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SEPTEMBER 16TH, 1907.

DIVISIONAL COURT.

HAMILTON v. HAMILTON, GRIMSBY, AND BEAMSVILLE ELECTRIC R. W. CO.

Costs — Taxation — Counsel Fee — Trial or Assessment of Damages — Interlocutory Judgment — Noting Pleadings Closed — Items of Tariff.

Appeal by defendants from order of FALCONBRIDGE, C.J., ante 197, dismissing defendants' appeal from certificate of senior taxing officer as to allowance of a counsel fee of $125 as fee with brief at trial.

J. G. Gauld, Hamilton, for defendants, contended that there was no trial but only an assessment of damages, and that not more than $10 could be allowed under item 152 of the tariff.

No one contra.

THE COURT (MEREDITH, C.J., MACMAHON, J., MAGEE, J.), held that there having been no interlocutory judgment, but merely a noting of the pleadings as closed, the proceedings were not to be regarded as an assessment of damages.

MEREDITH, C.J., speaking for himself, expressed the opinion that the note to item 153 of the tariff applies to item 152 as well, and thus the counsel fee of $10 on assessment of damages is liable to be increased.

Appeal dismissed without costs.

SEPTEMBER 17TH, 1907.

DIVISIONAL COURT.

LOUDEN MANUFACTURING CO. v. MILMINE.

Infant—Purchase of Goods—Action for Price—Defence of Infancy — Alleged Ratification after Majority — Letter Acknowledging Account—Insufficiency—Claim for Value of Goods in Hand after Majority — Amendment.

Appeal by plaintiffs from judgment of RIDDELL, J., 9 O. W. R. 829, dismissing the action, which was brought for the price of goods sold. The appeal was against defendant William S. Milmine only. That defendant set up his infancy at the time the goods were purchased.

R. L. McKinnon, Guelph, for plaintiffs, contended for ratification after majority, and also that they were entitled to judgment for the value of the goods in the possession of defendant William S. Milmine at majority.

J. G. Farmer, Hamilton, for defendant William S. Milmine, contra.

THE COURT (MEREDITH, C. J., MACMAHON, J., MAGEE, J.), agreed with the trial Judge that the letter relied upon as ratification was not sufficient to satisfy the statute; but held that plaintiffs were entitled to leave to amend by setting up an alternative claim for the value of the goods in the hands of defendant William S. Milmine at majority, and were entitled to succeed upon that claim to the extent of $75. Leave to amend granted, and judgment to be entered for plaintiffs without costs of action or appeal.

SEPTEMBER 17TH, 1907.

DIVISIONAL COURT.

EUCLID AVENUE TRUST CO. v. HOHS.

Summary Judgment — Rule 603 — Mortgage — Possession —Defence—Fraud—Leave to Defend.

Appeal by defendants from order of RIDDELL, J., in Chambers, reversing order of Master in Chambers, and

allowing plaintiffs to enter summary judgment under Rule 603, in an action by mortgagees to recover possession of mortgaged premises. The defendants were husband and wife. The mortgaged premises were the property of the wife. She set up by affidavit the defence that the mortgage was obtained from her by plaintiffs as security for a debt of her husband, by means of statements made by officers of plaintiffs, that the taking of the mortgage was a mere formality and she would not be liable upon it, and that the property of the husband would be sufficient to answer his debt.

W. E. Middleton, for defendants.

A. Cohen, for plaintiffs.

THE COURT (MEREDITH, C.J., MACMAHON, J., MAGEE, J.), held, following the decision of the House of Lords in Jacob v. Booth's Distillery Co., 85 L. T. 262, that this was a case in which unconditional leave to defend should be granted.

Appeal allowed and order of Master restored. Costs here and below to be costs in the cause.

SEPTEMBER 17TH, 1907.

C.A.

CAVANAGH v. GLENDINNING.

Principal and Agent — Agent's Commission on Sale of Mining Lands — Percentage Rate — On what Amount Commission Payable — Change in Form of Transaction — Continuity of Transaction — Substitution of Purchaser — Order of Divisional Court Directing New Trial — Appeal from, by Defendants — Increase in Amount Awarded to Plaintiffs without Cross-appeal — Judgment — Rule 817.

Appeal by defendants from order of a Divisional Court (28th November, 1906), upon the appeal of plaintiffs, setting aside the judgment of BOYD, C., at the trial, which was in favour of plaintiffs, but only to the extent of $1,500 and costs, and directing a new trial, with liberty to plaintiffs to amend their statement of claim by making an alternative

claim as upon a quantum meruit. The action was for the recovery of commission on a sale of mining lands. Plaintiffs claimed a commission at the rate of 10 per cent. on a sale for $250,000.

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

E. F. B. Johnston, K.C., for defendants.

J. Shilton, for plaintiffs.

Moss, C. J. O.:—. . . The employment of plaintiffs to find a purchaser was not questioned. The Chancellor found that there was an introduction to defendants, through the instrumentality of plaintiffs, of a person named Hanson, with whom defendants entered into an agreement in writing for the purchase by him of the lands in question, known as the Cross Lake property, for the price or sum of $250,000, upon certain terms as to payment set forth in the agreement; and this is not now disputed. But plaintiffs allege that defendants agreed to pay them commission at the rate of 10 per cent. upon the amount of the purchase price, and they contend that they earned and are entitled to be paid that sum. Defendants, on the contrary, contend that the bargain was that they were to pay plaintiffs 5 per cent. commission on all moneys as and when received on account of the purchase price; that plaintiffs procured Hanson on that basis; and that the sum of $30,000 only was received by defendants on account of the Hanson purchase, he having made default and abandoned the transaction, and the property having been subsequently sold to others. The Chancellor agreed with this contention. He held that the only bargain that he could find proved was that defendants would give 5 per cent. commission to be paid as the purchase money came in; and, as regarded the transaction with Hanson, that there was a complete break in it after the receipt by defendants of $30,000, and a new bargain and sale of the property, with which Hanson had nothing to do, and in respect of which, therefore, plaintiffs were not entitled to a commission. And on these grounds—substantially—he awarded plaintiffs 5 per cent. on the sum of $30,000.

