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COURT OF APPEAL.

APRIL 1ST, 1911.

*RE GOOD AND JACOB Y. SHANTZ SON & CO. LIMITED.

Company—Transfer of Paid-up Shares—Refusal of Directors to Allow—Dominion Companies Act, secs. 45, 80—By-law—Ultra Vires—"Regulating" of Allotment—Reasonable Restraint on Alienation.

Appeal by Jacob Y. Shantz Son & Co. Limited, from the judgment of a Divisional Court, 21 O.L.R. 153, dismissing appeal from the order of TEETZEL, J., directing the transfer of certain shares to J. S. Good.

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

E. E. A. DuVernet, K.C., and A. H. F. Lefroy, K.C., for the appellants.

S. Johnston, K.C., and W. M. Cram, for the respondent.

MOSS, C.J.O.:—The appeal in this matter is limited to the one general question, viz., the power of the appellants, a company incorporated under the Dominion Companies Act, R.S.O. (1886) ch. 119, to restrict the transfer of fully paid-up shares in the company as enacted in their by-law No. 2, clause 17. In other words, whether by virtue of their statutory powers they may pass and enforce such a by-law.

We are not concerned with any question of the respondent being bound by any special agreement, or by the circumstances under which the by-law was passed and confirmed by the shareholders. The special leave to appeal excludes all but the sole question stated in the order, and was only granted as to it, because of its general importance and the alleged conflict of decision with regard to it.

*To be reported in the Ontario Law Reports.

The Companies Act, under which the company was incorporated, was afterwards re-enacted by 2 Edw. VII. ch. 15, which in turn became chapter 79 of the Revised Statutes of Canada, 1906, but the various sections bearing upon the point in question here were left unchanged in substance, the chief change being in the numbering. For convenience, therefore, the provisions of the R.S.C. 1906 ch. 79, will be referred to instead of those of the earlier Act.

All companies obtaining incorporation under these Acts must, in general, govern themselves in accordance with the statutory provisions. All are alike subject to and controlled by these provisions. There are no distinctions dependent on the number or character of shareholders. Whether a company is intended to be one with shares for which all the world is invited to subscribe, or is intended to be a "one man" company, it must find its power within the four corners of the Act and the letters of incorporation. The letters of incorporation of the appellant company contain no special provisions. They constitute the petitioners and all others who may become shareholders in the company, a body corporate and politic with all the rights and powers given by the Act—no other rights or powers are expressly given.

What then are the powers given by the Act with regard to the transfer of shares? Do they carry the right to the directors or shareholders to prevent holders of fully paid-up shares of the capital stock who are not indebted to the company, transferring their shares, except with the consent of the board of directors, and to refuse to allow any person to hold or own stock without the consent of the board?

The cases of transfers of unpaid shares, shares on which calls are in arrear, and shares the holders of which are indebted to the company, are expressly dealt with by the Act, secs. 65, 66 and 67. In these instances the consent of the directors is necessary to render a transfer valid.

To fetter alienation of shares fully paid up and held by one not indebted to the company is, it is almost unnecessary to say, a serious innovation upon the ordinary right of the holder of personal property—which these shares are declared to be—to freely sell and transfer it to any one who desires to become the purchaser.

In a matter of such grave consequence to the holders of shares, hampering, as it would, their dealings with them and very materially affecting their market value, it is not surprising to find that throughout the Act, Parliament has not deemed it proper—as it has in the other cases—to confer, in unmistakeable

terms, the right to impose any such clog. And it is difficult to understand why, if there had been an intention to do so, it was not as clearly expressed as in the other cases.

The appellants rely upon section 45 as supplying the power, but it must be read in connection with the group of sections under the heading of "Transfer of Shares," in which are set forth the conditions and restrictions prescribed by that part of the Act, and secs. 80 and 81 as to powers of directors.

In order to ascertain what conditions or restrictions may be prescribed by by-law, reference must be had to sec. 80(*a*). So far as stock is concerned, the power conferred is to make from time to time by-laws not contrary to law, or to the letters patent of the company, or to that part of the Act as to the following matters: "The regulating of the allotment of stock; the making of calls thereon; the payment thereof, the issue and registration of certificates of stock; the forfeiture of stock for non-payment; the disposal of forfeited stock and of the proceeds thereof, and the transfer of stock."

Nothing in these matters indicates the assertion of a power to prevent the transfer except by consent of the directors, in any case in which the Act has not expressly authorized it. Forms of transfers, and certificates and records of transfers, there must be, in order to ensure accuracy and ease in tracing the title of shares transferred from time to time, and such necessary conditions and restrictions as the attainment of that object calls for are reasonable and fair. In these ways the by-laws may regulate the transfer of stock without at all interfering with or hampering its ready saleability. These are provisions which regulate, in the true sense of the word, the transfer of stock, and the power given by the Act extends no further. When secs. 45 and 80 are read together, it seems plain that the by-laws of the company spoken of in sec. 45 mean those relating to transfer of stock which sec. 85 authorises, and these are limited to regulation.

Little, if any, assistance is to be derived from previous decisions either in the Courts of this province or elsewhere. In every case the general rule is conceded. Primâ facie the shareholder has a free right to transfer to whom he will, and where it is sought to introduce a different rule, the enquiry must relate back to the source of authority to make and enforce it. In England it is commonly settled by the terms of the articles of the company, by which the shareholders may, and frequently do bind themselves to many special conditions and restrictions. In the cases in which the question has come before the Courts of this country it has been discussed with reference to the Act in force at the

time. And, as I mentioned in the reasons for giving leave to appeal this case, the decision of the Divisional Court may be said to be the first determination of the precise question.

For the reasons given by the Divisional Court, as well as those here stated, I am of opinion that the decision is right and that this appeal should be dismissed.

GARROW, J.A., and SUTHERLAND, J., agreed in dismissing the appeal, the former stating his reasons in writing.

MEREDITH, J.A.:—Upon the main point involved in this appeal it is especially necessary to start from the right premises if we are to reach, without great difficulty, a right conclusion; and I cannot choose but think that the respondent's contentions are based upon a false start in two quite material respects. In the first place, it seems to me to be quite fallacious to assume that the ownership of stock in an incorporated company is, in all things, the same as the ownership of pigs, sheep or corn; it seems to me to be important to remember that such a company, and the rights of its shareholders, are of the house and lineage of a partnership, and of the rights of its partners; to remember that a share in such a company carries with it not only the certificate, which is evidence of it, and a right to dividends, but also a joint interest, with all other shareholders, in the whole concern, with a voice in its control and management; it is very different with the case of the pig, the sheep or the corn, in which an absolute ownership, and sole control, go with the sale of the carcase or article. In the second place, it seems to me to be equally fallacious to assume that the provisions of the Act, declaring that the stock of a company "shall be personal estate," were meant to give to it all the attributes of goods and chattels; their purpose was to distinguish between real and personal property, and to give to the stock of all companies, incorporated under the Act, the character of personal estate, whether the property of the company—and so of the shareholders—happened to be real or personal, adopting the rule in equity in regard to the share of a partner in a partnership.

Then it is important to bear in mind that practically all companies created in this country must be created under the provisions of the enactment in question, or under similar provincial enactments, which were intended to do away with the need for any incorporation under a special Act in practically all cases, a proceeding the expense and delay of which would make it prohibitive in most of the innumerable present-day incorporations.

So that the result would be, if the judgment in appeal is right, that there is no means of putting any sort of restriction upon the ownership of stock in any company; a thing which I cannot but think would be intolerable in business, and which I am quite sure has never been generally thought to be the law here.

There are, of course, many companies in which it may be a matter of indifference who may be shareholders so long as the shares are paid up as payment is called for; the money, not the man, is the consideration; and that, Parliament seems to me to have recognised, making no provision such as that in question in some other enactments, as, for instance, the Bank Act: see sec. 36.

But, on the other hand, there are many companies in which the power to exclude is of vital importance; for instance, a company incorporated to carry on a business operated under a secret process; many other instances must occur, to any one familiar with business affairs, in which it would be fatal to the company if there were no power of restriction in regard to shareholders.

Again it would be extraordinary if there were no power to exclude one, for instance, whose avowed purpose in becoming a shareholder is to wreck the concern, or to close its doors in order to effect a monopoly, in some other concern, of the business carried on by the company.

Such power of restriction exists under the laws of England, and I venture to say is considered there to be essential in the interests of business. Our laws are largely, if not almost entirely, taken from the laws of England; and it would be an extraordinary thing if Parliament meant to reverse here the rule which prevails there; and a still more extraordinary thing that, if there had been any such intention, it was not expressed in the plainest of language.

Then coming directly to the enactment itself, we find language which to me seems clearly to indicate and declare an intention the very opposite of departure from the English rule; an unambiguous declaration of intention to adopt, rather than reject, the general principle of the law in England upon this subject. Section 45 of the Act provides that "The stock of the company . . . shall be transferable in such manner and subject to all such conditions and restrictions as are prescribed . . . by the by-laws of the company." I cannot but think that the judgment in appeal is in the teeth of these plain words. How are they to be got over? No attempt was made in the judgment in the first instance, or in the judgment of the Divisional Court; and they are not to be eliminated by ignoring them.

