The
Ontario Weekly Notes

Vol. V. TORONTO, OCTOBER 3, 1913. No. 2

APPELLATE DIVISION.

SEPTEMBER 22ND, 1913.

*DALLANTONIO v. McCORMICK.

Master and Servant—Injury to Servant—Workmen's Compensation for Injuries Act—Negligence of Foreman of Works—Liability of Master—Liability of Master's Principal—Railway Company—Construction Contract—Retention of Control—Liability for Negligence—Statutory Liability—Common Law Liability.

Appeal by both defendants, the Canadian Pacific Railway Company and McCormick, from the judgment of FALCONBRIDGE, C.J.K.B., 4 O.W.N. 547.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and LEITCH, JJ.

W. R. White, K.C., for the defendant company.

R. McKay, K.C., for the defendant McCormick.

R. R. McKessock, K.C., for the plaintiff.

CLUTE, J.:—The plaintiff was injured while working as a mucker in the employ of the defendant McCormick, who had a contract to construct a tunnel to divert a creek from passing under a trestle which the company desired to fill up. While the plaintiff was working on the approach to the mouth of the tunnel, a mass of rock fell upon his leg, crushing it and injuring it to such an extent that it had to be amputated.

It is not disputed that at the time of the injury the plaintiff was working under the instructions of the foreman in charge of the work. It is charged that the work was dangerous, and that the defendants knew of the danger, and did not take proper precautions to prevent the accident.

*To be reported in the Ontario Law Reports.

The defendant McCormick, besides denying the allegations in the statement of claim, pleads that he was employed by the defendant company as a hiring and purchasing agent for the work, the work itself being performed by and under the directions of the defendant company and its engineers.

The defendant company deny liability and allege that the defendant McCormick was an independent contractor and that the plaintiff was not in their employ, but was employed by McCormick and working under his foreman, and that the Canadian Pacific Railway Company are in no way liable for any injuries suffered by the plaintiff. . . .

It is perfectly clear from the evidence—indeed it was not contended otherwise—that the injuries were occasioned by negligence.

I also think it perfectly clear that McCormick is responsible for this negligence. The more difficult question is whether the Canadian Pacific Railway Company are also responsible.

The learned Chief Justice finds that the plaintiff was not careless or negligent in any way, and that the injuries were caused by the negligence of both defendants. He also finds "that the defendant McCormick, personally, and the Canadian Pacific Railway Company, by their engineers and servants, had abundant notice of the danger that existed in carrying on the work in the manner in which it was being carried on, and that the cause of the accident was the negligence of the defendants in either not guarding against the falling of the rocks which caused the accident, or first removing them before doing the work."

He also finds that McFadden and Houghton, two of the company's witnesses, are mistaken in thinking that scaling was done before the accident. Except as to the question of the liability of the Canadian Pacific Railway Company, which I shall consider later, I think the evidence fully supports the findings of the learned Chief Justice.

The result of the undisputed evidence is that the engineer in charge had actual notice of the danger to the men employed on the work, from rock falling from the face of the hill through which the tunnel was to be made, and, recognising this danger, sent his assistant to report. Upon the report, the face of the hill was directed to be scaled; that is, cleared of the débris. This work was commenced and about 1,000 yards of this stone and débris removed; but, as the learned Chief Justice finds, the scaling was not done before the accident, and the men were allowed

to proceed with their work when a loose rock fell, causing the accident complained of.

There can be no doubt as to the liability of McCormick, who, having knowledge of the danger, allowed the men to proceed with their work before the face of the hill had been properly scaled and made safe. Indeed, counsel for McCormick did not seriously argue that he was not responsible.

The liability of the company may be considered: (1) at common law; (2) under the contract; (3) under the Workmen's Compensation for Injuries Act.

The principal's liability is not taken away simply because the work is paid for by piece or by the day. The test is, did the master retain the power of controlling the work? Sadler v. Henlock, 4 E. & B. 578; Tarry v. Ashton, 1 Q.B.D. 314; Piggott on Torts (1885), p. 79. . . .

[Reference to Gray v. Pullen, 5 B. & S. 970; Hole v. Sittingbourne and Sheerness R.W. Co., 6 H. & N. 488; Pickard v. Smith, 10 C.B.N.S. 470; Reedie v. London and North Western R.W. Co., 4 Ex. 244; Pendlebury v. Greenhalgh, 1 Q.B.D. 36; Halsbury's Laws of England, vol. 21, p. 471, secs. 794, 795, 797; Brady v. Giles, 1 Mood. & R. 494; Cuthbertson v. Parsons, 12 C.B. 304; Steel v. South Eastern R.W. Co., 16 C.B. 550; Bennett v. Castle & Sons, 14 Times L.R. 288; Holliday v. National Telephone Co., [1899] 2 Q.B. 392; Hughes v. Percival, 8 App. Cas. 443; Allan v. Hayward, 7 Q.B. 960; Rapson v. Vubitt, 9 M. & W. 710; Halsbury's Laws of England, vol. 20, sec. 134; p. 132, sec. 260 et seq.]

The Workmen's Compensation for Injuries Act does not abolish, though it largely modifies, the doctrine of common employment. Negligence still has to be proven.

The limitation of the employer's liability where work is done under an independent contract is also fully dealt with in Beven on Negligence, ed. of 1909, p. 597. The learned author points out that the earlier decisions favour the view that a person is answerable for injury arising in executing the work that he has employed another to do, but that ultimately the view was adopted that limited the liability of the owner of the premises to those acts which he definitely authorises or that are in the nature of a nuisance which he permits.

