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JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

JULY 27TH, 1917

FIDELITY AND CASUALTY CO. OF NEW YORK v. MITCHELL.

Insurance—Accident Insuarnce—Bodily Injury—Accidental Means—Breach of Warranty—Extent of Disability—Sprained Wrist—Latent Tuberculosis—Infection—Total Disability—"Exclusively of all other Causes."

An appeal by the company from the judgment of the Second Divisional Court of the Appellate Division of the Supreme Court of Ontario, *Mitchell* v. *Fidelity and Casualty Co. of New York* (1916), 37 O.L.R. 335, 10 O.W.N. 311, affirming the judgment of MIDDLETON, J. (1916), 35 O.L.R. 280, 9 O.W.N. 341.

The appeal was heard by a Board composed of VISCOUNT HALDANE, LORD DUNEDIN, LORD SHAW, and SIR ARTHUR CHANNELL.

Sir John Simon, K.C., D. L. McCarthy, K.C., and M. W. Slade, for the appellants.

P. O. Lawrence, K.C., and J. D. Montgomery, for Mitchell, the respondent, were not called upon.

The judgment of the Board was delivered by LORD DUNEDIN, who said, after stating the facts, that three grounds of defence had been argued, viz.: (1) that there was breach of warranty on the part of the plaintiff, who was thereby disentitled to sue on the policy; (2) that the injury sustained by the plaintiff through accidental means did not independently, exclusively of all other causes, result in immediate continuous and total disability; (3) that the disability did not prevent him from performing any and every kind of duty pertaining to his occupation.

As to the first and third grounds, the Board had no hesitation in coming to the same conclusion as the Courts below.

The more difficult and delicate part of the case was in relation to the second ground. It was strenuously urged by the appellants that the disability could not be said to be caused by the accident independently of another cause; the other cause being the tuberculous condition, without which there would not have been continuous disability, as the sprain would have passed away in ordinary course.

The point was narrow and not without difficulty. But their Lordships agreed with the result reached in the exceedingly careful and able judgment of MIDDLETON, J., confirmed unanimously by the learned Judges of the Court of Appeal. His view is most tersely expressed in a single sentence: "This diseased condition is not an independent and outside cause, but is a consequence and effect of the accident."

Their Lordships agreed with the counsel for the appellants that the matter was not concluded by the cases on the Workmen's Compensation Act. What is sought in such cases is a chain of causation starting from the accident, without "any intervening circumstance to break the chain of causation:" Coyle or Brown v. John Watson Limited, [1915] A.C. 1.

What was to be determined here was the construction of the clause in the policy, "bodily injury sustained through accidental means and resulting directly, independently, and exclusively of all other causes," in total disability. Prior to the accident there was only a potestative tuberculous tendency; after it, and owing to it, there was a tuberculous condition. The accident had a double effect; it sprained the tendons and it induced the tuberculous condition. These two things acted together, and were the reason of the continuing disability; but, while they were both ingredients of the disabled condition, there was, on the true construction of the policy, only one cause, viz., the accident.

The appeal should be dismissed.

[The judgment is reported in the English Law Reports, [1917] A.C. 592.]

APPELLATE DIVISION.

SECOND DIVISIONAL COURT. NOVEMBER 23RD, 1917.

*OGILVIE FLOUR MILLS CO. LIMITED v. MORROW CEREAL CO.

Contract—Formation of—Purchase and Sale of Flour—Oral Agreement—Confirmation—Evidence—Offer—Letters—Telegrams—Findings of Trial Judge—Appeal—Statute of Frauds—Damages for Breach—Excessive Assessment by Trial Judge—Reference for Fresh Assessment.

Appeal by the defendants from the judgment of LATCHFORD, J., at the trial, in favour of the plaintiffs for the recovery of $12,700 in an action for damages for breach of an agreement to deliver a quantity of flour.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

Harcourt Ferguson, for the appellants.

W. N. Tilley, K.C., for the plaintiffs, respondents.

RIDDELL, J., read a judgment in which he said that (according to the plaintiffs' version of the facts) one Weeks, the general sales-agent of the plaintiffs, met Morrow, the defendants' manager (in reality the defendant), on the 12th October, 1916, in Montreal, and they travelled together to Toronto the same evening. Weeks wanted 20,000 bags of flour, and some negotiations took place between them. Weeks offered to buy 10,000 bags at $7.05 and another 10,000 bags at $7. Morrow was willing to sell at $7.05, but not quite satisfied to sell the extra 10,000 at $7. Before Weeks went on to London, Morrow getting off at Toronto, it was arranged that Morrow was to "confirm" the sale of 10,000 bags at $7.05, i.e., telegraph whether he would accept the offer of Weeks to buy 10,000 at $7.05; and that, later on, he was to let Weeks know about the 10,000 at $7. The same day, Morrow (in Toronto) called up Weeks (in London) by telephone and said that the 10,000 were all right, whereupon Weeks asked him to "confirm" the sale by wire. Morrow accordingly wired to Weeks: "We confirm sale six thousand bags October shipment four thousand November seven, five bulk Montreal also your

* This case and all others so marked to be reported in the Ontario Law Reports.

giving us until to-night on ten thousand more at seven dollars Montreal thanks." At the same conversation over the telephone, Morrow had asked if the offer was still good for the other ten, and he was informed that it was.

Not long after the first telegram, came a second: "Book ten thousand bags seven dollars bulk Montreal October November shipment our option."

The same day Morrow sent what he called "confirmation of sale" to the plaintiffs in Montreal:—

"Confirmation of Sale.
"Morrow Cereal Company.
"Toronto, October 13th, 1916. No. 1552.
"To the Ogilvie Flour Mills Co. Ltd.,
"Montreal, Que.
"Subject to our terms and conditions
"10,000 98's 90% patent Western wheat flour.....7.05
"Bulk basis Montreal.
"Date of shipment, 6,000 bags October
4,000 bags November.

10,000 bags.

"Morrow Cereal Company
"per Morrow."

He also sent a corresponding confirmation for 10,000 bags at $7.

("Bulk basis" means that the purchaser supplies the bags, or returns them if the vendor supplies them.)

On the 14th or 15th October, Weeks and Morrow met again in Toronto, and Morrow told Weeks to send the bags to Toronto. Weeks agreed to do so. The bags were sent accordingly, and Morrow was so informed by Weeks about a week thereafter. On the 23rd October, the shipping clerk of the plaintiffs sent to the defendants what purported to be confirmations of the purchases. This being received on the 24th October, the defendants wired: "Your acceptance on flour received this morning twelve days after our offer sorry too late heavily oversold." (Flour had advanced in price.) The plaintiffs wired, "What does your telegram of even date mean? We do not understand."

The defendants did not supply the flour, this action was brought, and judgment given for the plaintiffs.

Morrow's story was, that the conversation on the train amounted simply to a request by Weeks that Morrow should see what he could do and make an offer; that the telephone conversation was that, "subject to certain terms, we would be able to sell him

10,000 bags of flour at $7.05," i.e., "subject to them staying out of the market until the 1st November, as it would give us a chance to get the flour;" that Weeks said he would have to see or telephone Mr. Black, the manager at Montreal, and said, "You send along a wire, and if it is all right we will confirm it back;" that Morrow proposed to offer 10,000 more bags subject to these terms; that Weeks asked Morrow to send him a wire on that so that he might have something to shew to Mr. Black—and that Weeks was to notify him. Morrow did not deny that, on the 14th or 15th, he told Weeks to send the bags to Toronto.

Weeks denied the story of Morrow where it differed from his own.

The learned Judge said that the important question of fact was: "Were the telegrams of the defendants to London acceptances of offers, more or less definite, made by Weeks, or were they offers by the defendants which required acceptance?" The answer depended upon the credibility of the two witnesses, Weeks and Morrow. The trial Judge accepted the story of Weeks, and the Court could not say he was wrong.

If the learned Judge (RIDDELL, J.) had to pass upon the question without the assistance of the trial Judge's finding, his conclusion would be the same, both upon the probabilities and upon the fact that Morrow did not deny what Weeks swore to as to the directions by Morrow to "send the bags" to Toronto—a clear acknowledgment of the existence of a contract.