The Divisional Court, without determining any of the questions between the parties, were of opinion that there ought, in the interests of justice, to be a new trial. They

doubted whether any express contract for a specified rate of commission was proved, and thought that if it was the case that the parties had not agreed upon the amount of commission, the proper way to determine it would be to inquire if there was a usual rate in such transactions, which they thought would probably govern, but, if there was no such rate, then the inquiry should be what is a reasonable compensation. And they were of opinion that, as the evidence had not been directed to that view of the case, it would be more satisfactory that the inquiry should be at a trial rather than upon a reference.

They also expressed themselves as not at present satisfied that there was such a break in the transactions as disentitled the plaintiffs to commission upon the balance of the purchase money beyond the $30,000.

On the argument of the appeal the principal questions discussed were whether there was an agreement as to commission; if so, what were the terms; and if there was an agreement for a stated commission, upon what amount of purchase money was it payable? In addition it was contended for the plaintiffs that the Divisional Court having, in the exercise of their discretion, directed a new trial, their decision ought not to be interfered with.

Ast to the first branch of the case, I am of opinion that the plaintiffs failed to establish an agreement to pay a commission at the rate of 10 per cent.

On the other hand, I think the correspondence and testimony shew a distinct offer by the defendants of a commission of 5 per cent. and an acceptance by the plaintiffs of the engagement at that rate of compensation. There is no doubt that they hoped that perhaps through pressure to be exercised by Mr. A. E. Osler, or from motives of friendship for the plaintiff Hutchins, or in some other way, the defendant Glendinning might be induced to increase the commission to 10 per cent., but there was no promise or agreement to that effect on which the plaintiffs were entitled to rely, and they undertook the employment, and proceeded to procure a purchaser on the basis of 5 per cent. I do not think, however, that it is so satisfactorily shewn that the right to be paid this commission was conditioned upon the receipt by the defendants of the purchase money, or that the plaintiffs were only to be paid as and when the moneys were received on account of the purchase price. It is true that the defendant Glendinning states in his evidence that that

was the agreement, and reference was made to the clause in his letter to Osler of 11th October, 1905, to the effect that from any payment that might be made by the latter or any person for whom he was acting, a commission of 5 per cent. would be allowed, the same to be placed to his credit at the time the payment was made. But it seems plain that the object of the stipulation as to placing it to Osler's credit was to protect the right of his associates to share in the commission. At the time when that letter was written Glendinning was under the impression that Osler was intending to purchase for himself, or for himself and some others, and Glendinning's idea was to provide for the plaintiffs getting their commission out of any moneys that might be paid directly by Osler or his associates in a purchase. But these terms of the letter do not apply with precision to the case of a person procured to deal directly with the defendants and to become a purchaser and make an agreement for himself.

The defendant McLeod's information, however derived, led him to understand the nature of the arrangement with the plaintiffs to be that they were to procure a purchaser.

. . . .

The Chancellor found that Hanson came to the defendants as a purchaser, through the instrumentality of the plaintiffs. They dealt with him, made their own bargain with him, and, having done so, Glendinning wrote on 31st October, 1905, to the plaintiff Cavanagh as follows: "I am pleased to be able to report to you that we have closed a deal with C. L. Hanson of Chicago for $250,000—$15,000 in cash, $15,000 in 90 days, and balance of $190,000 (this is evidently a mistake in the sum, which was $220,000) in 15 months. This is a good deal, and as soon as they are satisfied as to our title the bank is to be instructed to pay us over the money held in escrow. I have written to Frank asking for instructions re the commission you were to get." On the same day he wrote Frank (Hutchins) informing him of the sale to Hanson, and saying, among other things, "You will kindly send instructions as to what steps are to be taken to secure you the 5 per cent. commission I agreed to offer." In the correspondence which followed, Hutchins does express the plaintiffs' willingness to accept a portion of the first payment and to wait for the remainder as the purchase money is paid. But this is based on the claim to be allowed 10 per cent. instead of 5 per cent. On the whole,

there is a good deal in the evidence to warrant the conclusion that the 5 per cent. commission was earned and became payable as soon as a binding agreement for the purchase of the property was entered into between the defendants and Hanson. There was no agreement by the plaintiffs to share the risk of Hanson failing to pay, nor any warranty, express or implied, of his solvency or financial ability.

The defendants dealt with him and entered into the agreement with him in reliance upon their own knowledge. They afterwards, without any reference to the plaintiffs, and without their knowledge or consent, varied the terms of the original agreement in ways that would have been to the plaintiffs' disadvantage as regards times of payment. So far as appears, the plaintiffs were never consulted in regard to the dealings with the property after the agreement with Hanson was entered into. This line of conduct was not consistent with the defendants' present contention that the plaintiffs were looking to Hanson's payments for the receipt of their commission.

But, even if this be not the proper conclusion, it does not end the plaintiffs' claim. On a careful consideration of the testimony, I am unable to agree with the Chancellor that there was such a break in the continuity of the transactions, commencing with the agreement with Hanson and ending with the agreement with Ferguson, as to deprive the plaintiffs of their right to payment of commission on the whole purchase money paid or payable under the latter agreement. Viewed in whatever light it may be, upon the evidence it appears to me that the sale of, or rather agreement to transfer, the property to Ferguson was nothing more than the final consummation of the agreement for sale initiated with Hanson by the agreement of 31st October, 1905 (exhibit 12). This was varied as to terms of payment by the agreement of 27th November, 1905, and both these were replaced by the agreements of 15th January, 1906, whereby they were cancelled. By the terms of these latter agreements, all contained in them was made to enure to the benefit of and be binding upon the personal representatives and assigns of the parties thereto. In all substantial respects these agreements corresponded with the earlier agreements, the main difference being as to the terms and times of payment. There had been difficulty in shewing a title, owing to the existence of registered cautions which it was necessary to get rid of, and in regard to which actions were pending.

On the eve of the trials, the defendants accepted a proposition made by Hanson that he would undertake to clear the title of the claims in litigation if the plaintiffs would reduce the purchase money by $50,000. As put by Mr. Boultbee in his testimony, they lowered the price from $250,000 to $200,000 if Hanson would remove the cautions, and he might have had to pay more for it (p. 149).