After as careful a review of the cases as I have been able to give, I do not think that the nature of the work to be done was such as to render the company liable at common law, independently of the contract. While it was dangerous to proceed with the construction of the tunnel until the hill had been

scaled and made safe, yet the injury did not arise from the fact that the scaling was dangerous, but because it was not done. It would not necessarily cause injury if carefully done.

It was neglect in not having the dangerous stone removed before the work was continued that caused the injury.

In the contract, however, the company saw fit to provide that "the work shall be carried on and prosecuted in all its several parts in such a manner . . . and at such times and at such places as the engineer shall from time to time direct, and to his satisfaction." And the contractor was bound "in all things to comply with the instructions of the engineer."

This reserved to the company such complete control over the manner of doing what was necessary as, I think, to make them liable with the contractor in case of negligence in the doing of it. It cannot be doubted that the injury arose owing to the manner in which the work was done; the scaling was imperfectly done; it was not completely done. It left the premises in a dangerous condition when the men were directed to proceed with the tunnel, with the consequent injury to the plaintiff.

There is such an intimate connection created and control reserved by the contract, between the company and the contractor, as to make them, in my opinion, both liable for the negligence which caused the accident.

The premises being in this dangerous condition, the plaintiff was directed to do the work. It is true that this direction was given by the contractor's foreman and renders the contractor liable under both sub-secs. 2 and 3 of sec. 3 of the Workmen's Compensation for Injuries Act.

I think that the company are liable independently of the Workmen's Compensation for Injuries Act, for the reason, as above indicated, that the company reserved to themselves the right to direct the manner in which the work was to be done. The company made themselves responsible for the manner of doing the work, and it was the negligent manner of doing the work that caused the accident.

If it be said that the plaintiff is not in the employ of the company, because hired and paid by the contractor, the answer is, that, if that be so, he is not met with the question of common employment, and does not have to invoke the aid of the statute to be relieved of the effect of that doctrine; and, if he has been injured owing to the negligence of the company, he is entitled to recover against the company for such negligence.

If, however, the plaintiff may be regarded as a servant of the company, then he has the right to invoke the benefit of sec. 3, sub-secs. 2 and 3, and sec. 4, of the Workmen's Compensation for Injuries Act; but, in my view of the case, he cannot be regarded as a servant of the company, and does not require to call in the aid of the Act.

The appeal should, I think, be dismissed with costs.

MULOCK, C.J., SUTHERLAND and LEITCH, JJ., concurred.

RIDDELL, J., for reasons stated in writing, agreed that McCormick's appeal should be dismissed; but was of opinion that the appeal of the railway company should be allowed, and as against them the action dismissed.

Appeal dismissed; RIDDELL, J., *dissenting in part.*

SEPTEMBER 23RD, 1913.

PLAYFAIR v. CORMACK.

Brokers—Employment to Purchase Shares for Customer—Sale of Agents' own Shares—Non-disclosure to Principal—Stock Exchange Rules—Undisclosed Principal—Evidence.

Appeal by the plaintiffs from the judgment of MIDDLETON, J., 4 O.W.N. 1195.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, and LEITCH, JJ.

W. N. Tilley and Harcourt Ferguson, for the plaintiffs.

J. J. Gray, for the defendant Cormack.

W. C. MacKay, for the defendant Steele.

THE COURT dismissed the appeal with costs.

SEPTEMBER 25TH, 1913.

RE KETCHESON AND CANADIAN NORTHERN ONTARIO R.W. CO.

Railway—Expropriation of Land—Compensation—Award—Basis of—Loss by Inconvenience—Capitalisation—General Evidence as to Amount of Loss—Opinions of Witnesses—Substantial Agreement—Doubt as to Independence of Testimony—Interest—Costs—Irrelevant Evidence.

Appeal by the railway company from an award of arbitrators fixing the compensation of the claimants in respect of parts of a farm taken for the railway at $3,328.

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

W. C. Mikel, K.C., for the company.

I. F. Hellmuth, K.C., and E. G. Porter, K.C., for the claimants.

The judgment of the Court was delivered by HODGINS, J.A.:—A great deal of strong, and, to my mind, justifiable, criticism was directed by Mr. Mikel against the basis of the award, shewn in the reasons given by a majority of the arbitrators. In several cases the estimated time lost and the amounts fixed are excessive, and no allowance appears to have been made for the fact that the work of the farm will, after a time, get back into more or less normal channels, and the present inconvenience will be largely minimised. Even the cattle-passes and the drainage can and will inevitably be put right by a comparatively small capital expenditure which will prevent the danger and difficulty sworn to. Apart from that, the method of the capitalisation of the yearly loss is hard to take seriously, if it is an endeavour to ascertain the present value of items distributed over many years to come and subject to many contingencies.

A majority of the arbitrators have taken the total loss by inconvenience, etc., at $151.85 per annum, and have allowed a sum as damages which will produce for all time that annual amount. If the award had to be dealt with in these aspects alone, it could not, in my judgment, be supported. Most of the elements which these items represent have been held to be proper to be considered in arriving at compensation in similar cases (e.g., Re Davies and James Bay R.W. Co., 20 O.L.R. 534),

but only when shewn to reduce the actual value of the land affected. As presented to the arbitrators, they represented only separate and distinct matters of inconvenience to the owner. The proper way of regarding them is pointed out in Idaho and W. Railroad Co. v. Coey, 131 Pac. Repr. 810, where it is said that the inconvenience of transporting the crop from the part of the land separated from the buildings, the inconvenience of transferring machinery and farm implements and the like from one part of the premises to another, the inconvenience in farming and cultivating the land occasioned by the construction of the railroad, in so far as these elements entered into any depreciation of the market value of the land not taken, may properly be considered in estimating the damages.