There was no difficulty from the Statute of Frauds.

The damages appeared to be excessive.

The appeal should be dismissed except as to damages, and the question of damages should be referred to the Master, who should dispose of the costs of the reference.

There should be no costs of the appeal but the plaintiffs should have the costs of the action.

LENNOX and ROSE, JJ., were of the same opinion as RIDDELL, J., for reasons stated by each in writing.

MEREDITH, C.J.C.P., read a judgment in which he dissented from the view of the other members of the Court, in regard to the main question. He agreed that the damages were excessive.

Judgment as stated by RIDDELL, J.

SECOND DIVISIONAL COURT. NOVEMBER 23RD, 1917.

MATHIEU v. LALONDE.

Limitation of Actions—Possession of Land—Tenancy—Payment of Rent by Payment of Taxes and Work Done upon Land—Length of Possession—Compensation for Improvements Made under Mistake of Title.

Appeal by the plaintiff from the judgment of SUTHERLAND, J., 12 O.W.N. 373.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

J. A. Macintosh, for the appellant.

M. J. Gorman, K.C., for the defendant, respondent.

The judgment of the Court was read by MEREDITH, C.J.C.P., who said that the evidence did not, in his judgment, warrant the conclusion of the trial Judge that the defendant had acquired title to the land in question under the Statute of Limitations.

The proper conclusion to be drawn from the whole evidence seemed to be, that, until the time of the correspondence between the parties, the defendant was in possession as tenant of the owner of the land, paying rent by way of payment of taxes and of work done upon the land; and, since that time, there had not been, up to the time of the beginning of this action, sufficient length of possession to give title under the statute; so that the plaintiff was now entitled to the land.

But the case was one for compensation in respect of improvements, increasing its value, made upon the land by the defendant since the time when he was advised that he had good title to it.

The appeal should be allowed; and there should be a reference to the proper officer to ascertain and state the amount of such compensation, reserving further directions and all questions of costs, except the costs of this appeal, which the defendant must pay to the plaintiff on the final disposition of the case. The plaintiff to have possession of the land when the compensation is paid.

SECOND DIVISIONAL COURT. NOVEMBER 23RD, 1917.

*REX v. MARTIN.

Ontario Temperance Act—Magistrate's Conviction for Offence against sec. 41—Unlawfully Having Intoxicating Liquor—"Indian"—Jurisdiction of Magistrate—Indian Act, R.S.C. 1906 ch. 81, secs. 2 (f) (i.), 137—Evidence—Proof that Accused was an Indian—Right to Supplement Evidence before Magistrate—Habeas Corpus Proceeding—Appeal—Certificate of Attorney-General—6 Geo. V. ch. 50, sec. 95.

Appeal by the defendant from the order of SUTHERLAND, J., 12 O.W.N. 396.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

J. B. Mackenzie, for the appellant.

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

MEREDITH, C.J.C.P., read a judgment, in which he said that the real question involved was, whether the Ontario Temperance Act applied to Indians. For, if not, the magistrate who made the "conviction" was without jurisdiction; and so there was really no conviction; and the appellant should be discharged in these habeas corpus proceedings.

By sec. 95 of the Act, an appeal to this Court lies from any judgment or decision of a Judge of the Supreme Court, upon any application to quash a conviction made under this Act, or to discharge a prisoner who is held in custody under any such conviction; but no such appeal lies unless the Attorney-General for Ontario certifies that he is of opinion that the point in dispute is of sufficient importance to justify the case being appealed. But in such a case as this, the absence of such a certificate cannot prevent this Court from ruling that there was really no conviction, and that the prisoner should be discharged. An act done without jurisdiction, by whatever name it may be called, cannot be a conviction under the Act; the Legislature cannot have meant the section to apply to anything but a conviction made by a person having jurisdiction under the Act, for an offence within its provisions, committed by a person to whom it is applicable.

The general right of appeal to this Court, in habeas corpus proceedings, given by the Ontario Habeas Corpus Act, R.S.O. 1914 ch. 84, sec. 8, is curtailed by sec. 95 of the Ontario Temperance Act, but only in cases of conviction under that Act.

That the appellant is an Indian was sufficiently proved at the "trial"—if such the proceedings before the magistrate could be fairly called; and, if it had not been so proved, there was no good reason why it might not be satisfactorily proved in these proceedings.

An Indian who commits an offence against a provincial law, beyond the limits of an Indian reserve, may be convicted, and punished just as all other persons may: Rex v. Hill (1907), 15 O.L.R. 406; Rex v. Beboning (1908), 17 O.L.R. 23.

That being so, the appeal fails altogether; it is not open to the Court to entertain the appeal upon the other grounds relied upon by counsel for the appellant; they do not involve the question of jusridiction mentioned.

A considerable time after the hearing of the appeal, and after the Chief Justice's reasons (above summarised) had been written, the Attorney-General consented to the question whether an Indian is liable to the penalties of the Ontario Temperance Act being considered by the Court. Referring to the consent, the Chief Justice said that, for the reasons above given, he did not think that any consent or certificate was necessary, and so did not stop to inquire whether such a consent or certificate was a compliance with sec. 95 of the Act.

The appeal should be dismissed.

RIDDELL, J., also read a judgment, in which he said that (regarding the consent of the Attorney-General as a sufficient certificate) the Court was bound by Rex v. Hill, 15 O.L.R. 406, to hold that an unenfranchised Indian was subject to provincial legislation in precisely the same way as a non-Indian, at least where, as here, he was out of his reservation.

He was also of opinion that legislation such as the Ontario Temperance Act is not legislation concerning Indians: Canadian Pacific R. W. Co. v. Corporation of the Parish of Nôtre Dame de Bonsecours, [1899] A.C. 367, 372.

The defendant being no longer in custody, habeas corpus does not lie: In re Bartels, [1907] 15 O.L.R. 205.

LENNOX and ROSE, JJ., agreed in the result.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. NOVEMBER 23RD, 1917.

*RE TAGGART.

Infant—Custody—Rights of Mother—Interests of Infant—Wishes of Deceased Father—Difference in Religious Faith—Infants Act, R.S.O. 1914 ch. 153, secs. 28, 36—Appeal—Divided Court.

APPEAL by Margaret Taggart, mother of the infant Mary Frances Stella Taggart, from the order of SUTHERLAND, J., 12 O.W.N. 390, dismissing the appellant's application for an order allowing her the custody of the child (aged 9) at present in the custody of her paternal aunt, Hannah Taggart, her father being dead.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

J. M. Ferguson, for the appellant.

Harcourt Ferguson, for Hannah Taggart, the respondent.

MEREDITH, C.J.C.P., in a written judgment, said that the learned Judge at Chambers, after anxious consideration of this case, in all its features, refused the application, deeming it better, in all the circumstances, that the present custody and care should not now be disturbed.

In what may be sufficiently described as ordinary circumstances, the home of young children whose father is dead should be with their mother, all together: see the Infants Act, R.S.O. 1914 ch. 153, sec. 28. But this case is not one of such ordinary circumstances: the mother has not a house of her own or any means of supporting or educating her children, except such as she can earn by her labour at housework. She is living with her own mother and sister, and it is to this joint home that she desires to take the child, away from the home where she now is, and for some time past has been—a home in which unquestionably the child is in all respects well cared for.

The father, in his lifetime, removed the child from his own home to that in which she now is, and did so because he deemed it better for the child on account of the mother's intemperate habits.

The child being well cared for now, and having been placed where she is by her father, and having remained there till his death, with the consent, or at all events without objection

on the part of, the mother, who is now able to support the child only by going out to work, it cannot be in the child's interests that the Court should take the chances of the assertions of intemperance being wrong. It is not as if the ruling of this Court now must be irrevocable; there is nothing to prevent a future application, should the mother consider herself able at any time to dispel any doubts as to her temperate habits.

Again, the purpose of the mother seems to be mainly to bring up the child in her own religious faith; and that she has no right to do. The general rule is, that children are to be brought up in the religious faith of their father, and there is nothing in this case to take it out of that rule.