The position was that he said, "Change the consideration to $200,000, and I will assume the risk of that caution" (p. 151). It ultimately turned out that Hanson was able to effect a settlement on payment of $30,000 and $2,000 for costs, thereby making a gain of $18,000 on the arrangement with the defendants. But in order to procure the $30,000, Hanson had recourse to Mr. A. G. Browning, a solicitor of North Bay, from or through whom he obtained an advance of that sum upon the terms of an agreement between them, dated 11th April, 1906. And as part of the agreement there was executed contemporaneously therewith an assignment by Hanson to Browning of all the former's estate and interest in, to, and under the agreement with defendants of 15th January, 1906, and the mining lease of the property issued to the defendants, and assigned or agreed to be assigned by them to Hanson (exhibits 22 and 23). Hanson's assignment to Browning was only by way of security for repayment of the advance of $30,000, together with an additional sum of $30,000 for the use of the $30,000 advanced, on or before 26th May, 1906.

Now, it is not open to serious doubt that up to this period the plaintiffs' rights in respect of commission on the sale remained unaffected. Hanson continued in the position of purchaser, entitled as against the defendants to the benefit of the agreement of 15th January, 1906, subject only to paying the purchase money, except in so far as the defendants had seen fit, on a question of clearing the title, to vary the extent of their claim under the agreement.

In what way did the subsequent dealings and transactions alter the situation so as to affect the plaintiffs or deprive them of their rights? As matters appear to me, all that was done was a continuation of the original agreement of sale and purchase by persons whose claims arose through Hanson and were based on his rights.

On 24th April, 1906, the defendants assumed to enter into an agreement with Browning for a transfer to him of the mining lease of the property, for the consideration of

$200,000, payable $15,000 on or before midnight of 5th May, 1906, a further payment of $15,000 on or before midnight of 15th June, 1906, a further payment of $10,000 on or before midnight of 15th July, 1906, a further payment of $60,000 on or before midnight of 15th October, 1906, and the balance of $100,000 on or before 12 months from the date of the agreement, i.e., on or before 24th April, 1907.

The $200,000 was based on that sum being the amount payable by Hanson under the arrangement by which he procured the removal of the cautions, and for which he paid $30,000, and except as to the times for payment of the $200,000 the agreement was a counterpart of the agreement of 15th January, 1906.

It may be noted that this agreement is one of the documents the printing of which in the appeal case is duplicated, and that in one (exhibit 21) the date is put as 20th April, while in the other (exhibit 24) the date is 24th April. The evidence seems to indicate that the latter is the correct date.

Mr. Browning and the others concerned with him in procuring this agreement do not deny that Hanson was entitled to the benefit of it, and there seems to be no doubt of that. At the time it was made, he was not in default either to the defendants under his agreement with them, or to Browning under the agreement with him. He was, however, willing that his assignee and mortgagee, Browning, should make the agreement of 24th April, and, because the defendants' solicitor very properly required some authority from him, he signed the release of 24th April (exhibit 18). But it is admitted, or not disputed, that, notwithstanding this instrument, he was, as between himself and Browning, still entitled to the benefit of the agreement between the defendants and Browning.

In making that agreement, Browning, besides acting for Hanson, was acting on behalf of his associates, among whom was Ferguson, and in equity the latter was assignee and mortgagee of Hanson and entitled to claim through him as Browning did. It only remained for Hanson to pay Browning's claim to entitle himself to call for an assignment of the agreement of 24th April, and to stand in the position of Browning and his associates with respect to the property.

Then on 5th May, 1906, before there was any actual default under the agreement of 24th April, a payment of $10,000 is made to the defendants, and a receipt is given by them acknowledging receipt of $10,000 paid to them by

John Ferguson "on account of purchase price of $200,000 for assignment of mining leases" of the property. Payment of the balance of the purchase money is provided for; $5,000 is to be paid on or before 8th May; and the remainder is to be paid in the amounts and on the days mentioned in the agreement of 24th April, except that 16th October is mentioned instead of 15th, as in that agreement.

The payment was arranged for and probably made by Browning, who met the defendants for the purpose. No doubt, his motive was to keep on foot the agreement by which the $30,000 paid to remove the cautions was to continue to be treated as a payment by Hanson on account of the purchase moneys, the balance of the purchase moneys remaining at $200,000.

It is unnecessary to discuss the effect upon Hanson's rights as between him and Browning and Ferguson of the stipulation in the document of 5th May as to the sale to Ferguson being subject to the right of Hanson and Browning to make payment on or before midnight, and I purposely refrain from doing so. But I fail to perceive why, as between the plaintiffs and the defendants, it should be treated as terminating the sale to Hanson, initiated through the plaintiffs, and continued throughout as a dealing with Hanson or his assigns.

Having regard to the relations between Hanson, Browning, and Ferguson, the substitution of the latter for Browning, who admittedly was entitled to Hanson's position, was a mere matter of form. And, so far as the plaintiffs were concerned, it produced no alteration in their position. The original sale is, in effect, being carried out, and, even on the defendants' own shewing as to the terms of payment, the plaintiffs are entitled to be paid 5 per cent. commission as and when the purchase moneys are received.

The plaintiffs did not cross-appeal or ask for this relief, being satisfied with the new trial awarded by the Divisional Court. But under Con. Rule 817 the Court has power to give any judgment that ought to have been pronounced, and may exercise it in favour of all or any of the parties, althought they may not have appealed.

The power thus given is wider than that possessed by the Divisional Court and Court of Appeal in England, and there is not the difficulty that was found in Toulmin v. Millar, 12 App. Cas. 746, more fully reported in 58 L. T. R. 96.

But if, for any reason, judgment cannot be entered for the plaintiffs as above indicated, I think the new trial ordered by the Divisional Court should be affirmed in order that the rights of the parties may be properly adjusted.

The order of the Court will be that the judgment of the Divisional Court be set aside and judgment be entered for payment to the plaintiffs of a commission at the rate of 5 per cent. upon the sum of $200,000 received, or to be received, in respect of the sale of the property, in addition to the $30,000 in respect of which the sum of $1,500 has been awarded by the judgment at the trial.