This is further enforced by the direction in that case that "in estimating the damage to the land not taken it was proper to consider the entire tract of land as one farm, and to determine the damages upon the basis of how the construction of the railroad would affect the whole body of land as one farm. In other words, the jury should consider two farms, one without any railroad across it, as it now exists, and the other with a railroad across it, as it will exist when respondent's line is built and in operation. This is the rule where, as here, the whole farm is in one continuous tract and is used and farmed as one body of land."

In this case the Court has to consider all the evidence which has come before the arbitrators in order to ascertain if the amount allowed is just. The Court cannot, it seems to me, deal merely with the evidence which appears to have impressed the arbitrators if there is other evidence upon which the award can be properly supported. In other words, I think this Court is entitled and bound to come to its own conclusion upon all the evidence, and is also entitled to disregard the reasoning of the arbitrators if it does not agree with it, or to adopt it if it so desires, or to support the award on any ground sufficient in law, whether or not that ground is relied on by the arbitrators, provided that the Court pays due regard to the award and findings and reviews them as it would that of a subordinate Court. See Atlantic and North-West R.W. Co. v. Wood, [1895] A.C. 257; James Bay R.W. Co. v. Armstrong, [1909] A.C. 624.

The majority award of $3,328 is based upon exact figures—$151.85 estimated annual loss; "capitalised at five per cent. $3,037"—which total, added to the value of the 2.16 acres taken, $216, and the cost of a bridge across the watercourse south of

railway track, $75, makes up the amount of $3,328. The arbitrators add to the schedule of figures this paragraph: "Taking the evidence as to the value of the farm and the depreciation thereto by reason of the railway, there is ample evidence to support a finding of $4,000 in favour of the landowners, but the arbitrators have placed their finding at $3,328 after considering the general evidence as to capitalisation of the annual loss as well as depreciation to the value of the farm."

The evidence to support a finding of $4,000 consists of two divisions: one founded wholly upon detailed annual inconvenience and its capitalisation; and the other giving a lump sum without being tied down to items as forming its basis. No doubt, it is to the latter class that the arbitrators refer in the sentence just quoted.

The claimant H. L. Ketcheson and the witnesses Donald Gunn, Francis Wilson, and Herbert Finkle, make the damage $4,000, and base it upon detailed and valued inconvenience capitalised. Counsel for the respondents meets the objection taken to this method of arriving at the result by urging that the general evidence referred to in the reasons for the award would support it.

I have gone over the evidence to see if an award of $3,328 could be properly based upon it; and it appears to consist of what the following witnesses say, namely, Ransom Vandervoort, James Boyd, Merritt Finkle, Harvey Hogle, George Gunn, George Ostrom, and Morley Potter. It cannot be said that there is any divergence of views among these witnesses. Indeed, the unanimity with which they agree on $4,000 is somewhat remarkable. But no evidence was called by the railway company, except as to the trustworthiness of the calculations of some of the witnesses. No one has, on behalf of the railway company, called in question the general fact of depreciation. Indeed, this evidence appears in the testimony of one of the company's witnesses, Frederick F. Clarke, an Ontario land surveyor: "Q. Has there ever been a time since the railway was constructed, to your knowledge, that the cattle could go through (the cattle-passes)? A. Not to my knowledge."

As I have said, I think that the objection to some of the items and to their method of presentation is well-founded, and that the method of arriving at a capital sum cannot be defended. Nor can I, after perusing the evidence, disabuse my mind of the conclusion that the views of the different witnesses are the result of more or less communication among themselves, and

that these views represent more a consensus of opinion, educated upon the subject, and backed up by general agreement, than the individual views of men who have independently arrived at a conclusion.

I cannot say that this is wrong. Much evidence before the Court is insensibly coloured in just the same way. Had there been a reasonable amount of evidence on behalf of the railway company that the depreciation was represented by a far smaller figure than $4,000, it might have been possible to reduce the award. But to do so on the present evidence could only be accomplished by disregarding the general evidence already mentioned and then attempting a criticism of the detailed figures; which would lead to no good result, if, as I have indicated, they represent calculations which are no true basis for an award of this nature.

While not satisfied with the amount awarded nor with the method by which it has been arrived at, I do not think that we can find any safe ground for refusing to accept the uncontradicted evidence of those who have given their opinion as to the amount of depreciation suffered by this farm.

The result is that the award must be sustained, but upon grounds which did not receive the principal share of the arbitrators' attention.

Upon the question of interest, I think the arbitrators have no jurisdiction to give interest as part of their award. The right to interest and costs is statutory (R.S.C. 1906 ch. 37, secs. 192, 199; 8 & 9 Edw. VII. (D.) ch. 32, sec. 3); and, as payment of the amount of the award is in some cases necessary to vest title in the railway company, nothing more should appear in the award than what the arbitrators have jurisdiction to fix. The provision as to it should be struck out: In re Clarke and Toronto Grey and Bruce R.W. Co., 18 O.L.R. 628. I do not think that the judgment of this Court in Re Davies and James Bay Ry. Co., 20 O.L.R. 534, intended to lay down any rule to the contrary.

In taxing the costs, regard should be had to the fact that the evidence given of settlements with other persons for parts of other farms taken, was not relevant evidence. Both parties participated in it; and, although the railway company first introduced it, that did not give its opponent a right to reply in kind: Rex v. Cargill, [1913] 2 K.B. 271.

The direction for payment to the life-tenant and remaindermen, if improper—and I do not say that it is—cannot override

the provisions of the Railway Act which enable a railway company to protect itself against apprehended claims. See secs. 187, 210, 213, 214.

The provision as to interest will be struck out, otherwise the appeal will be dismissed with costs.

Judgment accordingly.

MAGEE, J.A., IN CHAMBERS. SEPTEMBER 26TH, 1913.

