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BRITTON, J. MAY 28TH, 1907.

TRIAL.

BOUCK v. CLARK.

Sale of Goods — Absence of Express Warranty — Implied Warranty — Quality of Hay — Opportunity for Inspection — Acceptance — Estoppel — Division Court Judgment — Evidence as to Opinion of Quality.

Action for breach of warranty of the quality of hay purchased by plaintiff from defendant.

R. A. Pringle, Cornwall, and J. A. C. Cameron, Cornwall, for plaintiff.

I. Hilliard, Morrisburg, and C. H. Cline, Cornwall, for defendant.

BRITTON, J.:—The plaintiff is a dealer in hay and feed, doing business in the village of Winchester, and the defendant is a farmer residing in the township of Matilda. The plaintiff sought the defendant in the autumn of 1906, and says he purchased all the hay that defendant then had. It is set up in the statement of claim that the hay so purchased was to be good merchantable hay and of No. 1 quality. In his evidence the plaintiff said the hay was to be good green hay well saved.

The main facts are hardly open to question. The defendant represented that he had, in the autumn of 1906, about 200 tons of hay. It was in 3 barns of the defendant, and the plaintiff visited two of these barns, viz., the south-west and the south-east barns—he did not go to the north barn or see the hay therein, at the time he agreed to pur-

chase. At the barns visited plaintiff saw the hay in the mows, and was told that the hay was of uniform quality. The hay was to be sold by defendant and purchased by plaintiff as pressed hay. Some of the hay had been pressed before plaintiff's visit—this was covered up by the loose hay so that it could not be seen by plaintiff. The plaintiff agreed to pay $12 a ton for the hay, to be delivered as pressed hay, and he agreed to take all that defendant had.

The defendant commenced to deliver in December, 1906, and the hay, with the exception of a comparatively small quantity, was delivered to the plaintiff himself, and was inspected by him, so far as hay pressed and in bales could be inspected. The plaintiff had the right to inspect and to reject if the hay was not such as plaintiff purchased—and he exercised that right in at least one instance and as to a small quantity of hay. Upon the evidence it is quite impossible to find that there was any fraud on the part of the defendant, either by concealment or misrepresentation. It is conceded that there was no express warranty, and upon the whole evidence I am of opinion that there was no implied warranty. It is no fault of defendant's that plaintiff did not make a more full and careful examination. The plaintiff could have seen the hay as it was being pressed; and when it was being delivered, if the plaintiff was not satisfied with the outside of the bales, he could have opened such as he suspected, if any, or such and so many as would enable him to see the average quality of the hay. The plaintiff did open one bale under suspicion and found it good. It is in evidence, and I accept it as proved, that it is very difficult, if not impossible, in the ordinary process of pressing hay, to mix any considerable quantity of bad hay with good in such a way that the bad cannot be easily detected, without opening the bales. Apart from the odour as a means of detecting musty hay, discolouration will manifest itself, and weeds, wire grass, and other grasses that are not good hay will be seen on the exposed parts of the bales. I am satisfied that there was not any large quantity of the hay, when delivered by the defendant, of the inferior quality contended for by the plaintiff. The weight of evidence is that at the time of delivery the hay, except a comparatively small quantity, was of the quality of hay which the plaintiff saw. The evidence of defendant's witnesses, who were employed by him, and who assisted in pressing and who saw this hay pressed, is absolutely inconsistent with there

being any considerable quantity of hay such as the sample produced in Court by the plaintiff.

I am not able to fully understand how it is that there were complaints of bad hay to such an extent by purchasers from plaintiff—of hay said to have been part of defendant's hay. No doubt, there were causes for some deterioration after the hay was delivered to plaintiff. Snow was upon some of the bales. Some was delivered wet. Then hay from Touissant was received by plaintiff in a wet condition, and it was stored with hay delivered by defendant. The Christie barn, where plaintiff stored some of the hay, was in places more or less open, and some damage was done by reason of exposure to the weather.

The law as laid down in Jones v. Just, L. R. 3 Q. B. 197, is not questioned: "Under a contract to supply goods of a specified description, which the buyer has no opportunity of inspecting, the goods must not only in fact answer the specific description, but must be saleable or merchantable under that description," and "the maxim caveat emptor does not apply to a sale of goods where the buyer has no opportunity of inspection." That case was followed by Mooers v. Gooderham, 14 O. R. 451.

The present case is different in its facts. Here the buyer, the plaintiff, had an opportunity of inspecting, and, except in so far as he did in fact inspect, he waived inspection, and so the case is like Borthwick v. Young, 12 A. R. 671, where it was held that, as the sale was not a sale by sample, and the purchaser had not been deterred by any acts or conduct of the defendant from making a full inspection, the vendor was not liable on any warranty, expressed or implied. I find upon the evidence that if there was bad hay, musty hay, hay not well saved, of any considerable quantity, in the hay delivered by defendant to the plaintiff, at the time of such delivery it could have been discovered by plaintiff by any inspection which ought reasonably to have been made: Heilbutt v. Hickson, L. R. 7 C. P. 438.

Upon the evidence I think it clear that the acceptance by plaintiff of any load or bale of hay did not preclude him from rejecting any other load or bale which did not substantially answer the contract: Dyment v. Thompson, 12 A. R. 659, affirmed by the Supreme Court of Canada, 13 S. C. R. 303.

The place of delivery was the place of inspection. The plaintiff was not tied down to the exact time of delivery.

He had a reasonable time. He did not pay for the hay delivered until a considerable time after delivery. After delivery plaintiff commenced to sell the hay to his customers, and when he did this, and when the hay was in the hands of subsequent purchasers, plaintiff's right of rejection was gone: Perkins v. Bell, 12 Q. B. D. 193.

I have read the cases cited by counsel for plaintiff in his very full and able argument, but, applying the law to the facts before me, these cases do not shew that plaintiff is entitled to succeed.