Because sec. 80 of the same enactment provides that "The directors of the company may . . . make by-laws . . . for the regulating of the allotment of stock, the making of calls thereon, . . . and the transfer of stock," is assuredly no reason for repealing in effect the provisions of sec. 45 conferring power upon the company to restrict, and condition the transfer of stock. The by-laws of the directors remain in force without any assent of the shareholders, until the next annual meeting of the company after such by-laws are passed: sec. 81. So that it looks to me as if Parliament had adopted as nearly as possible the English practice by which the company—that is the shareholders—may make reasonable restrictions upon the transfer of stock.

I can find no justification for ignoring sec. 45; nor for attempting to create any repugnancy between it and sec. 80, contrary to the first principles of the interpretation of statutes; if they had to be read together, then the provisions of sec. 45 should enlarge those of sec. 80, rather than that the power conferred by sec. 80 upon the subordinate body should wipe out the power conferred by sec. 45 on the dominant body.

I feel bound to say that, looking at both provisions of the enactment, the case seems to me to be a plain one for reversing the judgment in appeal, by virtue of sec. 45, which, so far as their reasons shew, was not fully considered in the first instance, or in the Divisional Court.

And I feel bound to add that, if sec. 80 were the only one dealing with the subject, I would perhaps have no great difficulty in reaching a like conclusion.

The word "regulating" employed in sec. 80, was used in a very comprehensive sense, as the context plainly shews: "regulating" the allotment of stock cannot mean merely providing book-keeping and the like methods; it includes the actual allotment of the stock with restrictive power; see secs. 46 and 53: "regulating" the making of calls on the stock must include making the calls and everything in connection with them; "regulating" the forfeiture of stock must include making and declaring the forfeiture; "regulating" the disposal of forfeited stock must include the disposal of it; and "regulating" the transfer of stock can hardly be limited to book-keeping methods and the like. "Regulating" throughout this section, would, in the absence of sec. 45, I am inclined to think, mean the general power of control of the subjects which it covered; but subject to the general rule of the law that all such by-laws must be reasonable.

I can find nothing in secs. 64 to 67 in any way inconsistent

with the views I have expressed. Because Parliament has made some provisions respecting the transfer of shares, some of which are to prevail whether by-laws are or are not passed, and some of which give some particular power to the directors, if they choose to avail themselves of it, without a by-law, cannot reasonably be said to be a curtailment of the power conferred upon them to pass by-laws.

As the Chief Justice of this Court has pointed out, in giving leave to bring this appeal, there is no case, in any of our Courts, which supports the judgment in appeal; the case of In re Smith, 6 P.R. 107, was decided on the ground that the company had no power to refuse to transfer stock without assigning a sufficient reason. On the other hand the case of In re Macdonald, 6 P.R. 309, is one in which the very point was decided, 35 years ago, the other way; and, unless I am much mistaken, the practice has since been in accord with that judgment, as I believe have been the judgments of the Courts of the Province of Quebec under the same enactment. To rule otherwise now could not, I fear, be without disturbance to long settled notions and rights.

Another word, to end as I set out, with an endeavour to view the case from the proper standpoint and clear away some errors which seem to beset the case, I know of no general absolute law against restraints upon alienation; reasonable restraints are not obnoxious, indeed they are sometimes commendable. Nor can I see any sort of injustice, or any hardship to any shareholder, in a reasonable restriction of the power to transfer stock. If the law gives that power the shareholder takes his stock subject to it, it is part of his contract; if he does not like it he need not buy; if he buy he must stand to his bargain. Restrictions are for the benefit of the company as a whole, and must be reasonable; and companies are not created or carried on—or at least should not be—for the especial benefit of any particular shareholder; nor should they be at the mercy of his spite or selfishness.

Whether the directors had power to pass the by-law in question, I do not stop to consider; the general question whether there was any power anywhere in the company to put any restriction upon the transfer of shares is the question which the parties have come here to have determined; and that question I must answer in the affirmative; and that is as far as I need go at present.

MAGEE, J.A., agreed with MEREDITH, J.A., in dissenting from the judgment of the Court, for reasons to be stated.

APRIL 1ST, 1911.

*WILSON v. HICKS.

Life Insurance—Assignment of Policy to Stranger—Gift—Delivery—Intention—Evidence—Revocation—Construction of Assignment — Designation of Beneficiary — Insurance Act, sec. 151.

Appeal by the plaintiff from the judgment of a Divisional Court, 21 O.L.R. 623, setting aside the judgment of BRITTON, J., at the trial, which declared the plaintiff to be entitled to the money due under an endowment policy, and that an assignment of the policy to the defendant had been effectually revoked.

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

I. F. Hellmuth, K.C., and W. H. Best, for the plaintiff.

W. Proudfoot, K.C., for the defendant.

MACLAREN, J.A. (after setting out the facts) :—I find myself unable to agree with the trial Judge as to the assignment in question being a "declaration designating a beneficiary" within the meaning of the Insurance Act, R.S.O., ch. 203, sec. 151, or in his conclusion that it did not transmit to the defendant the title to the money represented by the policy in question, or as to the delivery of the assignment.

The subject of the gift was substantially the insurance money and not the policy. The assignment is on its face an absolute one, and fully complies with sec. 58, sub-sec. 5 of the Judicature Act, which provides that "any assignment . . . by writing under the hand of the assignor of any debt or other legal chose in action of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be effectual in law to pass and transfer the right to such debt or chose in action from the date of such notice," etc.

What the plaintiff did went even beyond this. He had obtained from the company two of their forms of absolute assignment. One of them he sent (duly signed and witnessed) to the company, which they acknowledged in the letter of the Tor-

*To be reported in the Ontario Law Reports.

onto manager to the defendant, enclosing the admission of the receipt by the Home Office of the notice of the assignment of the policy on the 26th of March. This of itself was a sufficient and complete assignment of the insurance money. He had previously in his letters to the defendant of February 23rd, and March 4th, advised her of his having executed the assignment to her, and of his desire that she should accompany him to Toronto to witness the delivery to the agent. Later, on the 5th of April, after he had sent the assignment to the company, he wrote the defendant regarding the other copy: "Also enclosed find assignment of interest in insurance policy." It was not necessary that this should be delivered to the defendant to perfect her title; but even if it were, I think a fair inference from the evidence would be that there was sufficient delivery. He was examined as a witness and did not contradict his statement in the letter as to having enclosed the assignment, and says that he did not keep a copy in his possession. It is true that the defendant says she did not receive it. In this she may be mistaken, and plaintiff's enclosing and mailing it would be sufficient.

It may be noted that all the policy required in order to complete an assignment was that "an original or a duplicate or certified copy thereof shall be filed in the company's Home Office." In the present case, as above stated, the original was filed there, as appears from the company's letter of March 26th, 1897.

As to the evidence by the plaintiff to the effect that the form he wrote to the company for was one relating to the naming of a beneficiary, I am of opinion that his testimony in this point was clearly inadmissible, as the proper foundation was not laid for the reception of secondary evidence. Besides, apart from the assignment itself, which must have been perfectly understood by a man of his intelligence, his own letters written at the time shew that he fully understood its nature and import.

As to the fact of the plaintiff retaining possession of the policy, from which the trial Judge drew a strong inference in his favour, I think it is quite susceptible of a more reasonable explanation. As he fully intended to keep on making the payments of the annual premiums, it was quite natural that he should retain the policy, which contained the best and the authoritative memorandum of the date, amount, etc., of these premiums.

I quite concur in the judgment of the Divisional Court and the remarks of Clute, J., as to the gift being complete, and in addition to the authorities cited by him I would refer to Kekewich v. Manning, 1 DeG. M. & G. 176. In my opinion a good deal of the evidence of the plaintiff was inadmissible, as being an at-

tempt to vary a written instrument by parol; but even if it were not open to this objection, I do not think his unsatisfactory and unsupported statements at the trial as to what was his intention and understanding should be allowed to override the plain and unequivocal language of the instrument, which his letters written at the time of the transaction shew that he, a merchant carrying on a large business, clearly understood as bearing the meaning which appears on its face.

I am of opinion that the plaintiff intended that each payment of a premium during the period that his relations with the defendant continued to be friendly should be a gift to her; as to those made by him after their final quarrel, my opinion is that the presumption would be different. In view, however, of the fact that at the argument before us, the defendant's counsel consented to the return to the plaintiff of the premiums paid by him after the assignment of the policy, without the condition attached thereto by the Divisional Court, the judgment of the Divisional Court should be varied by striking out the condition, and out of the money in Court there should be paid to the plaintiff the sum of $3,078, less the taxed costs of the defendant in the three Courts, and the remainder of the money in Court paid over to the defendant, and with this variation the appeal should be dismissed with costs.

MEREDITH, J.A., for reasons stated in writing, agreed in dismissing the appeal.

MOSS, C.J.O., and GARROW and MAGEE, JJ.A. concurred in dismissing the appeal, subject to the variation of the judgment of the Divisional Court, referred to in the judgment of MACLAREN, J.A.

APRIL 1ST, 1911.

