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ANGLIN, J. APRIL 17TH, 1906.

TRIAL.

MILLER v. BEATTY.

Water and Watercourses—Dam—Flooding Lands of Riparian Owner—Cause of Injury—Damages—Release—Statutory Powers.

Action to recover damages for the flooding of plaintiff's lands by the waters of Otter Lake, caused, as he alleged, by the improper construction and maintenance by defendants, the executors of William Beatty, deceased, of a dam in the Boyne river, and for an injunction.

W. L. Haight, Parry Sound, for plaintiff.

E. E. A. DuVernet and H. E. Stone, Parry Sound, for defendants.

ANGLIN, J.:—Defendants erected this dam in March, 1905, to float timber down the river. The dam was erected substantially, if not precisely, upon the site of a former dam built some 30 years ago by the Parry Sound River Improvement Company, which had not been used for many years, and had fallen into disrepair. The improvement company had refused to restore their dam.

Although this new dam differs in some details from the former structure, it is of the same height, and the evidence

does not satisfy me that there was anything negligent or improper in its construction or in the use made of it by defendants in the exercise of the rights conferred by sec. 1 of R. S. O. 1897 ch. 142. They used the dam during the spring freshet of 1905, which . . . seems to have been unusually great. They finished their drive on 27th May, 1905, and then left the sluice gates of the dam open. Upon the evidence, the spring freshet had not before this time entirely subsided.

After defendants had finished their drive, one Anderson, another lumberman, with the express consent of plaintiff, used the dam, keeping the sluice gate closed during a great part of the time, until 18th June.

It is also in evidence that the James Bay Railway Company have interfered with the channel of the river Boyne between the dam in question and Otter Lake. They have diverted the river from its former bed for their own purposes, and it is reasonably clear that the substituted channel which they have provided, while more direct, is of smaller capacity than the old channel, and is in fact inadequate to carry the waters of the river, which have consequently spread over the adjoining flat lands at this point. The current of the Boyne river is naturally very sluggish, and it seems highly probable that these works of the James Bay Railway Company seriously affect the outflow from Otter Lake.

That plaintiff's lands have been injuriously affected during 1905—some 4½ acres being flooded and from 10 to 14 acres kept in a more or less sodden state—is, I think, established. The damages which he claims, $500, are, however, in my opinion, very extravagant. If defendants should be held liable, I would assess plaintiff's damages at $150; moreover, I would award him only the costs of proceeding under R. S. O. 1897 ch. 85, allowing to defendants a set-off of the excess of their costs incurred in defending this action in the High Court over the costs to which they would have been put had plaintiff proceeded under the statute: Neely v. Peter, 4 O. L. R. 293, 295, 1 O. W. R. 499, 2 O. W. R. 114.

But the evidence by no means satisfies me that the erection and use of the dam of defendants is the real cause of the flooding of plaintiff's lands. The use made of the dam by Anderson, pursuant to plaintiff's license to him, and the probable effect of the works of the James Bay Railway Company,

render it impossible to find that any injuries sustained by plaintiff have been caused by defendants, even had they exceeded the powers conferred by R. S. O. 1897 ch. 142, sec. 1, of which I find no satisfactory evidence: Neely v. Peter, 4 O. L. R. at p. 296.

Moreover, I am by no means satisfied with plaintiff's explanation of the receipt which he gave to defendants in April, 1905, acknowledging payment of $10 in full of all claims on account of flooding from the dam.

Plaintiff, in my opinion, has failed to establish a cause of action against defendants, and his action must, therefore, be dismissed with costs.

OSLER, J.A. APRIL 17TH, 1906.

C.A.—CHAMBERS.

MORRISON v. CITY OF TORONTO.

Leave to Appeal—Action against Municipal Corporation for Non-repair of Highway—Notice of Accident—Reasonable Excuse for not Giving—Grounds for Leave—Previous Decision.

Motion by defendants for leave to appeal from order of a Divisional Court, ante 547, affirming judgment for plaintiff at trial for $750.

G. H. Kilmer, for defendants.

Z. Gallagher, for plaintiff.

OSLER, J.A.:—The only question is, whether the trial Judge and the Divisional Court were right in holding that there was reasonable excuse for not having given notice in writing of the accident and the cause thereof within 7 days after the happening thereof, as required by sec. 606 (3) of the Consolidated Municipal Act, 1903.

The accident happened on 14th November, 1904. No notice in writing was given until 31st January, 1905; but, if a reasonable excuse existed within the first 7 days after it

happened, the subsequent lapse of time would be unimportant, except, perhaps, in so far as it might be an element in the determination of the question whether defendants had been prejudiced in their defence by the omission to give the notice within the time prescribed. It does not appear that there was here any prejudice of that kind.

Defendants relied upon . . . O'Connor v. City of Hamilton, 10 O. L. R. 536, 6 O. W. R. 227, contending that the judgment of the Divisional Court in this case was directly opposed to it. If that were so, no doubt, leave to appeal ought to be given. One of the Judges in the Divisional Court whose judgment in the O'Connor case was reversed by the judgment of this Court, does indeed say (7 O. W. R. at p. 552) that the finding of the trial Judge in this case that there was reasonable excuse should, "notwithstanding the ultimate decision in the O'Connor case, be sustained;" but, unless the judgment of the Court proceeded on that ground, I need not attach too much weight to the expression, and leave to appeal ought not to be given, unless, having regard to all the opinions for judgment in the Court below, there is reason to say that upon the facts of the case the discretion of the trial Judge and of the Divisional Court was wrongly exercised. . .

What may be a reasonable excuse for not giving notice depends very much upon the circumstances of each particular case. . . .