The defendant offered evidence of a judgment in a Division Court between these parties as an estoppel against plaintiff in his claim for damages. There is no estoppel, but what took place is, in my opinion, important as shewing what plaintiff then thought about the quality of the hay now in question, and what he thought his rights were.

The defendant did not in fact deliver all his hay on hand in November, 1906, to plaintiff. He sold 56 tons to other people. After the payment by plaintiff for the 101 tons, the defendant, assuming that plaintiff desired and was willing to accept more, delivered 6 tons and 640 lbs. of hay in an ice-house of plaintiff at Suffels crossing. Plaintiff was annoyed about it, locked up the ice-house, refused to allow defendant to re-take the hay, and refused to accept more. The now defendant, Clark, commenced an action in the 10th Division Court . . . for the value of this hay, calling it $13 a ton. Bouck, the now plaintiff, put in a defence admitting the quantity of hay, but saying the price should be $12 a ton, making $75.84. He put in as a set-off the non-delivery of the balance of defendant's hay, and alleging the sale to other persons of 56 tons at $13 a ton, claiming $1 a ton, or $56, and Bouck paid $19.84 into Court. This was on 18th March, 1907, and I regard it as strongly confirmatory not only of what I thought the bargain really was, but of what plaintiff on that date thought it was. No complaint was then made of the quality of the hay by plaintiff, or by any purchaser from him.

I ought to say further that, even if the bargain was as plaintiff contends, or if there was an implied warranty, the evidence is not clear as to a breach. Considering when the complaints as to the quality of hay were made, and from whom the complaints first came to plaintiff, and having regard to what could easily have happened to the hay after delivery by defendant, defendant may not have been at all

to blame. The sale by auction of part of the hay, under the admitted circumstances attending the sale, does not determine the true value of the hay then sold. Plaintiff decried the hay. The sample shewn by plaintiff to intending purchasers was not a fair sample. One purchaser at the sale re-sold the same hay very soon after the sale, f.o.b. at Ottawa, for $14.75 a ton. From this would have to be deducted freight to Ottawa. That is not a complete answer, but it is evidence that the sale was under circumstances that would not be fair to the hay.

The plaintiff impressed me as an honest man, but a man of very pronounced opinions, and he, as it appeared to me, had wrought himself up to a feeling of strong antipathy to the defendant. The plaintiff accepted as true what people said that was not good about the defendant, and so did what he did in regard to the sale.

The action must be dismissed and with costs.

FALCONBRIDGE, C.J. OCTOBER 28TH, 1907.

TRIAL.

DOWNS v. HAMILTON AND DUNDAS R. W. CO.

Negligence—Pleasure Grounds—Injury to Person—Licensee—No Unusual Danger—Nonsuit.

Action for damages for personal injuries sustained by plaintiff, owing to the negligence of defendants as alleged, in a pleasure park owned or leased by defendants.

G. Lynch-Staunton, K. C., and F. Morison, Hamilton, for plaintiff.

W. W. Osborne, Hamilton, for defendants.

FALCONBRIDGE, C.J.:—There was no fee charged by defendants or by the authority of defendants for admission to the park or "woods." A cash fare was paid on the railway, which does not run into the park. In fact, there is a platform running between their platform-station and the park.

Plaintiff is, therefore, in the position of a bare licensee, to whom no duty is owing, unless the accident happened by reason of some unusual danger known to defendants and unknown to plaintiff, which is not this case.

On the motion for nonsuit, I therefore dismiss the action—under the circumstances without costs.

OCTOBER 28TH, 1907.

DIVISIONAL COURT.

PLENDERLEITH v. PARSONS.

Costs—Taxation—Copy of Shorthand Evidence Taken in Master's Office—Allowance between Party and Party.

Appeal by plaintiff from order of RIDDELL, J., ante 387, allowing an appeal by defendant from the taxation by the senior taxing officer at Toronto of defendant's costs of an action for redemption, and allowing as part of defendant's costs the expense of procuring a copy of the notes of evidence taken in the Master's office.

T. Hislop, for plaintiff.

H. E. Irwin, K.C., for defendant.

THE COURT (MULOCK, C.J., BRITTON, J., CLUTE, J.), dismissed the appeal with costs.

OCTOBER 28TH, 1907.

DIVISIONAL COURT.

RE CASHMAN AND COBALT AND JAMES MINES LIMITED.

Mines and Minerals—Mining Claims—Contest—Decision of Mining Commissioner — Appeal — Weight of Evidence —Right of Claimant whose Claim has Failed to Appeal against Allowance of Rival Claim—"Any Licensee or Person Feeling Aggrieved"—Mining Act, secs. 52 (3), 75.

Appeals by the Cobalt and James Mines Limited from a decision of the Mining Commissioner finding against the

claim of the appellants and from another decision finding in favour of the claim of Cashman.

The appeal was heard by FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.

J. E. Day, for the appellants.

George Ross, for Cashman, the respondent.

RIDDELL, J.—One Landrus, to whose rights the appellants have succeeded, claimed to have made a valuable discovery, and alleges that he staked the claim as required by the Act. Cashman also claimed to have a right to the property in question. The claims were adjudicated upon by the Mining Commissioner, who decided in favour of Cashman. It is admitted that if the claim of the appellants were valid, it has precedence over that of Cashman; and therefore the first question is whether the appeal of the company against the decision of the Commissioner disallowing their claim is well founded.

The Mining Commissioner had before him the witnesses, and he has found as a fact that Landrus made no discovery of valuable mineral within the Act, and further that the alleged discovery is not within the boundaries of the property staked by Landrus or the appellants, but some little distance south of their south boundary. It is admitted that if either finding be sustained, this part of the appeal must fail.

There is abundant evidence upon which the Commissioner might find as he has, and unless we are prepared to reverse our own recent decision in Bishop v. Bishop, ante 177, and a long line of cases which are followed therein, we cannot give effect to the contention of the appellants.