RE KENNA.

Security for Costs—Habeas Corpus Proceeding—Custody of Infant—Applicant out of the Jurisdiction—Motion for Security Made after Refusal of Application and Appeal Launched by Applicant—Security Limited to Future Costs—Discretion—Amount of Security.

Philip Kenna, the father of Frederick Kenna, an infant, of five years of age, having launched an appeal from the order of MIDDLETON, J., 4 O.W.N. 1395, refusing an application by the appellant, upon habeas corpus, for delivery of the infant to his custody by Albert Breckon and his wife, the foster parents, the latter moved before a Judge of the Appellate Division in Chambers for an order requiring Philip Kenna to give security for past and future costs, he being out of the jurisdiction.

H. F. Parkinson, for the applicants.
T. L. Monahan, for Philip Kenna.

MAGEE, J.A.:—Albert Breckon and his wife, the present custodians of the infant, apply for an order that security for their costs already or hereafter incurred be given by Philip Kenna, the infant's father, who throughout the proceedings has been and still is resident out of Ontario. His application in habeas corpus proceedings for the custody of the infant was dismissed, but he has given notice of appeal from that dismissal.

I think the decision of Ferguson, J., in Re Giroux (1903), 2 O.W.R. 385, upholding a præcipe order for security issued in habeas corpus proceedings, must govern me as to the original right to obtain security; and see Re Pinkney (1902), 1 O.W.R. 715.

In Small v. Henderson (1899), 18 P.R. 314, Osler, J.A., considered the practice to be that security could be applied for and obtained at any time before judgment; and, the judgment having been in the plaintiff's favour, he refused to order security when the defendant was appealing; and see Gledhill v. Telegram Printing Co. (1909), 14 O.W.R. 1.

In Hately v. Merchants Despatch Co. (1886), 12 A.R. 640, the plaintiff, after obtaining judgment, was held not entitled to have his bond for security given up to him for cancellation, as the defendants were appealing, and hence the final judgment had not been given.

The effect is, I think, that the proceedings are still continuing, and judgment has not been given, and the respondents, who have been successful, are entitled yet to ask for security, as the old rules with regard to early application do not, under the present general Rules, apply. See Martano v. Mann (1880), 14 Ch. D. 419, and Smerling v. Kennedy (1903), 5 O.L.R. 430.

In Lydney and Wigpool Iron Ore Co. v. Bird (1883), 23 Ch. D. 358, Pearson, J., said: "If the defendant may apply from time to time for an increase of the amount of the security, why may not his original application be made at any time?"

Then should the security be for past as well as future costs? That it may be required to cover both was held in Brocklebank & Co. v. King's Lynn S.S. Co. (1878), 3 C.P.D. 365, and in Massey v. Allen (1879), 12 Ch. D. 807, but in both cases the application was made promptly after the happening of the circumstance entitling the applicant to make it. Here the applicants knew of the non-residence throughout. From whatever motive, they chose not to apply for security; and I do not think that they should, in a case such as this, be now entitled to obtain it as to the costs which they knowingly ran the risk of being unable to recover.

I, therefore, as a matter of discretion in this case, limit the security to costs which have been or may be incurred in or by reason of the appeal; and I fix the amount at $60 if paid into Court, or $120 as the penalty if a bond be given. The security to be given within four weeks or the appeal to be struck out; a corresponding reasonable extension of time to be given the appellant in his appeal proceedings, which, if not agreed upon, I will fix.

Costs of the application to be costs in the cause.

HIGH COURT DIVISION.

BOYD, C. SEPTEMBER 18TH, 1913.

GOLDSMITH v. HARNDEN.

Will—Power of Appointment—Exercise of—Validity—Subsequent Attempted Exercise of Power—Revocation—Title to Land—Action for Possession.

Action to recover possession of land, tried at Belleville.

BOYD, C.:—The land in question was owned by John Flatt, who by his will devised it for life to his brother Daniel Flatt, and after his death he devised a further life estate therein to Homer Flatt, and in case Homer Flatt should leave offspring surviving, the ultimate devise was to such of his offspring as Homer should appoint. On the 23rd November, 1880, Homer exercised his power of appointment in favour of one of his offspring, Luella Sweet, who has survived him. In November, 1889, Luella conveyed for value all her rights in the land to P. D. Goldsmith, and he conveyed all to his wife, the plaintiff, in October, 1901.

Homer, life tenant, died last year, and this action is brought to get possession of the land as against the defendants.

They claim under a subsequent appointment of the same land made by Homer of the 28th April, 1900. By the defence the effect of the earlier appointment is sought to be avoided by allegations that the first appointment was not valid and irrevocable, that it was made without consideration and without the knowledge of the appointee, and that it is void as against the subsequent appointment, which was for valuable consideration.

These matters of defence, whatever their importance, were none of them proved by any evidence. On the present record and evidence there is nothing to invalidate the first deed of appointment made in 1880, and the registered title of the plaintiff under that would seem to be unimpeachable by the defendants.

Apart from this record, however, the defendants in argument set up the invalidity of the plaintiff's title because of the circumstances under which the first deed of appointment was made, as disclosed in the report and judgment of the case Sweet v. Flatt, reported in 12 O.R. 229 (1886). That happens to be

my own decision, and the expression is used in the reasons for judgment that "untrue representations were made to the appointee and her father which induced the execution of the power of appointment." From this isolated sentence it is urged that the exercise of the power of appointment was nugatory, being exercised in such a way as to invalidate it; this point was raised in that action; it was argued that the appointment was exercised for another purpose than to give the appointee any interest, and that the whole transaction should be vacated if any part of it was to be set aside (pp. 231-2). But by the decision the instruments subsequent to the deed of appointment were declared to be inefficacious and the title of the plaintiff as appointee was sustained (p. 235). No doubt, the rights of the appointee were contingent on her surviving the life-tenant who was to appoint; but, on his death, her right to the fee became absolute under the appointment of 1880, which was not invalid, and had not been disturbed by the appointor up to the time of his death. This deed of appointment was valid as between appointor and appointee. The misrepresentations were not such as to affect the valid passing of the interest under the control of the life-tenant (the appointor).

