless to act in such a case as this.

There does not appear to have been a large amount of evidence given before the learned Taxing Officer, and what was given does not seem to me to be very definite or conclusive. In the argument before us reference was made to other experienced gentlemen, familiar with the class of work in question, who might have been, but were not, called. And there must, we would think, be no dearth of such evidence.

Upon the whole, I have come to the conclusion, reluctantly I admit, that the clients are entitled to have the taxation at least partially re-opened for the purpose of shewing, if they can, that the bills in question should be still further reduced. The amounts, even as allowed, are certainly very large. They greatly exceed the amounts as entered in the solicitors' dockets, which, while not conclusive, ought to be at least prima facie evidence of what the correct charges should be. The whole account need not, of course, be gone into, but only those items of which the client still complains, which are all, I think, set out in the judgment of Riddell, J. Both parties, as to these, will be at liberty to call further evidence, and the clients will take the risk in costs, if in the end they fail to obtain a further reduction.

It is a pity that there is no proper tariff for such charges. It places all parties in a very awkward position. That there is power to fix such a tariff, see the Solicitors Act, 1912, secs. 46, 47. And it may be worth while to note the various clauses (a) to (e) of the latter section, as to what should guide in framing such a tariff, these being indirectly some guide even in the absence of a tariff or until one is provided.

We were asked to interfere with the order heretofore made as to costs by the Taxing Officer. The clients might very well, under the circumstances, have been given their costs, considering the very large amount struck off the bills; but it was, I think, a matter within the discretion of the Taxing Officer, with which we ought not to interfere.

As to the other costs, if the parties had produced the evidence before the Taxing Officer which I think might have been obtained, we should have been able to deal with the whole matter here. For that omission both parties are, it seems to me, somewhat to blame. We are reversing the result in the Divisional Court, in so far as concerns the solicitors' cross-appeal; but, on the other hand, are not allowing the clients' appeal otherwise than by a reference back to the Taxing Officer; in other words, giving them another opportunity, on further evidence, still further to reduce the bills, if they can, so that the final result is still uncertain.

Conditions such as these lead me to think that a fair order as to costs is to direct that the order of Britton, J., as to the costs of the proceeding before him, should stand, and that there should be no costs to either party of the appeal or cross-appeal to the Divisional Court or to this Court. The costs upon the reference back will, of course, be in the discretion of the Taxing Officer.

MACLAREN and MAGEE, JJ.A., and LENNOX, J., concurred.

MEREDITH, J.A., for reasons stated in writing, concurred in allowing the clients' appeal and dismissing the solicitors' cross-appeal; but dissented as to the costs of the appeals here and below.

Judgment as pronounced by GARROW, J.A.

SEPTEMBER 27TH, 1912.

*MARTIN v. GRAND TRUNK R.W. CO.

Master and Servant—Injury to Servant—Negligence of Fellow-servant—Liability of Master—Workmen's Compensation for Injuries Act, sec. 3, sub-sec. 5—Railway—"Person in Charge or Control of Engine"—Evidence—Findings of Jury.

Appeal by the defendants from the judgment of MULOCK, C.J.Ex.D., in favour of the plaintiff, upon the findings of a jury, in an action for damages for injuries sustained by the plaintiff while in the service of the defendants, owing, as the plaintiff alleged, to the negligence of one McNaughton, a fellow-servant.

The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, and MAGEE, JJ.A., and LENNOX, J.

I. F. Hellmuth, K.C., and W. E. Foster, for the defendants.

W. S. Brewster, K.C., for the plaintiff.

GARROW, J.A.:—The plaintiff and McNaughton were both in the employment of the defendants, the former as yard foreman at the city of Brantford, and the latter as his helper. Early on the morning of the 16th October, 1910, the plaintiff, while engaged upon his duties in the yard, was struck and severely injured by an engine which was being used for shunting purposes. The collision was, it is said, brought about by the negligence of McNaughton in carrying out a shunting order given by the plaintiff, by taking the engine along the west-bound track instead of the east-bound track. The plaintiff, after the order, assumed that the engine which was following behind him would proceed on the east-bound track; and, in consequence, was walking forward so near the west-bound track that he was struck by the buffer of the engine.

The evidence shewed that the portion of the yard which it was desired to reach could be reached by both tracks, but that the east track was much the more direct, and in fact the only natural and proper one to use on the occasion in question.