*GOLDSTEIN v. CANADIAN PACIFIC R.W. CO.
ROBINSON v. CANADIAN PACIFIC R.W. CO.

Railway—Carriage of Live Stock—Special Contract—Approval by Board of Railway Commissioners—Injury to Persons in Charge Travelling Free, by Reason of Negligence—Liability—Indemnity by Owners and Shippers—Duty to Inform Persons in Charge—Implied Agreement to Indemnify.

Appeal by the defendants from the judgment of TEETZEL, J., 21 O.L.R. 575, in favour of Burns and Sheppard, third parties,

*To be reported in the Ontario Law Reports.

at the trial of the issues between the defendants and the third parties.

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

W. Nesbitt, K.C., and G. A. Walker, for the defendants.

W. R. Smyth, K.C., and S. King, for the third parties.

Garrow, J.A. (after referring to the facts of the case, and the terms of the contract between the parties, which are set out in the report cited, proceeded) :—At the trial of this issue questions were raised whether the third parties were the shippers or only agents, and whether Goldstein and Robinson, or either of them, could under the circumstances be considered nominees of the shippers within the meaning of the contract, both of which were upon the evidence, properly, I think, determined in the defendants' favour. But, notwithstanding such findings in the defendants' favour, Teetzel, J., came to the conclusion that the defendants were not entitled to the indemnity claimed.

His judgment proceeds to some extent upon his view of the situation created by the absence of the signature to the special contract, which, in his opinion had the effect of remitting the parties to their common law rights, a conclusion not in my opinion essential to the determination of this issue, and to which I, therefore, while agreeing in the result, do not at present adhere. In Hall v. North Eastern R.W. Co., L.R. 10 Q.B. 437, a case approved of and followed in our Courts (see Bicknell v. Grand Trunk R.W. Co., 26 A.R. 431; Sutherland v. Grand Trunk R.W. Co., 18 O.L.R. 139), Blackburn, J., at p. 441, says: "The plaintiff did not sign the ticket, and he was not asked to do so, but he travelled without paying any fare, and he must be taken to be in the same position as if he had signed it." The circumstances are not of course identical, but my present impression is in line with the view of Blackburn, J., that a person, who would otherwise be in the position of a trespasser, cannot after the event repudiate the contract which conferred the right which he was exercising, upon the ground that he was not aware of all its contents.

The plaintiffs by their pleading did not disaffirm the shipping contracts, but rather the reverse. They allege that they were where they were, in charge of the shipments for the third parties, and in pursuance of the defendants' regulations. It may, therefore, well be that the plaintiffs' real cause of action,

as claimed, was that the conditions in the contracts exempting the defendants from liability did not in law extend to cover injuries to the person caused by gross negligence, as well as, or in addition to, the other cause suggested, namely, that not having signed the special contracts they were not bound by their terms.

No trial having taken place it is now quite impossible to accurately ascertain what the defendants feared or exactly why they settled; the only really material fact appearing, so far as the third parties are concerned, being that before doing so the defendants took the precaution of obtaining from them the undertaking not to dispute the liability of the defendants to the plaintiffs, or the amounts at which it was proposed to settle.

But at that time the present issue, namely, the claim of the defendants against the third parties to indemnity had been joined, and that being so the undertaking cannot fairly be regarded as affecting that question further than as it expressly states.

The general rule as to the right of indemnity is that the claim, unless expressly contracted for, must be based upon a previous request of some kind, either express or implied, to do the act in respect of which the indemnity is claimed.

[Reference to Birmingham & District Land Co. v. London & North Western R.W. Co., 34 Ch.D. 261, per Bowen, L.J., at p. 274, and to Corporation of Sheffield v. Barclay (1905), A.C. 392, per Lord Halsbury, at p. 397.]

The plaintiffs made no claim against the third parties. They could not have done so successfully under the circumstances as they appear. And if the contracts had been signed, as was apparently intended, according to the form, and to the instructions to agents before set out, they could have made none even against the defendants upon the contracts, whatever their rights, if any, might have been in respect of the alleged gross negligence with which they charged the defendants, and with which latter claim at least the third parties could be under no responsibility. Upon the evidence it is, I think, clear that the failure to obtain such signatures, if material, as perhaps, as I have before suggested, it was not, rests, not upon the third parties, but upon the defendants themselves. And in addition the defendants by their officials in charge of the train must almost at once have known, what the third parties had no similar means of knowing, that the signatures had not in fact been obtained, for it was the duty of the conductor of each division to punch the contract, which duty if performed must at once have disclosed the absence of the signatures. And yet the journey was not interrupted on

that account. The third parties if they ever gave the matter a thought, which is, I think, improbable, might well under the circumstances have relied upon the defendants to see that their own forms were properly filled up, and their instructions to their own agents followed.

Under these circumstances, there being as it is conceded, no express covenant or contract of indemnity, it would be impossible on the authorities to which I have referred, to imply one. To do so would not, in my opinion, be in furtherance of an existing contract, but to make an entirely new and different one between the parties.

For these reasons I would affirm the judgment and dismiss the appeal with costs.

MEREDITH, J.A., agreed that the appeal should be dismissed, for reasons stated in writing.

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

APRIL 1ST, 1911.

SHAW v. MUTUAL LIFE INSURANCE CO. OF NEW YORK.

Life Insurance—Endowment Policies—Alleged Misrepresentation by Agent—Reserve—Surplus—Alternative Claim—Rescission of Contract Refused.

Appeal by the defendants from the judgment of LATCHFORD, J., 2 O.W.N. 89, rescinding two endowment policies on the plaintiff's life, and ordering repayment of all premiums paid by him, with interest and costs. The facts are stated in the report cited, and in the judgment of MAGEE, J.A., infra.

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

F. Arnoldi, K.C., and D. D. Grierson, for the appellant company.

G. H. Kilmer, K.C., for the plaintiff.

MAGEE, J.A.:—The plaintiff was convassed in September, 1889, by two persons, Belfry and McNeil, separately and together, claiming to act as agents for the defendant company, and was induced by them to sign an application dated 27th Septem-

ber, 1889, to the company for $2,000 insurance on his life to be covered by two policies of $1,000 each. Two policies were issued pursuant thereto, dated 2nd November, 1889. The annual premiums, $33 on each, were payable on 2nd November each year, till 20 premiums should be paid. By the terms of the policies, in case of the plaintiff's death during the 20 years the $2,000 would be payable, and the whole of the tabular annual premiums would be returned, but if he survived that period the policies would be credited with a share of surplus. As to whence this surplus was to be derived, or how it was to be ascertained, the policy was silent. As to that the company must have intended to give much latitude to their agents or canvassers if any satisfaction was to be given to their customers. Each policy was said to be issued upon the 20 years' distribution plan, whatever that was. For any explanation of it the public would be apparently left to the tongues of the agents or loose leaf literature possibly, of which we have no specimen or hint. In the application it was called the "20 pay life return premium plan, 20 year distribution," but with no better information, and there was printed a stipulation that "in any distribution of surplus the principles and methods which may be adopted by the company for such distribution and its determination of the amount equitably belonging to such policy" were thereby ratified and accepted. If a company chooses to leave its transactions beclouded by indefiniteness of this sort, which can only be made clear in practice by the statements of agents, it can hardly hope, even if it deserves, to escape litigation. However, that share of surplus might according to the policies be availed of at the end of the 20 years in various ways—one of which was that it might be drawn in cash.

Each policy also contained a stipulation that it might be surrendered to the company at the end of the 20 years, "and the full reserve computed by the American Table of Mortality and four per cent. interest, and the surplus as defined above, will be paid therefor in cash."

The plaintiff went on paying the premiums, and at the end of the 20 years applied to surrender his policy and get the reserve and the surplus in cash, and was then informed that these amounted to $434.06 and $236.76 respectively, on each policy, making in all $1,345.64, which the company offered to pay, but it would pay no more. He claimed that he had been induced to apply for the insurance upon the representation by the company's agents that the amounts on each policy would be $527 guaranteed for reserve, and $486 estimated for surplus, making in all $2,026.

In this action the plaintiff at first claimed only payment of this latter amount with interest, but at the trial he added an alternative claim for the return of his premiums with interest. The learned trial Judge gave effect to this alternative claim, and found that there was misrepresentation with regard to the amount of the reserve, but not with regard to the surplus, such as to entitle the plaintiff to avoid the whole contract, and judgment was entered against the company for $2,078.64, the amount of the premiums paid with interest.

It is not here contended for the plaintiff that there was misrepresentation as to the surplus which would entitle the plaintiff to relief. At best that amount would be extremely uncertain and nothing more than an estimate could be made, and no more was in fact professed to be given, and there is no evidence whatever of fraudulent exaggeration with regard to it. Fortunately the new Insurance Act of 1910 prohibits such estimates for the future and will remove one source of disappointment, if not dissatisfaction.

The appeal is thus narrowed to the alleged misrepresentation as to reserve, the amount of which was not at any time uncertain, but always a fixed ascertainable sum. It must be said that the plaintiff's evidence is not very clear with regard to it.