No good purpose would be served by opening up the transaction and the litigation for another investigation on this aspect of the case. The appointment was good, though voluntary and though not disclosed at the time to the appointee, and it was not competent for the appointor, of his own motion, to execute any subsequent appointment which would operate as a revocation of the first.

The plaintiff should have judgment as asked with costs.

KELLY, J. SEPTEMBER 20TH, 1913.

RE CANADIAN GAS POWER AND LAUNCHES LIMITED.

RIDGE'S CLAIM.

Collateral Securities—Mortgage Given to Company as Collateral Security to Notes for Price of Article Sold—Right of Holder of Notes to Assignment of Mortgage—Equitable Right—Company in Course of Winding-up—Liquidator—Costs.

Appeal by the Bank of British North America from the report of the Master in Ordinary in a winding-up matter.

G. Larratt Smith, for the appellants.
S. G. Crowell, for the liquidator.
H. C. Macdonald, for Ridge, the claimant.

KELLY, J.:—The Master has found, and I think properly, that the bank became the holder for value of Ridge's notes without notice of any defect in the payees' title, and are entitled to enforce payment against Ridge. He also held that there was and is no debt due by Ridge to the company (now insolvent); and, therefore, that the bank have no right to an assignment of the mortgage made by Ridge to the company as collateral security for the notes. With this latter finding I disagree. Except that the time for delivery was not expressly stated, there was a distinct and definite agreement in writing, signed by Ridge, for the purchase of the launch, for part of the price of which the notes and mortgage were given, a cash payment having been made on account of the contract-price. The agreement itself was not before the Master when he had the claim under consideration, although there was evidence of its existence. Had it been produced, his conclusion might have been different. It is now produced, and no exception is taken to it by Ridge's counsel. It expressly provides that the giving of the mortgage is collateral to the notes; and it is clear that the mortgage was given accordingly.

My view is, that the Master was in error in ruling that the bank are not entitled to an assignment of the mortgage. This case is not in that respect distinguishable from Central Bank v. Garland, 20 O.R. 142 (affirmed in appeal, 18 A.R. 438), where the learned Chancellor, stating the law as drawn from authorities which he then cited, held that the hire receipts there in question were accessory to the debt, that there was no right to separate the two things (the hire receipts and the notes), and that in equity the transfer of the notes to the bank was a transfer of the securities (the hire receipts). That applies here. The company could not, and the liquidator cannot, resist the claim of the bank to have the mortgage accompany the notes. The liquidator should not discharge the mortgage, but assign it to the bank, to be held as collateral security to Ridge's notes.

The liquidator's counsel appeared on the motion, and submitted to whatever ruling the Court might make. Costs of the bank and of the liquidator of this application will be payable out of the estate.

Had there been any dispute or contention on Ridge's part as to the existence of the contract for the purchase when it was produced on the application, I might have thought it proper to refer the matter again to the Master for reconsideration. But there is no denial of the agreement in the form in which it now appears, and I therefore deal with the matter without so referring it.

BOYD, C. SEPTEMBER 22ND, 1913.

*RE HAVEY.

Life Insurance—Moneys of Infants—Appointment of Mother as Trustee—Letters of Guardianship—Insurance Act, 2 Geo. V. ch. 33, sec. 175—Amending Act, 3 & 4 Geo. V. ch. 35, sec. 10—Powers of High Court—Payment of Infants' Moneys into Court—Exception—Discretion—Payment to Mother—Undertaking to Apply for Maintenance and Benefit—Costs.

Motion by Catherine Havey, the mother of two infants entitled each to $500 insurance moneys, and appointed their guardian by a Surrogate Court, for an order appointing her trustee to receive the moneys for the infants, under the Ontario Insurance Act.

The application was heard at the Ottawa Weekly Court.

F. A. Magee, for the applicant.

BOYD, C.:—By the latest amendment to the Insurance Act, where there is no trustee designated by the assured, the shares of infants may be paid to the executors or to a trustee appointed by the High Court, and such payment shall be a valid discharge. This amendment restricts the provisions of the law repealed, which, from the Insurance Act R.S.O. 1897 ch. 203, permitted the Surrogate Court, as well as the High Court, to intervene. Acting under 2 Geo. V. ch. 33, sec. 175, the applicant, widow of the assured, in July, 1913, obtained letters of guardianship for the purpose of receiving the money, $500 (that sum being payable to each of the two infants). But, as the new law, 3 & 4 Geo. V. ch. 35, sec. 10, came into force in May, 1913, the letters were and

*To be reported in the Ontario Law Reports.

are nugatory for the purpose. Hence this application to the High Court. The mother has given security, and she is the natural guardian of the infants, both girls, of three and five years respectively, and will have charge of them probably for many years, and the amount in question is comparatively small. The new Act gives a discretion to the Court to dispense with security in the case of mothers where the insurance money does not exceed $3,000. These changes indicate that the purpose of the amended law is to commit insurance moneys to the supervision of the High Court as a Court of Equity, and to recognise the necessity of safegarding the money of infants. Since 1889 at least, the policy of the Court has been definitely fixed to keep under the best possible protection moneys intended for the benefit of infants, so that the corpus will be forthcoming when the beneficiary is entitled to call for it.