The order given to McNaughton by the plaintiff was verbal and was called to him from a distance. It must now, however, be assumed that the order was heard, and was understood by McNaughton, who, although apparently available, was not called as a witness. No question, apparently, was raised at the trial

*To be reported in the Ontario Law Reports.

concerning the sufficiency of the order or as to McNaughton's understanding of it. McNaughton accompanied the engineer upon the engine, and personally, without any further order or instruction from any one, opened the switch to admit the engine upon the wrong track, where afterwards the mischief was done.

There were allegations of incompetence on the part of McNaughton and also of contributory negligence on the part of the plaintiff.

A motion for a nonsuit was denied by the learned Chief Justice: and the case was submitted to the jury, who, in answer to questions, found as follows:—

1. Were the defendants guilty of negligence, causing the accident? A. Yes.

2. If so, in what did such negligence consist? A. Mr. McNaughton failing to carry out his orders from the plaintiff, Martin.

3. Was McNaughton competent for the position he filled as yard-helper? A. No.

4. Was the accident caused by reason of the negligence of any person in the service of the defendants who had any superintendence intrusted to him, whilst in the exercise of such superintendence? A. Yes.

5. If your answer is "yes," who was the person, and what was the negligence? A. (a) Mr. McNaughton. (b) In not carrying out his instructions from plaintiff, in taking west-bound track instead of east-bound track.

6. Was the accident caused by the negligence of any person in the service of the defendants, who had the charge or control of any locomotive or engine upon the defendants' railway? A. Yes.

7. If your answer is "yes," who is such person? A. Mr. McNaughton.

8. Could the plaintiff, by the exercise of reasonable care, have avoided the accident? A. No.

9. At what sum do you assess the damages? A. Common law, $4,000; Workmen's Compensation Act, $2,600.

And judgment for $2,600 was afterwards directed to be entered in favour of the plaintiff; the learned Chief Justice being of the opinion that the plaintiff was not entitled to recover as at common law, but was entitled, under sub-secs. 2 and 5 of sec. 3 of the Workmen's Compensation for Injuries Act, to judgment for the amount found by the jury.

Nothing, I think, turns upon the alleged incapacity of Mc-

Naughton. Indeed, the sole point in the case—as counsel upon the argument admitted— is: Are the defendants responsible, under the circumstances, for the negligence of McNaughton in sending the engine along the wrong track?

That responsibility must, I think, rest, if at all, upon an affirmative answer to the further question: Was he—or, rather, is there reasonable evidence that he was—on the occasion in question a person in charge or control of the engine within the meaning of sub-sec 5 of sec. 3 of the Workmen's Compensation for Injuries Act?

That sub-section, it has been said, should receive a liberal construction in the interests of the workman. . . .

[Reference to Gibbs v. Great Western R.W. Co., 12 Q.B.D. 208, 210, 211; McCord v. Cammell, [1896] A.C. 57, 63.]

And, bearing in mind the authoritative views upon the question of construction expressed in those cases—in which, I hope, it is not presumptuous to say, that I entirely agree—I am of the opinion that there was in this case such reasonable evidence.

The question is not one merely of superintendence in the ordinary sense, nor of physical control of the mere mechanism of the engine, but rather the question, who, in the course of his duties and employment, had, at the time, the direction and control of its movements upon the tracks? And that that person was McNaughton, the evidence leaves little room to doubt.

The engineer, Robert Hay, who had been in charge of the yard-engine operating under the direction of the plaintiff as yard-foreman with the assistance of McNaughton, as his helper, for two weeks before the accident—and who was, therefore, familiar with the mode of carrying on the work—said in answer to questions by the trial Judge:—

Q. In operating your yard-engine, do you take instructions from Mr. McNaughton? A. Yes, sir, if he gives them to me. Sometimes the yard-foreman gives the instructions to him, and he delivers them to me.

Q. And, if McNaughton gives you instructions how to move your engine, it is your duty to obey his instructions? A. It is my duty to take his signals, or to go where I am told, as long as I am going right.

Q. Was McNaughton on that engine with you? A. He was on the footboard of the engine.

Q. Who, in fact, opened the switch to let you in on the west-bound track? A. McNaughton, I think.

Q. And you took the track he turned you in on? A. Yes, sir.

Q. If he had turned you in on the east-bound track, would

you have taken it? A. I would have had to have taken to the east-bound.