The statute-law of the Province has not encroached upon a father's right respecting the religious faith in which his children shall be brought up—it has expressly preserved it: see sec. 36 of the Infants Act; see also In re Scanlan (1888), 40 Ch. D. 200, and In re Story, [1916] 2 I.R. 328.

The appeal should be dismissed.

LENNOX, J., was of the same opinion, for reasons stated in writing.

RIDDELL, J., in a short written judgment, said that at the conclusion of the argument he was of the opinion that the best interests of the child called for an allowance of the appeal; and further consideration and a careful perusal of the evidence had confirmed him in that view.

He thought at one time that the provisions of sec. 36 of the Infants Act might prevent the Court from giving effect to the wishes of the mother; but this he now thought was not the case.

He could find nothing of binding authority compelling the Court, in the present instance, to prevent the mother having the custody of her child. The custody was the only matter in question, though it was plain that the odium theologicum (notoriously the most bitter of all) entered largely into the contest for the custody.

The appeal should be allowed.

ROSE, J., was of the same opinion, for reasons stated in writing.

The Court being divided, appeal dismissed with costs.

SECOND DIVISIONAL COURT. NOVEMBER 23RD, 1917.

*ROSS v. SCOTTISH UNION AND NATIONAL INSURANCE CO.

Insurance—Fire Insurance—Subject-matter of Insurance—Occupied Houses—Fire Occurring while some of the Houses Unoccupied—Policies not Effective as to Unoccupied Houses—Defence as to Occupied Houses—Vacancy as to Others—Change Material to the Risk — Absence of Notice — Statutory Condition 2 (Insurance Act, sec. 194) — Finding of Jury — Sec. 156 (6)—Evidence—Appeal—Costs—Interest.

Appeal by the defendants from the judgment of BRITTON, J., at the trial of the action with a jury.

The action was to recover the amount of a loss by fire sustained by the plaintiffs in respect of buildings in Keele street, Toronto, insured by the defendants. The judgment was in favor of the plaintiffs for the recovery of $12,000.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

R. McKay, K.C., and Shirley Denison, K.C., for the appellants.

H. J. McDonald and C. W. Moorehead, for the plaintiffs, respondents.

MEREDITH, C.J.C.P., read a judgment in which he said that the plaintiffs, having insured houses against injury by fire whilst occupied, sought, as to some of them, to recover compensation for injury to these houses by a fire which occurred while they were unoccupied. How was it possible that they could do so? The subject-matter of the insurance was occupied houses—no others were within the insurance contract. The bargain which the parties made was the only bargain which the Court could enforce.

Counsel for the plaintiff exhausted all possible contentions in support of the claim; but none of them came anywhere near dislodging the defendants from their stand, "That is your contract."

No application in writing was proved, or appeared to have been made, for the insurance; nor had any oral application inconsistent with the words of the policy been proved. It was true that the insurance was for a fixed period at a fixed premium; and that the houses were not insured during all that period; but that was the bargain; and there was nothing unlawful in it. Whether

reasonable or not was a question for consideration before making it, not after the loss.

There was no greater right to recover in this case than if the plaintiffs were suing for a loss which occurred before the policy came into force or after it had run out.

As to the unoccupied houses, the appeal should be allowed and the action dismissed.

As to the occupied houses, the defence was, mainly, that the vacancy of the other houses caused a change material to the risk which avoided the policy, because no notice of it was given to the insurers, as required by statutory condition 2 (Insurance Act, R.S.O. 1914 ch. 183, sec. 194).

But the case was tried by a jury, and they found that the change was not material to the risk, and so the policies were not avoided by that condition. And sec. 156 (6) provides that such a question shall be a question of fact for the jury. It cannot, however, be a question of fact for the jury if there is no evidence to go to the jury: that is, if there is no evidence upon which reasonable men could find in any but one way; but, the learned Chief Justice said, he was not prepared to say that this was such a case. There was evidence that the fire actually started upon one of the occupied premises, and there were other circumstances which brought sec. 156 (6) into effect.

Other objections made against the plaintiffs' claim were overruled upon the argument—objections which were of so little moment that they need not be dealt with again now.

The judgment should stand as to the occupied houses, that is, those occupied as dwelling-houses only.

The appellants should have their costs of the appeal, and respondents their costs of the action.

Having regard to the objections as to proofs of loss and other circumstances, the case was not one for the allowance of interest upon the amount of the loss, before judgment; no adjustment of the loss could ever have been made by the insurers with the assured except on the basis of payment in respect of unoccupied as well as occupied houses.

RIDDELL, J., was of opinion, for reasons stated in writing, that the findings of the jury should be set aside, and the action dismissed with costs thereof and of the appeal.

LENNOX, J., was of the same opinion, for reasons also stated in writing.

ROSE, J., was of opinion, for reasons stated in writing, that the appeal should be allowed and the action dismissed in so far as the policy covering the shop was concerned; that, as to the other policies, there should be a new trial to ascertain the amount of the loss; that the plaintiffs should pay the defendants the costs of the appeal; that the plaintiffs' costs of the former trial should be paid by the defendants; and that the costs of the new trial should be in the discretion of the trial Judge.

Judgment as stated by the Chief Justice.

SECOND DIVISIONAL COURT. NOVEMBER 23RD, 1917.

ELLIOT v. KEENAN BROTHERS LIMITED

Contract — Formation — Correspondence — Offer — Acceptance — Parties not ad Idem—Difference as to Subject of Contract—Purchase and Sale of Lumber—Action for Damages for Refusal to Accept.

Appeal by the defendants from the judgment of the Judge of the County Court of the County of Brant in favour of the plaintiff for the recovery of $332.13 damages, with costs, in an action for damages for refusal to accept lumber, in breach of an alleged contract.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

H. S. White, for the appellants.

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

MEREDITH, C.J.C.P., in a written judgment, said that there might have been no great difficulty in supporting the conclusions of the County Court Judge if the plaintiff had not insisted that the transaction in question included one-inch lumber, though this lumber was, in comparison with the rest of the lumber in question, little in quantity and small in value.

At the trial, a witness firmly testified that the rejection of the lumber was because of the plaintiff's insistence that the one-inch boards were included in the transaction, and should be taken. On the argument of the appeal, the plaintiff still maintained that the one-inch lumber was included in the sale which he alleged.

The Statute of Frauds was pleaded, and so the transaction must be found in the writings. And they opened with the plaintiff's offer, by post-card, to sell to the defendants one car two-inch maple and two cars two-inch white and red oak and some white ash. The next writing was the memorandum made by the witness Little, after going to see the lumber for the defendant, in consequence of their having received the post-card offer. The memorandum was intended to evidence a purchase to be made of the lumber, if the defendants accepted it; the memorandum was seen by the plaintiff, but not signed by him. In it two-inch lumber only is mentioned. Then follows the defendants' offer to buy, at the price mentioned in the memorandum—$23 a thousand—the plaintiff's stock of oak, maple, and white ash, according to his offer. Dimensions are not in any way expressly mentioned in this writing. The plaintiff's answer to that offer, conveyed by post-card, states that the plaintiff "will deliver all my maple, oak, and white ash, f.o.b. car, Vanessa street, for $23 per M.," etc. And the last writings of importance upon this subject are the defendants' letters to the plaintiff of the 11th August, in which they say, "Will you kindly write to us by return mail when it will be convenient to you to ship the 2M. maple, ash, and oak we bought from you some time ago?" and the plaintiff's answer to it by letter in these words: "Yours to hand. Will try and be ready to load lumber next week. Will telephone you when I get cars." Not a word of objection to or comment on the statement in the defendants' letter—in effect, that their purchase was of two-inch lumber.

The defendants denying, as they do, the purchase of any but two-inch lumber, it cannot be held, upon the evidence afforded by these writings, that they purchased also one-inch lumber. The most that can be said is, that there was really no agreement —that the parties were not bargaining as to the same thing: the subject-matter of the negotiations on the one side was "all my lumber," whilst on the other it was "your two-inch lumber."