In the present case the facts are very fully set forth in the judgment of Mulock, C.J., and, taking the whole of plaintiff's evidence together, and not resting upon isolated answers, I think the case a very different one from the case referred to, and that it was properly distinguished from it on the facts. Besides the shock occasioned by his fall and slight injuries to other parts of his body, plaintiff sustained an injury to his head of a very severe character, which for the first fortnight, and a fortiori for the first week, after its occurrence, may fairly be said to have prevented him from thinking, if he thought at all, of anything but his own condition as a sufferer. It may be assumed against him, as the Chief Justice says, and ought to be assumed, that he was not ignorant of the law, and that if he had remembered or had been told that notice of the accident ought to be given at once, he would have been able to direct a friend to give it for him. But, upon the evidence, I think it was open to the trial Judge to hold that his injuries had

made him incapable, for the time, of considering his situation except as a sufferer, or of taking or suggesting the initiative of any course to be pursued on his recovery. Without saying anything about plaintiff's absence of will power, or metaphysical considerations of that kind, which Mr. Kilmer objected to very much as indicative of an attempt to fritter away the requirements of the statute, I am of opinion that defendants have not shewn any plausible reasons for thinking that the trial Judge and the Divisional Court might not properly hold that the condition to which plaintiff was reduced by his accident was a sufficient excuse for not giving the notice within the statutory time.

I do not see that the decision is opposed, either on the facts or on principle, to anything decided or said by this Court in the O'Connor case, and therefore leave to appeal should be refused.

Costs follow.

CARTWRIGHT, MASTER. APRIL 18TH, 1906.

CHAMBERS.

McPHEE v. McPHEE AUTOMATIC CO.

Discovery—Production of Books of Company—Affidavit on Production—Privilege—Relevancy.

Motion by plaintiff for an order for inspection of the books of defendant company.

J. W. Bain, for plaintiff.

G. M. Clark, for defendant company.

THE MASTER:—The action is brought to set aside certain assignments of patents, etc., now held by defendant company. Plaintiff alleges that the assignments were made on the faith of representations made by Kelly and Bickell, who afterwards formed the defendant company. Of this company Kelly and Bickell were directors when the assignments were made to the company. Plaintiff asks for inspection of the defendant company's books to establish (if he can) that Kelly and Bickell were directors, and that the promises made by them to him as to his being given

stock in the defendant company, etc., were not carried out. The president of the company has been examined, but says he knows nothing as to these matters, and that whatever information there may be will be in the books.

In these circumstances, I think plaintiff is entitled prima facie to have production, so as to know what evidence the books will furnish, unless they are positively denied to contain any relevant entries.

It was argued that such discovery was only consequential, and could not be had at this stage, as plaintiff was not making any claim to be a shareholder. This, no doubt, correctly lays down the general rule. Here, however, plaintiff is charging defendant company with notice of fraud or breach of contract by Kelly and Bickell, through whom defendant company are alleged to have obtained the documents impeached.

It is well established that information may have to be given in some cases, though doing so may oblige the disclosure of what otherwise would be privileged: see Marriott v. Chamberlain, 17 Q. B. D. 165, and Milbank v. Milbank, [1900] 1 Ch. 383.

In order to protect the defendant company, I think the better course will be to direct them to file a further affidavit on production. In this the books, etc., should be set out, and it can be said (if the fact is so) that they contain nothing that will assist plaintiff's case or impair that of defendants.

This should be done within a week, and the costs of this motion will be reserved.

The defendant company may be willing to admit the periods during which Kelly and Bickell were directors or members, and the affidavit could be qualified accordingly.

CARTWRIGHT, MASTER. APRIL 18TH, 1906.

CHAMBERS.

CONMEE v. LAKE SUPERIOR PRINTING CO.

Practice—Delay in Prosecuting Action—Dismissal for Want of Prosecution—Motion to Vacate Order—Relief—Terms—Costs.

The action was commenced on 30th May, 1902. It came on for trial at the autumn sittings, but was postponed at de-

fendants' request. At the spring sittings in 1903 it was postponed on plaintiff's affidavit that he was unable to leave the sittings of the Legislative Assembly. It came on again for trial in November, 1903, and after the trial had proceeded for more than a day, it was postponed because a juror had expressed an opinion on the case adverse to plaintiff.

Notice of trial was not given for the spring or autumn sittings of 1904. Defendants moved to dismiss and plaintiff for further postponement; and on 21st October, 1904, an order was made postponing the trial until the spring sittings of 1905.

Nothing further was done in the matter until 5th March, 1906, when defendants moved again to dismiss. No cause was shewn and the order was made, but held until the next day. On March 7th a copy was served on the Toronto agents of plaintiff's solicitor.

On 9th March plaintiff launched a motion to have the matter reconsidered, so that the order to dismiss might be vacated, and the action allowed to proceed, as he was quite unaware of the motion and had never given his solicitor any authority to allow judgment to go by default.

Casey Wood, for plaintiff.

C. A. Moss, for defendants.

THE MASTER:—The facts of this case sufficiently appear from the report in 2 O. W. R. 509. . . . It will be sufficient to take the order of 21st November, 1904, as the starting point, as the delay up to that time had been considered and dealt with. It will also be proper to deal with the motion as if cause was being shewn now to it instead of having been allowed to go by default.

In view of my decision in Muir v. Guinane, 10 O. L. R. 367, 6 O. W. R. 64, and cases cited, the oversight or neglect of plaintiff's solicitor should not be allowed to prejudice the client. He is entitled to have the motion decided on its merits.

All motions to dismiss must be decided on their own facts, and precedents are of little use. See Milloy v. Wellington, 3 O. W. R. 37, and cases noted there.

The question, therefore, here is whether the delay since November, 1904, has been sufficiently accounted for. Plaintiff states that he was unable to have the action tried at the

spring sittings of 1905, as he was obliged to take his daughter to Colorado at the time. He further says that defendants' solicitor agreed to this. Mr. Keefer has replied to that affidavit, but does not dissent from this statement, which I therefore accept.

This disposes of any argument based on that default. The last autumn sittings were fixed for 6th November. As to this plaintiff affirms that about 1st October he was summoned to Colorado to procure a suitable residence for his daughter in the winter. On his return to Toronto about the end of the month he found that no preparations had been made for the trial, and that it was then too late to do so.

He further says that if it had not been for such necessary absence he would have given notice for last sittings, and that he now intends to proceed with the trial as speedily as possible.

He also says that negotiations for a settlement have been pending ever since November, 1903, and have never been finally disposed of. This is denied by defendants, and must therefore be held not proven.