Q. Did he give you any verbal instructions? A. No, sir, not that I am aware of.

Q. You simply ran your engine as directed by McNaughton? A. Yes, sir.

Q. Then you place the responsibility upon him for the route you took on that occasion? A. Oh, yes.

Q. You were just working the engine, and he was selecting the track? A. Yes.

Q. So that you yourself were not governed by the signal Martin gave? A. No.

Q. So that in fact, whatever you did, you did, as you assumed, in compliance with McNaughton's orders? A. Yes.

In face of such plain uncontradicted evidence, it seems idle to say, as is said by the defendants, that McNaughton was a mere messenger, having no power or control over the movements of the engine.

All, however, that we have to decide is, that there was here some reasonable evidence proper for the jury upon which to base their 6th and 7th findings; and, as I have said before, in my opinion there was.

The appeal should, in my view, be dismissed with costs.

MOSS, C.J.O., MACLAREN and MAGEE, JJ.A., concurred.

LENNOX, J., dissented, for reasons stated in writing.

Appeal dismissed; LENNOX, J., *dissenting.*

SEPTEMBER 27TH, 1912.

*RE MACDONALD AND CITY OF TORONTO.

Municipal Corporation—Expropriation of Land—Compensation—Award—Injurious Affection of Land not Taken—Depreciation in Value—Change in Character of Street—Street Railway Lines—Local Improvement Assessment.

Appeal and cross-appeal from the award of the Official Arbitrator for the City of Toronto, upon an arbitration under the

*To be reported in the Ontario Law Reports.

provisions of the Municipal Act, to fix the compensation to be paid by the city corporation to Mary Pringle Macdonald, the claimant, for the taking, under a by-law, of certain lands required for the widening of St. Clair avenue, in the city of Toronto.

The appeal was heard by Moss, C.J.O., Garrow, Maclaren, and Magee, JJ.A., and Lennox, J.

H. L. Drayton, K.C., and C. M. Colquhoun, for the city corporation.

J. S. Fullerton, K.C., and H. C. Macdonald, for the claimant.

Garrow, J.A.:—The award gives to the claimant three sums, namely: $587.40, the value of the land taken; $750, for injuriously affecting the remainder of her land (a building lot upon which there is a dwelling-house), by reason of the loss of a tree on the land taken and the bringing of the street line ten feet nearer to the house; and $250, for injurious affection for "depreciation caused by the change of the general character of the street." Only the last item is appealed against.

The cross-appeal is confined to two matters: (1) the dismissal by the arbitrator of a claim for a further allowance because of a supposed intention on the part of the city to place upon the avenue a street railway; and (2) an omission to entertain or give effect to the circumstance that the city is proceeding under the local improvement clauses of the Municipal Act, by virtue of which the claimant will be assessed for a portion of the cost of the street widening in question.

It is convenient, I think, to dispose of the items of the cross-appeal first. And as to both my opinion is, that the learned arbitrator was right.

As to the first, there is no evidence that a street railway is immediately about to be placed upon that portion of St. Clair avenue adjoining the claimant's lands, and certainly none that it is to be placed upon the lands taken from her under the by-law. The ten feet taken from her is to be added to the now existing highway. The whole, including the ten feet taken on the other side of the street, will be highway under the control of the civic authorities, and may, I think, be used as any other highway may, as in fact the narrower St. Clair Avenue might have been, without complaint from any of the adjoining proprietors. So that if in the end, even if it is decided to place a street railway upon the widened street, that alone can give the claimant no right to a special allowance because of that. What

does she get the second item of the award for? She has in the first been paid for the land actually taken, and the second is solely given because of the extension of the highway. Must the city, in addition, pay because it intends to use or uses the widened street for any lawful purpose for which in the public interest it might have used the narrower avenue? See The King v. Mountford, [1906] 2 K.B. 814.

As to the other item, the widening of the street is proposed to be done under the local improvement plan, the city paying a part, and the proprietors a part; and, if one proprietor may be allowed what the claimant asks, all should be allowed the same, with the result that it would not be a local improvement at all, but a charge upon the general funds of the city. It is one thing to say that, if the claimant is being charged with a benefit, she may off-set the amount of such benefit with the amount of the assessment which she is compelled to pay, which was the case of Re Pryce and City of Toronto, 20 A.R. 16, to which we were referred, and a totally different thing to say that the tax thus imposed is the proper subject of all allowances as part of the "due compensation" for which the statute provides.