Subsequent letters seem to indicate that that which the defendants then had most in mind was the quality, not the dimensions, of the lumber; but all that might be although the transaction, so far as they were concerned, related only to the two-inch lumber; and the rejection of the lumber was, in part at least, because of the plaintiff's insistence upon delivery of the one-inch lumber under the contract; and this action was brought to recover damages in respect of the one-inch as well as the two-inch lumber, and such damages had been claimed throughout.

If the parol evidence could affect the question, it would be difficult to find greater certainty in it than in the writings.

The result is, that the plaintiff cannot enforce the contract he sets up and insists upon; and, never having been willing to carry it out according to the defendants' view of it, has no claim upon them in respect of it.

The appeal should be allowed and the action dismissed.

LENNOX, J., concurred in the judgment of the Chief Justice.

RIDDELL, J., agreed in the result, for reasons stated in writing.

ROSE, J., also agreed in the result.

Appeal allowed.

SECOND DIVISIONAL COURT. NOVEMBER 23RD, 1917.

*DURANT v. ONTARIO AND MINNESOTA POWER CO.

Negligence—Injury to and Death of Person Caused by Fall of Frozen Surface in Gravel-pit—Servant of Teamster—Contract of Teamster with Defendants—Undertaking to Remove Surface—Dangerous Place—Knowledge of Danger—Duty Owed by Defendants—Breach—Cause of Death—Direction of Person in Charge—Negligence of Deceased—Evidence—Contributory Negligence—Action under Fatal Accidents Act—Damages—Reasonable Expectation of Pecuniary Benefit—Parents of Deceased.

Appeal by the defendants from the judgment of KELLY, J., 12 O.W.N. 394.

The appeal was heard by MEREDITH, C.J.C.P., LENNOX, J., FERGUSON, J.A., and ROSE, J.

E. G. McMillan, for the appellants.

H. H. Dewart, K.C., for the plaintiff, respondent.

MEREDITH, C.J.C.P., in a written judgment, said that the plaintiff's son was killed while working as a teamster, loading gravel in a gravel-pit. The gravel was under a cover of frozen earth and snow, which had not been sufficiently removed, in consequence of which the men, in loading their waggons, were obliged to work in a stooping position, under, or partly under, an overhanging surface of such earth and snow, a part of which fell on the plaintiff's son and killed him. The gravel was being taken out by the defendants by the teamsters at so much for each

load. The plaintiff's son was not one of the contracting teamsters; he was merely hired by such a teamster to work for him. The surface earth and snow had to be removed in order that the gravel might be reached and got out; and it was the defendants' duty to have that done; that was the agreement between them and the teamsters, as well as between them and the owner of the land from whom they had acquired the right to take the gravel at so much a load or cord.

The defendants failed to perform properly that duty; they did not employ enough men to do it; and the failure to perform it was the cause of the young man's death; and that seems to me to be enough to make the defendants liable in this action.

It was argued that, even though the defendants might be liable to a teamster with whom they had contracted, they were not liable to a teamster's servant, with whom they did not contract. That argument could not prevail. In the circumstances of this case, a duty was cast by law upon the defendants to every one who was rightly there, employed in removing the gravel for or at the instance of the defendants—a duty to take reasonable care that the frozen surface should be removed in such a manner as not to be a source of needless danger to those so employed; that duty they neglected; and what was complained of in this action was a direct consequence of such negligence. It was not as if the young man was a trespasser or a volunteer; he was there by the defendants' leave, for their benefit as well as his own, just as his master would have been if there instead; and there where it was the defendants' business to have the surface properly removed so that the work in which the men were engaged could be conveniently done.

Reference to 29 Cyc. 426; Smith on Negligence, 2nd ed., pp. 7, 8.

This case is not like Smith v. Onderdonk (1898), 25 A.R. 171, or Caledonian R.W. Co. v. Mullholland, [1898] A.C. 216—more like Heaven v. Pender (1883), 11 Q.B.D. 503, and Elliott v. Hall (1885), 15 Q.B.D. 315.

The claim of a teamster for personal injuries sustained by reason of failure to remove the surface would not arise out of the contract; that was not the purpose of the contract or the intention of the parties to it; its purpose and their intention were to enable the teamsters to do their work and earn their pay more easily; the price would have been greater per load if the defendants had not undertaken to remove the surface, and the price of the gravel would have been greater if the owner of the land had to remove it. Both teamster and teamster's servant appeared to be on a

like footing in respect of a claim of that character; that is, in the circumstances, there was a duty upon the defendants, towards every one there as this young man was, employed in removing gravel, to take reasonable care that the frozen surface was so removed that it should not be a needless danger to them when so engaged.

Reference to Le Lievre v. Gould, [1893] 1 Q.B. 491, at p. 502.

The day before that on which the death was caused by the falling earth, the defendants' servants, in or towards the performance of their duty to remove the surface, had exploded three charges of dynamite in the frozen surface soil so as to loosen it and remove it. This was done about six o'clock in the evening, an hour after sunset, and so no examination was or could be made of the full effect of the explosion; and on the following morning no examination of any kind was made; and yet the teamsters were ordered by the defendants' same servant to load the gravel at that part of the pit where the explosion had taken place. The explosion rent the surface without throwing it down, but in such a manner that, when the men removed some of the gravel under it, it fell and caused the death of the young man; the rent was one which any reasonable examination in daylight of the place of the explosion should have discovered; and so the defendants were liable because of this neglect of their servant—the direct cause of the death.

The young man was not the cause of his own injury. He knew nothing of the explosion or of the want of care in respect of it, and he was ordered by the servant of the defendants to work there; he was without experience—it was his first and last day there. The defence of contributory negligence was on a like footing in those respects.

Nor could the Court interfere with the judgment on the ground of the damages being excessive: the plaintiff had made out a stronger case than usual in this respect.

The appeal should be dismissed.

FERGUSON, J.A., read a judgment to the same effect.

LENNOX and ROSE, JJ., concurred.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. NOVEMBER 23RD, 1917.

REX v. CURRIE.

Criminal Law—Unlawful Application of Mark Appropriated for Use of the Crown—Criminal Code, secs. 432, 433—Proof of Application—Stated Case.

Appeal by the defendant (upon a stated case) from a conviction by the County Court Judge's Criminal Court (York) on the 10th October, 1917, for that the defendant "did, without lawful authority, apply a Government stamp on or upon shells to be used for naval and military purposes, contrary to the Criminal Code."

The question stated was, whether there was any proof that the mark was one covered by the section of the Criminal Code under which the defendant was convicted.

The appeal was heard by MEREDITH, C.J.C.P., LATCHFORD and LENNOX, JJ., FERGUSON, J.A., and ROSE, J.

J. F. Boland, for the defendant.

Edward Bayly, K.C., for the Crown.

MEREDITH, C.J.C.P., reading the judgment of the Court, said that, on the supposition that the defendant had been prosecuted and convicted of having unlawfully applied a mark appropriated for His Majesty's use under an order in council, as provided for in sec. 432 of the Criminal Code in its present form, contrary to sec. 433, an application was duly made under sec. 1014 of the Code for a reserved case on the question whether there was any proof adduced at the trial of the mark having been so appropriated in the manner prescribed by sec. 432; and eventually that question was stated for the opinion of this Court.

It now turned out that that supposition was an erroneous one; that the prosecution and conviction of the defendant were not for an unlawful use of such a mark; but were for the unlawful use of a mark which, under another part of sec. 432, is expressly and directly appropriated to His Majesty's use.

The case, therefore, required no consideration: the enactment itself afforded the proof of the appropriation of the mark.

Other questions were suggested and discussed, but the Court had power only to deal with the question reserved, which must be answered in the affirmative.

Conviction confirmed.

SECOND DIVISIONAL COURT. NOVEMBER 23RD, 1917.

*GALLAGHER v. TORONTO R. W. CO.

Negligence—Automobile Injured by Street-car Running into it—Cause of Accident—Findings of Jury—Negligence Consisting in Excessive Rate of Speed of Street-car—Failure to Connect Negligence Found with Injury—Finding against Contributory Negligence of Driver of Automobile—Evidence—Inference—Onus of Proof.