[The learned Judge then quotes from and discusses the plaintiff's evidence,and proceeds as follows]: I do not feel warranted in differing from the other members of the Court in the conclusion that the evidence was too unsatisfactory to undo a transaction entered into so many years ago. I confess, too, that I cannot bring myself to believe that there was intentional misrepresentation by McNeil in the sum stated as the amount of reserve in the slip.

[Discussion of the evidence on this point, and as to the agency of McNeil, in which the opinion is expressed that "the finding of the learned trial Judge that McNeil was the agent of the company appears . . . well warranted." The judgment proceeds]: If it were the fact that the representation as to the amount of reserve being $527 was made before the application, that the plaintiff made the application upon the representation, that the representation was made by an agent of the company, and that such agent was acting within the scope of his authority in making representations as to the amount of reserve, and that the policy contained nothing to shew that the representation was incorrect, or put the plaintiff on his guard, there would be, in my opinion, no ground for interfering with the judgment. . . .

But in the view that the plaintiff did not clearly prove that the proper amount of reserve was not in fact stated to him, I concur in allowing the appeal.

MEREDITH, J.A., for reasons stated in writing, agreed in allowing the appeal.

MOSS, C.J.O., and MACLAREN, J.A., also concurred.

APRIL 1ST, 1911.

PETERSON LAKE SILVER COBALT MINING CO. v. NOVA SCOTIA SILVER COBALT MINING CO.

Lease—Mutual Mistake in Description of Property—Rectification—Mining Companies—Lease of Part of Location by One to the Other—Common Officers of Companies—Agreement on Behalf of Companies—Validity, in Absence of Fraud—Strip of Land in Dispute—Intention to Include—Necessity of Written Document.

Appeal by the plaintiffs from the judgment of TEETZEL, J., of April 6th, 1910, 1 O.W.N. 619, after the trial of certain issues in the action. The facts are fully set out in the report cited.

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

W. Nesbitt, K.C., and R. S. Robertson, for the plaintiffs.

I. F. Hellmuth, K.C., and Joseph Montgomery, for the defendants.

MOSS, C.J.O.:—All issues of fraud or want of good faith have been eliminated from this case. So also for the present has the question whether, if the lease of the 25th of February, 1908, remains in its present form, there has been a trespass upon the plaintiffs' rights. And, as stated by Mr. Nesbitt in opening the appeal, the whole question for determination on this appeal is whether a triangular piece of land forming the north-west corner of lot 16, sec. G. in the township of Coleman was included, or intended to be included, in the lease.

The learned trial Judge has found that it was intended to be included, and has directed the lease to be rectified in accordance with his finding.

Upon the evidence, and having regard to the whole probabilities, there appears no reason to doubt that it was intended to include in the lease every such portion of the plaintiffs' property as lay alongside, or contiguous to, the boundary line of the defendants' mining location upon Lot 16, sec. G.

There was no thought or intention of excluding or reserving from the lease any part of the land belonging to the plaintiffs touching or immediately adjoining the defendants' property at that point. The intention and agreement of the parties to the negotiations was to the contrary, for very good and satisfactory reasons. The idea was that the lease would bring the two properties together in the hands of the defendants, and this was to be effected by means of a lease for 10 years. The first proposal was for a sale to the defendants of 30 acres of the mining lands of the plaintiffs "immediately adjoining the property" of the defendants. This was not accepted, but at a duly convened and properly constituted meeting of the plaintiffs' board of directors a lease was authorised, undoubtedly for the purpose of giving effect to the design of bringing the properties together. Mr. Jacobs, to whom the task of preparing the instrument was assigned, supposed that what was drawn effected the purpose, and if he had thought that, owing to the direction of the boundary line, the plaintiffs' property embraced any part of Lot 16, section G. it would have been included in the lease.

Upon the facts there should be no difficulty in giving effect to the intention and agreement of the parties. I agree with the learned trial Judge in his conclusion, for the reasons he has given. It was urged for the plaintiffs that assuming that the intention was, and that the instructions to Mr. Jacobs were, to give a lease that would bring the properties together, the records of the meeting do not shew that to be so, and that as the lease is in the names of the respective companies, and the agreement was in their names and on their behalf, the only manner of shewing the common mistake was by something in writing. But the law seems to be as stated by Neville, J., in Mashonaland R.W. Co. v. Beira R.W. Co., noted in 125 Law Times Journal (1908), p. 283. The case does not appear to be otherwise reported, but the short note seems to shew it to be in point here.

The appeal should be dismissed.

GARROW, MACLAREN, and MEREDITH, JJ.A., concurred in dismissing the appeal, MEREDITH, J.A., giving reasons in writing.

MAGEE, J.A., dissented in part, for reasons to be stated.

HIGH COURT OF JUSTICE.

CLUTE, J. MARCH 27TH, 1911.

TRUSTS AND GUARANTEE CO. v. BOAKE.

Will—Administrator—Account—Beneficiary Residing with Relatives—Trust for Investment—Family Arrangement—Claim for Maintenance—Onus of Proof—Implied Promise—Contract—Intention to Make Gift—Cancellation of Authority.

Appeal from the report of the Senior Judge of the County of York, acting as special Referee, dated 24th February, 1911.

Under the will of John James, made in 1877, one Mary Ann James became entitled to a one-sixth share of the residuary estate. Probate of the will was issued to the executors, who continued to act until 1889, when the surviving executor having moved out of the country, there was a family arrangement come to by which the executor handed over to the defendant, William F. Boake, who had married a sister of Mary Ann James, the share which the executor held in hand and which amounted to $2,935. Prior to that time the said Mary Ann James had resided with different members of the family, but after her share was handed over to the defendant, she resided with him until her death on or about the 21st October, 1908, intestate, except as hereinafter mentioned. The plaintiffs as the administrators of her estate asked that the defendant should account for the moneys of the said Mary Ann James which have come to his hands.

The learned Referee found that in December, 1891, the defendant received from the surviving executor two promissory notes, one of Thomas Jackson, for $2,650.83, and one of Joseph E. Stong, for $283.33. He further found that the defendant handed these notes over to his wife, Martha Emma Boake, sister of the said Mary Ann James, who collected the interest thereon and expended the necessary sums therefrom upon the said Mary Ann James without applying anything for the care and board of the said Mary Ann James until the end of the year 1904.

He further found that the said Martha Boake, with the consent and approval of the defendant, after expending sums necessary for Mary Ann James, other than for care and board, had in hand on the first of January, 1902, notes amounting to $2,600 and cash amounting to $900, representing the assets belonging to

the said Mary Ann James, and the sum of $81.48, balance of income carried from 1901.

An account had been taken of the disbursements made on behalf of Mary Ann James to the 21st October, 1908, including her funeral expenses and the sum of $100 paid to the Fred Victor Mission and $20 to Miss Frazer, both paid subsequent to the death of Mary Ann James, amounting in all to the sum of $1,581.06, and the Referee allowed the sum of $1,042.13 for board and lodging, leaving a balance due to the estate of $538.93, after deducting $500 for the Stong note, and $100 for the Fred Victor Mission and $20 to Miss Frazer.

John W. McCullough, and James McCullough, for the plaintiffs.

I. F. Hellmuth, K.C., and B. N. Davis, for the defendant.

CLUTE, J. (after setting out the facts as above) :—Objection is made that no amount for board and maintenance should be allowed prior to 1902. The amount allowed for the period from 1891 to 1902 was at the rate of $2 per week during the period that the deceased lived at the defendant's house. During this period the allowance was reasonable if not very low, and the care and attention given by the defendant towards her sister is not complained of. There is no doubt for this modest sum the said Mary Ann James had a comfortable home and living, and, if the law permitted, it is not unreasonable that the defendants should receive what the Referee has allowed in this respect. The will expressly provides that the share given to the deceased shall be invested and that she should have the interest annually.

On the argument I was inclined to think that, the will expressly providing for the payment of the interest annually, and there being no other provision for her support, a trust was created for this purpose in favour of the deceased, especially as the will further provides that at any time her sisters may think it advisable, she shall have her share in her own hands to do with it as she pleases; and that the sisters surviving having approved of what the defendant had done in supporting and maintaining the deceased, the application of the fund towards the support and maintenance was a fulfilment of the trust, and might be supported upon that ground. Upon a careful perusal of the pleadings, evidence and report, and a further examination of the cases, I think this view suggested on the argument is untenable, and that the defendant is not entitled to board prior to 1902.

The defendant by his statement of defence states that from the year 1899 to the end of the year 1902 the amount received by him was invested from time to time and the accumulated income arising from the said $2,934.16, over and above what was paid to the said Mary Ann James, increased the amount of the capital to $3,500. He further states that it was not until 1904 that $900 of the principal was applied on account of board. The evidence shews, and the learned Referee has found to the same effect.

The evidence further clearly establishes the fact that for the period prior to 1902 there was no agreement that anything should be allowed for board. The evidence seems to shew, and the Referee has found, that the defendant's wife acted as mother and guardian to the deceased. I do not think a distinction can be drawn between the defendant and his wife in respect to the nature of the relation which existed between them and the deceased during this period. Mary Ann James was a sister of the defendant's wife and treated as such during her stay in their family. She was in truth during this period referred to as a part of the family. She was a person of rather weak mind and evidently regarded by the testator as of doubtful capacity to look after her own affairs.