The defendants to pay the plaintiffs the costs of the appeal to this Court. No costs of appeal to the Divisional Court.

GARROW and MACLAREN, JJ.A., concurred.

MEREDITH, J.A., and RIDDELL, J., dissented, for reasons stated by each in writing.

SEPTEMBER 17TH, 1907.

C.A.

GRAND TRUNK R. W. CO. v. CITY OF TORONTO.

CANADIAN PACIFIC R. W. CO. v. CITY OF TORONTO.

Railway—Bridge over Highway Crossing—Protection of Public—Order of Railway Committee of Privy Council—Jurisdiction—Action — Injunction — Declaration — Existence of Highway—Harbour—Water Lots—Jus Publicum—Construction of Statutes, Patents, and Agreements—Municipal Corporation — Diversion of Highway — Expropriation of Lands—Compensation—Navigable Waters—Order in Council Sanctioning Order of Railway Committee—Time for Commencement and Completion of Work—Variation of Order without Appeal.

Appeals by plaintiffs from judgment of ANGLIN, J., 6 O. W. R. 852, dismissing the actions.

The appeals were heard by Moss, C.J.O., OSLER, GARROW, and MACLAREN, JJ.A.

W. Cassels, K.C., and W. A. H. Kerr, for plaintiffs the Grand Trunk Railway Company.

E. D. Armour, K.C., and Angus MacMurchy, for plaintiffs the Canadian Pacific Railway Company.

J. S. Fullerton, K.C., and A. H. Marsh, K.C., for defendants.

Moss, C.J.O.:—. . . The first and main ground on which plaintiffs claim to be entitled to the relief they seek is want of jurisdiction in the Railway Committee of the Privy Council to order plaintiffs to construct and maintain over their respective lines of railway a bridge extending from the south side of Front street southward in the line of Yonge street to the waters of Toronto Bay. This contention is based upon the proposition that Yonge street is not a street or highway upon or along or across which any portion of plaintiffs' railways is constructed—that in fact it extends only to the north side of Esplanade street, but in any case no further south than the north side of the Canadian Pacific Railway Company's line of railway.

It is not disputed that, assuming the existence of jurisdiction in the premises, it was in general the province of the Railway Committee, under sec. 187 of the Railway Act, 1888, to determine the question whether it was expedient or necessary for the public safety to require plaintiffs to protect the street or crossing and to direct the nature of the work and the steps to be taken by means of which such protection should be afforded, and that in such case the action of the Committee is not open to review in the Courts of the province.

But it is contended that, as regards the order made in this instance, there are objections to its validity which entitle plaintiffs to relief in these actions, even though the Railway Committee's general jurisdiction be conceded. These objections will be noticed more fully later on.

From the nature of the case as presented on plaintiffs' pleadings, it is manifest that upon them rests the burden of establishing the grounds on which they claim . . . relief.

Plaintiffs are here seeking a declaration that the order is invalid and incapable of enforcement because made, as

they allege, in a state of circumstances which does not afford jurisdiction to the tribunal. They also, it is true, claim an injunction against the enforcement of the order, but, as pointed out by the trial Judge, it is not alleged or shewn that defendants were threatening or intending to enforce it, and if plaintiffs are entitled to any relief, it is to a declaratory judgment only. Enough appears on the face of the impeached order to exhibit prima facie jurisdiction in the premises. And it is for the plaintiffs to displace, if they can, the grounds upon which the jurisdiction has been assumed. This, after all, is only another way of stating the familiar proposition that plaintiffs must make out their case.

To what extent, if at all, the question of the existence of Yonge street as a highway south of the north side of Esplanade street was discussed before the Railway Committee, does not appear. If there was a contest on conflicting facts, it must be assumed that the Committee decided them adversely to plaintiffs. Plaintiffs can place their right to impeach the jurisdiction based on findings of fact no higher than in a matter of prohibition, and in such cases it is settled law that the Courts will not interfere where there has been a finding on facts which go to the question of jurisdiction.

In this case there is no reason to doubt that the Railway Committee had before it ample information on which it could well base the conclusion that Yonge street was a street or highway across which the lines of plaintiffs' respective railways were constructed, within the meaning of sec. 187 of the Railway Act, 1888.

To begin with, the expression "highway" in the Railway Act, 1888, includes any public road, street, lane, or other public way or communication: sec. 2 (g).

For many years before and at the time when the order in question was made by the Railway Committee, the locus in quo, to all outward visible appearance upon the ground, easily fell within the statutory description. It was being travelled upon daily for business and other purposes by very many vehicles and large numbers of pedestrians crossing and recrossing plaintiffs' lines of railway from and to the north side of Esplanade street to and from the waterfront, without objection or opposition on the part of the plaintiffs or any other body or person. To all intents and purposes it was a public highway or communication in common public use for a long period of years. In the words of the trial Judge, "the

right of the public to so cross has been notoriously exercised, and the railway company"—he is here referring to the Grand Trunk Railway Company—"has in many ways recognized the existence of duties on its part to persons exercising that right such as it owes to travellers upon a crossing highway." He goes on to say: "What has been said of the Grand Trunk Railway upon the Esplanade is equally true of the Canadian Pacific Railway since the construction of the 'Don branch' south of the Grand Trunk Railway."

When to this open and continuous user and enjoyment by the public of access to the water front by means of a well-defined route in the line of Yonge street, as an admitted highway, and to the long-continued acquiescence therein by plaintiffs, there is added the fact that, so far as appears, it was only in the course of proceedings in this action that it was asserted, and then only on behalf of plaintiffs the Canadian Pacific Railway Company, that there was any ownership of or title to the soil of the land on which their tracks are situate when crossing the route in question, and that the municipality in which the soil is vested, by grant from the Crown, was acknowledging the public right and basing its application on that ground, what more was required in order to give the Committee jurisdiction?