Appeal by the defendants from the judgment of one of the Judges of the County Court of the County of York, upon the findings of a jury, in favour of the plaintiff for the recovery of $208.20 damages and costs in an action for injury to the plaintiff's motor-car by its being struck by a street-car of the defendants, by reason of the negligence of the defendants' motorman, as the plaintiff alleged.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL and LENNOX, JJ., FERGUSON, J.A., and ROSE, J.

R. McKay, K.C., for the appellants.

I. F. Hellmuth, K.C., for the plaintiff, respondent.

FERGUSON, J.A., in a written judgment, said that the first three questions to and answers of the jury were: "(1) Were the plaintiff's damages caused by the negligence of the defendants? A. Yes. (2) If so, in what did such negligence consist? A. Excessive rate of speed. (3) Was the plaintiff guilty of any negligence which contributed to the collision? A. No."

The expression "excessive rate of speed," as used by the jury, is a relative term: it does not mean a rate beyond that fixed by statute, by-law, or regulation, but a rate beyond which the street-car would not have been driven by a motorman exercising the care which a man of common prudence would have exercised, having regard to all the circumstances.

Whether or not that standard had been exceeded, and whether or not the excess was the cause of the accident, were questions of fact for the jury. They answered both in favour of the plaintiff; and the question before the Court on the appeal was not whether the speed was excessive, or whether the excessive speed was the cause of the accident, but, was there before the jury any evidence on which they could make those findings?

In the city of Toronto, Yonge street is the main north and south artery and Bloor street one of the main east and west arteries of traffic. There was evidence that the plaintiff drove his car south in Yonge street, turned into Bloor street, and, when proceeding west in Bloor street, at a rate of about 12 miles an hour, was overtaken by the defendants' street-car, and his auto-car smashed and damaged. There was evidence that the street-car was travelling at from 15 to 20 miles an hour; that there had been a recent fall of snow; and that the pavement and rails were slippery. The collision and damage were established.

The jury were asked to find how and why the collision occurred. The plaintiff's evidence was directed to the theory that the street-car overtook and smashed his auto-car because the motorman was either unable or unwilling to check the speed of his car. The defence theory was, that, after leaving Yonge street, the plaintiff drove his car past and on to the tracks in front of the street-car, and there stalled or otherwise suddenly checked the speed of his auto-car so that the motorman did not have an opportunity to stop the street-car in time to avoid the accident, and that the plaintiff was the author of his own damage.

The jury had accepted the plaintiff's theory; but, instead of finding that the motorman did not try to avoid the collision, they in effect said that he was unable to stop, not because the plaintiff did what the motorman said the plaintiff did, but because the motorman was driving his car at such a high rate of speed as to deprive himself of the control necessary to enable him on a slippery rail to check or stop his car quickly enough to avoid hitting the plaintiff's car travelling ahead of him at the rate of 12 miles an hour.

There was abundant evidence to support the jury's finding of negligence, and the finding that the negligence was "excessive rate of speed."

The negligence found was the proximate cause of the accident —a different case from Reed v. Ellis (1916), 38 O.L.R. 123. But the jury had not by their answers indicated the connection between the negligence found and the accident; and the question was, whether the Court should, as in Ryan v. Canadian Pacific R. W. Co. (1916), 37 O.L.R. 543, grant a new trial, on that ground, or dismiss the appeal on the ground that the jury, on the evidence, did reasonably draw the inference that the effective cause of the accident was "the excessive rate of speed:" Billing v. Semmens (1904), 7 O.L.R. 340, 344; Toben v. Elmira Felt Co. (1917), 11 O.W.N. 375.

The learned Judge said that the latter was the proper result, and he was assisted to that conclusion by the opinion that the

plaintiff's story (if believed) cast upon the defence the burden of explaining the cause of the accident. Why the motorman did not or was unable to stop his car was a fact peculiarly within his own knowledge. He went into the box and told his story, which the jury had not accepted. On the contrary, they had accepted the plaintiff's story, and found no contributory negligence. In view of that finding, the only other reasonable explanation of the cause of the accident was to be found in the jury's answers to questions (1) and (2).

The verdict might, if necessary, be supported on the principles enunciated in McArthur v. Dominion Cartridge Co., [1905] A.C. 72, discussed and explained in Grand Trunk R. W. Co. v. Hainer (1905), 36 S.C.R. 180, and St. Denis v. Eastern Ontario Live Stock and Poultry Association (1916), 36 O.L.R. 640.

The appeal should be dismissed.

MEREDITH, C.J.C.P., was also of opinion, for reasons stated in writing, that the appeal should be dismissed.

LENNOX, J., concurred.

RIDDELL and ROSE, JJ., dissented.

Appeal dismissed with costs; RIDDELL *and* ROSE, JJ., *dissenting.*

SECOND DIVISIONAL COURT. NOVEMBER 23rd, 1917.

THOMAS v. ROELOFSON.

Mechanics' Liens—Building Contract—Payment of Builders by Percentage on Time and Material—Application to Material Furnished by Building-owner —Registry of Lien Vacated on Payment of Amount Claimed into Court—Judgment in Action to Enforce Lien—Declaration of Lien—Principal and Agent Sued together—Personal Judgment against both—Election to Hold one—Counterclaim—Damages for Breach of Contract to Finish in a Particular Time—Contradictory Evidence—Finding of County Court Judge—Appeal—Costs—Mechanics and Wage-Earners Lien Act, secs. 27 (4), 42.

Appeal by the defendant from the judgment of the Judge of the County Court of the County of Waterloo in an action to enforce a lien under the Mechanics and Wage-Earners Lien Act, R.S.O. 1914 ch. 140.

The appeal was heard by RIDDELL and LENNOX, JJ., FERGUSON, J.A., and ROSE, J.

Peter White, K.C., for the appellants.

J. H. Hancock, for the plaintiffs, respondents.

The judgment of the Court was read by RIDDELL, J., who said that the Roelofson Machine and Tool Company Limited was incorporated in November, 1915, by the defendant Roelofson, who held practically all the shares and managed the business as though it was his own. In June, 1916, he entered into a contract with the plaintiffs, builders, that they should build a factory. The plaintiffs alleged that the terms were, "15 per cent. time and materials; the defendant Roelofson, that the terms were, "15 per cent. time and the materials supplied by the builders." The story of the plaintiffs was accepted by the County Court Judge, and should now be accepted by the Court.

The plaintiffs believed that they were to build for Roelofson, knowing nothing of any company. Roelofson, however, was acting for his company, and the company was the owner of the land upon which the building was to be erected.

There was nothing to indicate that the builders were not to furnish all the materials.

Some time after the contract was entered into, Roelofson said to one of the plaintiffs that he could get bricks cheaper than they could, and asked whether it would make any difference; the builder said it would not. Roelofson did, however, buy and furnish some bricks.

On the completion of the building, a contest arose as to whether the plaintiffs were entitled to commission on the materials furnished by Roelofson; and this action was begun under the Mechanics and Wage-Earners Lien Act against both Roelofson and the company.

The company applied to the Court, and KELLY, J., made an order that, upon payment into Court of the amount claimed, the lien should be vacated, reserving the right to the plaintiffs to prove their claim to the lien and to the moneys paid into Court.

It was contended (1) that the plaintiffs were not entitled to 15 per cent. on the material furnished by Roelofson. However the case would have been had it been in contemplation from the beginning that the defendants should supply part of the material, the County Court Judge was right in holding that the plaintiffs were entitled to the 15 per cent. on the material furnished by the defendants.

(2) It was urged that the judgment improperly declared a lien on the property. The order of KELLY, J., made under sec.

27 (4) of the Act, vacated the registration; and the reservation of the right "to prove their claim to the said lien" must be read as meaning their right to a lien at the time of taking proceedings, with the legal consequences flowing therefrom in respect of the money paid into Court. In this respect the judgment was wrong and should be amended.

(3) A personal judgment was given against Roelofson and his company. The plaintiffs' contention was, that they did not deal with him as an agent or know him as such. In such cases, both principal and agent may be sued, but only one to judgment: Pollock on Contracts, 8th ed., p. 109; M. Brennen & Sons Manufacturing Co. Limited v. Thompson (1915), 33 O.L.R. 465, 472; Campbell Flour Mills Co. Limited v. Bowes (1914), 32 O.L.R. 270. [Imrie v. Eddy Advertising Service Limited and E. B. Eddy (1917), 12 O.W.N. 27, 289, distinguished.] The plaintiffs elected to hold Roelofson; they should be allowed to do so, and the judgment should be amended accordingly.