[Reference to Mooney v. Grout, 6 O.L.R. 521; Iler v. Iler, 9 O.R. 551; Redmond v. Redmond, 27 U.C.R. 220, and other cases which are clear authority that where brothers or sisters or other near relatives live together as a family, no promise arises by implication to pay for services rendered or benefits conferred, which as between strangers would afford evidence of such promise.]

With respect to the subsequent period from 1902 until the death of Mary Ann James, I think the Referee has properly allowed this amount to the defendant. It seems to me to stand on an entirely different footing. The plaintiffs in their statement of claim expressly plead that the defendant is entitled to be allowed a reasonable sum for board and lodging of the deceased Mary Ann James, from and including the year 1902 until her death, for the time the deceased lived with the defendants, but say that the interest of the moneys of the deceased held by the defendant should have been sufficient to maintain the deceased, and the defendant has had all the income thereof. They took the same position before the Referee, and in the face of this express admission, I think it too late now to raise the question as to the liability of the estate for board and maintenance during this period.

There is a further reason also why an allowance should be made during the later period. The deceased had boarded with other relatives for a portion of this time, who were duly paid by the defendants for such board. It must have been well understood by the sisters who were directed by the will to a certain extent to act as advisers and guardians towards their sister, that the defendant should charge at the same rate as has been charged by other relatives during the portion of the time that the deceased resided with them.

With respect to the Stong note, there is no doubt that the action of the defendant in permitting the claim to remain uncollected was done with the approval and consent of the surviving sisters, who would have an interest in the estate in case Mary Ann James died without a will. If this be so it is wholly unfair that, having acted with their consent and approval, the defendant should now be held liable to them for this amount, and in the final disposition of the estate this fact should be taken account of, and to the extent of their shares the defendant should be recouped for the portion of this sum which may form part of this judgment. But they are not before the Court, and in the meantime, I think the further advance made by the defendant to Stong, amounting to $283.33, should be charged against the defendant.

With respect to the two items of $100 to the Victor Mission and $20 to Miss Frazer, paid after the deceased's death, but directed by her to be so paid, these also must be disallowed. The Master finds, and I presume there is no doubt, that the deceased expressed an intention to make these gifts and directed the defendant so to do, but they were not in fact made during her lifetime, and her death had the effect of cancelling the authority of the defendant to make the gifts. What I have said in respect of the Stong note applies also to these amounts. In the final adjustment of the estate, the payments having been made with the assent of the sisters, the defendant should be recouped, except as to the share of the Jacksons. To the extent indicated by the foregoing, the Master's report should be varied, and if counsel can agree upon the amount of the judgment to which the plaintiff is entitled, I will hear the further motion for judgment and as to costs. If counsel cannot agree, the matter must be referred back to the Official Referee for correction and further report.

Costs of this appeal reserved, to be disposed of with the other costs of the action.

DIVISIONAL COURT. MARCH 30TH, 1911.

FORBES v. FORBES.

Security for Costs—Application by Administrator for, in Issue Between Non-resident Claimants and Estate—Order for Security Made by Surrogate Judge—Plaintiffs Brought into Court at Instance of Defendants—Appeal from Surrogate Court to Divisional Court—Sum not Exceeding $200—*Jurisdiction.*

Appeal by the plaintiffs from an order of the Judge of the Surrogate Court of the county of Essex, directing the defendants to give security for costs under the circumstances set forth in the judgment of BRITTON, J.

The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and SUTHERLAND, JJ.

J. F. Boland, for the plaintiffs.

F. McCarthy, for the defendants.

BRITTON, J.:—This motion is in connection with the estate of William A. Forbes, deceased. Letters of administration duly issued out of the Surrogate Court of the County of Essex to John B. Forbes, a brother.

The appellants are non-residents, living at the city of Detroit in the State of Michigan, and claim to be the widow and children respectively of the deceased, and entitled to his estate.

Under Rule 944, the administrator made an application "for a direction as to the administration of the said estate, or for an order directing an issue between certain claimants who had filed claims with the administrator, and the brothers and sisters of the deceased."

On the 27th January, 1911, upon this application an order was made by SUTHERLAND, J., directing "the trial of an issue in the Surrogate Court of the county of Essex," in which the appellants should be plaintiffs, and the brothers and sisters of the deceased, mentioned individually, defendants, and the question to be tried should be whether the appellants are the widow and children respectively of the deceased.

The appellants filed in the Surrogate Court a statement of claim on the 18th February, 1911. The defendants (the respondents) thereupon applied to the Judge of the Surrogate Court of the county of Essex for, and obtained an order for

security for costs, dated 25th February, 1911, whereby it was ordered—

"1. That the plaintiffs do . . . give security on their behalf in the sum of $120.00 or pay into Court the sum of $60.00 to answer said defendants' costs of the trial of the issue herein. . . ."

And it was further ordered—"4. That in default of such security being given by the plaintiffs, this action be dismissed with costs."

From this last-mentioned order the plaintiffs in the issue so directed as above, now appeal upon the following grounds: [The learned Judge set out the grounds of appeal, being in effect that the order was improper and contrary to the intent of the order directing the trial of the issue; that the issue was a bonâ fide contest, into which the plaintiffs did not come voluntarily; and that in such a case the costs were properly payable out of the estate, and security for costs should not be required from any of the parties. He then proceeded.]

On the argument of this motion, certain preliminary objections were taken by the defendants (respondents) as follows:

1. That as the amount involved in the order, namely, the sum of $120 security, or $60 in cash, is less than $200 no appeal lies from the order under the Surrogate Courts Act, 10 Edw. VII. ch. 31, sec. 34, sub-secs. 1 and 2, which are to the following effect:

"(1) Any person who deems himself aggrieved by an order, determination or judgment of a Surrogate Court, in any matter or cause, may appeal therefrom to a Divisional Court of the High Court.

"(2) No such appeal shall lie unless the value of the property to be affected by such order, determination or judgment exceeds $200."

I think this objection is untenable. I do not think clause 2 was intended to refer to a sum of money mentioned in an order as security for costs, but to property belonging to, or in question in connection with, the estate itself.

2. On the ground that the order for security for costs is an interlocutory order and the appeal is, consequently, not to a Divisional Court, but to a Judge in Chambers. In support of this, reference is made to sec. 34, sub-sec. 3, which is to the following effect:

"(3) The practice and procedure upon and in relation to an appeal shall be the same as is provided by the County Courts Act, as to appeals from the County Court," and to the County Courts Act, 10 Edw. VII. ch. 30, sec. 40, sub-sec. 1:

"(1) An appeal shall also lie to a Divisional Court at the instance of any party to a cause or matters from (c) Every decision or order in any cause or matter disposing of any right or claim, if the decision or order is in its nature final and not merely interlocutory."

I do not think that this objection is well founded. Section 34, sub-sec. 1, gives a very wide right of appeal to a Divisional Court from any order made in a Surrogate Court, and sub-sec. 3 does not, I think, restrict this in any way, but merely prescribes that the practice and procedure upon and in relation to an appeal shall be the same as provided by the County Courts Act as to appeals from the County Court. But there is perhaps a serious objection to the order on this ground, that the application under which the order directing the issue was made being in the High Court, and the only matter sent to the Surrogate Court to be dealt with therein being that issue, the Judge of that Court had no power to make the order in question at all. I am inclined to think that on this ground the order appealed from cannot stand.

I think also that the appellants should succeed upon the ground set forth in the second clause of the notice of motion, in which they say that they did not come into Court voluntarily, but were brought into Court by and at the instance of the defendants.

The issue directed as above was in consequence of the action taken by the administrator of the estate, and the motion made by him. While it is true that in the issue the appellants are made plaintiffs, that does not affect at all the question involved in this motion. But for the action of the administrator in launching the motion in which the issue was directed, the proceedings in question would not have been taken.

[Reference to Ward v. Benson, 2 O.L.R. 366, per Moss, C.J.O., at p. 368.]

In this case the plaintiffs in the issue directed as above, have been brought into Court at the instance of the administrator of the estate, who is one of the defendants contesting the right of the plaintiffs to succeed in the issue so directed.

The appellants have not come into Court voluntarily, but have been brought into Court by and at the instance of the administrator, who has the same interest in the estate as, and is no doubt working in conjunction with the other defendants.

I think the appeal must be allowed and the order in question set aside with costs throughout.

FALCONBRIDGE, C.J.K.B., and SUTHERLAND, J., concurred.

DIVISIONAL COURT. MARCH 30TH, 1911.

*JONES v. TORONTO AND YORK RADIAL R.W. CO.

Street Railways—Injury to Person Crossing Track—Negligence—Excessive Speed—Failure to Give Warning—Causal Negligence—Contributory Negligence—Ultimate Negligence—Rights of Foot Passengers—Findings of Jury.

Appeal by the plaintiff from the judgment of RIDDELL, J., ante 684, dismissing the action with costs.