There is no doubt this is an extreme case. It seems prima facie inexcusable that a libel action should still be pending and untried more than 4 years after the issue of the writ. The delay, however, has not been wholly due to plaintiff's inaction. While, therefore, he need not hope for any further indulgence, I think the justice of the case will be met by making him undertake to go to trial at the ensuing June sittings, and pay the costs of and incidental to this motion, within a week after taxation; and in default the action to stand dismissed with costs.

APRIL 18TH, 1906.

DIVISIONAL COURT.

WHITE v. CAMPBELL.

Fraudulent Conveyance—Husband and Wife—Parent and Child—Gift—Absence of Insolvency and Fraudulent Intent — Business Carried on by Wife — Attempt to have Stock in Trade Declared Available for Husband's Creditors—Remedy—Sheriff—Interpleader.

Appeal by plaintiff from judgment of BRITTON, J., ante 146, dismissing action.

F. E. Hodgins, K.C., for plaintiff.

E. C. Kenning, Windsor, for defendants.

THE COURT (MEREDITH, C.J., TEETZEL, J., CLUTE, J.), dismissed the appeal with costs.

APRIL 18TH, 1906.

DIVISIONAL COURT.

LINDEN v. TRUSSED CONCRETE STEEL CO.

Master and Servant — Injury to Servant — Company—Absence of Personal Negligence—Proper Appliances—Competent Foreman — Damages — Workmen's Compensation Act.

Appeal by defendants from judgment of MABEE, J., ante 236, in an action tried with a jury, in favour of plaintiff for the recovery of $500 damages under the Workmen's Compensation Act; and cross-appeal by plaintiff seeking to increase the amount to $2,500, the amount found by the jury, as at common law.

J. M. Godfrey, for defendants.

W. Cook, for plaintiff.

THE COURT (MEREDITH, C.J., TEETZEL, J., CLUTE, J.), ordered a new trial, deeming the findings of the jury unsatisfactory.

MEREDITH, C.J. APRIL 19TH, 1906.

WEEKLY COURT.

RE WIARTON BEET SUGAR CO.

FREEMAN'S CASE.

Company — Winding-up — Contributory — Bonus Shares—Allotment of, as Paid up — Nothing Actually Paid—Transfer — Liability of Original Holder — Directors—Breach of Trust—Compensation — Winding-up Act, sec. 83—Set-off—Powers of Referee.

Appeal by B. B. Freeman from the certificate of an official referee, upon a reference for the winding-up of the

company, shewing that he had settled the appellant on the list of contributories in respect of certain shares in the company.

W. M. Douglas, K.C., for the appellant.

W. H. Blake, K.C., for the liquidator.

MEREDITH, C.J.:—The first of the two principal questions raised upon the argument was as to the liability of the appellant to be placed on the list of contributories in respect of certain shares which were allotted as bonus shares, some of them directly to the appellant, and others of them to other persons who transferred their shares to the appellant, he having notice that they had been issued as bonus shares, and that, although they were issued as fully paid up, in fact nothing had been paid in respect of them.

That the appellant is liable in respect of such of these shares as were standing in his name at the commencement of the winding-up was not disputed, but as to certain of them which had been transferred to persons who are entitled to hold them as fully paid up shares, it was contended that, the appellant having parted with all interest in them, and the shares being vested in his transferees, he was not liable to calls in respect of them, and therefore not liable to be placed on the list of contributories for the amount which ought to have been paid on them, as between the company and the appellant.

The second of the two principal questions argued was as to the right of the appellant, assuming him to be liable to be placed on the list of contributories for the amount unpaid on these shares, to set off against that liability a debt owed to him by the company at the commencement of the winding-up.

Upon both of these questions the official referee came to a conclusion adverse to the appellant.

It was stated upon the argument that no case could be found in which it has been decided that one to whom shares have been allotted as paid up shares, under circumstances which render him liable to pay for the shares, but who, before the commencement of the winding-up, has transferred them to a person who has been accepted as transferee, and who is entitled to hold the shares as fully paid, is liable to be placed on the list of contributories for the amount which ought to have been paid in respect of the shares.

Reliance was, however, placed by counsel for the respondent on the observations of Mellish, L.J., in Spargo's Case, L. R. 8 Ch. 407, at p. 410, which are as follows: "It appears to me that you must shew your shares to have been fully paid up. When you take shares you become bound to pay cash for them. If you do not do so, and the company, nevertheless, registers them in your name as fully paid up, and you sell them to bona fide holders as fully paid up shares, they are not liable to pay calls on them, but how is your original liability to pay got rid of?" In that case it became unnecessary for the Court to consider whether the liability was got rid of, and it is not to be forgotten that, as has been pointed out by high authority, observations of the character of those of the Lord Justice addressed to counsel in the course of their argument have not the weight even of obiter dicta. . . .

[Reference to Buckley on Companies Acts, 8th ed., pp. 44, 45, 640; Lindley on Partnership, 6th ed., pp. 113, 114.]

Under the English Companies Act, past members within a year after they have ceased to be members, are made liable in the event of the company being wound up, under certain conditions and with certain limitations as to the extent of their liability to contribute to the assets of the company, and legislation of a similar character is found in the Bank Act of Canada.

The Ontario Companies Act, under which the Wiarton Beet Sugar Company was incorporated, does not contain any provision of a similar character, and the only persons upon whom calls may be made are the shareholders of the company, which I take to mean those who are shareholders when the call is made: see secs. 32, 34, 37.

I find nothing in the Winding-up Act which creates any liability on the part of a past member of a company, when such a member is not subjected to such a liability by the Act under the authority of which the company is created or some Act relating to it.

Section 44 of the Winding-up Act, though very general in its terms, can, I think, notwithstanding the use of the words "or otherwise," have no application to any liability which is not one of the shareholder or member as such, and sec. 45 is designed, I have no doubt, to meet such cases as are dealt with in the provisions of the Bank Act to which I have referred, and to provide for cases in which, as under

that Act, a shareholder is liable beyond the amount unpaid on his shares.

I am unable, therefore, to come to the conclusion that the appellant is liable qua shareholder to contribute to the assets of the company under the Winding-up Act.

It is, in the view I take, unnecessary to consider whether, had the appellant not been a director of the company at the time the bonus shares were allotted to him, the liquidator would have been without remedy against him because of the transfers of the shares which he has made. The appellant was a director when each of the transactions which resulted in the allotment to him of the bonus shares was entered into, and, I have no doubt, committed a breach of trust in being a party to the allotment of the shares as fully paid up, as well as in putting them off on his transferees, to the prejudice of the company, as fully paid up shares.