There is, perhaps, another view upon which the jurisdiction of the Committee would attach, quite irrespective of the position of Yonge street as a highway crossed by plaintiffs' tracks. Section 187 applies to the case of a railway constructed upon or along a street or other public highway at rail level. The Esplanade has been determined to be a public highway over its full width of 100 feet (2 O. W. R. 602), and portions of the Grand Trunk Railway Company's lines are constructed upon and along it. Is not this fact sufficient to give jurisdiction under the section? And, if so, does it not rest exclusively with the Committee to deal with the question of the public safety at the point on the Esplanade in the line of Yonge street, and to determine upon and direct the measures to be taken in order to remove the danger arising from the position of the tracks and the extent of traffic there? The public have an undoubted right to travel upon and over the Esplanade, to the full extent of its width, and in doing so at the point in question it is immaterial whether they are to be regarded as travelling on Esplanade street or on Yonge street; their danger is

the same. And if, in order to give effect to proper measures of safety, it becomes necessary to carry the proposed work beyond the line of the Esplanade and over the tracks of the Canadian Pacific Railway Company, is there any reason why the jurisdiction should not extend so far?

It is not necessary, however, to support the jurisdiction on this ground.

The trial Judge has made an independent examination of the whole case as presented on the evidence adduced before him, and has come to the conclusion that no good reason has been shewn against the existence of Yonge street as a highway crossed by the lines of the respective railways—a conclusion in which I entirely concur.

There is no need to enter into an inquiry as to the origin of Yonge street, or to trace the steps by which it was established on its present site as a thoroughfare to the water's edge of the bay. It is admitted that prior to 1840 Yonge street had become a highway from north of the limits of the city at least as far south as to the water's edge of the bay.

The history of the Esplanade commences in 1837, when an order in council dated 17th August authorized the grant by the Crown to the city of Toronto of nearly all the then ungranted land and land covered by water on the water front of the city, from Berkeley street west to Simcoe street, and provided for the construction of an Esplanade or street 100 feet in width south of the water's edge, as shewn on a plan. Following this came a patent from the Crown to the city dated 21st February, 1840, granting the lands and lands covered by water referred to in the order in council. A perusal of these instruments and an examination of the plan annexed to the patent renders it difficult to resist the conviction that it was the intention both of the Crown and of the city to preserve, by means of the public highways then leading to the water's edge, free access by the citizens and the public generally to the water front, wherever that might happen to be; to the water's edge as long as the then conditions continued; and to the southern edge of the Esplanade whenever that work was completed.

Clearly it was contemplated that on the water line there was to be a breastwork extending from the east to the west end of the Esplanade, and that the whole space between it and the natural margin of the bay was to be formed into dry land by being filled in with earth. And equally clearly it

was contemplated, as the plan indicates, that the parts forming the extensions of the streets should continue as streets down to the new water line. And throughout the mass of subsequent agreements and legislation there is not a line or a syllable manifesting or indicating the slightest design by the city authorities, or any one else, to depart from that intention. On the contrary, many of these instruments afford evidence of the consistent adherence of the authorities of the city to that view, and the full understanding of and acquiescence in the same by the various other parties concerned or interested in the construction of the projected work. When, after several abortive attempts to proceed with the construction, the Grand Trunk Railway Company undertook it under agreement with the city dated 30th August, 1856, one part of the work that the company agreed to perform was to "grade, level, and make the 16 streets leading thereto and thereon," the reference of course being to the Esplanade, and Yonge street being one of the 16 streets. Can it be fairly doubted that the parties to the agreement intended to express and did express their understanding as to what was to be the position on the ground when the work was completed, i.e., 16 streets affording direct access across the Esplanade to the water front between the water lots lying in front of the Esplanade and extending to the Windmill line? In following up the history of the dealings with the various railway companies after the completion of the construction of the Esplanade and the filling in with earth of the space between it and the natural shore of the bay, the same solicitude for the public right of access to the water front is shewn, and again and again the thorough understanding and interest of all parties to that effect is manifested.

It is unnecessary to go in detail through the various Acts of the legislature and agreements. The trial Judge has fully performed that task, and has demonstrated that not in regard to the Grand Trunk Railway Company alone, but also in regard to the Canadian Pacific Railway Company, the city authorities have guarded the right to public highways and crossings over the various lines of railway to the water front, and that Yonge street is included in such highways.

The special contention of the Canadian Pacific Railway Company, founded upon their original occupation of the line of their railway along the south front of the Esplanade,

has, in my opinion, been fully met and answered by the trial Judge. This work was performed in the exercise of the powers and franchises of the Ontario and Quebec Railway Company, which are much more restricted than those conferred upon the Canadian Pacific Railway Company by their special Act, 44 Vict. ch. 1, which, as said by Gwynne, J., in City of Vancouver v. Canadian Pacific R. W. Co., 23 S. C. R. 1, at p. 12, granted to that company much greater powers and privileges than were given to the railway companies of purely commercial character constructed under the Railway Act of 1879. And for that reason, as well as for the reason that the facts were entirely different, neither that case nor the subsequent case of Attorney-General for British Columbia v. Canadian Pacific R. W. Co., [1906] A. C. 204, has any application to the present case.

Briefly, the location of the "Don branch" lines and their construction on the site authorized by the order in council of 25th January did not operate to vest in the Ontario and Quebec Railway Company, or its lessees the Canadian Pacific Railway Company, the fee or any estate of freehold in the parcels of land or land covered with water lying at the foot of the 11 streets from Berkeley street to Bay street, inclusive, over which the tracks were laid, nor was it intended or thought that it would have any further operation than the usual right of crossing a highway. Nothing more strongly illustrates and emphazises this than the letters patent of 10th June, 1893, and the map which accompanies and is made part of it. The latter shews on its face that it was prepared by or on behalf of the Canadian Pacific Railway Company, and makes reference to a letter from Mr. G. M. Clark, the company's solicitor, to the Hon. T. M. Daly, Minister of the Interior, dated 14th November, 1892. There is also a memorandum or certificate of the clerk of the Privy Council to the effect that it was approved on the terms of an order in council of 23rd March, 1893, by the Governor in council. The order in council, which was put in evidence, along with the letters patent, by the plaintiffs, makes reference to an application made by the Canadian Pacific Railway Company, "under date the 14th November last," obviously the letter of that date from Mr. Clark to the Hon. Mr. Daly noted on the plan, and no doubt the letter set out in the statement of defence to which the trial Judge refers. It was objected by the plaintiffs that these documents were

not receivable as evidence. But they do not add to, vary, or contradict the terms of the letters patent, and, apart from the fact that the order in council, which incorporates in substance the statements of the letter, was put in by the plaintiffs, they may well be looked at, on an inquiry like the present, as to the circumstances existing when the occurrences in question took place.