I would, for these reasons, dismiss the cross-appeal as to both items.

And I would allow the appeal of the city. I am wholly unable to see any fact or principle upon which the third item can rest. Section 437 of the Consolidated Municipal Act, 1903, provides for "due compensation" being made to persons in the position of the claimant. And "due compensation" simply means a full indemnity in respect of all pecuniary loss by reason of the exercise of the power of the corporation. And the only subjects of such pecuniary loss are: (1) the lands actually taken; and (2) the injury to the leasing or selling value of what is left. See, among the numerous cases on the subject, Wadham v. North Eastern R.W. Co., 14 Q.B.D. 747, 16 Q.B.D. 227, a case of special value owing to the premises being a hotel; Duke of Buccleuch v. Metropolitan Board of Works, L.R. 5 H.L. 418, a residence; Re Stockport, etc., R.W. Co., 33 L.J. N.S.Q.B. 251, a mill; approved in Essex v. Local Board of Acton, 14 App. Cas. 153; and Regina v. Moss, 5 Ex. C.R. (Can.) 30, at p. 36. The injury must be to the land itself, and must be such as affects its value; otherwise no claim can be made—nothing is allowable upon merely sentimental or æsthetic grounds or any other grounds which do not affect value. Now, assuming, as I do from the course of the evidence and the

wording of the award, that the arbitrator intended in the second item to include all that tends to depreciate the value of the parcel retained by the claimant, what is there left capable of being reduced to a money basis? Nothing that I can see. The claimant may not like a wide street, or a wide pavement, or she may like a shady street or a street with boulevards or without them; but all these things, which apparently from the arbitrator's judgment are the basis of the allowance in question, have really nothing to do with the matter, in my opinion. Nothing has been altered so far by the city. The wide pavement and the other matters are all in the future, and all seem to involve the same principle as the street railway question. If it was right to disallow a claim in respect of that very palpable, even if ill-founded, objection, it was, I think, with deference, quite illogical to allow for what in the future the city may do in changing the general character of the street. As I have before said, the widened part for which the city pays becomes a part of the highway for all purposes. And no one can lawfully complain of the changing of a sidewalk or the widening of a pavement or the removal of a tree from the highway so under civic control.

I would, therefore, allow the appeal of the city with costs, and dismiss the cross-appeal with costs.

MACLAREN, J.A., concurred, for reasons stated in writing.

MOSS, C.J.O., MAGEE, J.A., and LENNOX, J., also concurred.

Appeal allowed and cross-appeal dismissed.

HIGH COURT OF JUSTICE.

BOYD, C., IN CHAMBERS. SEPTEMBER 24TH, 1912.

DICK & SONS v. STANDARD UNDERGROUND CABLE CO.

Stay of Proceedings—Action by Contractors against Owners—Breach of Contract—Claim for Damages—Prior Proceeding by Mechanics' Lien-holder—Contractors not Asserting Lien—Mechanics' Lien Act, 10 *Edw. VII. ch.* 69, *sec.* 37.

Appeal by the plaintiffs from an order of a Local Judge perpetually staying this action, on the ground that the matters in controversy therein were before the Court in a proceeding to enforce a mechanics' lien.

E. C. Cattanach, for the plaintiffs.
G. H. Levy, for the defendants.

BOYD, C.:—The plaintiffs claim a large amount of damages, $100,000, against the defendants for breach of contract in not supplying materials to carry on a construction contract made by the plaintiffs with the owners of the land, the defendants. This action was launched after mechanics' lien proceedings had been begun by an alleged lien-holder, on behalf of himself and all others, against the contractors and the owners. To determine what should be paid for liens, it may be necessary to consider the rights of the contractors and owners inter se; but the contractors do not propose to claim any lien on the property, and refuse to bring in any such claim in the mechanics' lien proceedings. They are claiming a much larger sum than the value of the land, by way of damages against the owners; and their claim, if successful, will not interfere with the right of those having liens to be paid under the Act. The plaintiffs do not propose to make any claim under the Act; and I do not think the statute is of sufficient stringency to enable the judicial officer charged with the mechanics' lien contest to bar the plaintiffs in their independent action and stay all proceedings therein perpetually. All things necessary to work out the liens quoad the land are within his jurisdiction, but I do not think a wider scope should be given to the provisions of the Act 10 Edw. VII. ch. 69, sec. 37.