It is also, I think, not open to doubt that the case is one in which it would be proper that an order should be made under sec. 83 that the appellant should contribute to the assets of the company by way of compensation in respect of this breach of trust, and the amount unpaid on the shares in question would seem to be a not unreasonable sum to require him to contribute. That there is no right of set-off against a sum ordered to be paid under the authority of this section is settled by the English cases, and that irrespective of the effect of sec. 101 of the Companies Act of 1862: Pelly's Case, 21 Ch. D. 492; Fletcroft's Case, ib. 519.

It may be that technically it was not open to the official referee to make an order under sec. 83 on the application with which he was dealing. That question was not argued, and I express no opinion upon it.

If the parties are content that I shall deal with the case irrespective of the point I have just mentioned, and to waive it, the order will go dismissing the appeal as to the bonus shares, without costs as between the parties, but the liquidator will be entitled to his costs out of the assets

If they are not content, the case must be spoken to again.

With regard to cases 891 and 896 mentioned in paragraphs 3 and 5 of the certificate, my present view is that the official referee was wrong in settling the appellant on the list of contributories as to these shares. 891 appears to be a case in which a transfer has been made of shares properly allotted, and I do not see why, having been transferred, the appellant remains liable for what is yet due on them.

Both of these cases may also be spoken to.

It is but fair to the appellant to say that I am not to be understood as meaning that I think there was any dishonest intention on his part in becoming a party to the allotment of the bonus shares or in participating in the benefits of it.

APRIL 19TH, 1906.

DIVISIONAL COURT.

ROGERS v. BRANN.

Mortgage—Conveyance of Equity of Redemption to Mortgagee—Merger—Intention—Evidence—Statute of Limitations—Vacant Land—Legal Estate—Acknowledgments in Writing—Letters of Owner of Equity — Dictation to Amanuensis—Costs.

Appeal by plaintiff from judgment of MABEE, J., 6 O. W. R. 993, dismissing action without costs.

W. M. Boultbee, for plaintiff.

Strachan Johnston, for defendant Nesbitt.

THE COURT (MEREDITH, C.J., TEETZEL, J., CLUTE, J.), dismissed the appeal without costs.

CARTWRIGHT, MASTER. APRIL 20TH, 1906.

CHAMBERS.

DONALDSON v. TOWNSHIP OF DEREHAM.

Parties—Motion by Defendant to Add Another Defendant—Damage to Land by Drain—Municipal Corporations—Highway—Non-repair—Dividing Line between Townships—Joint Liability for Repair.

Plaintiff resided in the township of Bayham, and his land abutted on the road which separated the township of Bayham, in the county of Elgin, from the township of Dereham, in the county of Oxford. This road was therefore

under the joint jurisdiction of those townships, as provided by the Municipal Act, 3 Edw. VII. ch. 19, sec. 622 (O.) The statement of claim alleged that the corporation of the township of Dereham unlawfully constructed drains along the said highway, whereby large quantities of water had been brought on to plaintiff's lands and injured them. It further alleged that at certain seasons water was brought by said drain to plaintiff's land with such velocity that it overflowed the drain on the highway in front of his lands, and discharged thereon and injured them. Plaintiff claimed damages and an injunction.

Defendants moved to have the corporation of the township of Bayham added as defendants.

J. E. Jones, for defendants.

R. C. H. Cassels, for plaintiff.

THE MASTER:—The motion was made in reliance on sec. 610 of the Municipal Act, the contention being that the action was instituted by plaintiff "by reason of default in keeping the highway in repair," and that therefore the action must be brought against both municipalities.

Affidavits have been filed on both sides bearing on the question whether the corporation of the township of Bayham were in any way concerned in the construction of the drain in question. These are conflicting, and therefore it would seem that the motion must be disposed of on the pleading. In Imperial Paper Mills v. McDonald, ante 412, 472, it was said by the Chancellor: "There must be a very clear and a very strong case made to induce the Court to introduce a new defendant against whom the plaintiff does not wish to proceed."

Unless, therefore, this action is one "for default in keeping the highway in repair," the motion must fail at the present stage. This would not prevent a different disposition at the trial. It might there be shewn, for some reason, that the corporation of the township of Bayham should be a party. But I am unable to see that the action is one for non-repair. There is no such allegation in the statement of claim. How can the damage sustained here be said to be caused by non-repair, any more than if the township of Dereham's agents or servants had kindled a fire on the highway which, through their negligence, had spread to plaintiff's land and destroyed his crops?

Surely the first element of an action for non-repair must be that some person lawfully using a highway has been injured thereon by its being out of repair. . . .

If a person walking on the highway on a dark and tempestuous night was driven off the road into the ditch and seriously injured, would the action be for non-repair by reason of the existence of the ditch? There might, no doubt, be a recovery on this ground owing to the absence of a guard rail, which, no doubt, would be a breach of duty on the part of the municipality. But that is a different question.

The defendants are not without remedy. Under sec. 609, they are entitled to bring in the corporation of the township of Bayham as third parties, and they may have leave to do so now if so advised.

The words in sec. 609 (1), (2), would seem adapted to such a case as the present.

The costs of the motion will be to plaintiff in the cause.

ANGLIN, J. APRIL 21ST, 1906.

CHAMBERS.

MONTGOMERY v. SAGINAW LUMBER CO.

Third Party Procedure—Indemnity or Relief over—Claim against Foreign Corporation—Cause of Action—Employers' Insurance Contract—Damages.

Appeal by defendants from order of local Judge at Windsor setting aside his own ex parte order allowing defendants to issue and serve a third party notice, and setting aside the service thereof on the third parties, the Standard Life and Accident Insurance Company.

F. E. Hodgins, K.C., for defendants.

C. A. Moss, for the third parties.

ANGLIN, J.:—Defendants are sued for damages alleged to have been sustained by plaintiff, an employee in their factory. They carried an insurance policy with the company whom they seek to bring in as third parties, by which the insurers undertook to indemnify the assured against loss by

reason of any claims made in respect of personal injuries sustained by their employees. Defendants' factory is at Sandwich, Ontario. The Standard Life and Accident Insurance Company are an American company, not licensed to do business in Ontario, and having no place of business or agent in this province. . . .