This being the case, I do not think that the appellants can be heard as against the claim of Cashman. Section 52 (3) gives "any licensee or person feeling aggrieved by any decision," etc., the right to appeal; but sec. 75 makes it clear that what is meant is, any licensee feeling aggrieved, and not generally any licensee whatsoever, who is given the right to appeal. The notice is to be served "upon all parties adversely interested"—unless an intending appellant has himself some interest or claims some interest in the property, there can be no "parties adversely interested." If the appeal against the allowance of Cashman's claim were to succeed,

the company would receive no benefit greater or other than any other person. In the absence of express legislation giving such an extraordinary right, the claim of an intending appellant to appeal under such circumstances cannot be sustained.

Both appeals should be dismissed with costs.

BRITTON, J., gave reasons in writing for the same conclusions.

FALCONBRIDGE, C.J., also concurred.

RIDDELL, J. OCTOBER 25TH, 1907.

TRIAL.

REX v. MICHIGAN CENTRAL R. R. CO.

Criminal Law—Indictment of Railway Company—Nuisance—Carrying Dangerous Explosives—Fatal Injuries to Persons—Board of Railway Commissioners—Plea of Guilty—Punishment—Mitigating Circumstances—Imposition of Fine.

Indictment of defendants under secs. 221 and 247 of the Criminal Code for a nuisance and for carrying dangerous explosives without proper precautions.

E. Meredith, K.C., for the Crown.

D. W. Saunders, for defendants.

RIDDELL, J.:—This is an indictment against the Michigan Central Railroad Company, presented at the recent assizes for the county of Essex. By reason of the fact that the defendants have pleaded guilty, I must, in order to pronounce the appropriate sentence, examine into the facts, and that I am able to do only by a perusal of the sworn evidence at the coroner's inquest holden a few days after the casualty. At this inquest the defendants were represented by counsel, who took an active part in cross-examining witnesses—and I think that the facts must be fairly well established by such testimony.

It seems to me that the following was the course of events. The Pluto Manufacturing Co. of Emporia, Pennsylvania, shipped a quantity of dynamite under the name of "powder," paying double first class freight rate. At Black Rock, in the State of New York, this was received by A. D. McAllister of that place, foreman of the freight house and yards of the New York Central and Michigan Central Railroad Companies. He says that he did not know or suspect that this was dynamite, but supposed that it was simply powder cartridges—gun cartridges. He loaded the explosive into a car borrowed from the New York Central Railroad Company, apparently a barrel of oil, and some iron pipe, a number of their "powder cards," containing a warning that the car contained high explosives, and placed these cards upon each side of the car. No care was taken by him to see that the car was proper for carrying high explosives: and in the car were placed bars of iron and a number of other parcels, the car being filled as an ordinary way car or main line freight car is filled. All the experts say that a car containing nitroglycerine or dynamite should contain no other freight. The car was taken up by P. H. Sheridan, a conductor on the defendants' railway, and brought by him to St. Thomas, arriving there at 8.50 p.m. of 7th August, 1907. The car had been opened at Welland, and part of the freight taken out there; on its arrival at St. Thomas it was "switched to the freight foreman" at the freight house. At that point the freight foreman, William Stubbs, found the car on the morning of the 8th—it was then sealed but had in it goods consigned to St. Thomas, a coil of rope, two boxes (one of them hardware), and some plates of steel. These were taken out, leaving nothing in the car but the boxes of "powder" and apparently a barrel of oil, and some iron pipe. The car left St. Thomas on the morning of the 9th at 7.10, and arrived at Essex at 2 p.m. of the same day. The car was opened at Ridgetown, and it was found that two or three boxes of the explosive had shifted and were on edge; and the conductor, Alexander McIntosh, knew that it was explosive he was carrying, but did not replace the boxes or touch them. The car was left at Essex near the freight house. Next morning at about 7.40 the car was "found" by conductor Thomas of the Amherstburg train, and on being moved in making up his train, cracking was heard on or under the car. The conductor then examined the car and found it loaded with boxes of dynamite, and it was found

also that the boxes were leaking and the fluid from the boxes had leaked and was still leaking down through the bottom of the car—4 or 5 of the boxes being out of place. The boxes were righted, but no pains taken to wash the floor or the axles, bolsters, or running gear of the car. The barrel of oil and iron pipe were taken out of the car, and 5 or 6 pieces of freight were put in. The car was placed next to the engine, and, after being moved about for a time, the cracking noises continuing loudly, a terrible explosion took place, killing two men on the spot, and more or less seriously injuring about 40 others.

Some of the expert evidence tends to shew that, had the boxes been so loaded that they could not get out of position, and so that no other freight could strike them, there would not have been so much danger. No care seems to have been taken by the company to see to it that those in charge of this high explosive knew how to deal with it—no one was sent with the shipment to attend to it; but this fearfully dangerous substance was shipped with no more care and precaution than a carload of potatoes. It makes one's blood run cold to consider the history of this car—an ordinary car, leaky, loaded partly with dynamite and partly with other freight, shunted into the yard at St. Thomas, left there all night, taken the next day to Essex, shunted there in the afternoon, and after staying there a day and a half shunted backwards and forwards with detonations like pistol shots—and no one taking the slightest care.

It is true that there were placards shewing that the car was laden with high explosives, and that is the reason apparently why the Board of Railway Commissioners declined to allow a prosecution under the Railway Act. Had it not been for this refusal, I should have thought that so to placard an ordinary freight car would not be sufficient to make such a car "designated for the purpose" as required by the Railway Act. It may be well to say a word or two as to the right of railway companies, under circumstances like the present—to see how far the defendants were called upon to act as they did. At the common law it is clear that no carrier could be compelled to carry such goods as these, dangerous in their nature. Common carriers "are not bound to receive dangerous articles such as nitroglycerine, dynamite, etc.:" "Cyc.," vol. 6, p. 372 B; 3 Wood's Railway Law, sec. 426; Hutchinson on Carriers, sec. 113; California Powder Works v. O.