(4) A counterclaim was set up by the defendants for damages for breach of an alleged contract to finish in a particular time. The evidence was contradictory, and the plaintiffs' denial of such a contract was rightly accepted by the County Court Judge.

(5) This Court could not interfere on the question of costs—the County Court Judge had not exercised the jurisdiction given him by sec. 42 of the Act.

The appellants succeeded only on two minor points and failed on every matter of real substance. They should pay the costs of the appeal.

Appeal allowed in part.

HIGH COURT DIVISION.

MIDDLETON, J. NOVEMBER 20TH, 1917.

*McKAY v. HUTCHINGS.

Limitation of Actions—Mortgage—Payments of Interest by Son and Daughter of Mortgagor—Sufficiency to Keep Mortgage Alive as against all Persons Claiming under Mortgagor—Limitations Act, R.S.O. 1914 ch. 75, sec. 24.

Action upon a mortgage, dated the 16th September, 1888, payable 5 years after its date, with interest at 7 per cent.

The action was tried without a jury at Stratford.

R. S. Robertson, for the plaintiff.

F. H. Thompson, K.C., for the defendants.

MIDDLETON, J., in a written judgment, said that the mortgagor died on the 25th July, 1904, leaving him surviving his widow and three children, the defendants. After the mortgagor's death, the son and daughters continued to reside with the widow upon the mortgaged land until the marriage of one of the daughters a few years ago, when that daughter went to live with her husband elsewhere. Since then, the remaining members of the family had remained in occupation.

Payments had been made from time to time on account of the interest upon the mortgage—the last payment on the 26th June, 1915. These payments were nearly always made by the son, but on a few occasions by the daughter who remained at home—it was said, with money supplied by the son. All the members of the family were wage-earners and contributed to a common fund for the upkeep of the household.

The mother took the position that she was no party or privy to the making of the payments on account of interest, and that she had now acquired a possessory title to the mortgaged land. The other members of the family sided with her in making this contention, at any rate so far as the mortgagee was concerned.

The learned Judge said that he had come to the conclusion that this defence was not maintainable; that the case was governed by sec. 24 of the Limitations Act, R.S.O. 1914 ch. 75; and that sec. 13 had no application. Section 24 provides that no action shall be brought upon a mortgage but within 10 years next after a present right to receive mortgage-money accrued, "unless in the meantime some part of the principal money or some interest thereon has been paid." Interest had been paid; and the only question was, whether the payment by one or more of those claiming under the mortgagor was a sufficient payment to take the case out of the statute.

Reference to Roddam v. Morley (1857), 1 DeG. & J. 1; In re Hollingshead (1888), 37 Ch. D. 651; Lewin v. Wilson (1886), 11 App. Cas. 639, 646; Dibb v. Walker, [1893] 2 Ch. 429; In re Lacey, [1907] 1 Ch. 330.

In the light of these authorities, in the circumstances disclosed, the payments by the son and the daughter were sufficient to keep the mortgage alive as against all those claiming under the mortgagor.

Judgment for the plaintiff with costs.

MIDDLETON, J., IN CHAMBERS. NOVEMBER 21ST, 1917.

*REX v. PURDY.

Ontario Temperance Act—Magistrate's Conviction for Having Liquor on Premises other than "Private Dwelling-house"—6 Geo. V. ch. 50, sec. 41 (1)—Building Containing Dwelling and also Shop—Sec. 2 (i) and clause (i.)

Motion for an order quashing a conviction of the defendant for having intoxicating liquor upon premises, not being his private dwelling-house, without a license, contrary to sec. 41 (1) of the Ontario Temperance Act, 6 Geo. V. ch. 50.

R. J. Maclennan, for the defendant.
J. R. Cartwright, K.C., for the Crown.

MIDDLETON, J., in a written judgment, said that under one roof there was a dwelling and above it a harness-shop. He assumed in the applicant's favour that it was shewn that there was no access from the lower flat to the shop above, though this was not clearly shewn. The adjoining house was used partly as a dwelling and partly as a harness-shop—this shop extending over both dwellings, and access to it being through the adjoining premises.

A quantity of liquor was found upon the premises occupied by the accused, and he was convicted of having liquor in a place other than a private dwelling-house.

The question was, whether, having regard to the interpretation clauses of the Act, this conviction could be sustained. There was no evidence that, apart from the definition, the premises were not a private dwelling-house: the accused lived in them with his family, and had access to them by a front-door and a rear-door, of which he and he alone had the keys.

"Private dwelling-house" is defined (sec. 2 (*i*)) as "a separate dwelling with a separate door for ingress and egress, and actually and exclusively occupied and used as a private residence." Had the statute made no other provision, the learned Judge would have been of opinion that part of a larger building separated from the rest of the building, and having a separate door for ingress and egress to and from the outside, was a separate dwelling; but, by sub-sec. (i.), it is enacted that the words "private dwelling-house" shall not be construed to include "any house or building occupied or used or partially occupied or used as . . . a shop, or as a place of business, or as a factory . . ."

Here the building was partly used as a shop, and so the case was brought within the exception.

Motion dismissed with costs.

MIDDLETON, J., IN CHAMBERS. NOVEMBER 21ST, 1917.

*KRISTO v. HOLLINGER CONSOLIDATED GOLD MINES LIMITED.

Alien Enemy—Right to Maintain Action—Protection under Proclamation of August, 1914.

Motion by the defendants to dismiss the action or stay proceedings upon the ground that the plaintiff is an alien enemy.

J. Y. Murdoch jun., for the defendants.
A. G. Slaght, for the plaintiff.

MIDDLETON, J., in a written judgment, said that it was admitted that the plaintiff was within the Proclamation of the 15th August, 1914; he was, therefore, entitled "to continue to enjoy the protection of the law;" and this conferred upon him the right to assert his claims in our Courts and to invoke their assistance for the protection of his property: Schaffenius v. Goldberg, [1916] 1 K.B. 284. Suing is but a consequential right of protection: *Wells* v. *Williams* (1697), 1 Salk. 46.

The motion should be dismissed with costs to the plaintiff in any event.

MIDDLETON, J., IN CHAMBERS. NOVEMBER 21ST, 1917.

REDMOND v. STACEY.

Appeal—Leave to Appeal from Order of Judge in Chambers—Rule 507—Important Question of Pleading—Libel—Statement of Defence—Facts Admissible only in Mitigation of Damages—Rule 158—Opinion of Judge in Another Proceeding—Facts on which Opinion Founded.

Motion by the plaintiff for leave to appeal from the order of KELLY, J., ante 179, dismissing the plaintiff's appeal from the order of the Master in Chambers, ante 79, refusing to strike out para. 12 and a portion of para. 11 of the statement of defence.

G. S. Hodgson, for the plaintiff.
F. S. Mearns, for the defendant.

MIDDLETON, J., in a written judgment, said that he did not regard the portion of para. 11 attacked as of any moment; but para. 12 was a matter of importance.

The libel complained of was the publication of a statement said to be defamatory concerning the plaintiff, an architect, who was charged by the defendant, it was said, with incompetency and dishonesty in certain things done in connection with a building being erected by the defendant in the town of Oshawa. The 12th paragraph referred to a public investigation held by DENTON, Jun. Co. C.J., in 1913, in connection with certain matters in which the plaintiff acted as an architect for the Corporation of the City of Toronto, and in which it was said that the Judge criticised adversely the conduct of the plaintiff in connection with the matters which were the subject of his investigation.

It is established by Millington v. Loring (1880), 6 Q.B.D. 190, that either party is entitled to plead facts which he is entitled to prove at the trial, and a ruling as to the right to set up certain facts in a pleading must, logically, be regarded as determining the right to give these facts in evidence; and, therefore, such a motion as this may rightly be considered a matter of moment and importance. Since that decision, there has been in England controversy as to the necessity and propriety of pleading facts which are only admissible in mitigation of damages; and, so far as actions of libel and slander are concerned, this controversy has been put an end to by the passing of a Rule requiring notice to be given before the trial.