Whatever claim defendants may have against the insurance company, arising or to arise out of the action brought against them by plaintiff, is, in my opinion, a claim for indemnity or other relief over, within the purview of Rule 209. This is certainly the case as to any damages to which plaintiff may be found entitled, and the costs to which defendants may be put seem to be also within the scope of the loss against which they are to be protected. It is true that the right to payment will not accrue until plaintiff has judgment against defendants, and, it may be, by reason of a special provision of the policy, not until defendants have actually paid such judgment. This may prevent defendants from obtaining, by the prosecution of third party proceedings, a judgment or order for payment against the insurance company. But, if this procedure were for that reason to be held wholly inapplicable, its main purpose would be frustrated. "The object of the Act," says Blackburn, L.J., in Benecke v. Frost, 1 Q. B. D. 419, 422, "was not only to prevent the same question being litigated twice, but to obviate the scandal which sometimes arose by the same question being differently decided by different juries." See, too, Wilson v. Boulter, 18 P. R. 107, 109. It is obviously important that the ascertainment of the amount of damages to which plaintiff may be entitled, as well as the determination of the liability of defendants to pay such damages, should be effected in a proceeding that will bind, as to these issues and the findings of fact on which they depend, the insurance company as well as the defendants.

If the insurance company were an Ontario corporation, I see no difficulty in the way of their being brought in as third parties. Nor does the fact that they are a foreign corporation present any insuperable obstacle. Though not doing business here, nor licensed by the Ontario government, they may be sued in this province upon any contract which they have made, to be performed within Ontario, and which has been broken within the province: Rule 162 (e). The fact that, in doing such business without an Ontario license, they

have disregarded the prohibition of the Ontario Insurance Act, while it would prevent their maintaining any action in respect to such business (Bessemer Gas Engine Co. v. Mills, 8 O. L. R. 647, 4 O. W. R. 325), cannot avail them as a defence against a claim upon their policy otherwise valid. If liable to suit, they are liable to third party procedure, because of the provision of Rule 209 that a third party notice shall be served "according to the Rules relating to the service of writs of summons," of which Rule 162 is one.

Upon the motion which defendants must make under Rule 213, the third parties may obtain such directions as the Court may deem requisite or proper to assure to them the benefit of any special provisions of their contract with defendants. Moreover, it will be open to the Judge or officer who deals with that motion to further consider whether, having regard to all its features, this is a case proper for the application of the third party procedure: Donn v. Toronto Ferry Co., 11 O. L. R. 16, 6 O. W. R. 920, 973.

The appeal of defendants will be allowed with costs here and below, to be costs to defendants in the third party proceedings in any event thereof.

HODGINS, LOC. J. IN ADMIRALTY. APRIL 12TH, 1906.

EXCHEQUER COURT IN ADMIRALTY.

CANADIAN LAKE AND OCEAN NAVIGATION CO. v. THE "DOROTHY."

Ship—Collision—Rules of Road — Negligence — Conflicting Evidence—Damages—Costs.

Action for damages for a collision, tried at St. Catharines and Toronto.

F. King, Kingston, for plaintiffs.

W. D. McPherson, for defendant ship.

THE LOCAL JUDGE:—This case is an illustration of the experience which Admiralty Courts have had of the conflict of evidence in collision cases. As has been well said by Mr.

Justice Davis of the Supreme Court of the United States, "It almost universally happens in cases of this description (collision) that different accounts are given of the occurrence by those in the employment of the respective vessels; and that the Court has difficulty, on this conflict of evidence, in deciding to which side a preferable credence should be given. There are generally, however, in every case, some undeniable facts which enable the Court to determine where the blame lies:" The "Great Republic," 23 Wall. at. p. 29. And a similar experience has been given in the House of Lords by Lord Blackburn in "The Khedive," 5 App. Cas. at p. 880: "The Judge of the Admiralty, in giving the reasons for his judgment, observed that the evidence was, as is not unusual, very conflicting, and that he had not been able to reconcile it with the supposition that both parties intended to speak the truth."

The collision between the steamers in this case took place on the afternoon of 21st August, 1905, in the Soulanges canal in the province of Quebec, nor far from the guard lock at Coteau. The preliminary act of each party states that the time of the collision was 3.30 p.m. The engine-room log-book of the "Dorothy" gives the time of the collision as 3.60 (4 o'clock) p.m.—a discrepancy of 30 minutes. Both pleadings say that "the weather was clear, and there was practically no wind, and very little current in the canal." The plaintiffs' steamer "J. H. Plummer" is of 992 tons' register, about 254 feet long, 37 feet beam, and 24 feet deep, and was on a voyage from Fort William on Lake Superior to Montreal. The "Dorothy" is of 287 net tons, 147 feet long, 27 feet beam, and 16 feet deep, and was on a voyage from Wilmington in the State of Delaware, to Houghton in the State of Michigan, United States. While the "Plummer" was coming out of the lock, passing signals of one blast each were exchanged between the steamers, indicating that they would pass each other port to port.

The preliminary act of the "Plummer," in describing the collision, alleges that the "Dorothy" sheered from her side of the canal across the course of the "Plummer," and the answer to question 14 charges that the fault attributed to the "Dorothy" is improper navigation, first, in leaving her side of the canal and throwing herself across the course of the "Plummer," and then in attempting to straighten up and regain her first course, after the "Plummer's" two-whistle signal, instead of either reversing her engines and coming to

a stop, or else continuing towards the south bank in the direction of her sheer.

The preliminary act of the "Dorothy" alleges that, "The 'J. H. Plummer' apparently not navigating in accordance with the single blast signal, the engine of the 'Dorothy' was stopped and backed. The 'J. H. Plummer' then blew a passing signal of two blasts, and sheered or steered to port toward and into the 'Dorothy's' port bow." And the answer to question 14 charges that the fault of the "J. H. Plummer" was that (1) "she violated article 28 of the rules of the road in the following particulars: (a) In that she did not direct her course to starboard, as she agreed by her single-blast passing signal. (b) In that she blew a passing signal of two blasts, and directed her course to port after agreeing by whistle signal to direct her course to starboard. (c) In that she failed to stop and reverse. (2) That she violated article 29 of the rules of the road. (a) In that she did not maintain a proper look-out. (3) In that she violated article 25 of the rules of the road, in that she failed to keep to that side of the mid-channel which lay on her own starboard side."