I vacate the order to stay procedings, with all costs of motion and appeal to be in the cause to the plaintiffs.

DIVISIONAL COURT. SEPTEMBER 28TH, 1912.

*CITY OF TORONTO v. WILLIAMS.

Municipal Corporations—Prohibition of Erection of Apartment House—By-law—2 Geo. V. ch. 40, sec. 10—Permit for Erection—Revocation—Bona Fides—"Location" before Statute—Building not Actually Begun.

Appeal by the plaintiffs from the judgment of BRITTON, J., 3 O.W.N. 1643.

*To be reported in the Ontario Law Reports.

The appeal was heard by BOYD, C., LATCHFORD and MIDDLETON, JJ.

Irving S. Fairty, for the plaintiffs.

G. C. Campbell, for the defendant.

BOYD, C.:—This lot was purchased by the defendant in May, 1911, for $10,000, at the rate of $100 a foot. Land in the neighbourhood is now held at $200 per foot.

On the 1st October, 1911, a permit was obtained for building on it a two-storey and attic dwelling (a bungalow); and, for the purpose of the project, a cellar was dug, 26 by 60 feet and 4 feet deep, and a small load of stone hauled there in the latter part of that month.

On the 31st January, 1912, a permit was obtained to erect an apartment house on the same lot (which would supersede the other permit); but no work was done in pursuance of this scheme till the 18th July, 1912, when a new excavation was begun on the north side of the lot, and more or less work done.

Before this last work on the lot, the defendant knew of a by-law being passed by the city on the 13th May, 1912, forbidding the erection of apartment houses on residential streets, which included this locality, and that former permits would cease and become invalid; and there was a letter received by him from the City Architect notifying him that the permit was withdrawn. Prior to this, the only work done on the place was referable to the abandoned bungalow scheme.

This by-law was pursuant to the powers given to cities by the statute 2 Geo. V. ch. 40, sec. 10 (assented to 16th April, 1912); and it follows the words of the Act. The prohibition is against "the location" on the streets named of apartment houses.

The argument before us was, that the location of this apartment house (coupled with the defendant's intention to build thereon) had attached or had been completed when the permit was obtained, and that all the prior and subsequent work done on the lot was referable thereto, and, having been so acted upon, it was inequitable and incompetent for the plaintiffs to recede or to revoke the location.

But it is to strain the meaning of the word "location" to give it this scope. No doubt, the word is used with a technical or conventional import when used in connection with lines of railway and other undertakings, as pointed out by Strong, C.J., in The Queen v. Farwell, 14 S.C.R. 426. But there is

nothing in the statute to interfere with its etymological and ordinary meaning: City of Toronto v. Ontario and Quebec R. W. Co., 22 O.R. 344.

The word "location" is used in the statute in its primary and proper import, as given in Latham's Johnson's Dictionary (sub voce), namely: "Situation with regard to place; act of placing; site of being placed." Read the clause with this substitution of words: "Prohibit the situation with regard to place of an apartment house on the street. Prohibit the act of placing a house on the street. Prohibit the site of house being placed on the street." Any of these substitutes brings out the meaning, which is forbidding the locus being used for the purpose of putting an apartment house thereon.

The context and intent of the statute and by-law is to forbid the placing of an apartment house on that site. The preparation of the plans and specification was no more than a preliminary to the application for a permit; and the permit, when granted, was merely to erect the proposed building, that is, to locate it on the site. No outlay has been incurred since the granting of this permit up to the date of its revocation, and no case of estoppel can be made out. The permit to build may be regarded as a license to build; but that the owner might withdraw from, as might also the city, in case the situation was not changed, in pursuance of the license. No such change is proved here; the only change appears to be a steady increase in the value of the land.

We cannot mistake the policy of the Legislature; the plaintiffs, as a public body, are called on to enforce it in proper residential neighbourhoods. While it may bear hardly on the individual owner, who is hampered in the free enjoyment of his property, still it is one of the effects of advancing civic life and amenity that for the sake of preponderating advantages to the whole locality, one proprietor may have to suffer deprivation.