The rule is, that, on any application to the Court with respect to the handling or the obtaining of infants' money, the fund must be brought into Court; subject, of course, to the discretionary power of setting aside so much for purposes of maintenance. This policy, set forth in many decisions such as Re Smith's Trusts, 18 O.R. 327, Re Harrison, 18 P.R. 303, and Re Humphries, 18 P.R. 289, has in effect been recognised by the Legislature.

The present case may fall within the exception which permits the whole fund to go out to be applied for the welfare of the infants by the mother as occasion arises. The mother is to be appointed trustee under the Act and the share of the children is to be paid to her, on her undertaking to apply for their maintenance and benefit.

The fixed sum provided by the new regulations is to be allowed for costs.

MEREDITH, C.J.C.P. SEPTEMBER 22ND, 1913.

NIAGARA NAVIGATION CO. v. TOWN OF NIAGARA.

Highway—Evidence to Establish—Onus—Failure to Satisfy—Exercise of Statutory Powers—Harbour—Encroachment—Trespass—Damages—Costs.

Action for damages for trespass by the defendants, the town corporation, upon what the plaintiffs alleged to be their lands, in the town, and for a declaration of right, an injunction, and other relief.

The defendants set up that the lands in question formed part of a highway.

W. C. Chisholm, K.C., and A. E. Knox, for the plaintiffs.

A. C. Kingstone and Featherston Aylesworth, for the defendants.

MEREDITH, C.J.C.P.:—Two important questions are involved in this litigation: (1) whether the place in question ever was a highway; and, if so, (2) whether it has ceased to be such by reason of the exercise of the power conferred by an Act of Parliament.

The difficulties involved in the first question are much greater than they ought to be, by reason of the lack of evidence regarding the original laying out of the locality in question into lots and ways.

If one have regard only to the ground itself and any work upon it, the evidence is altogether against the defendants' contention—altogether against any notion that the very place in question ever was a way of any kind. By reason of its low-lying character, it was not suitable for a road; and has never been used as such. On the contrary, in earlier days, the way, of which the defendants contend it is a continuation, was always fenced off from it by a close board fence, with a gate only in it, used to "shoot" logs through; and there are yet indications, in broken posts, of a fence which inclosed the place in question and the adjoining property from all use as a way. And for a great many years past the plaintiffs, and those through whom they claim, have had the whole piece of property enclosed by a wire fence, built in the line of the old posts, and taking the place of the old fence. Such few acts of user as were proved afforded no evidence of a highway; they were but such acts as are common upon, and evidence of, vacant land being passed over without objection by the owner.

If one have regard to such plans as were produced at the trial, and of what would have been probable in laying out land ordinarily, no peculiar circumstances intervening, it might well be held that the place in question was originally laid out as an allowance for road. But there are some special circumstances: the low-lying character of the place, and the fact that from early days it was looked upon as the place of a shipyard and harbour; things of vastly greater importance, then, than another of the several ways to the river in that locality.

If obliged to determine this question in this action, my ruling would be that the onus of proof is on the defendants, and that they have not satisfied it.

But on the other ground my ruling must also be in favour of the plaintiffs; and upon this question there are not so many difficultes arising from lack of evidence, though little was adduced directly respecting it.

The great importance of a dock, and a shipyard, at the head of the great Lake Ontario, at the river, is made very evident by the fact that an Act of Parliament was passed, conferring large rights in, and powers over, the locality in question, upon individuals undertaking the work.

Assuming that the place in question had been laid out as, or had, in any manner, become, a road allowance, in which the public had acquired a right, then, under the enactment beforementioned, there was power to appropriate it for harbour and shipyard purposes; and it was, as I find, so appropriated, and title to it was acquired under the Act.

It is true that the harbour basin does not include all of it; but it is equally true that a large part of it is actually covered by the waters of the dredged and wholly artificially made harbour; so much so that, judging by the maps alone, in the absence of any other evidence on the subject, it seems very improbable that the water of the river Niagara could be reached now, in any manner, by means of this supposed public way, without crossing some part of the artificially constructed harbour. There can be no doubt that the public would have no right to make use of the harbour in any way, against the will of the owners, even if the way extended to the water's edge; but it does not. The embankment is part of the work authorised by, and done, under the Act of Parliament, and so has become the private property of the shipyard and harbour owners. It is necessary for their reasonable and proper use in repairing and maintaining, and carrying on business in, the harbour; and it so encroaches upon the place in question that it would be idle to say that its usefulness as a road, its existence as a place for a highway, is not gone, having been rightly acquired under the Act of Parliament, which, it ought not to be needful to say, is something more than a grant from the Crown.

Admittedly, if any part of the place in question remain a highway, it would be the duty of the defendants to safeguard the public, lawfully using it, from the danger which the harbour would cause: City of Toronto v. Canadian Pacific R.W. Co.,

[1908] A.C. 54; and, admittedly also, it is the right of the plaintiffs to make any reasonable use of the harbour embankment, which covers so much of the place in question, and to enclose it, things quite inconsistent with any use of the place in question as a highway.

I have dealt with the case from the defendants' standpoint, and, thus dealt with, it fails; and so it becomes unnecessary to consider the plaintiff's claim of ownership of the land extending from the waters of the harbour a considerable distance beyond the place in question.

It is satisfactory to know that the loss of the place in question as a road—if it ever were an allowance for road—is not a very serious loss; there are several other roads to the river, not far off, and, if another nearer be desired, it could be had at no great cost; it would be a much more difficult thing to move any part of the harbour to make room for a road in the place in question.

There will be judgment for the plaintiffs and $25 damages, for the trespasses complained of, with costs of action on the High Court scale, without set-off.

No injunction, or other relief, is needed.

HODGINS, J.A., IN CHAMBERS. SEPTEMBER 25TH, 1913.