& P. R. Co., 113 Cal. 329; Railroad Co. v. Lockwood, 17 Wall. 357. And it is the clear duty of those offering such goods for shipment to notify the carrier of their nature, that all due precautions may be taken.

The Railway Act does not take away this right of railway companies which they had at the common law, but, on the contrary, expressly provides that the company shall not "be required to carry upon its railway, gunpowder, dynamite, nitroglycerine, or any other goods which are of a dangerous or explosive nature:" R. S. C. 1906 ch. 37, sec. 286. And the Act goes on to provide that "every person who sends by the railway any such goods shall distinctly mark their nature on the outside of the package containing the same, and otherwise give notice in writing to the station agent or employee of the company whose duty it is to receive such goods and to whom the same are delivered:" R. S. C. 1906 ch. 37, sec. 285 (2). And further: "The company may refuse to take any package or parcel which it suspects to contain goods of a dangerous nature, or may require the same to be opened to ascertain the fact:" R. S. C. 1906 ch. 37, sec. 287.

It will be seen that the Parliament of Canada have taken great care in protecting railways, and have made that definite and certain which formerly was to be gathered in a more or less indefinite form from such cases as Crouch v. London and North Western R. W. Co., 14 C. B. 255; Brass v. Maitland, 6 E. & B. 470; Farrant v. Bowes, 11 C. B. N. S. 555; Nitroglycerine Case, 15 Wall. 524; Edwards v. Sherratt, 1 East 604; Boston and Albany R. Co. v. Shanley, 107 Mass. 568; Pate v. Henry, 5 St. & P. 101.

It is open to a railway company absolutely to refuse to carry any goods of this character, and there exists no authority which can compel the company to do so. The company then may fix such a rate as to enable them to use all the care and employ the number and kind of servants necessary for the safety of the public. The statute provides that "the company shall not carry any such goods of dangerous nature, except in cars specially designed for that purpose, on each side of which cars shall plainly appear in large letters the words 'dangerous explosives:" R. S. C. 1906 ch. 37, sec. 287.

This provision, however, gives the minimum of what is required of the company; and these defendants themselves have recognized, and indeed it must be obvious, that much more may and in many cases will be demanded than an observance of this section. In this case it is well, in my humble judgment, that the statute is not exhaustive, as, in order to indict a railway company under this section, it is necessary that the leave of the Board of Railway Commissioners shall first be obtained.

R. S. C. ch. 37, sec. 411, fixes the penalty of $500 for an offence against the section of the Railway Act already referred to (sec. 287), and sec. 431 (4) provides that no prosecution shall be had against the company for any penalty under this Act in which the company might be held liable for a penalty exceeding $100, without the leave of the Board being first obtained. Upon application to the Board they declined to allow a prosecution under sec. 287 without further evidence.

No indictment, therefore, was preferred based upon the Railway Act, but the defendants were indicted under secs. 221 and 247 of the Criminal Code. Another count was added under sec. 279 of the Code, but that was withdrawn by the Crown, and the defendants were called upon to plead upon the following indictment:

"The jurors for Our Lord the King upon their oaths present that the Michigan Central Railroad Company on the 9th day of August, in the year of Our Lord 1907, at the town of Essex, in the county of Essex, and at other places in the said county, were guilty of a common nuisance. And the jurors aforesaid upon their oath aforesaid do further present that the said Michigan Central Railroad Company, at the time and places aforesaid, were guilty of an indictable offence in that the said the Michigan Central Railroad Company had then and there under their charge and control certain inanimate things, to wit, a certain car loaded with an explosive substance, and the said explosive substance, the said inanimate things, being such that they might, in the absence of precaution and care, endanger human life, and thereby the said the Michigan Central Railroad Company became and was under a legal duty to take reasonable precautions against and use reasonable care to avoid such dan-

ger, but that the said the Michigan Central Railroad Company then and there omitted without lawful excuse to perform such duty."

In charging the grand jury, I directed them that if they found that the company had done all that was reasonable in the way of providing proper care and instructing the employees as to how such dangerous goods should be handled, no bill should be found against the company—that, if they found that the company had omitted any reasonable precaution, they might find a bill—and that if it appeared that any servant of the company within Ontario had omitted to do anything which he knew or should have known to be a reasonable precaution, or if he had not in all matters been reasonably careful, a bill would be prepared against such employee. The grand jury was further directed that the finding of a bill against one did not exclude a bill against the other, and that it was their duty to consider on the evidence offered to them whether the railway company were guilty of an offence—but in considering that, they might also consider whether it appeared to them that any employee should be indicted as well—and if so a bill would be laid before them against such employee. The grand jury by their action have apparently exonerated the employees—or at least those who had charge of the explosive in Ontario.

Upon arraignment, counsel for the defendants pleaded guilty to the two counts already set out—and the Crown abandoned or withdrew the remainder of the indictment.

Upon my asking counsel for the defendants if he had anything to say why the judgment of the Court should not be pronounced upon his clients for the indictable offence of which they had been found guilty, the following took place according to the reporter's notes:—

"His Lordship: Have you anything to say why the judgment of the Court should not be pronounced on your clients for the indictable offence to which they have pleaded guilty?

"Mr. Saunders: Yes, my Lord, one or two considerations I should like to urge upon your Lordship. The Michigan Central Railroad Company have instructed me to plead guilty, as I have done, for two considerations. They are of

the opinion that the prime cause of the accident was the defective condition of this explosive which was shipped to them under another name, powder and cartridges, not dynamite; but they cannot deny, at the same time, that there was certain negligence or want of duty on their part in handling it. That is the first consideration.

"In the second place they recognize that in the defence of a criminal charge of this sort, must necessarily be involved to some extent the question as to whether the blame should be attributed to their officers and servants. They do not desire to take that position and prefer therefore to plead guilty to the charge as they have done.