The evidence given on this trial is a mass of contradictions, and necessitates such an analysis of the leading facts, and the drawing of such reasonable deductions therefrom, as will enable the Court, sitting as a jury, to decide to which statements a preferable credence should be given.

The witnesses for the "Plummer" say that the "Dorothy" was improperly navigated, that she sheered across the bow of the "Plummer," and that she kept going ahead up to the time of the collision. The "Dorothy's" witnesses say that the "Plummer" was improperly navigated, that she sheered across the bow of the "Dorothy," and kept going ahead at the time of the collision. Each side further says that its vessel stopped and reversed under the order "full speed astern."

The witnesses for the "Plummer" further say that the "Dorothy" sheered from one side to the other, and that her stern struck the bank of the canal before the collision.

The "Dorothy's" witnesses say that she kept "absolutely parallel to the bank of the canal all the time," and that the force of the collision drove her bow on the bank of the canal.

Taking this latter statement first, which came out in the following answers of the captain of the Dorothy: Q. 403.

"You were perfectly right in saying that she (the 'Dorothy') remained absolutely parallel to the bank all the time? A. Yes, I think so." He had previously stated Q. 247. "What was your position to the bank at the time of the collision? A. Our bow was inclined towards the bank." Q. 249. "Prior to the striking? A. Yes." Q. 250. "About how far from the bank? A. When I started to back she was 30 or 35 feet from the bank, but in backing she would naturally swing a little, her stern would go out, and that would throw our bow towards the bank. I should say our bow was possibly 25 feet from the bank when the 'Plummer' hit us." Q. 251. "And her stern? A. Her stern was probably a little towards the middle of the canal."

This evidence shews that instead of being "absolutely parallel to the bank all the time," the "Dorothy" was diagonally or angle-wise across the canal at the time of the colision. And it would seem a reasonable deduction from the backing movement described, that the swinging of the "Dorothy's" stern outwards towards the middle of the canal would make her bow follow the track of the stern and move towards that outward course, provided her helm was kept amidships, or so moved as to counteract the outward swing of the stern from the bank,—for it could not be presumed that the continuous moving backward would operate so as to cause the "Dorothy" to swing as on a fixed pivot.

This diagonal or angle-wise position of the "Dorothy" is more fully described by the captain of the "Plummer." Q. 33. "What action did you observe the 'Dorothy' to take after the one-whistle agreement? A. The 'Dorothy' was making very bad steering; she was first on one bank and then on the other." Q. 54. "What was the first deviation, if any, that you observed after that? (her being on the 'Plummer's' starboard side). A. She started out for the middle of the canal." Q. 55. "How far did she get? A. She got out across our bow, past the middle of the canal with her bow." Q. 73. "Where was the 'Dorothy's' stern? A. Up against the bank or close against the bank." Q. 74. "Close to which bank was the stern of the 'Dorothy'? A. The north bank, and her head heading to the south bank." Q. 89. "Out of her own water? A. Yes. "And further on he said in answer to Q. 429: "She had come over to the north side, and when she got to the north side she started out for the south side, and when she started for the south side, I blowed two whistles."

Cinginni, the wheelsman of the "Dorothy," said, Q. 252. "Was she (the 'Dorothy') coming ahead all the time? A. Yes. Just at the time of the collision we go back a little across towards the bank, she run to the bank." Q. 53. "What direction was she pointing in that way? A. She was pointing towards the bank." But others of the "Dorothy's" officers swear she was going full speed astern before the collision; while officers of the "Plummer" swear that she moved forward, and sheered from side to side, and that her bow went over the centre line of the canal.

On this point, whether the "Dorothy" was moving forward or reversing, the evidence of Denison, a passenger, is material. Qs. 16 and 17: "Tell us what you noticed with reference to the beginning from the time you first noticed her (the 'Dorothy')? A. I noticed her coming up the canal, a considerable distance down the canal, and when she got further up the canal she veered from the side she was travelling on to over the centre of the canal." Q. 18. "Towards which bank? A. Towards the right hand bank, which would be the south bank. She passed over the centre line of the canal—I don't know as to the distance, how far over, but she came over towards the south bank a considerable distance, and then gradually straightened herself out, and returned to her course pretty well about the centre of the canal. She came along on that course for some distance, and within a short distance of the 'Plummer,' she swung across the canal in almost an identical manner to the way she had done in the first place." Q. 22. "When she swung across this time, what position would her stern occupy with reference to the north bank? A. Approximately close to it." Q. 23. "And her bow, with reference to the centre line of the canal? A. Past it."

There are some other material facts disclosed in the evidence which have a bearing on the question to which side a preferable credence shall be given. (1) The criticism of the wheelsman of the "Plummer" on the steering of the "Dorothy" when approaching the "Plummer," which was brought out on the cross-examination of the captain of the "Plummer." Q. 255. "From the time you left the guard lock up to the time of the collision was any statement made to you, or anything said to you by any man or officer of the 'Plummer?' A. There was by the wheelman." Q. 256. "What did he say? A. He said that this boat here, the 'Dorothy,' was making awfully bad steering; and I said yes,

I am going to go as slow as I can and as careful as I can." (2) The conversation between the captains as they passed immediately after the collision, which I find to have been as given by the captain on the "Plummer," "When we got abreast of one another, bridge to bridge, or just about, I says to him, "Captain, I done all I could for you." He says, "I know you did, my stern was on the bottom, and I could not help it, or dragged the bottom, or something to that effect" (p. 33.) These two facts are more consistent with the evidence given on the part of the "Plummer" than that given on the part of the "Dorothy."