RE MINISTER OF PUBLIC WORKS AND BILLINGHURST.

Crown—Expropriation of Land—Warrant for Possession—Expropriation Act, R.S.C. 1906 *ch.* 143, *sec.* 21—*Leasehold Interest—Acquisition of Reversion by Crown—Receipt of Rent — Waiver — Estoppel — Discretion — Terms — Compensation—Secs.* 8(2), (3), 22, 26, 28 *of Act.*

Motion by the Minister of Public Works for Canada for a warrant for possession of land expropriated under the Expropriation Act, R.S.C. 1906 ch. 143.

The motion was made under sec. 21 of the Act, notice having been served pursuant to directions given by HODGINS, J.A., upon a previous application.

N. B. Gash, K.C., for the applicant.

W. A. Proudfoot, for Billinghurst, the respondent.

HODGINS, J.A.:—It was urged that the Judge giving the direction for service under sec. 21 of ch. 143, R.S.C., is the one intended by the statute to deal with the issue of the warrant thereunder; consequently, I dispose of this motion.

Counsel for the respondent contended that the Crown had, subsequently to the notice of expropriation, become owner of the lands of which the respondent was and is tenant, and had received rent from him, and was, therefore, estopped from proceeding further with the expropriation of his leasehold interest. I am unable to see how the Crown has disabled itself from taking the leasehold by acquiring the fee of the lands and entering into the receipt of the profits thereof. It is expropriating the leasehold interest, whether it or the former landlord is entitled to receive the rent until possession is given up.

It is all in the respondent's interest that he should remain undisturbed as long as possible. But, if the receipt of rent implied a waiver of any prior proceedings to get possession, then it can be, and is, in these proceedings, satisfactorily explained. See McMullen v. Vanatto, 24 O.R. 625, and per Morrison, J., in Manning v. Dever, 35 U.C.R. 294 (the latter case cited by Mr. Proudfoot).

I do not say that the Crown can be bound by waiver, but I deal with the application as argued.

Negotiations have gone on since possession was demanded many months ago; the parties cannot agree, and the matter must be settled by arbitration. Meantime, possession is required immediately, as sworn to on behalf of the Department affected.

I think the warrant must issue; but I exercise any discretion I have by delaying its execution for a month, on the condition that the tenant repay now the rent refunded, and pay from the date of his last payment, until the expiration of the month of respite, rent at the rate reserved in his lease. This will enable him to look around for a place to which his business may be transferred. If he can agree on the compensation, it can be paid to him. If not, I do not see that I can fix it, or order it to be paid into Court. See sec. 8, sub-secs. 2 and 3, secs. 22, 26, 28.

The costs will be reserved to be dealt with under sec. 32.

KELLY, J. SEPTEMBER 27TH, 1913.

RE TOZMAN AND LAX.

Vendor and Purchaser—Contract for Sale of Land—Objections to Title—Conveyance by Trustee under Will—Registration of Will—Letters Probate not Issued—Outstanding Interest—Quit-claim Deed—Right of Way—Width of Way—Terms of Payment of Purchase-money—Terms of Renewal of Existing Mortgage.

Application by the vendor upon an agreement for the sale and purchase of land, under the Vendors and Purchasers Act, for an order declaring that the vendor was able to make a good title as against the objections of the purchaser.

A. Cohen, for the vendor.
L. M. Singer, for the purchaser.

KELLY, J.:—The main objection to the title made by the purchaser is that arising from the conveyance made on the 15th April, 1887, by George Trolley, as trustee under the last will and testament of Elizabeth Trolley, deceased, to Martha Ann Gray. Elizabeth Trolley, by her will dated the 6th June, 1881, and registered in the registry office on the 7th June, 1882, appointed her husband, George Trolley, the sole executor thereof, with full power to sell or dispose of any or all of her real estate, should he think it to the interest of her children to do so; she having earlier in the will devised her real estate to be equally divided among her children when the youngest became of age. Probate of the will not having been issued, the purchaser makes objection to the vendor's title, which is derived through the above-mentioned deed. From a careful consideration of the whole matter as submitted, I do not think that the title on that ground is objectionable.

In a further objection, the purchaser asks that a quit-claim deed be obtained from the Confederation Life Association, to whom, more than a year after they had become mortgagees of the property, a quit-claim deed was made by one Macdonald, who was owner of or interested in the property before the mortgagor acquired title. The mortgage has since been discharged, but I think a quit-claim deed should also be obtained from the association, so as to remove what otherwise might hereafter be set up as a cloud on the title.

As to the requisition that the vendor give title to a right of way of one foot six inches in width (instead of one foot five inches), the contract for sale does not expressly refer to this right of way nor its extent, nor is it shewn by survey or otherwise what is the width of the strip of land over which the purchaser is to have a right. In the absence of this information, I am unable to say what is its width, or that the vendor is bound to give such right over one foot six inches.

The only matter remaining to be disposed of is, what are the terms of payment of the purchase-money? On the argument it developed that since the contract was made the vendor had paid $50 on account of the principal of the $2,900 mortgage then on the property, thus leaving $2,850 of the mortgage to be assumed by the purchaser; this with the $50 deposit already paid, the further payment of $550 to be made on closing the transaction, and the giving of the $500 mortgage provided by the contract, removes any doubt about the manner of payment.

The question raised by the purchaser as to the terms of renewal of the existing mortgage is not one occasioning any difficulty or entitling him to reject the title.

There will be no costs of the application.

COOK v. COOK—CAMERON, OFFICIAL REFEREE, IN CHAMBERS—SEPT. 18.