"The company must, therefore, throw itself upon the mercy of the Court in regard to the punishment that your Lordship will see fit to inflict, and they wish me to urge upon your Lordship the consideration that they have paid and are arranging to pay and will have to pay a very large sum of money for the damages, civil damages, that have been occasioned to property and to persons by this explosion. This will cost them a very large sum of money. That I should urge would be a consideration that your Lordship might well take into consideration in imposing any further penalty. If your Lordship sees fit, I am prepared to undertake to furnish the Court with the particulars of these damages and claims, so that your Lordship may have them before you in making up your mind as to what would be the proper verdict to enter."

"His Lordship: The objects of punishment in a criminal prosecution are generally two. The first is to bring the offender to a sense of the wrong which he has committed and to bring about a state of penitence in that offender. This applies in but a very slight degree to a case in which a corporation has been found guilty; and the conduct of the company in pleading guilty shews that, so far as a corporation can, the corporation recognizes its guilt. The other consideration is the prevention of the perpetration of similar offences by others; that is the end to which punishment as a rule is directed. I have always thought (and the more I think of it the more I am sure I am right), that if it were made more costly to railway companies and others to disobey than to obey the law, offences against the law would be much diminished.

"Had it not been that the railway company have already, as I am informed, paid very dearly for their offence, a sum probably a hundred times the money they would make out of the freight on such material in a year, the fine which I should impose (the only punishment in my power) would have been a very large one.

"It is, however, right that I should consider and I shall consider the fact, if it be the fact, that the railway company have already paid out large sums of money through this accident and will probably be obliged to pay out further sums. Therefore, if I am furnished in some official form, in such a way that it may go on record, and not be gainsaid at any future time, with evidence that the railway company have expended a large sum, and a statement of the amount they have expended, I shall take that into consideration in fixing the amount of the fine, which I shall in the exercise of my duty impose on this railway company. That cannot be furnished me to-day, I take it, and moreover it is a matter in which I do not want to act hastily. It is not as though a crime had been committed yesterday and must be punished to-day. I want to act with due deliberation and care, as I believe this is about the first case of the kind in our criminal records."

In respect of the first ground urged, namely, that the prime cause of the accident was the defective condition of the explosive, I refuse to give the slightest weight to any such consideration. Railway companies are, for the benefit of the public, granted extraordinary powers, and they must be held to a strict account as to the manner in which they perform the services for the performance of which they are granted such powers. They must be held to know that sometimes explosives, like every other commodity, are not very well made, but defective, and they must entirely satisfy themselves of the safety of what they carry, or use other means for the protection of the public. In my view, it is not too much to require of a railway company, if it persists in carrying explosives, to do so only in cars made for the express purpose, in a train on which no other freight or passengers are carried, and accompanied by a person who understands how to deal with such explosives, if by any chance there should be a leaking or should other trouble ensue. This would cost money—but an accident such as this costs

money also—and it is open to railway companies to charge such a rate of freight as will recompense them for such expenditure. However that may be, it is the clear duty of railway companies to take all due care of the lives and of the property of others, no matter what it may cost.

In this particular case it would seem that had the boxes of dynamite been carefully braced or fixed in the car so that they would not shift their position, or if the car had been so made that the fluid could not make its way through the bottom of the car, or if any one who understood the nature of the substance and how to handle it when it had begun to leak had accompanied the shipment, this horrible calamity would not have occurred.

Nor do I attach the slightest importance to the second statement of counsel, namely, the question as to the relative guilt of company and employee. The company, so far as appears, took no care whatever to have the employees instructed in the handling of such materials (and knowledge of that character does not come by instinct). The company subjected these very employees to the gravest danger through this inexcusably careless method of handling such freight. If the employees were negligent, they may have to answer for such negligence civilly and criminally—but this cannot be allowed to diminish in any way the criminal responsibility of the employers. I must and shall consider this case as though these defendants were wholly and solely the cause of the lamentable accident—we continue to call such occurrences accidents—"crimes" were the better word.

I reiterate that it is my firm, well considered opinion that the best way to prevent similar occurrences, accidents or crimes, whichever word may be selected, is to make it more costly for railway companies to violate the law than to observe it. Th great defect in our system is the want of some officer whose duty it is to watch for offences against the law and cause offenders to be prosecuted. Substantive law and legislation we have enough and to spare, but we have always failed to provide prompt and sure methods for the detection of offences. The practice of shipping explosives in the manner disclosed in this case has apparently been going on for years without detection, ad it would not even now have been discovered had not the explosion happened. Neither

does it always follow that, when an offence against the law does become obvious, it is prosecuted.

An offence has been proved in this case, and it remains only for me to inflict the appropriate punishment.

I am informed upon affidavit that the cost to the company is:—

For claims paid or certain to be paid, about $11,000
For damages to company's own property. 4,700

And there are claims to an amount over $50,000 which have not been adjusted.

Under these circumstances I reduce the fine which otherwise I should impose—although I shall not impose a merely nominal fine.

The sentence of the Court is that the Michigan Central Railroad Company do pay as and for a fine for the indictable offence of which they have admitted their guilt and for the use of Our Sovereign Lord the King, the sum of $25,000, upon the second count. If this sum be paid to the sheriff of Essex within 30 days from this date, the Attorney-General will be instructed to direct that no further proceedings be taken. If not, I shall deliver judgment upon the first count at the opening of the next Sandwich Assizes, to which time this Court will stand adjourned after the delivery of this judgment.

I should add that if it were the fact that the board of directors or the general manager of the defendants' company, or any one responsible directly or indirectly for the system carried on in the transportation of explosives, resided within the jurisdiction of this Court, I should have recommended their being indicted as well as the company. It is right and just that employees of whatever grade shall be placed upon trial when any negligence of theirs caused wounds or death, and the higher officers through whom a defective system is put or kept in operation should not escape. And I am not of those who frown down the stern and rigorous application of the criminal law. There is many a man who would laugh at a fine who would dread the obloquy of the prisoner's dock and shrink before the door of the

penitentiary. But I have not been able—nor have the Crown officers or the grand jury—to find any person, high or low, in the service of the company within the territorial jurisdiction of the Court who can be said to be in any way (except through ignorance so far as concerns the operatives), the guilty authors of the shocking casualty. So far as our law is concerned, those who are really responsible for the bloodshed at Essex on that fateful August day must be left to their own conscience and the court of public opinion.