Then consideration must also be given to the expert evidence respecting the size of the rudders in ocean and shallow fresh water navigation, and the enlargement of the "Dorothy's" after the collision. Captain McMaugh's evidence is material. Q. 36. "If you observed a vessel taking a devious course from bank to bank, in approaching you, how would you account for that,—what is causing that? A. She is certainly very erratic in her movement. It might be caused by the officer, or want of proper steering apparatus." Q. 38. "Would the size of the rudder have anything to do with the erratic movement? A. Yes, it has. That has been the trouble with most of these sea-going vessels coming to our fresh water, that the rudders have been found too small for canal purposes, and in nearly every instance they have been enlarged." The following month when the "Dorothy" was in the dry dock at Cleveland for repairs, her rudder was enlarged by an extension of about 15 to 18 inches at the top and about 12 inches at the centre.

Another fact brought out in evidence, but not commented on by counsel, is the discrepancy between the time of the collision as stated in the preliminary act filed by the "Dorothy," 3.30 p.m., and the time stated in the engine-room log-book, 3.60 or 4 p.m.—a difference of half an hour. From an inspection of the engine-room log-book, it seemed to have been very carelessly kept; and it certainly does not record a daily or regular statement of the signals given to the engine-room. No amendment to the preliminary act is now allowable, as stated by Dr. Lushington in The "Vortigern," Swab. 518: "Neither party is allowed to depart from the case he has set up in his preliminary act." The same hour, 3.30 p.m., appears in the statement of defence, and no application was made to amend, or to state more correctly in the pleadings the

alleged log-book time of the collision. See The "Miranda," 7 P. D. 185.

After a careful review of the evidence, I have come to the conclusion that a preferable credence should be given to the evidence adduced on the part of the "Plummer," as to the facts of the collision; and I therefore find that the navigation of the "Dorothy" was faulty, and caused her to sheer from side to side in the canal, and that she is mainly responsible for the collision.

I further find that this sheering of the "Dorothy" from side to side, before meeting the "Plummer," being inconsistent with, and a violation of, the mutual agreement arrived at by the single blast signal to pass port to port, warranted the "Plummer" in assuming that such agreement could not be carried out, and that a new agreement was necessary—but what was the appropriate action or agreement will be considered later on. See The "DesMoines," 154 U. S. 584.

While I find that the chief fault for this collision was the faulty navigation of the "Dorothy," there are some facts affecting the liability of the "Plummer" which must be considered. The first is respecting her compliance with article 25a (1904), which provides that "in narrow channels, every steam vessel shall, when it is safe and practicable, keep to that side of the fair way, or mid-channel, which lies on the starboard side of such vessel." The evidence given by the officers of the "Plummer" establishes the fact that, after leaving the guard lock, she overlapped the centre line of the canal by about 8 or 10 feet, or about one-fourth of her beam. A similar overlapping by the "Dorothy" is proved by the evidence of Wright, immediately before the collision. He said that the "Dorothy's" nose was about ten feet across the centre line of the canal, and that she then began straightening up. Q. 269. "And what then happened? A. Then she struck us on the port side of the stern, and scarred us there."

Both vessels therefore violated the rule of the road, which as stated in Towboat No. 7, Norfolk and Western, 74 Fed. R. 906, requires that when vessels approach each other in channels, especially narrow ones, each vessel is bound to keep well over to the side of the channel on his starboard hand. See also Newport News, 105 Fed. R. 389.

The localities of the wounds caused by the collision, on both steamers, are important in determining where in the

canal the collision must have taken place. The "Plummer's" beam is about 37 feet; and, assuming her being, as stated, about 8 or 10 feet over the centre line, her stem would be a little within her starboard side of the canal, and the wound on her being about 10 inches from her stem on her port bow, and the "Dorothy's" beam being about 27 feet, and the wound on her being about 6 or 8 inches from her stem on her port bow, are facts which justify the conclusion that the collision must have taken place about or on the centre line of the canal, and that neither vessel was keeping wholly within her own water. For it has been well said that "the wound made by a collision is one fact which outweighs all other evidence as to locality or speed,—it cannot be argued or explained away." And, as I find, this conclusion warranted by the evidence, it follows that the "Plummer" was also in fault in not complying with the rule of the road quoted above which requires that, "In narrow channels, every steam vessel shall, when it is safe and practicable, keep to that side of the fair way or mid-channel which lies on the starboard side of such vessel." The normal width of the canal is 164 feet, and the width at the bottom is said to be about from 100 to 120 feet—thus giving a sufficient water space of from 50 to 60 feet to each steamer to pass the other within her own water.

The sailing rule above quoted was considered in The "Unity," Swab. 101—the case of a vessel coming midway down the channel of the river rather south inclined to the south. Dr. Lushington, quoting the rule of the road, and commenting on the expression "whenever it is safe and practicable," said: "What is the meaning of these words? I apprehend it to be where there is no local impediment of any kind, no difficulty arising from the peculiar formation of the channel itself, no storm, no wind, or anything of that kind occurring. Then the obligation continued to keep to the starboard side, and no consideration of convenience, no opportunity of accelerating the speed, none whatever, can justify a disobedience of this statute."

And in The "Fanny M. Carvell," 13 App. Cas. 459, the Judicial Committee of the Privy Council held that the infringement of the rule "must be one having some possible connection with the collision"—thus throwing upon the party guilty of the infringement the burden of shewing that it could not possibly have contributed to the collision. Proof of that kind has not been given, nor does it seem possible.

I have intimated that the faulty navigation of the "Dorothy" in sheering from side to side in the canal warranted the captain of the "Plummer" in proposing that a new agreement should be arranged for the steamers passing each other in the canal. The captain under rule 28 proposed by a two-blast signal to pass starboard to starboard. This signal was not answered by the "Dorothy," as it should have been; and I must here repeat the rule referred to in Cadwell v. Bielman, 7 O. W. R. 398, that "the duty to answer a signal is as imperative as the duty to give one." But I think that the appropriate signal under the rule when he noticed the faulty navigation of the "Dorothy," and the warning comment of his wheelsman that "the 'Dorothy' was making awfully bad steering," should have been the danger signal indicated in the same rule as follows: "In every case where the pilot of one steamer fails to understand the course or intention of an approaching steamer, whether from signals being given or answered erroneously, or from other causes, the pilot of such steamer so receiving the first passing signal, or the pilot so in doubt, shall sound several short and rapid blasts of the whistle, not less than four; and if the vessels shall have approached within half a mile of each other, "both shall reduce their speed to bear steerage way and if necessary stop and reverse." When the faulty navigation of the "Dorothy" was noticed, I think the "Plummer" should then have stopped, and, if necessary, reversed. See The "Albert Dumois," 177 U. S. 240.