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

J. MacGregor for the plaintiff.

C. A. Moss, for the defendants.

BOYD, C.:—The rule of law which governs this appeal is expressed in the words of Lord Penzance in Radley v. London and North Western R.W. Co., 1 App. Cas., at p. 759; "though the plaintiff may have been guilty of negligence, and though that negligence may have contributed to the accident, yet if the defendant could, in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him."

The evidence, though, as in most cases of accidents, conflicting and in this case contradictory (even as between the defendants' witnesses), is sufficient to sustain the findings of the jury, and upon their findings judgment should pass for the plaintiff. The narrative of the transaction as verified by the jury may be given briefly: the plaintiff who is slightly deaf got out of his wagon, and proceeded to cross Yonge street on a skew (as he calls it) of about 45 or 50 to the street car tracks laid on the west side of the highway. Before crossing he looked up north and saw the defendants' car at a standstill—he says at Davisville switch, but it may have been closer, so as to be 200 feet, instead of 550 distant—whatever the distance, he believed he had time to get across (to Robert's house where he was going) before the car could reach the place, and he kept on till aroused by the impact of the car accompanied by shouting and ringing of the gong. He had been seen and shouted to from the approaching car behind him some 20 yards off, but though he could hear the gong he does not seem to have heard the shouts.

*To be reported in the Ontario Law Reports.

The answers of the jury are not to be divided up into primary, and intermediate, and ultimate negligence. What they find as the plaintiff's negligence is that "he might have exercised a little more care"—*i.e.*, I suppose, by looking again for the car; but as to the defendants they find that the car driver should have seen the man sooner, and have sounded his gong continuously, and that the car should have been stopped in a shorter distance. They also find that, notwithstanding the fault of the plaintiff, the defendants could by the exercise of reasonable care have prevented the collision.

The jury thus upon the evidence find an ultimate want of care on the part of the motorman, after the danger to the plaintiff became apparent, and after the plaintiff appeared to be unconscious of the danger. This is to be regarded as the decisive cause: the approach of the plaintiff was only the condition under which this injury became imminent, and was not the ultimate determining cause.

Put the case of a man standing on the track with his back towards an approaching car and for some reason unconscious of its approach, or the case of a drunk man staggering alongside the track, the negligence of the man would not warrant his being run down when he was seen or ought to have seen by the motorman, whose duty it is to be on the lookout. In the neat phrase of Coleridge, J., in Clayards v. Dethick, 12 Q.B., at p. 445, his want of care may have made him "liable to the injury but could not have occasioned it." The final negligence of the defendants, in these cases, has relation solely to a situation produced by the prior fault of the plaintiff.

The cases applied by my brother Riddell of Reynolds v. Tilling and Rice v. Rice are those in which there were concurrent and simultaneous negligence of equal character by both parties, in which the defendants had no possible opportunity of avoiding the consequences of the plaintiff's carelessness. The distinction between this case and Rice v. Rice is noted by Meredith, J., in Rice v. Toronto, 16 O.W.R., at p. 530. I agree with the view presented by my brother Middleton in Sim v. Port Arthur, 2 O.W.N. 865.

The same view of the law is supported by the highest authorities in the United States. See G.T.R. v. Ives, 144 U.S.R. 429 and Philadelphia v. Kleeth, 128 Fed. R. 820 (1906), where the federal Judge, Gray says: "No one should be relieved from liability from injury inflicted by him on another, by reason of the fact that that other has negligently exposed himself to a danger, if when that situation was, or ought to have been apparent to

him, he omitted such reasonable precautions as would, if exercised, have avoided the accident."

These considerations apply in weighing the degree of care required as between foot passengers and men in charge of a street car operating in public highways.

1. The public have a right to cross a street and go over the street car track for that purpose, and such people have an equal right to be there with the cars.

2. The motorman is in control of a powerful propelling force which if carelessly used may endanger life and limb.

3. The specific business of the man driving the car is to be on the lookout for anyone in danger or likely to be in danger from the movement of the car, and is to use a commensurate degree of care to avert such danger.

4. This is emphatically so when the person on or near the track, and heading that way as if to cross the track, appears to be unconscious of the imminent danger.

5. If the motorman sees the exposed condition of the traveller, and proceeds without giving warning or using his best endeavours to stop, this negligence is excessive and criminal.

6. The circumstances may be such as to warrant the jury in finding there is culpable negligence in the motorman, if he should have timeously seen the dangerous situation, unless he satisfies them that he has good reason for his want of maintaining an effective lookout.

All these elements enter into this present case, and the jury have reached their sense of the situation by saying, as to the plaintiff, that he might have taken a little more care, as compared with their finding, that the motorman should have seen him sooner, and taken proper steps to control the speed or otherwise protect the man from the impact of the car.

In brief, the situation of danger was apparent and should have been manifest to the other agent, and the neglect to take prompt steps at that time to avert the collision was the final act of negligence which gives the right to recover damages, despite the preliminary fault of the plaintiff in getting close to the tracks. As said by a writer in the *Law Quarterly Review*: "The party who last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is considered to be solely responsible for it;" vol. II., p. 507 (1886); Halifax Electric v. Inglis, 30 S.C.R., at p. 258, *per* King, J.

The judgment should be reversed and the plaintiff should recover $1,200 and costs of action and appeal.

LATCHFORD, J.:—I agree.

MIDDLETON, J., also agreed in the result, giving reasons in writing, in which he stated that the case had given him much anxiety, and that he was not entirely satisfied with the result.

BRITTON, J. MARCH 31ST, 1911.

BROWN v. CITY OF TORONTO.

Municipal Corporations — Accident — Negligence — Surface of Boulevard below Curb—Invitation—Construction and Repair—Liability under Municipal Act—Three Months' Limitation—Notice of Action under sec. 606 of Act—Omission to Give—Duty of Corporation to Repair Street—Damages.

Action by John and Joanna Brown to recover damages for injuries to the latter, alleged to have been caused by the negligence of the defendants. The facts are stated in the judgment.

S. H. Bradford, K.C., and T. H. Wilson, for the plaintiffs.
H. L. Drayton, K.C., and H. Howitt, for the defendants.

BRITTON, J.:—The plaintiff Joanna Brown on the evening of the 28th May, 1909, was at the store of one Charles Simons situated at the north west corner of Albert and Elizabeth streets, in the city of Toronto. She started for her own home about nine o'clock, leaving the store by the door opening on the west side of Elizabeth street, and turning south walked upon the concrete pavement until she came to the unpaved boulevard, and crossing this boulevard, tripped upon the curb, which runs westerly along the southerly limit of the boulevard to Chestnut street. By reason of so tripping, she fell headlong southerly upon Albert street and was severely injured. At first plaintiff thought that only her arm or elbow was injured. She was assisted back to the store and seemed in a somewhat dazed condition. Her husband was sent for, and he came and accompanied his wife to their home. It was then found that her leg was badly bruised and it was seen that the unfortunate woman was badly shaken. She was a large woman, and such a fall was undoubtedly serious to her, more so than, at the time, or for a considerable time thereafter, the plaintiffs thought.

The plaintiff was not able to be at the trial, and her examination de bene esse was put in.

The cause of the plaintiff tripping was that the surface of

the boulevard was, at that point, nearly two inches lower than the top of the curb. The plaintiffs allege that the depression or hole in the boulevard was caused by the negligence of the defendants in taking up the old board walk, and not filling in to the level of the curb the space formerly occupied by the board walk.

This sidewalk was taken up and the work of filling in was done in 1908—Mrs. Simons, a witness called by the plaintiffs, said that the boulevard, after the walk was taken up, was filled up level with the curb, and then a storm came. She thinks the city put more sand in after the accident.

The weight of evidence is, and I so find, that the work of construction was properly done. Unless the city was bound to put concrete or some paving upon the boulevard, unless the city was not at liberty to make and maintain the boulevard with uncovered earth, the work of 1908 was reasonably well done. By reason of the storm spoken of by Mrs. Simons, and the wind, rain and snow of the fall of 1908, the winter of 1908-9 and spring of 1909, and pedestrians walking more or less upon the boulevard, it settled and was at the time of the accident in the condition described. This boulevard is part of the street. I am of opinion upon the facts of this case, that the depression or hole as it was called, although not deeper at most, as compared with the top of the curb, than two inches, was dangerous. Mr. Simons, the proprietor of the store, had with the knowledge and presumably with the consent of the defendants, constructed a concrete pavement, filling the space on Elizabeth street, between the city's pavement and the building, and extending southerly to the northern limit of the city's concrete pavement on Albert street. There was an invitation to all persons going to, or coming from Simons' store, to use his concrete walk, and persons coming from that store, intending to go down Elizabeth street and to cross Albert street, would naturally cross the boulevard as Mrs. Brown did, and might as Mrs. Brown did, trip upon the curb.

I find that the defendants were guilty of negligence in allowing that part of the street, described as boulevard on the northerly side of Albert street, where the accident happened to the plaintiff Mrs. Brown, to be out of repair, and the accident to Mrs. Brown occurred by reason of that negligence. I find that the plaintiff Mrs. Brown was not guilty of contributory negligence.