In truth the statement in the order in council that "the company further points out that the giving of this easement will not interfere with the Crown granting to the City of Toronto or to any other party a full title to the said parcels of land, subject only to the use for railway purposes above mentioned," no more than summarizes the situation which had been agreed upon and provided for by the "Windmill Agreement" entered into on 15th March, 1888, and to which the Canadian Pacific Railway Company were parties, by their solicitor, Mr. Clark, the writer of the letter of 14th November, 1892.

The Canadian Pacific Railway Company never obtained in respect of these parcels a higher or greater right than a railway obtains in respect of the crossing of a highway in the course of its construction. And in regard to both the plaintiffs not only does the evidence adduced at the trial not displace the conclusion which the Railway Committee must have formed with regard to the existence of Yonge street as a street or public highway across which the railways are constructed, but it is strongly confirmatory thereof. I agree with the trial Judge that "the existence of the prolongation of Yonge street as a public way or communication in the nature of a street running to the south front of the works constructed for the Don branch, and crossing the tracks of the Canadian Pacific Railway Company, as well as the Grand Trunk Railway Company, on the Esplanade, is abundantly established both in fact and in law."

The Railway Committee, therefore, had jurisdiction to entertain and deal with the defendants' application. And having jurisdiction it was for it and not for any of the ordinary tribunals to determine how and by what means the danger complained of was to be remedied or avoided. It is said that the order operates harshly on the plaintiffs. But with that we have nothing to do. Of that the Committee was the sole judge.

But it is contended that, assuming that the Railway Committee was possessed of general jurisdiction in the

premises, the order made was ultra vires and without jurisdiction because it assumed to direct the construction of a bridge and also a "diversion" of Yonge street from the line by which it at present connects Front and Esplanade streets, and because it directs the appropriation by the plaintiffs, for the purposes of the so-called diversion, of lands and buildings now the property of the plaintiffs the Grand Trunk Railway Company. The point was made that sec. 187 only authorizes a bridge or a diversion, and not both, and there was much learned argument as to whether the word "or" should be treated as disjunctive or should be read as "and," and so make the powers and remedies cumulative. But for the purposes of this case, it is not necessary to refine on the language of the section. Read together with sec. 188, and in its light, it appears to be intended to invest the Committee with power to direct or order the execution of any work rendered necessary by or properly incidental to the carrying out of the main design determined upon. And anything that is rendered necessary by the primary work, it should be within the power of the Committee to direct to be done. It is only necessary to ascertain what the decision of the Railway Committee was, and to see whether what was ordered in consequence of that decision was within their power and authorities under sec. 187. The decision was that the immediate construction of a bridge over the railway tracks was necessary for the protection of the travelling public, and that upon the completion of the bridge the crossing of the railway tracks at rail level would be unnecessary and dangerous. The Committee therefore directed that a bridge should be constructed, either upon the west or east side of Yonge street, at the option of the defendants, so as to give a straight crossing over the railway tracks, and that, upon completion of the bridge, Yonge street, where it crossed the railway on the level, should be closed.

But, inasmuch as the bridge must start at the south side of Front street, and as the width of the masonry for the piers and columns would occupy the greater part of the present width of Yonge street southerly to and across Esplanade street to the tracks, and as it was necessary that Yonge street between Front street and the tracks should continue available for traffic, it was essential to widen Yonge street for that purpose.

The direction as finally made with regard to the widening, and of which the plaintiffs complain, was that, "with a view to overcoming the inconveniences caused by the construction of the said bridge on the westerly side of Yonge street, it is ordered that the Grand Trunk Railway Company of Canada and the Canadian Pacific Railway Company shall expropriate or otherwise acquire a strip of property about 44 feet in width on the east side of Yonge street extending southerly from Front street to Esplanade street as shewn upon the said plan, and that such strip of property shall be used as a diversion of Yonge street and as and for a highway for the purpose of and to form part of Yonge street. The said expropriation shall be made and Yonge street so widened before the commencement of the erection of the bridge or so soon thereafter as may be reasonably possible, and the cost of such expropriation, widening, and all damages occasioned thereby shall be borne by the Grand Trunk Railway Company of Canada and the Canadian Pacific Railway Company in equal shares."

While these directions may appear to operate with some degree of hardship upon the plaintiffs, yet, if they were within the jurisdiction of the Committee to give, they cannot be reviewed and declared void on that ground.

Now, the name given to that which is directed with regard to Yonge street is of no consequence. Call it a diversion or a widening, both of which terms are applied to it in the order, or a deviation, as it was termed in argument, the essence is the same—it is a work necessary for the convenience of the traffic which would otherwise be impeded by the construction of the bridge. And it can hardly admit of a doubt that, when the carrying of a municipal highway by means of a bridge over the tracks of a railway involves carrying it over another municipal highway lying alongside and running parallel to the railways' tracks, there is, incidental to the power under sec. 187 to order the bridge, power to preserve or provide proper access to and from the parallel highway from and to the highway from which the bridge springs. Matters of this nature must necessarily be the subject of consideration on every application like the present, and it is to be assumed that in every case the Committee would endeavour to avoid creating any greater change or causing any more inconvenience than the nature of the work necessarily called for.

The fact that the direction involves the acquisition of lands, or that some of the lands to be used for the purposes of the work are now the property of the Grand Trunk Railway Company, does not appear to oust the jurisdiction of the Committee. Section 187 clearly contemplates the taking of land when needed for the proper carrying out of the requirements of the Committee. And when all or some of the land needed is already the property of one of the railway companies affected by the order, the matter is reduced to a question of adjustment between them. It has not been shewn in these actions that the present use made by the Grand Trunk Railway Company of the lands in question renders impossible or even difficult its devotion to the purposes directed by the Committee, even if that could properly be the subject of inquiry except before the Committee.