Under the Ontario practice, Rule 158 permits a defendant in libel or slander either to plead the facts or to give notice of his intention to give them in evidence, and in this respect our Rules differ from the English Rules. Wood v. Earl of Durham (1888), 21 Q.B.D. 501, which has been much canvassed in England, has no application here owing to this difference in practice.

Scott v. Sampson (1882), 8 Q.B.D. 491, must be regarded as finally settling the law upon the question as to what may be shewn by the defendant in mitigation of damages.

In the article upon Libel and Slander in Halsbury, vol. 18, pp. 724, 725, Lord Justice Vaughan Williams thus sums up the matter: "The defendant is entitled by the common law to give general evidence in such an action of the plaintiff's bad reputation. But the defendant is not entitled to adduce evidence of particular facts as tending to shew the character and disposition of the plaintiff."

In Odgers on Libel and Slander, 4th ed., p. 376, the law is stated to the same effect and with the same exception: "But the defendant may not go into particular instances;" and the

learned author adds in a note: "The law on the point was settled by the decision in Scott v. Sampson."

Upon another ground, the paragraph in question is most objectionable. It is an attempt to place before the jury in this particular action the opinion that a Judge had formed concerning the conduct of the plaintiff in another transaction, without placing before the jury the evidence upon which that opinion was formed. The impropriety of this is demonstrated by Rex v. Baugh (1916), 36 O.L.R. 436.

For these reasons, the case is one in which leave to appeal should be granted (Rule 507). The costs should be costs in the appeal.

MIDDLETON, J. NOVEMBER 22ND, 1917.

*ROTH v. SOUTH EASTHOPE FARMERS' MUTUAL FIRE INSURANCE CO.

Insurance—Indemnity against Loss or Damage by Fire or Lightning —Building Partly Destroyed by Lightning-stroke without Fire—Further Injury by Wind Following Immediately—Evidence—Theoretical Testimony as to Impossibility of Lightning Causing Damage to Metal-covered Building—Testimony of Eye-witnesses—Liability of Insurers for Damage Caused by Wind—Whole Damage Proximately Caused by Lightning.

Action upon a fire insurance policy.

The action was tried without a jury at Stratford.
G. G. McPherson, K.C., for the plaintiff.
W. T. McMullen, for the defendants.

MIDDLETON, J., in a written judgment, said that by a policy bearing date the 30th January, 1913, the defendant company insured the plaintiff for 4 years against all such immediate loss or damage, not exceeding $4,000, as should happen by fire or lightning to his property specified. On the 2nd August, 1916, a violent storm occurred, and, according to the evidence of the plaintiff, his wife and son, his barn (part of the property specified) was struck by lightning, the result being the tearing away of the roof and part of the wall at one end of the barn, and almost immediately thereafter a wind came with such violence that it tore down the greater portion of the structure then standing, and

the barn and contents were substantially damaged. The plaintiff's claim was for $825.88.

The defendant company said that the entire damage must have been occasioned by the wind, and not by the lightning. There was no fire. Reliance was placed upon the evidence of a professor at the Guelph Agricultural College, who testified that, owing to the fact that the building was covered with metallic shingling and siding, it would be impossible for the lightning to cause the destruction attributed to it.

The learned Judge said that he placed absolute reliance upon this witness's testimony; but he did not see how he could, upon the strength of the witness's theoretical evidence, discredit the story told by apparently credible eye-witnesses. The vagaries of lightning are infinite; and he is a bold man who is able to predicate what will occur when lightning strikes a building. It is altogether likely that this witness would be absolutely right if a metallic building were adequately grounded—in that event the electric charge would be dissipated harmlessly. But here the foundation practically insulated the metallic building from the earth. It did not appear to be at all demonstrated that the electric discharge could not have torn away the roof and side of the barn in the manner described by those who said that they saw it.

Then it was argued that, the insurance being only against damage by fire and lightning, the real damage to the barn and its contents was by the wind, and was too remote to come within the scope of the policy.

The great bulk of the destruction was occasioned by the windstorm. Whether the wind would have damaged the barn if it had not previously been opened by the lightning, no one could say; but the contention was, that the plaintiff's recovery, if any, must be confined to the immediate result of the lightning-stroke.

In all cases of insurance, the proximate and not the remote cause of the loss is to be regarded: Everett v. London Assurance (1865), 19 C.B.N.S. 126, 133; Ionides v. Universal Marine Insurance Co. (1863), 14 C.B.N.S. 259, 285, 289; Pink v. Fleming (1890), 25 Q.B.D. 396.

Where an injury within the policy continues, and further damage results from a cause which alone would not have occasioned the damage, the further damage may be regarded as proximately caused by the original injury: Reischer v. Borwick, [1894] 2 Q.B. 548, 551, 552; Bunyon on Fire Insurance, 6th ed., p. 155.

The test seems to be, whether there was a sufficient interval to allow the first cause to be regarded as having entirely ceased to operate by reason of an opportunity to repair.

Here, no opportunity was afforded to the plaintiff to remedy the condition brought about as the result of the lightning before the wind followed which completed the demolition of the structure. The injury caused by the lightning was, in this view, throughout an operating and continuing cause and a proximate cause, within the meaning of the rule.

If the plaintiff should be held by a higher Court entitled to recover only for the injury done by the lightning, his damages should be assessed at $250, subject to a reference at the election of either party, at the risk of costs, and in that case the plaintiff should be relieved from a set-off of costs.

But, upon the facts and law, the plaintiff was entitled to recover the whole sum claimed, $825.88, and costs.

RIDDELL, J. NOVEMBER 23RD, 1917.

*REX v. McCARTHY.

Criminal Law—Doing Grievous Bodily Harm—Verdict of Guilty of "Attempt"—Criminal Code, secs. 72, 949—Intent—Evidence—Instruction to Jury—Refusal of Trial Judge to Reserve Case.

The defendant was indicted upon two counts: (1) for manslaughter; (2) for doing grievous bodily harm.

At the trial, before RIDDELL, J., and a jury at the Toronto assizes, the jury, after long deliberation, failed to agree; and were then told by the learned Judge that, while they could not find a verdict of an attempt to commit manslaughter—as an attempt required intent, while the essence of manslaughter was absence of intent—yet they might find a verdict of attempt on the second count. The jury found a verdict of attempt only on the second count.

The learned Judge was asked, on behalf of the defendant, to reserve a case for the Appellate Division, on the ground that the jury should not have been allowed to find a verdict of attempt only.

T. C. Robinette, K.C., for the prisoner.
Peter White, K.C., for the Crown.

RIDDELL, J., in a written judgment, referred to sec. 949 of the Criminal Code: "When the complete commission of an offence

charged is not proved but the evidence establishes an attempt to commit the offence, the accused may be convicted of such attempt and punished accordingly."

An attempt implies an intent: Criminal Code, sec. 72; and even an intent is not enough: Year Book, 17 Edw. IV., 2 pl. 2. Intending to commit a crime is not the same as attempting to commit it: Regina v. McPherson (1857), Dears & B. 197: Rex v. Sutton (1736), K.B. Cas. temp. Hardwicke 370, 372; Regina v. Eagleton (1855), Dears. 515.

It was open to the jury to believe any part of the evidence and to disbelieve any other part: they might find that there was here an intent, and, with that intent, an act done looking to the commission of the offence, which act failed of effect.

The defendant came down a street toward King street driving an automobile at great speed—two women, the deceased and a companion, hanging on the rug-bar behind the front-seat, while they were sitting on the rear-seat and yelling loudly. Going at such speed and turning the King street corner at such speed, the jury might well consider, indicated an intent to do harm to the women.

The defendant testified on his own behalf; his evidence went to shew that the whole thing was an accident; but that the jury did not believe, and the Judge agreed with them.

The jury must have found that the defendant did some act with the intent charged; there is no incongruity in their believing that the car striking the kerb was not an accident, but wilful and done with the intent of injuring the deceased, while believing that everything thereafter was accidental and not expected or contemplated.