This is said to be a test case, involving a score of other permits; and, this being so, and the point being without authority, it seems fitting, while we reverse the decision in appeal, to do so without costs.

The injunction is continued indefinitely while the prohibition continues.

LATCHFORD and MIDDLETON, JJ., concurred, each stating reasons in writing.

Appeal allowed.

FARMERS BANK OF CANADA v. SECURITY LIFE ASSURANCE CO.—MASTER IN CHAMBERS—SEPT. 23.

Writ of Summons—Service out of the Jurisdiction—Order Authorising—Motion to Set aside—Guaranty Executed in another Province—Conditional Appearance.]—This was an action on a guaranty given by the defendants, who were all resident at Montreal, where the document was executed on the 29th December, 1909. The usual order for service abroad was made under Con. Rule 162 (e); and the defendants moved to set this aside. The guaranty was admittedly signed at Montreal, and it was argued that primâ facie this would not import payment outside the Province of Quebec. It was further contended that, in any case, even if the guarantors had to seek out their creditor, this would be done in Montreal itself, because sec. 70 of the Bank Act, R.S.C. 1906 ch. 29, provides that "the bank shall establish agencies for the redemption and payment of its notes at the cities of Toronto, Montreal," and others; and that, therefore, payment of the obligation in question could be properly made at Montreal, unless there was an express agreement to the contrary. It was contended, in addition, that a bank, being incorporated to do business throughout the Dominion, could not be said to be resident in the Province in which its head office was situated more than in any other; and the provisions of sec. 76(a) of the Bank Act were also emphasised. The Master said that the questions were new in his experience, and were worthy of consideration. Copies of the whole correspondence had been put in by the plaintiffs, comprising letters passing between the defendants and the head office of the plaintiffs, or their Toronto solicitors, and pressing for payment. If this was to be made at the head office or to the solicitors, then the order was right. But this was nowhere exactly stated, though the whole of the negotiations were with them only. The matter was left in such doubt, that the best course seemed to be to allow the defendants to enter a conditional appearance, and leave the plaintiffs to prove a cause of action within the Province, on peril of having their action dismissed with costs. This was approved in the recent case of Farmers Bank of Canada v. Heath, 3 O.W.N. 682, 805, 879; and a similar order should be made in this case; the defendants to have a week to appear; costs in the cause. H. E. Rose, K.C., for the defendants, M. L. Gordon, for the plaintiffs.

BLACK v. CANADIAN COPPER CO.—MASTER IN CHAMBERS—SEPT. 25.

Particulars—Statement of Claim—Motion before Delivery of Defence—Absence of Affidavit — Nuisance — Damages.]—This action was brought by a florist residing at Sudbury to restrain the defendants "from continuing to allow the escape of noxious vapours, gases, acids, smokes, etc., from their roastbeds and smelter on to the lands of the plaintiff and the vegetation thereon." The plaintiff also claimed $5,000 for damages already suffered. In the 4th paragraph of the statement of claim it was said that the defendants "wrongfully and negligently permitted and allowed the said noxious vapours, gases, acids, and smoke to escape," and thereby caused the plaintiff great damage in respect of his plants, flowers, trees, etc. In the 5th paragraph it was said that the plaintiff, in consequence of the continued damage, had been obliged, at great sacrifice, to sell his property, and must move some miles from Sudbury if he was successfully to carry on his business, in case the defendants were permitted to continue their present methods of smelting. The defendants, before pleading, demanded particulars, under the 4th paragraph, of the negligence therein charged, as well as of the plants, etc., said to have been destroyed or injured. As to paragraph 5, particulars were asked as to what was meant by the sale of the lands at a great sacrifice. The plaintiff's solicitors in reply sent a telegram saying, "Defendants have all particulars referred to." The defendants thereupon moved to set aside the statement of claim, as not complying with Con. Rule 268, and in particular paragraphs 4 and 5, as being embarrassing because indefinite, or for particulars. The Master referred to Tipping v. St. Helen's Smelting Co., 4 B. & S. 608, 616, 11 H.L.C. 642; Smith v. Reid, 17 O.L.R. 265; and said that the one material fact on which the plaintiff must rely was that damage had been caused to his property by the defendants' works. This was sufficiently and plainly alleged in the 4th paragraph, and no particulars were necessary at this stage. As to the 5th paragraph, if the defendants were held liable, the damages payable to the plaintiff would most probably be a matter of reference and would not be gone into at the trial, which would, no doubt, be before a Judge without a jury. The Master also drew attention to the absence of any affidavit by the defendants that the particulars asked for were necessary for pleading, and said that this omission was suggestive, in face of

the telegram of the plaintiff's solicitors. Following his previous decision in Spalding v. Canadian Pacific R.W. Co., 9 O.W.R. 870, he thought that the motion should be dismissed (costs in the cause) and the statement of defence should be delivered in ten days: this without prejudice to a similar motion after discovery, if the defendants should think it necessary. H .E. Rose, K.C., for the defendants. C. M. Garvey, for the plaintiff.