It is further contended on behalf of the plaintiffs that, even if the order could have been validly made by the Railway Committee, it is void because of the want of the sanction of the Governor-General in council. It is argued that no sanction was validly given in accordance with the provisions of the Railway Act, 1888, and that in any event the Governor in council could not alter or vary the terms of the order, and that by changing the dates specified in the order of the Committee for the commencement and completion of the work, the order was rendered void.

These contentions may be dealt with upon the assumption that the effect of the Statute 4 Edw. VII. ch. 32, sec. 1, was to leave the legislation as regards the powers, authority, and jurisdiction of the Governor in council in the same plight and condition as if the Railway Act of 1903 had not become law.

What then was required to be done or might be done by the Governor in council with respect to the order made by the Railway Committee under date of 14th January, 1904? It is, of course, quite plain, upon the language of sec. 187, that joint action is required in order to give vitality or operative effect to a decision of the Committee that it is expedient or necessary for the public safety to require a railway company to do certain acts or perform certain works. No doubt the preliminary inquiries and the report of the conclusions thereon are made by the Railway Committee, but what they have done goes for naught unless the sanction of the Governor in council is given. In effect it is nothing more than a report or recommendation submitted for the

consideration of the Governor in council, and is there finally dealt with. Is there legally or constitutionally anything to prevent the Governor in council from adopting the recommendation in whole or with such alterations as upon discussion in council appear proper to be made? The expression "Governor in council" in this section has no unusual meaning. When it says "with the sanction of the Governor in council" it means the Cabinet or Privy Council acting in the ordinary constitutional way. It is not a case of conferring a special power, but a case of the council exercising its ordinary functions.

It is well known, of course, that the practice in the Dominion of Canada for a number of years has been in accordance with constitutional usage that the business in council is done in the absence of the Governor-General. The mode in which business is done is by report to the Governor-General of the recommendations of the council sent to the Governor-General for his consideration, discussed when necessary between the Governor-General and the Premier, and made operative by being marked "approved" by the Governor-General. See Todd's Parliamentary Government under Colonial Institutions, pp. 37, 38. The matter is first brought before the council in the form of a memorandum or report by a responsible Minister of the Crown, generally containing his recommendations. But the council need not accept or adopt the memorandum or report on the recommendations as made. It is for it to take such action as seems appropriate. And in this must be involved the right and the power to make such changes in a report or recommendation of the Railway Committee, when submitted, as may be recommended by the Minister submitting the same, or as may be decided upon after discussion in council. The final conclusion of the council approved by the Governor-General is the sanction of the Governor in council required by sec. 187.

In this particular instance the order passed by the Railway Committee on 14th January, 1904, was brought before the council by the Minister of Railways and Canals, who was the chairman of the Committee, with a recommendation that it be sanctioned except as to the dates for commencement and completion, which he recommended should be 15th October, 1904, and 15th April, 1905, respectively, instead of the dates mentioned in the tentative order of 14th January, 1904. The council adopted the recommenda-

tion and submitted it for approval, and it was approved by the Governor on 7th October, 1904. It appears to me that no reasonable exception can be taken to this procedure or the order which is the outcome of it. In any case I should have thought that in the matter of dates which were not in any respect of the essence of the order, their alteration by the Governor in council could have had no possible effect upon its validity.

In this view, it does not seem to me that there was any necessity for the subsequent proceedings taken while the cases were before the trial Judge.

It was argued that, inasmuch as the dates fixed by the Railway Committee had expired before this action of the Governor-General in council, the order was effete and could not be revived. But the answer is that it was not an operative order at all until sanctioned. The whole order was tentative, and the dates were not binding on any of the parties. The power to deal with it and alter or vary it in any particular resided with the Governor in council until it was finally sanctioned. After that, if it became necessary to extend the time fixed for the completion of the work, the power to do so, upon proper cause shewn, is given to the Railway Committee under sec. 189.

It may, perhaps, be proper to refer to an objection taken, that the order provides no proper place for the terminus of the bridge at its southern end, the locus at present being partly water in the slip between the wharves to the east and west of the present termination of Yonge street at the water front. One answer to this is that in point of fact the part now covered by water really forms part of Lake street under the Windmill agreement, and that all that is needed to secure a landing for the bridge is the extension of Lake street to the east in accordance with the terms of the agreement, and, no doubt, defendants will gladly do whatever may be their share of that work. But the question of the terminus of the bridge was for the Committee alone. There being jurisdiction to deal with the subject of a bridge, it is not for the Courts to enter into the question whether the work determined upon has been directed to be done in the most reasonable manner or in the way best adapted to carry into effect the end intended to be accomplished.

The appeals should be dismissed.

I may add that if the trial Judge had acted upon the conclusion he appears to have formed that the only relief

plaintiffs could seek was a declaratory judgment, and that the cases were not proper ones for granting such relief, I should not have been prepared to disagree with him. But, as he deemed it proper, influenced by the importance of the questions involved and the apparent anxiety of all parties to obtain a decision upon them, to deal with the whole case, and has done so in the most careful, painstaking, and thorough manner in every branch and detail, it seemed to me to be undesirable to dispose of the case otherwise than on a consideration of the merits.

OSLER and GARROW, JJ.A., each gave reasons in writing for the same conclusion.

MACLAREN, J.A., also concurred.

CARTWRIGHT, MASTER. SEPTEMBER 18TH, 1907.

CHAMBERS.

BERRY v. HALL.

HALL v. BERRY.

Consolidation of Actions—Cross-actions—Possession of Land—Specific Performance of Contract—Burden of Proof—Stay of one Action—Judicature Act, sec. 57, sub-sec. 12.

Motion by Berry, plaintiff in the first action and defendant in the second, for an order under the Judicature Act, sec. 57, sub-sec. 12, staying the second action and allowing the claim of the plaintiff therein to be set up in the first action, etc.

H. D. Gamble, for Berry.

S. H. Pritchard, for Hall.

THE MASTER:—By the writ of summons in the first action the plaintiff therein asks for possession of a lot in the town of Haileybury. It was issued on 16th May. The statement of claim was delivered on 3rd September, and states that plaintiff is owner of the lot in question, and that

in October last defendants offered to buy the same for $2,250, but they were not to have possession until payment; that defendants paid a deposit of $375, and some time in October unlawfully took possession, but refuse to give up possession or pay the balance of the purchase money.