I may also add that I have received representations from a number of persons who have claims against the railway company complaining that they have not been paid. The town council of the town of Essex have also transmitted a resolution requesting me to suspend judgment until the payment of the claims arising from the accident. These communications are somewhat irregular, but I have no thought that they were made with any knowingly wrong intent. The representation of the private individuals has been transmitted to the company, and I am glad to be assured that some of these claims are in the course of adjustment; as to some others it is a mere question of amount.

But in any case I could not use the criminal law or allow it to be used as a lever to enforce the payment of civil claims for damages. Any one who puts the criminal law in force for the purpose of bringing about the settlement of a civil claim is guilty, in law and in conscience, of a wrong—and I, administering the law, may not do that which I must, sitting as a Judge, reprobate in others. In fixing the penalty I have given consideration in favour of the company only to what has been paid and what is admittedly to be paid—and if the company should hereafter be ordered to pay more, that is their misfortune.

However that may be, no more in twentieth-century Canada than in mediæval Venice, may a Judge "to do a great right, do a little wrong."

OCTOBER 29TH, 1907.

DIVISIONAL COURT.

RE RODD.

Mines and Minerals — Appeal from Decision of Mining Commissioner — Evidence — Re-inspection—Ex Parte Report of Government Inspector — Finding of Commissioner — Duty of Appellate Court.

An appeal by J. H. Rodd from the decision of the Mining Commissioner cancelling the appellant's mining claim.

L. G. McCarthy, K. C., for the appellant.

J. R. Cartwright, K. C., for the Commissioner.

The judgment of the Court (FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.), was delivered by

RIDDELL, J.:—The learned Commissioner in his written reasons for judgment says that, after hearing the evidence adduced and deeming it unsatisfactory as regards the merits of the discovery, and the circumstances disclosed regarding the nature of the samples being such as to lead him to believe that they were not samples which had been wholly found upon the claim, "and there being in fact nothing else whatever shewn in connection with the discovery which any one having the least experience in such cases could think of accepting as to any extent establishing a discovery," he directed a re-inspection by another government inspector. He then goes on to say that the report of this inspector shews the alleged discovery to be worthless.

Mr. McCarthy, for the appellant, pressed us with an argument that it was contrary to natural justice to allow the report of an inspector who was not subjected to cross-examination to determine the judgment of the Mining Commissioner; and be offered to pay the expense of a further inspection, if the Court would direct that the matter should go back for further evidence or a new trial.

Without deciding how the case would stand had it been that the decision of the Commissioner was in reality based upon evidence which had not been sifted by cross-examination, and without deciding whether we have the power to do more than allow or dismiss an appeal, it seems to me that in this case the appellant must fail.

The Commissioner has in substance said: "I do not believe the evidence adduced by the applicant; he failed to satisfy my mind that he was entitled, and had there been nothing more he could not succeed. But, lest there might be something on the ground not brought to my notice, to avoid doing an injustice to the applicant, I ordered a government inspector to re-inspect. He reports nothing to change my mind, but the contrary." I think this is an adjudication upon the evidence already adduced, and not upon the inspector's report.

Of course, in appeals from decisions of the Mining Commissioner the same rules must apply as in appeals from those of any other judicial officer. . . .

Appeal dismissed without costs.

RIDDELL, J. OCTOBER 30TH, 1907.

TRIAL.

MADILL v. McCONNELL.

Will — Execution of — Undue Influence — Testamentary Capacity — Evidence — Demeanour of Principal Witness — Credibility — Character Evidence — Residuary Bequest to Church — Alleged Procurement by Minister — Dismissal of Action — Costs — Solicitor and Client — —Defendants Making Common Cause with Plaintiffs— Executors' Costs.

Action for a declaration that a certain instrument in writing was not the last will and testament of Joseph Madill, deceased.

G. W. Bruce, Collingwood, for plaintiffs.

H. Cassels, K.C., for defendants the Presbyterian Church in Canada.

J. Porter, Simcoe, for defendants the executors.

C. E. Hewson, K.C., for other defendants.

RIDDELL, J.:— . . . The statement of claim alleges that the late Joseph Madill, being under the influence of his pastor, the Rev. Mr. McC., was, while he was in a weak and enfeebled condition of body and mind, induced by him to make a will; that this will was so made by Joseph Madill when he was not of testamentary capacity; that the will was not properly executed; and that the provisions of the said will were ineffectual in law.

I may say at once that there is no foundation for the claims as to undue influence, irregularity of execution, and incapacity of the legatees.

The only question is, whether the testator was, at the time, of testamentary capacity. Considerable evidence was given, of a more or less vague character, indicating a failure of physical and mental power; and Dr. N., the attending physician, gave more specific evidence—Dr. M. being then called as an expert to give his opinion upon the evidence of Dr. N. The defendant McC., being called, gave a very detailed account of the circumstances under which the will was drawn; and it is admitted that, if he is to be believed, the decedent was of testamentary capacity, and the will must stand. The plaintiff, recognizing this fact, called a number of neighbours to testify that from the reputation of McC. they would not believe him on oath. Some of these witnesses spoke from dealings they had had themselves, but others fulfilled the conditions of such evidence. Several of these witnesses belonged to a malcontent section of the reverend witness's church, and some seem to have had business dealings with him. He appears to have been agent for Roller Bearing and other stocks, and to have sold some of these to his friends. Even with the altered meaning of the word, it seems as unwise now as it was 1900 years ago for those sent to preach to carry "scrip"—many cases in the Courts have shewn the danger of serious trouble arising from ministers dealing with such precarious merchandise, and this both to themselves and others.