That decision is in effect that the condition of the street, which was the cause of the accident, was not due to misfeasance,

was not a common law liability, but a liability under sec. 606 of the Municipal Act of 1903, and if so, plaintiffs' remedy is barred by reason of the action not having been brought within three months from the time of the accident, and by reason of no notice of action pursuant to sub-sec. 3 of the section mentioned.

[Reference to Pearson v. County of York, 41 U.C.R. 378; Minns v. Omemee, 8 O.L.R. 508; Anderson v. Toronto, 15 O.L.R. 643.]

In this case the plaintiffs do not claim for want of repair, but charge negligence in not so filling in the boulevard that the work would remain as a permanent work, as part of the street, and that even if what was done was apparently well done—the result shews that it was not well done—it is no excuse that the hole or depression was caused in the manner indicated by me, because the city should have filled up the space in such a manner, as to prevent such a condition as existed at the time and place of the accident.

[Reference to Bathurst v. McPherson, 4 A.C. 256, cited with approval in Pictow v. Geldert (1893), A.C., at p. 531, and to Sangster v. Goderich, 13 O.W.R. 419.]

In all these cases there was non-repair of the highway, but the cause of the condition of want of repair, which led to the accident, was a work which the municipality had a right to undertake, and in doing it, did it so negligently, that irrespective of any distinct obligation to keep the streets in repair, and whether bound to do that or not, they were responsible, and as for their misfeasance.

Here the streets in Toronto, must be kept in repair by the corporation. The work the corporation did in 1908 was on the line of their duty to repair and keep in repair Elizabeth and Albert streets. There was no outside work, not a work in connection with sewer system or any other of the many things which the corporation is authorised to do—so in my view of it, the liability, if any, is expressly that created, or if liability before, it is a liability continued by sec. 606. The Legislature has chosen to say that for damages resulting from that liability, the notice of action must be given, and the action itself must be brought within three months after the damages sustained, and so this action cannot be maintained. If I am wrong in my conclusion, and if the plaintiffs shall ultimately be held entitled to recover, the damages should be assessed at $100 for the husband and $650 for the wife, making in all $750, and I so assess them, contingently, and if they are entitled to recover they should get costs.

Upon the evidence, I am not able to say that the very serious mental and bodily condition of Mrs. Brown is wholly attributable to this accident. At her time of life, and for reasons given in evidence, other causes might exist that may in part account for her ill-health, but she was badly hurt by the fall, and if entitled to recover at all, should recover the amount as stated.

Upon the law, I am obliged to dismiss the action. No costs.

DIVISIONAL COURT. APRIL 1ST, 1911.

RE MEDORA SCHOOL SECTION NO. 4.

Public Schools—Two School Buildings in one Section—Public Schools Act, secs. 31, 72(*g*), 126—*Discretion of Trustees—Township Corporation—By-law—Mandamus.*

Appeal from the judgment of MIDDLETON, J., 2 O.W.N. 594, directing a mandamus to issue, compelling the townships of Medora and Wood to pass a by-law and issue debentures to the amount of $700 for the building and equipment of two schoolhouses in the section.

The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and LATCHFORD, JJ.

W. N. Tilley, for the appellants.

W. C. Chisholm, K.C., for the trustees.

LATCHFORD, J.:— . . . Upon the appeal, as upon the motion resulting in the order appealed from, the only substantial question involved was whether under the Public Schools Act, 9 Edw. VII. ch. 89, there can be more than one public school in a school section. Nothing is to be found in the Act prohibiting the establishment of two or more schools in a section, while under sec. 72, sub-sec. (*g*), referred to in the judgment appealed from, the power is conferred upon the boards of all public schools of determining, among other matters, "the number . . . of schools to be opened and maintained." By sec. 31, when a school becomes inaccessible during certain months, power is given to the Minister of Education to require the township council to form a new school section, or the Minister may require the trustees of the existing school section to provide a second school. The power to establish a second school for part of the year was

given to trustees in 1904 by 4 Edw. VII. ch. 30, sec. 16. This latter section is now repealed, 9 Edw. VII. ch. 89, sec. 133. It is argued from sec. 31 of the Act now in force that a second school can be established in a school section only by order of the Minister, and in the circumstances stated in sec. 31. I cannot see the force of this contention. The provision quoted merely gives power to the Minister to compel the trustees to provide a second school, and to my mind implies, not an inability, but a duty, on the part of the trustees, to establish a second school wherever the circumstances render a second school necessary. The topography of school section No. 4 Medora, as shewn by the sketch map filed, makes it impossible for many of the children resident in the section to attend the existing school. The trustees of their own motion may, in my opinion, do what the Minister has power to compel them to do.

In addition to sec. 72(*g*), sec. 126 clearly contemplates that there may be several schools in a rural school section. It imposes a penalty upon every member of the board of trustees of "any rural school section" neglecting to transmit to the Inspector a verified statement "of the attendance of pupils"—not in the school, but "in each of the schools under its charge." A similar provision first appeared in the Public Schools Act of 1874, 37 Vict. ch. 28, sec. 179, thirty years before the enactment was passed providing for a second temporary school in a school section. It has been in every consolidation of the Act since made; R.S.O. 1877 ch. 204, sec. 240; 48 Vict. ch. 49, sec. 263; R.S.O. 1887 ch. 225, sec. 262; 54 Vict. ch. 55, sec. 206; 59 Vict. ch. 70, sec. 209; R.S.O. 1897 ch. 292, sec. 111, and 1 Edw. VII. ch. 39, sec. 117. It has undergone slight modifications in the thirty-seven years of its existence, but in every case it is made to apply to "the trustees of any rural school section" and to "each of the schools under their charge."

I think this disposes of the argument that there can be but one school in each public school section. The appeal should, in my opinion, be dismissed with costs.

FALCONBRIDGE, C.J.K.B.:—I concur.

BRITTON, J.:— . . Assuming that there was jurisdiction to make the mandatory order mentioned, I am of opinion, with all respect, that this is a case in which the judicial discretion should have been exercised against the board of trustees of that school section, upon their application for the order.

The public school supporters are comparatively few—there

is a wide divergence of opinion between the members of the township council and the trustees, and it is a case to which sec. 31 of the Public Schools Act (ch. 89, 9 Edw. VII.) applies and was intended to apply.

It may be that by virtue of sec. 72, sub-sec. (*g*), of that Act, there is power in a rural public school board to determine the number of schools to be opened and maintained in the district, but, if there is such power, it seems to me contrary to the whole scope and intention of the legislature in reference to rural schools. The Act seems to me consistent throughout with the intention that, except under circumstances mentioned in sec. 31, there should be only one school house and one school maintained in each rural section. When more than one school is required in any school section by reason of the condition of the roads, or other causes such as exist here, the Minister should deal with the matter, and either require the council to form a new section, or the board to provide a second school in their section.

If a second school house is erected and a second school established by the trustees, they are bound to keep it open—to keep both open—during the whole period of the school year, except when otherwise provided by the Act—see sec. 72, sub-sec. (*h*). If the matter is dealt with by the Minister under sec. 31, he may provide that the second school be opened during such months of the year as he may deem necessary, and may prescribe the area from which pupils shall have the right to attend such second school—see sec. 3, sub-sec. 2. That is precisely, in my opinion, what the trustees and council and ratepayers should have done in the case of this unfortunate school section.

[Reference to the proceedings leading up to the appeal.]

With the sites unpaid for, and no price determined upon, so far as appears, and holding the view that the jurisdiction is, to say the least, not free from doubt, and in the interest of the ratepayers, I would allow the appeal without costs, and dismiss the motion without costs.

OTTAWA WINE VAULT CO. v. MCGUIRE—MULOCK, C.J.Ex.D.—MARCH 27.

Fraudulent Conveyance by Husband to Wife—Voluntary Settlement—Inadequate Consideration—Assumption of Mortgage — Covenant — Bar of Dower — Subsequent Creditor — 13 Elizabeth.]—Action by plaintiff company on behalf of itself and other creditors of John L. McGuire to set aside as fraudulent

and void a deed of lands in the village of Madoc made by him to his wife, the defendant, Hattie McGuire. John L. McGuire was a hotel-keeper, and owned the lands in question subject to a mortgage thereon for $3,250. In August, 1908, being at the time out of business, he purchased, in partnership with his brother James H. McGuire, the Crown Hotel business in the city of Ottawa from one Allen for $8,550. On the 14th November, 1908, he made the impeached conveyance to his wife, the consideration as stated in that deed being "natural love and affection and of the party of the first part assuming the burden of the hereinafter mentioned mortgage, and one dollar," the wife by the deed covenanting to pay the mortgage. The firm carried on the hotel business until the 30th March, 1910, when they made an assignment for the benefit of their creditors—at which time their liabilities amounted to $8,810.93, the only assets at that time consisting of certain furniture in the hotel, which was sold under a distress warrant for rent and taxes for $571.23, the whole of which went towards rent and taxes, the assignee realising nothing therefrom, thus there were no assets to meet the firm's liabilities. The learned Chief Justice found that at the time when John L. McGuire made the conveyance of the Madoc lands, which were valued at $15,000, to his wife, he had apparently assets, exclusive of these lands, amounting to $16,388.23, wherewith to meet liabilities of $14,771, leaving an apparent surplus of $1,617.23. The question then, was whether under these circumstances, McGuire was entitled to withdraw from his assets available for creditors, and to vest in his wife, the Madoc property. On its face the consideration for the deed was "natural love and affection" and assumption by the wife of the mortgage against it for $3,350. The mere fact that some obligation attached to the property assumed by the grantee does not necessarily make the conveyance one for valuable consideration: In re Ridler v. Ridler, 22 Ch.D. 81. In this case the wife's covenant was illusory, as she had no means wherewith to implement it, and it could not be regarded as constituting a valuable consideration. It was also sought to shew that the deed could be supported as for value by reason of the wife's bar of dower in some Toronto property, which was conveyed by McGuire to Allen from whom the hotel property was purchased, as part of the price, but the learned Chief Justice found on the evidence, that she did not bar her dower in consideration of any promise from her husband that he would convey to her the Madoc property, although she had been importuning him to convey it to her, as he never gave her definitely to understand, and she had no