Then as to the contention that there was no proper look-out on the "Plummer," I cannot, after reading the comment of the captain and wheelsman, find that the absence of a look-out, as required by the rules, contributed to the collision. And in The "Blue Jacket," 149 U. S. 371, it was said: "It is well settled that the absence of a look-out is not material when the presence of one would not have availed to prevent a collision" (p. 389).

The Merchant Shipping Act, 1894 (Imp.), provides (sec. 419, sub-sec. 8), where in the case of a collision it is proved to the Court before which the case is tried that any of the collision regulations have been infringed, the ship by which the regulations have been infringed shall be deemed to be in fault, unless it is shewn to the satisfaction of the Court that the circumstances of the case made departure from the regulations necessary.

These collision regulations have been framed for the protection of lives and property in navigating the sea and the inland lakes and rivers, and for the guidance of navigators taking early and prompt measures to avoid "the risk of a collision." And so strictly have the Courts enforced them that even when a vessel committed a comparatively venial error it was held that it could not be absolved from the consequences prescribed by law, and must be held liable: Amatson Speers, 15 App. Cas. 37.

It is therefore no justification for a departure from the rules of navigation that one vessel was disregarding the duty of observing an obligatory rule, that the other is therefore authorized to proceed other than in strict conformity to the rule she is bound to observe, and which she sees the other is disregarding. Instead of affording any right, or discretion, or relaxation of vigilance, it imposes the duty of special care, prompt action and maritime skill. For it has been well said by Sir James W. Colville in The "Frederick William," 4 App. Cas. at p. 672, "To leave to masters of vessels a discretion as to obeying or departing from the sailing rules is dangerous to the public; and that to require them to exercise such discretion, except in a very clear case of necessity, is hard upon the masters themselves, inasmuch as the slightest departure from these rules is almost invariably relied upon as constituting a case of at least contributory negligence."

No circumstances have been proved in this case warranting a departure by either steamer from the collision regulations, and I must therefore find that each of them infringed the regulations as to the rule of the road, and that both of them therefore were in fault for the collision.

The damages caused to both ships will be equally divided, and each party will bear his own costs. Reference to the District Registrar to take the necessary accounts. See R. S. C. ch. 79, sec. 70; The "Agra" and "Elizabeth Jenkins," L. R. 1 P. C. 501; and the form of the decree in The Stoomvoart "Maatschappy Netherland" v. Peninsular and Oriental Steam Navigation Co., 7 App. Cas. 795.

HODGINS, MASTER IN ORDINARY. APRIL 30TH, 1901.

MASTER'S OFFICE.

RE MERCHANTS' LIFE ASSOCIATION.

VERNONS' CLAIMS.

Life Insurance — Unmatured Policy — Mode of Calculating Present Value of Reversion.

Claims made under life insurance policies upon the winding-up of a friendly society.

THE MASTER:—The claimants under the policies of life insurance in this matter contend that by the payment of a yearly premium of $13.10 for 4 years, in all $52.40 for an insurance of $1,000 on the life of P. C. Vernon, the present value of the policy is $221.12, and that by the payment of a yearly premium of $12.76 for 4 years, in all $51.04 for an insurance of $1,000 on the life of J. R. Vernon, the present value of the policy is $212.50; in other words, that payments to a life insurance company aggregating $103.44 have in 4 years gained or have entitled the insured to $433.62. The contention, if correct, is rather startling to all interested in life insurance, and especially to all interested in friendly society insurance, the company in this litigation being a friendly society, and one whose very low rates of premium compelled me, on the evidence of actuaries, to find that its low rates had contributed nothing towards the formation of a reserve fund, which is essential and a financial necessity in ordinary insurance companies.

The order of reference directs me to calculate the present value in the sum assured by each of the above policies at the decease of the life assured, and also the present value of a life annuity equal to the future premium which would become payable during the probable duration of the life assured, and to allow the difference.

In ascertaining the respective amounts so directed, reference has been had to the tables of the Institute of Actuaries of Great Britain, recognized by the Insurance Act, R. S. O. 1897 ch. 203, sec. 149, sub-sec. 2, in so far as the said tables are applicable.

In these tables I find that the figures in the first two columns x and ax are absolute and unchangeable, and that the third Ax and the fourth Px are variable. Column x gives the age, which is the governing factor. Column ax gives the discounting factor, which governs the present value of an annuity of $1 payable at the end of the year; but when the annuity is payable in advance it has to be increased by one. Column Px gives the amount of the usual annual premium for an insurance of $1. Column Ax gives the product of the multiplication of the discounting factor ax plus one, by the actual annual premium charged for an insurance of $1.

The present value in the sum assured ($1,000) by the policy on the life of P. C. Vernon is found by ascertaining that she is now of the age of 46 years. For that age the discounting factor is 12.9267 plus one (equals 13.9267), as the premium was payable in advance. The annual premium charged by this association for that age is $15.44. These multiplied together give $215.028248.

The present value of a life annuity equal to the future premiums which would become payable during the probable duration of life of the said P. C. Vernon is obtained by taking the same discounting factor (13.9267) and multiplying it by $13.10, the amount of the annual premium she had been paying for the insurance, beginning at the age of 42, of $1,000 on her life, which gives $182.439770.

Present value in the sum assured	$215 02
Present value of future premiums	182 43
Which would make the amount to be allowed to P. C. Vernon	$32 59

But, as the actuaries make it $33.28, I allow that sum.

Applying the same computation to the claim of J. R. Vernon on his policy for $1,000, who was insured at the age of 41 (premium $12.76), and he is now of the age of 45 years (premium $14.68), I allow the sum stated by the actuaries, $32.29.

As the claims made are so largely in excess of the premiums paid for the 4 years' insurance and of the amounts allowed, I let the claimants bear their own costs.

[Note—This judgment of the Master was given on a reference back, directed by the Divisional Court (1 O. L. R. 257), and was partly reversed on appeal (2 O. L. R. 682).]