The second action was begun on 28th May, claiming specific performance of an alleged agreement made on 3rd October, 1906, for sale of the lot in question. The plaintiff in this at the same time delivered a statement of claim, and Berry delivered a statement of defence and counterclaim on 3rd September, being the day on which the statement of claim was delivered in his action.

On 6th September a statement of defence and counterclaim was delivered in the first action, repeating the allegations made in the statement of claim in the second action, and on 14th September Berry replied to and joined issue on this.

The first action might be tried by a jury, but the second is a non-jury case. The jury sittings at North Bay are fixed for 7th October, and the non-jury for 9th December. But under the Judicature Act, sec. 90, and Rule 538 (e), the latter can be set down for the earlier sittings, and there is no reason why it should not be ready for trial at that time, especially as both parties are anxious for a speedy hearing.

. . .

It was conceded that an order should go staying one of these actions. The only question was which should be stayed. This is a matter of some difficulty. The whole question is fully considered in Thomson v. South Eastern R. W. Co., 9 Q. B. D. 320. It will be sufficient to refer to that case without repeating the remarks of Brett, L.J. From these it appears that the question of which is the earlier action is not important, unless there is nothing else to guide the Judge. The ratio decidendi is concisely stated by Holker, L. J. (at p. 335): "In such a matter as this I cannot be confident, but it seems to me to be reasonable that the party to the litigation who has substantially everything to prove in it, and who would fail substantially unless the necessary evidence were produced, should be allowed to commence the proceedings at the trial and to have the control of the action." In this he was adopting the ground on which the matter was put by Brett, L.J.

Applying this principle to the present case, it would seem to follow that the second action is the one which should be

allowed to proceed, as the whole burden of proof is on Mr. Hall. Although the statement of defence in the first action commences with a denial of the plaintiff's title, yet, as it continues, it admits his title, and states an agreement of plaintiff to sell and delivery of possession by him to defendants. There is no allegation of an agreement in writing, and Berry relies on this as a defence, under the Statute of Frauds, to the second action. It is, therefore, clear that Hall must give such evidence as will entitle him to a judgment requiring plaintiff to complete the sale, and that, if this cannot be adduced, the plaintiff must succeed. The real dispute seems to be as to certain alterations and improvements which Hall alleges Berry was to make, and which Berry repudiates; but Hall must prove his right to retain possession and to have a conveyance if Berry refuses to carry out the sale.

The case of Holmes v. Harvey, 25 W. R. 80, seems to have proceeded on the ground that actions for specific performance were at that time assigned to the Chancery Division, so that the judgment has no application to our practice.

The order will be to stay the first action, and let the whole question be tried in the other, which should be so expedited by both parties that it can be set down at the October sittings. The costs of this motion will be in the cause, and those of the first action will abide the result of the second action.

SEPTEMBER 19TH, 1907.

DIVISIONAL COURT.

KIRTON v. BRITISH AMERICA ASSURANCE CO.

Fire Insurance — Insured Buildings Destroyed by Fire from Railway — Compromise of Owner's Claim against Railway Company — Bona Fide Settlement — Claim against Insurance Company — Subrogation.

Appeal by plaintiff from judgment of MABEE, J., at the trial at St. Thomas, dismissing an action to recover $550 upon an insurance policy against fire. Plaintiff had a farm adjoining the Pere Marquette Railway, and his barns were

burnt, probably by the fault of the railway company. The barns were valued for the purposes of this action at $1,250, and were insured by defendants for $550. Plaintiff had received $450 from the railway company, but not in full of his claim. It was held at the trial that plaintiff could not recover for the benefit of the railway company.

W. H. Blake, K.C., for plaintiff, contended that the right to subrogation arises only where the insurer pays the total loss.

H. D. Gamble, for defendants, contra.

THE COURT (MEREDITH, C.J., MACMAHON, J., MAGEE, J.), held that it was competent for plaintiff, acting bona fide, to compromise his claim against the railway company for a sum less than the total loss by the burning of his buildings, assuming that they were liable to him. Also, that a settlement for $1,000, in the circumstances of the case, was not unreasonable, and a settlement for that amount could not be said to be otherwise than a bona fide one. If plaintiff were willing to treat his claim against the railway company as amounting to $1,000 and to be debited with that sum, there should be judgment in his favour for $250 with costs; but no costs of appeal to either party. If plaintiff were not willing to do that, there must be further investigation of the circumstances of the transaction between the railway company and the plaintiff; the evidence upon this point to be taken at the next sittings at St. Thomas. Plaintiff to have time to elect.

SEPTEMBER 19TH, 1907.

DIVISIONAL COURT.

MILLS v. SMALL.

Building Contract—Provisions of—Construction—Architect—Remuneration—Extra Work—Payment for, outside Contract—Increase in Cost—Knowledge and Acquiescence of Owner—Breach of Covenant—Damages—Cross-action—Stay of Execution.

Appeal by defendant from judgment of RIDDELL, J., 9 O. W. R. 893, in favour of plaintiffs in an action to recover

moneys due for work done for defendant upon a theatre in Hamilton under a contract with the Fuller Claflin Theatre Building Company of New York. The aggregate amount of the work was not to exceed $22,500. Ultimately the building cost $34,000. Riddell, J., allowed the Fuller Claflin Co. $450 and $500 for extra services, the plaintiff Righetti $600, the Roeser & Sumner Co. $218.50, and plaintiff Mills $45.28.

J. L. Counsell, Hamilton, for defendant, contended that some of these sums should not have been allowed.

H. H. Bicknell, Hamilton, for plaintiffs, contra.

THE COURT (MEREDITH, C.J., MACMAHON, J., MAGEE, J.), dismissed the appeal with costs, without prejudice to any action which may be brought by plaintiff to recover damages for breach of alleged covenant that building would be completed for $22,500. Execution in this action for claim of company of $950 to be stayed for 6 months to enable defendant to set off his claim.