I did not and do not place much reliance on this character evidence—much of it was clearly given gladly and with a desire to injure the minister; and I thought that much of it was given without a thorough understanding of the foundation upon which such evidence should be based.

At all events, from the conduct and demeanour of Mr. McC. in the box, I was and am convinced that he was telling the truth.

Dr. M. was not recalled after the evidence of Mr. McC.; and it was admitted that he would and must say that the decedent had a disposing mind if Mr. McC. was telling the truth. The opinion of Dr. M. was based wholly or mainly upon the evidence of Dr. N., and I do not place entire confidence in the accuracy of that evidence.

If the evidence of Mr. McC. and that of Dr. N. are inconsistent, I accept the evidence of the former. In all cases I judge of the credit and weight to be given to the evidence by the conduct and demeanour of the witness.

Had I the slightest doubt as to the substantial accuracy of the evidence of Mr. McC. (which I have not), it would be removed by the evidence of the Rev. Mr. McK. (against whom there is no imputation). He gave evidence of conversations with the deceased, a few months before the will was drawn, which indicated that his mind was running in the direction the will displays.

Moreover, no benefit of any kind accrued to Mr. McC. from the provisions of the will. The suggested benefit of executor's remuneration he would equally receive if the will were drawn in any other way—and if he could be such a rascal as to have a will made by an incompetent man, the natural thing to expect would be that he would take care to have some substantial benefit for himself . . .

I find that the charges against Mr. McC. are absolutely and entirely without foundation in fact, and that the action should be dismissed.

In the exercise of my discretion, I direct that the costs of the executors and of the church be paid, between solicitor and client, by the plaintiffs and the defendants who made common cause with them, i.e., Mary Van Allen, Jennie Sorntall, Letitia McLaren, Richard Langtry, and Frederick Thornbury. Counsel for these stated at the trial that they were making common cause with the plaintiffs, and he assisted counsel for the plaintiffs throughout with suggestions. The practice of bringing actions in the name of some only of the next of kin, and making the others parties defendants, is sometimes necessary—but parties so made defendants should understand that if they make common cause with the plaintiffs, they do so at their peril as to costs and that the fact that in form they are defendants will not protect them.

My power to award costs between solicitor and client in such a case as this seems to be established by Andrews v. Parnes, 39 Ch. D. 133; Sandford v. Porter, 16 A. R. 565,

577, and cases cited; although the rule may be different in a purely common law action: Cree v. St. Pancras, [1899] 1 Q. B. 693; at p. 698. And it has been held in England and here that a successful party may be ordered to pay the costs of the unsuccessful party: Myers v. Financial News, 5 Times L. R. 42; Neale v. Winter, 9 Gr. 261. So that, even if it could be considered that these defendants were (as they are not) successful, they might be ordered to pay costs.

The executors will be entitled to all costs out of the estate, between solicitor and client, which they cannot make out of those ordered to pay; the Presbyterian Church being residuary legatees, it is unnecessary to make such an order as to them.

OCTOBER 30TH, 1907.

DIVISIONAL COURT.

CLARK v. C. H. HUBBARD CO. LIMITED.

Contract—Sale of Assets and Goodwill of Company—Promise to Pay Purchase Money by Instalments—Release by New Agreement—Conflicting Evidence—Finding of Trial Judge—Appeal—Invalidity of Novation Contract—Illegal Consideration—Powers of President and General Manager of Companies—Acquisition of Shares of one Company by another—Ultra Vires—Delay of Plaintiff in Repudiating Novation Contract—Change of Position—Estoppel.

Appeal by plaintiff from judgment of FALCONBRIDGE, C.J., dismissing an action to recover $2,842 and interest.

Z. Gallagher, for plaintiff.

W. R. Smyth, for defendants.

The judgment of the Court (MULOCK, C.J., ANGLIN, J., CLUTE, J.), was delivered by

ANGLIN, J.:—The plaintiff sues to recover the sum of $2,842 and interest thereon, alleged to be due him under an agreement made by the defendants on 21st April, 1902, whereby they promised to pay to him the sum of $3,000, balance of the purchase money of the assets and goodwill of the Clark Dental Manufacturing Company, in stated instalments, with interest on deferred payments. The trial Judge . . . found that, by agreement entered into on 21st April, 1903, and slightly altered and finally settled on 26th October, 1903, the plaintiff, in consideration of certain stipulations in his favour then made by or through Dr. Beattie Nesbitt, agreed to release and did release the defendants, the Hubbard Company, from their obligations to him under the agreement of 21st April, 1902. The evidence as to the character of the negotiations between the plaintiff and Dr. Beattie Nesbitt and as to the purport and intent of the memorandum executed on 21st April, 1903, and confirmed on 26th October, 1903, by the signatures of both the plaintiff and Dr. Beattie Nesbitt, is conflicting. Upon this conflicting evidence the trial Judge has based his finding that the purpose of the parties was to effect a novation agreement releasing the defendants and substituting for them as debtors to the plaintiff the obligors under the new agreement. It is impossible to say that there is not evidence and sufficient evidence to support the finding of the Chief Justice. With that finding it is therefore impossible for us to interfere.

The plaintiff, however, urges that the novation agreement was invalid and ineffectual, because, as to a portion of the consideration which it purported to give to him for the release of the Hubbard Company from liability, it is illegal. The memorandum of this agreement is in the following form:—

$11.50
30 dy.
300
850 due 27th Sept.
6 per cent.
Clark receives
2,500 pref. stock.
1,250 com. stock.
300 draft accepted by C. D. H. Co., 30 days
850 draft accepted by C. D. H. Co., due 27 Sept.

Salary 1,300 a year
with bonus $50 for every 1 per cent. div.
declared on common stock
accepted April 21st, 1903.
T. N. Clark.
Oct. 26th, 1903.
Beattie Nesbitt.
T. N. Clark.
T. N. C. Ten dollars a week extra for winter
B. N.