Security for Costs—Libel and Slander Act, 9 Edw. VII. ch. 40, sec. 19—Con. Rule 373(g)—Words Imputing Unchastity—Defence—Plaintiff not Possessed of Property to Answer Costs.] —Application by the defendant for an order for security for costs under sec. 19 of the Libel and Slander Act, 9 Edw. VII. ch. 40, and under Rule 373(*g*) of the new Consolidated Rules. It was contended by the plaintiff's counsel that the action brought was not covered by sec. 19, as the words complained of did not impute unchastity. The learned Official Referee (sitting in lieu of the Master in Chambers) found that the words complained of were covered by the section referred to; and said that, upon this finding, the order for security should go as a matter of course.—It was also contended that the defendant should not only disclose a primâ facie defence, but must shew the nature of this defence. That had been done.—The plaintiff's counsel admitted on the motion that the plain-

tiff was not possessed of property sufficient to answer the costs of the action if a verdict should be given in favour of the defendant. This fact was also admitted on the examination of the plaintiff. See Lancaster v. Ryckman, 15 P.R. 199; Paladino v. Gustin, 17 P.R. 553. There would be the usual order for security for costs, with costs of the application. J. W. McCullough, for the defendant. W. C. Davidson, for the plaintiff.

REX v. MCLEAN—KELLY, J., IN CHAMBERS—SEPT. 20.

Liquor License Act—Selling without License—Magistrate's Conviction—Motion to Quash—Evidence—Jurisdiction.]—Application by the defendant to quash a magistrate's conviction for selling liquor without a license. KELLY, J., said that the defendant's right to succeed depended on whether there was evidence before the magistrate on which the conviction could be based. For the defendant it was contended that there was not; but, upon the learned Judge's reading of the record, he was convinced that there was evidence on which the magistrate could properly convict. It was true that the evidence was, in some respects, conflicting; but the magistrate, with the witnesses before him, was the one to judge as to the weight to be given to the testimony. In these circumstances, the conviction should not be disturbed. Application dismissed with costs. H. S. White, for the defendant. J. R. Cartwright, K.C., for the Crown.

COLUMBIA GRAPHOPHONE CO. v. REAL ESTATES CORPORATION LIMITED—HOLMESTED, SENIOR REGISTRAR—SEPT. 24.

Particulars—Statement of Claim—Damages—Breaches of Contract.]—This action was brought by lessees against their lessors to recover damages for breaches of agreements contained in the lease as to furnishing electric energy and steam power to the plaintiffs for the purpose of their business. Various grounds of loss and damage were stated in general terms in the statement of claim, and a demand was made by the defendants for particulars of some of the allegations. This demand was answered by the plaintiffs, but the defendants contended that the answer was insufficient, and moved for better particulars.

The motion was heard by the Senior Registrar of the High Court Division, sitting in lieu of the Master in Chambers. The learned Registrar said that it was suggested that what the defendants really wanted was particulars of the damages which the plaintiffs allege that they had sustained, and that, as it was improbable that on the trial of the action the Court would go into the question of the quantum of damages, but would probably refer that question to a Master, it might be regarded as a premature proceeding now to require the plaintiffs to deliver the required particulars. If this were a plaintiff seeking particulars from a defendant in reference to the plaintiff's damages, that might be so; but, where a defendant is applying for particulars from the plaintiff of his alleged damage, the case is different, and what in the case of a plaintiff might not be proper to grant, may be quite proper to grant in the case of a defendant. The inquiry into the particulars of the plaintiff's alleged damage appeared to be necessary before trial to enable a defendant to say whether or not he would pay money into Court in satisfaction of the claim, and for that purpose he was entitled to be put in possession before a trial of such particulars of the plaintiff's claim as would enable him to form an estimate of its character. Usually plaintiffs were careful to claim at all events enough to cover the injury of which they complained, but in the present case the plaintiffs appeared, according to the particulars which they had furnished, to have suffered over $16,300 damage, and yet had only claimed $15,000. This led to the conclusion that the plaintiffs themselves had not a very definite idea of their alleged damages. But, when a suitor comes into Court, he ought at least to be in a position to furnish to his opponent reasonable and definite information of the damage of which he complains. Applying these considerations to the answers of the plaintiffs to the defendants' demand, the conclusion was reached that, in some respects complained of, they were insufficient; and further and better particulars should be given in respect of the following matters: (1) name of person who made the representation referred to in the 5th paragraph of the statement of claim; (2) particulars demanded by 4th paragraph of demand; (3) better and more detailed particulars of the two items of $8,000 each in the plaintiffs' answer numbered 6; (4) particulars of the number of gramophones and records respectively which the plaintiffs alleged that they were prevented from making owing to the matters complained of in the 9th paragraph of the statement of claim; (5) further and specific statement of the expense of the

electric motor and the quantity and cost of the electric energy referred to in the 10th paragraph of the statement of claim; (6) particulars of loss of custom, prestige, and profits, and orders refused or not fulfilled, in consequence of the matters complained of in the statement of claim. Costs of the motion to be costs to the defendants in the cause. Grayson Smith, for the defendants. O. H. King, for the plaintiffs.

OWEN SOUND LUMBER CO. v. SEAMAN KENT CO.—HOLMESTED, SENIOR REGISTRAR—SEPT. 24.

Particulars—Statement of Claim—Contract.]—Motion by the defendants for particulars of the statement of claim. The learned Registrar, sitting in place of the Master in Chambers, said that the plaintiffs should deliver to the defendants particulars of the contract mentioned in the 3rd paragraph of the statement of claim, stating whether or not it was in writing and the terms thereof; and should also deliver particulars as demanded by paragraphs 2, 3, and 4 of the demand. Costs of the application in the cause to the defendants. Coyne, for the defendants. H. S. White, for the plaintiffs.