WILLIAM PEACE CO. v. WILLIAM PEACE—LATCHFORD, J.—SEPT. 25.

Covenant—Restraint of Trade—Breach—Declaration—Injunction—Patent for Invention—Infringement.]—Action for an injunction and damages in respect of an alleged infringement of a patent and for breach of a covenant. The defendant undertook, for good consideration, not to engage in any business for the manufacture of weather-strips within the city of Hamilton or within five miles of the city limits for a period of ten years; and further covenanted that he would not allow his name to be used in connection with any such business. The learned Judge finds that the defendant has been guilty of a breach of both the provisions of this covenant; and awards the plaintiffs a declaration and injunction accordingly with costs. Upon the question whether the metallic strip used by the defendant, after the plaintiffs had threatened to take action against him, was an infringement of either of the patents assigned to the plaintiffs by the defendant, the learned Judge finds in favour of the defendant. T. Hobson, K.C., for the plaintiffs. A. O'Heir, for the defendant.

FEE v. MACDONALD MANUFACTURING CO.—DIVISIONAL COURT—SEPT. 25.

Charge on Land—Registration—Absence of Interest in Creator of Charge—Cloud on Title—Removal—Damages.]—Appeal by the defendant company from the judgment of SUTHERLAND, J., 3 O.W.N. 1378. The appeal was heard by BOYD, C., LATCHFORD and MIDDLETON, JJ. The Court varied the judgment below. The judgment as varied is as follows: Declare that the defendant company have no right to any money coming to

Margaret Lang. The defendant company to pay the plaintiffs' costs of the action. As against the defendant Henry Lang, action dismissed without costs. The defendant company to pay the costs of the appeal. R. S. Robertson, for the defendant company. A. E. H. Creswicke, K.C., for the plaintiffs and the defendant Henry Lang.

WALKER AND WEBB v. MACDONALD—FALCONBRIDGE, C.J.K.B.—SEPT. 26.

Costs—Third Parties.]—This action and the action of Graham against the same defendants were disposed of by the judgment noted ante 1. The question of the third parties' costs of this action was afterwards mentioned by counsel. The Chief Justice said:—As a matter of precaution, the defendants claimed indemnity over against G. J. Foy Limited. They did this for their own protection. In the result they have not needed that shield. And, therefore, they ought to pay the third parties' costs in this action—to be set off pro tanto against their claim and costs in the Graham suit. G. F. Shepley, K.C., for the defendants. E. J. Hearn, K.C., for the third parties.

ARMSTRONG v. TOWN OF BARRIE—FALCONBRIDGE, C.J.K.B.—SEPT. 27.

Highway—Nonrepair—Injury to Pedestrian—Evidence.]—Action for damages for injuries sustained by the plaintiff by falling into a hole in a highway. The learned Chief Justice said that, even if he were to ignore the testimony of one A. E. Patterson, who was said to have a contingent interest in the result of this action, the evidence adduced by the defendants was overwhelming as to the condition of the area and sidewalk. The plaintiff must be quite in error as to the manner in which he met with the accident. Action dismissed with costs, if exacted. A. E. H. Creswicke, K.C., for the plaintiff. J. H. Moss, K.C., for the defendants.

KARCH v. KARCH—DIVISIONAL COURT—SEPT. 27.

Husband and Wife—Alimony — Custody of Children.]—Appeal by the plaintiff from the judgment of KELLY, J., 3 O. W.N. 1446, in an action for alimony, awarding the defendant (the husband) the custody of the children. The appeal was heard by BOYD, C., LATCHFORD and MIDDLETON, JJ. The Court dismissed the appeal without costs. H. Guthrie, K.C., for the plaintiff. W. E. S. Knowles, for the defendant.