reason to believe that he would do so, until the month of November, 1908, some three months after she had barred her dower. But even assuming that her bar of dower could be regarded as a consideration, the learned Chief Justice took the view that it was almost nominal, and certainly so grossly inadequate as to be insufficient to have justified the husband in alienating so large a part of his estate to the prejudice of his creditors. He therefore found that the conveyance of the Madoc property was voluntary. At the time of its execution, without the Madoc property, the assets were wholly insufficient to meet the husband's then existing liabilities, which to the extent of $8,810.93 are still unpaid. The case comes within the provisions of 13 Elizabeth, and the conveyance in question is fraudulent and void as against the creditors of John L. McGuire, and should be set aside with costs. W. D. Hogg, K.C., for the plaintiffs. F. B. Proctor, for the defendants.

RICHARDSON v. RICHARDSON—MIDDLETON, J.—MARCH 29.

Account—Sale of Lands—Written Agreement—Family Arrangement.]—Appeal by the plaintiff and cross-appeal by the defendant from the report of John A. Barron, the referee. MIDDLETON, J., gave reasons in writing for making certain variations in the account as taken by the referee, and expressed the view that it could be adjusted by the parties in accordance with his findings without the expense of a reference back. Upon the motion for judgment there should be judgment for the balance found due, with $150 costs, which sum was fixed, having regard to the partial success both upon the action and appeal. G. G. McPherson, K.C., for the plaintiff. R. S. Robertson, for the defendant.

GIBSON v. HAWES—DIVISIONAL COURT—MARCH 29.

Examination for Discovery—Order to Commit—Attitude of Receiver—Certificate—Costs.]—Appeal by the defendant from the order of TEETZEL, J., in Chambers, directing that the defendant be committed unless he attends for examination for discovery and answers certain questions. It was held upon the argument, that a certificate should be obtained from the receiver, as an officer of the Court, as to his desire respecting the examina-

tion, and on such certificate being obtained, the Court (BOYD, C., RIDDELL and SUTHERLAND, JJ.) directed that the appeal should be dismissed, but that no costs should be allowed of the appeal, as the attitude of the receiver now first appeared. E. D. Armour, K.C., for the defendant. F. Arnoldi, K.C., for the plaintiff.

MALTEZOS v. BROUSE—DIVISIONAL COURT—MARCH 31.

Lessor and Lessee—Agreement to Lease—Option Given by Same Writing—Absence of Consideration.]—Appeal by the plaintiff from the judgment of the Junior Judge of the County of Carleton, dismissing the action. This was an action for damages for alleged breach of an agreement by the defendants to lease certain premises in the city of Ottawa to the plaintiff. The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and SUTHERLAND, JJ. The Court was of opinion, for reasons given in writing by each of its members, that the appeal must be dismissed with costs, as the case was completely covered by the principles laid down in Davis v. Shaw, 21 O.L.R. 474. J. R. Osborne, for the plaintiff. A. E. Fripp, K.C., for the defendants.

O'LEARY v. NIHAN—MIDDLETON, J.—MARCH 31.

Bond Securing Annuity—Delivery—Assignment—Action in Foreign Court—Res Judicata.]—Action to recover $1,855, alleged to be due on a bond by which the defendant on the 16th June, 1877, covenanted to pay one Julia O'Leary $100 a year on the 1st of June in each year, during her natural life, in consideration of her relieving him from payment of a balance of $400 which he owed her on the purchase money of certain lands which she had sold to him in August, 1872. The bond was assigned by Julia O'Leary to her brother Jeremiah O'Leary, who in July, 1896, brought suit upon it in the Supreme Court of New York, claiming $1800 for 18 instalments of the annuity, with interest. The defendant denied, in that action, the making of the bond, which the plaintiff had not in his possession. The plaintiff therefore had to accept the onus of proving the bond strictly, in which he succeeded, and ultimately obtained a judgment, on which an action was brought in Ontario, in June, 1897. At the trial of that action, Meredith, C.J., held that the proceedings

in the New York Court were conclusive, and gave judgment for the plaintiff, which was enforced. The present action was brought to recover the 15 instalments accruing from June, 1896, to June, 1910, and interest. MIDDLETON, J., in his written judgment said that the situation disclosed was very peculiar, and, while on the evidence he had no doubt as to the defendant's liability, it seemed most unlikely that it was ever intended that he should be liable for the sums claimed in the action. The former action determined all questions that were, or could have been in issue in it, so that the defendant could not now retry the issue as to the delivery of the bond, and the other defences raised by him are not maintainable. Judgment was therefore given for the amount claimed with costs. A. C. Kingstone, for the plaintiff. M. Brennan, and M. J. McCarron for the defendant.

ANTAYA v. WABASH R.W. CO.—MIDDLETON, J.—MARCH 31.

Railway—Accident—Negligence—Contributory Negligence.] —Action for damages for injuries sustained by being struck by an engine of the Wabash Co. The learned Judge held that on the evidence there was no case of negligence upon the part of the defendants, and that the negligence found by the jury was not in any way suggested by counsel or in the course of the evidence. "The situation was simple. The passengers from the Grand Trunk R.W. train on alighting had to cross the track between it and the platform. The Wabash train was delayed till the track was clear, and then was permitted to come on. The passengers, among whom was the plaintiff, were walking on the platform in a position of perfect safety till the Grand Trunk train drew out and the Wabash passed. The Wabash was visible for a long distance and had been whistling. Apparently all save the plaintiff knew of its approach. She stood on the platform with her umbrella up, and was watching the G.T.R. train depart, and as the last car reached the crossing, she stepped without any warning immediately in front of the Wabash and was injured. The train was only a few feet from her when she stepped down to the track and she was struck before she reached the first rail. The accident . . . was the result of her own negligence, or at any rate something not attributable to defendants' negligence." J. H. Rodd, for the plaintiff. H. E. Rose, K.C., for the Wabash R.W. Co. E. Meredith, K.C., and Forster, for G.T.R. Co.

McNABB v. TORONTO CONSTRUCTION CO.—MASTER IN CHAMBERS —MARCH 31.

Pleading—Parties—Motion to Amend Writ and Statement of Claim by Adding Plaintiffs—Substitute Plaintiff—Bona Fide Mistake—Con. Rule 313—*Motion too late.*]—Motion by the plaintiff for leave to amend the writ and statement of claim by adding as plaintiffs, himself and other members of a partnership. The action began on 3rd October, 1907, and was at issue on 13th December of that year. Nothing further was done except examinations for discovery until 23rd December, 1910, when a motion was made to dismiss for want of prosecution. On that application an order was made allowing the action to proceed on certain terms, one of which was that the plaintiff was to set the case down and go to trial at the Toronto non-jury sittings, within five weeks from 12th January. It was also ordered that security for costs should be given, as plaintiff has gone to reside in Alberta, and this was done, and the case set down on 1st March inst., after which the plaintiff's motion was launched, on 13th March. The Master said that it seemed clear that the motion should have been made under Rule 313, to substitute the firm as sole plaintiffs, and following Biggar v. Kemp, 17 O.L.R. 360, leave was given to the plaintiff's solicitor to make what was said in that case to be a necessary affidavit of a bona fide mistake on his part, if he could do so. On such an affidavit being made, and the solicitor being cross-examined, it did not appear why the present motion was not made before joinder of issue or, at latest, after the examinations for discovery. In answer to his own counsel, he said that he thought when the action was begun that there was no partnership, though one had been intended. This would have been sufficient for the success of the motion if made promptly after the examinations for discovery, but as it is now it seems too late, especially as to grant it would be to institute a new action, and nothing would be saved by this in expense. It may be that defendants would prefer that the motion should be granted, so as to preserve the order for security which would be a term of the allowance of the motion. But if this is not agreeable, then the motion must be dismissed, with costs to the defendants in any event, leaving the plaintiff to discontinue and bring a new action properly framed, or to proceed with the present action as he may be advised. This election should be made in a week so that the proper order may issue, and the pending motion for a commission to take McNabb's evidence may also be disposed of. J. M. Ferguson, for the plaintiff. J. Grayson Smith, for the defendants.