Reference to Rex v. Menary (1911), 23 O.L.R. 323, 18 Can. Crim. Cas. 237.

In many cases where murder is charged, it seems to the trial Judge that the case is clearly made out; but the jury cannot be prevented from finding only manslaughter. So here, if a soft-hearted or soft-headed juryman stands out against finding the main offence proved, the jury cannot be prevented from finding an attempt only, if but the evidence can be read to justify such verdict.

The learned Judge declined to state a case.

CLUTE, J. NOVEMBER 24TH, 1917.

*MURPHY v. CITY OF TORONTO.

Workmen's Compensation Act—4 Geo. V. ch. 25 and Amending Acts—Contractor—Assessment—Failure to Pay—Notification to City Corporation, Principal of Contractor—Payment of Asessment by Corporation—Right to Withhold Amount from Sum Due on Contract—Absence of Evidence of Order or Decision of Workmen's Compensation Board—Sec. 10 of Act.

Action to recover $2,230.20, the balance alleged to be due to the plaintiff, a contractor, for work done for the Corporation of the City of Toronto, the defendants, under a contract.

The defence was that the defendants had paid the Workmen's Compensation Board the sum of $2,230.20, pursuant to the Board's order, that being a sum primarily due by the plaintiff, and that they were justified in charging that sum against the plaintiff, and so nothing was due to him.

The action was tried without a jury at Toronto.

F. J. Hughes, for the plaintiff.

Irving S. Fairty, for the defendants.

CLUTE, J., in a written judgment, referred to many of the provisions of the Workmen's Compensation Act, 4 Geo. V. ch. 25, as amended by 5 Geo. V. ch. 24, 6 Geo. V. ch. 31, and 7 Geo. V. ch. 34, and to the proceedings of the Board in respect of the plaintiff as a contractor, the correspondence, and other facts in evidence.

On the 20th December, 1916, the defendants were notified by the solicitor for the Board that the plaintiff's assessment under the Act, plus a percentage for non-payment when due, amounting in all to $2,230.20, remained unpaid, and were asked to pay it. It was pointed out by the Board that, under sec. 10 of the Act, the city corporation, as the contractor's principals, were responsible for the payment of this amount, "with the usual right of indemnity by way of withholding balances to meet it." The defendants paid the amount to the Board, and withheld it from the amount due to the plaintiff for his work under his contract.

The learned Judge said that the difficulty in the defendants' way, in their answer to the plaintiff's claim, was, that there was no evidence that the Board made an assessment, or gave notice of an assessment being made, or became entitled to register an assessment, or had registered an assessment, or that the defendants had been called upon by any official act of the Board

to pay the amount alleged to be assessed against the plaintiff as an employer of workmen.

It was urged by counsel for the defendants that all this was unnecessary, inasmuch as anything the Board did was conclusive and binding, and there was no jurisdiction in the Court to make inquiry in respect thereof.

This argument shewed a misapprehension of the position. The Court heard the evidence, not for the purpose of reviewing the action of the Board, but to be satisfied that the Board had acted and had made a decision; and of this no sufficient evidence was offered.

It could not be pretended that any action or decision of the Board was of greater force and virtue than the decision of one of His Majesty's Courts having jurisdiction over the subject-matter and rendering a judgment from which no appeal had been taken; yet in that case, if the judgment was relied upon, it must be proved—a casual letter of a clerk or solicitor would not be evidence of such a judgment having been given or entered. In short, proper proof should have been given of the decisive action taken by the Board.

Under the Act, evidence should have been given to shew that the employer (the plaintiff) was liable to pay the amount in question to the Board; and, in default of payment by him, such evidence should have been offered to the defendants as would shew that they were justified in paying the amount out of the sum due from them to the plaintiff. In both particulars, there had been failure.

The plaintiff was not free from blame, and he should not have the costs of the action against the defendants.

He was entitled to judgment for $2,230.20, but the entry of the judgment should be stayed for one month to enable the parties, with the sanction of the Board, if that can be obtained, to ascertain and adjust the differences between them and the Board.

KELLY, J., IN CHAMBERS. NOVEMBER 24TH, 1917.

C. v. C.

Costs—Taxation as between Solicitor and Client—Examination of Important Witness on Foreign Commission—Attendance of Counsel from Ontario to Examine Witness—Necessity for—Special Circumstances—Counsel-fee—Travelling Expenses.

Appeal by the plaintiff and cross-appeal by the defendant from the taxation of the plaintiff's costs of an action for alimony.

M. L. Gordon, for the plaintiff.
R. T. Harding, for the defendant.

KELLY, J., in a written judgment, said that the appeals were in respect of a fee of $1,500 charged by the plaintiff's counsel on the examination at Spokane, in the State of Washington, of a witness under a commission, and an item of $384.33 for expenses of Toronto counsel at and going to and from Spokane, whither he went to arrange for and conduct the examination.

The costs were taxed as between solicitor and client under the judgment of MIDDLETON, J., 38 O.L.R. 481; see pp. 486 and 487, where it was said that the costs should be liberally taxed. The judgment was affirmed: 39 O.L.R. 571.

A substantial part of the defence to the action was on the question of the validity or otherwise of the marriage of the parties; and this depended on whether the divorce obtained by the plaintiff from L. was valid. L. was the witness examined at Spokane, and his testimony was of importance.

In the peculiar circumstances of the case, counsel at Spokane, instructed from Toronto, could not have conducted the examination as fully and satisfactorily as counsel from Ontario, familiar with the law of the Province in which the parties resided and the action was to be tried and determined.

Without stating any general rule or practice, the learned Judge was of opinion that the circumstances warranted the sending of counsel from Toronto to Spokane.

The examination was conducted on behalf of the plaintiff by counsel from Toronto, with whom appeared a Spokane counsel. Two counsel-fees should not be allowed—there should be one counsel-fee for the counsel who conducted the examination, i.e., counsel from Toronto. If he chose to procure for his own guidance and for his own purposes the assistance of Spokane counsel, the charges of the latter should be met by him. One counsel fee of $650 should be allowed, and the item of $384.33 for expenses should also be allowed.

The plaintiff should have the costs of the appeals.

HANNAH v. ROBSON (No. 1)—FALCONBRIDGE, C.J.K.B.—NOV. 22.

Will—Action to Establish—Proof in Solemn Form—Costs.]—Action to establish the will of Elizabeth Robson, tried without a jury at Whitby. FALCONBRIDGE, C.J.K.B., in a written judgment, said that the will was proved in solemn form, and there should be judgment for the plaintiff. On consideration of all the circumstances and the cases on the subject, the learned Chief Justice thought the defendant might consider himself fortunate if he were not ordered to pay costs. But, inasmuch as he refrained from calling witnesses, if he had any, he should be allowed costs, fixed at $75, for which credit should be given him in the action on the promissory notes (see infra). The infants' costs, fixed at $75, should be paid out of the estate. J. E. Farewell, K.C., and F. M. Field, K.C., for the plaintiff. T. R. Ferguson, K.C., for the defendant. H. R. Frost, for the widow and infant children of Norman Robson, deceased.

HANNAH v. ROBSON (No. 2)—FALCONBRIDGE, C.J.K.B.—NOV. 22.

Promissory Notes—Contest as to Ownership—Costs.]—An action on two promissory notes, tried without a jury at Whitby. FALCONBRIDGE, C.J.K.B., in a written judgment, said that the only question reserved was the question of costs. The defendant contested the case entirely at his own risk—principally as to the ownership of the notes—and perhaps he ought to pay full costs, but, having regard to all the circumstances, the plaintiff's costs of the action to be paid by the defendant should be fixed at $100. Judgment for the plaintiff for $2,600, with interest on the $1,600 note at 6 per cent. and on the $1,000 note at 5 per cent. to judgment. Credit to be given to the defendant for a $100 legacy and interest from the date of the death of the testatrix and for $75 costs awarded to him in the action to establish the will (supra). J. E. Farewell, K.C., and F. M. Field, K.C., for the plaintiff. T. R. Ferguson, K.C., for the defendant.