Interpreted by the evidence, this memorandum means that for $1,150 then due him under his agreement with the defendants, the plaintiff was to receive two drafts, one for $300 and the other for $850 accepted by the C. D. Hubbard Co.; that he was to enter into the employment of the Dominion Chair Company at a salary of $1,300 a year, receiving in addition a bonus of $50 for every 1 per cent. of dividend declared upon the common stock of the Dominion Chair Company; and that, in consideration of this agreement and of his release of the Hubbard Company from further liability, he was to be given $2,500 worth of preferred stock, paid up, and $1,250 worth of common stock, paid up, in the Dominion Chair Company. This was the original agreement which, on 26th October, was modified by a provision that during the winter the plaintiff's salary from the Dominion Chair Company would be increased by $10 a week. It is as to the items providing for the transfer to him of the preferred and common stock that the plaintiff contends that this agreement is illegal.

Neither the name of the defendant company nor that of the Dominion Chair Company appears as a party to this memorandum. Dr. Beattie Nesbitt, however, testifies that in making the agreement he acted as president and general manager both of the defendant company and of the Dominion Chair Company. The evidence makes it clear that he was in fact president of both companies, and that he had the fullest control of both and the widest powers of a general manager.

The Hubbard Company owned the business of the Clark Dental Manufacturing Company, which the Dominion Chair Company was incorporated to take over. The defendant

company transferred this business, with all its assets and goodwill, to the Dominion Chair Company, in consideration of the receipt from that company of a large block of its shares to be allotted to the vendor company as paid up stock. This stock appears to have been issued or allotted in the name of Dr. Beattie Nesbitt as trustee for the C. H. Hubbard Company Limited. Out of the stock so allotted, the plaintiff was to receive the shares stipulated for in the agreement of 21st April, 1903. The plaintiff's contention is that it was ultra vires of the Hubbard Company to acquire this stock, and that, if it is their stock which he is to receive, that company could not, either directly or through Dr. Beattie Nesbitt, validly contract to give it to him, and could not make title to it. If, on the other hand, the agreement is to be regarded as an agreement by the Dominion Chair Company through Dr. Beattie Nesbitt to allot and issue this stock to the plaintiff, he contends that the latter company could not properly issue it to him as paid up stock, and that under his agreement it is only paid up stock that he can be asked to take.

That the arrangements between the plaintiff and the two companies in question, effected through Dr. Nesbitt, are most informal, and possibly such as the plaintiff could not have enforced the performance of, may be admitted. There appears to have been on all sides an utter disregard of the usual formalities accompanying transactions of this character, and Dr. Nesbitt seems to have acted as if he were in very fact and deed both the Hubbard Company and the Dominion Chair Company.

But the plaintiff under the agreement which he now impugns has received payment of the two drafts—one for $300 and the other for $850; he has also received salary for upwards of 3 years from the Dominion Chair Company, amounting to something over $4,000. From the time of the making of this agreement until the summer of the year 1906 he appears to have made no claim upon the defendants. He does not in his present action make any offer to repay the moneys which he has received, and, inasmuch as he has given 3 years' service to the Dominion Chair Company, and cannot return the salary received without leaving himself unpaid for these services, it is practically an impossibility

to put the parties in the same position as they occupied before the agreement of 21st April, 1903, was entered into.

Whatever might have been his rights had the plaintiff promptly repudiated the novation arrangement, it is entirely too late now, because of any part failure of consideration under that agreement, to open up the entire transaction and to restore him in regard to the defendant company to the same position which he held before releasing them.

Moreover, it is asserted by counsel for the defendants that the stock for which the plaintiff stipulated in the arrangement of April, 1903, has been allotted to him by the Dominion Chair Company, now the Clark Manufacturing Company, and that the certificates for such stock can be had by him at any time he chooses to seek them. If this stock is not paid up stock, as the plaintiff alleges, and if he is unable to obtain paid up stock because of the inability of either the defendant company or the Clark Manufacturing Company to give him such stock, it may be that the plaintiff will have a cause of action for damages, if not against one or other of these companies, against Dr. Beattie Nesbitt, either because he personally undertook by the agreement of April, 1903, that the plaintiff would receive such stock, or because he entered into this agreement, on behalf of either the defendant company or the Dominion Chair Company, upon an implied representation that he had authority to bind and did bind either one of these companies to give the plaintiff the stock in question. Upon this aspect of the case it is unnecessary to express any opinion.

The plaintiff's appeal, in my opinion, fails because he has for 3 years and upwards acted upon the agreement of April, 1903, has permitted the Dominion Chair Company to act upon the same agreement, has himself received very considerable benefits under the agreement, and has, during the same period, withheld all claim against the defendant company. The appeal should be dismissed. But, inasmuch as the laxity and disregard of formality by the defendants or their agent, Dr. Nesbitt, afforded plausible grounds for the attitude of the appellant, we think he should not be required to pay the costs of the appeal.

BOYD, C. JUNE 20TH, 1907.

WEEKLY COURT.

PLENDERLEITH v. PARSONS.

Mortgage — Redemption — Rate of Interest post Diem — Interest—"Liabilities"—63 & 64 Vict. ch. 29 (D.)

Appeal by plaintiff from the decision of the Master in Ordinary, 9 O. W. R. 265, upon the question of the rate of interest.

T. Hislop, for appellant.

H. E. Irwin, K.C., for defendant.

BOYD, C., held that the proper construction of the word "liabilities" in 63 & 64 Vict. ch. 29 (D.), which provides for the statutory rate of interest being 5 instead of 6 per cent., with the proviso that the former Act, R. S. C. 1886 ch. 129, is not to apply to liabilities existing at the time of its passing, is liabilities respecting the rate of interest, and that in a mortgage made in 1884, payable in 1900, bearing interest at 7 per cent., in which there was no provision for the payment of interest after maturity, the damages allowable as interest after maturity were not within the proviso.

The appeal as to the rate of interest was allowed, and it was directed that interest should be computed at 5 per cent. only after July, 1900.