The
Ontario Weekly Notes

VOL. VII. TORONTO, NOVEMBER 27, 1914. No. 12

HIGH COURT DIVISION.

KELLY, J. NOVEMBER 16TH, 1914.

HAYWOOD v. HAMILTON BRIDGE WORKS CO. LIMITED.

Negligence—Injury to Workman by Breaking of Chain in Moving Steel Plates—Absence of Evidence of Defect or Weakness—Action by Workman against Master—Nonsuit.

Action for damages for injuries sustained by the plaintiff while working for the defendants, by reason of the defendants' negligence, as he alleged.

The action was tried with a jury at Hamilton.

J. L. Counsell, for the plaintiff.

S. F. Washington, K.C., for the defendants.

KELLY, J.:—At the time the plaintiff sustained the injuries in respect of which he has brought this action, he and two other men, all in the employ of the defendants, were engaged in moving steel plates at the defendants' works. The plaintiff had frequently been engaged at the same work for the defendants. The plates were about 40 feet long, about 2 feet 6 inches in width, and $\frac{5}{8}$ of an inch thick. Three of the plates were laid together, and a chain, with which they were to be raised, was passed around them at the centre, and then fastened by McCoy, one of the men—the plaintiff being at one end and the third man at the other end, helping in the operation of raising. The chain, without any warning, broke, and the plates fell, so severely injuring the plaintiff's finger that amputation of a part of it followed.

There is no evidence of defect or weakness in the chain, or to shew what caused it to break, nor is there anything to indicate that the defendants had been negligent, either in not providing a better or different chain, or that they had any knowledge of any condition from which they could have known that it was

otherwise than safe and fit for the purposes for which it was used. The furthest that the plaintiff or any of his witnesses would go was to say that they had not seen any inspection of the chain.

At the close of the plaintiff's case, the defendants moved for a nonsuit, and I reserved judgment thereon and directed the case to proceed so as to obtain the jury's findings. The defendants called no evidence, and questions were then submitted to the jury. They assessed the plaintiff's damages at $300, "clear Court expenses," but failed to agree upon an answer to the main question, whether the occurrence happened as the result of negligence or through accident.

In answer to the motion for a nonsuit, it was contended for the plaintiff that the breaking of the chain was of itself sufficient primâ facie evidence of negligence to call upon the defendants for an explanation—relying on Corner v. Byrd (1886), M.L.R. 2 Q.B. 262. A perusal of the reasons for the judgment of the Justices who in that case sustained the judgment of the trial Judge in favour of the plaintiff, shews that their findings did not rest solely on the mere breaking of the hawser; the Chief Justice saying that the defendant was liable because the accident could have been prevented by care on his part; and another Justice holding that the defendant was liable because he had not made use of another means (the employment of a tug) to avoid the happening.

A decision more in line with the present case is that of Hanson v. Lancashire and Yorkshire R.W. Co. (1872), 20 W.R. 297, where, on appeal, the opinion was expressed that the mere fact of a chain breaking was not even primâ facie evidence of negligence.

In the 8th edition of his work on the Employers' Liability Act and the Workmen's Compensation Act, Mr. Ruegg, at p. 223, expresses the view, which seems reasonable, that the mere breaking of chains, ropes, planks, ladders, or other things meant to support or carry weight, is not primâ facie evidence of negligence.

Here, where there is no evidence whatever, apart from the mere breaking, that the chain was or appeared to be or was known to be weak or otherwise defective or insufficient or unfit for the purpose for which it was used, there is not that additional evidence of defect in condition or of any negligence by the defendants which would so far support the plaintiff's contention as to justify the case being submitted to the jury.

In that view, the action should be dismissed with costs.

LENNOX, J. NOVEMBER 16TH, 1914.

DARRAH v. WRIGHT.

Company—Wages of Servant—Unsatisfied Judgment for—Ontario Companies Act, R.S.O. 1914 *ch.* 178, *sec.* 98—*Liability of Directors—Computation of Wages—Allowance for Board—Interest—Costs—Evidence — Application to Reopen Case after Trial—Refusal—Suggested Defence.*

Action by John Darrah against T. J. Wright and John McLaren to recover $1,258.99 for wages, interest, and costs of an unsatisfied judgment recovered by the plaintiff against the Salvator Silver Mine Limited, an incorporated company, of which the defendants were alleged to be directors.

The action was tried by LENNOX, J., without a jury.

George Ross, for the plaintiff.

A. H. Armstrong, for the defendant McLaren.

The defendant Wright did not appear.

LENNOX, J.:—As the defendant Wright did not appear and was not represented at the trial, and counsel for McLaren only appeared after the action was disposed of, and I refused to reopen the case, for reasons hereinafter stated, it is necessary to set out the facts and findings with some particularity.

The plaintiff was a labourer and servant in the employment of the Salvator Silver Mine Limited, within the meaning of the Companies Act, R.S.O. 1914 ch. 178, sec. 98, from the 8th February until the 12th December, 1913, earning wages at the rate of $125 a month, and board worth $25 a month; and the Salvator Silver Mine Limited paid for the plaintiff's board at this rate until the end of August. After this date, the plaintiff paid for his board—I presume because his employers failed to provide or pay for it, but this is an inference only, as I cannot recall that the reason was stated in evidence, although it was clearly sworn to that the board cost the employers $25 during the time they paid it, and cost the plaintiff at the same rate during the period of his employment subsequent to the end of August. The statute making the defendants liable for wages during the time they are directors is to be construed strictly. With some hesitation, I have come to the conclusion that the remuneration of the plaintiff may be treated as equivalent to a contract origin-

ally for a total of $150 a month, or, if not, that a new contract for payment at this rate may be implied from continued employment under the new conditions arising at the beginning of September.

The plaintiff sued for his wages and board and $81 travelling expenses, and on the 28th January recovered judgment against the Salvator Silver Mine Limited for $1,202 debt and $30.80 for costs; and issued execution for these sums. The writ of execution has been returned "nulla bona," and it is sworn by the Sheriff and the plaintiff that the money is not recoverable from the Salvator Silver Mine Limited, and that nothing has been paid. The recovery of judgment is not, of course, conclusive against the defendants. The plaintiff claims $25 of the $81 referred to and $41.80 for costs in addition to such portion of the wages as the defendants are jointly or severally liable for. I cannot allow any portion of the $81, and the costs must be reduced to $35.80, as $6 for the writ of execution was not claimed by the writ of summons in this action; and, in the absence of the defendants at the trial, an amendment increasing the amount claimed should not be allowed.

Under the statute referred to, the directors are jointly and severally liable for wages earned during the time they are directors. The defendant Wright was a director from the 5th April until the 3rd December, 1913. The defendant McLaren became a director on the 26th August, 1913, and thereafter continued to be a director while the plaintiff was employed.

The wages account for the purposes of this action may be treated as beginning on the 14th April, 1913, as payments sufficient to cover the wages indebtedness down to that date are shewn to have been made. The defendant Wright is, therefore, liable from the beginning but not quite down to the end of the service period. The other defendant is liable for the services rendered from the 26th August only.

The liability of the defendants respectively for wages and costs is as follows:—

1913. April 30.	Wages at $125 per month from April 14	$ 70.00
July 31.	Wages at $125 per month from April 30	375.00
August 25.	Wages at $125 per month from July 31	104.16
	Total wages before defendant McLaren became a director.....	$549.16

August 31.	Balance of August wages at $125 per month	20.84	
December 3.	Wages at $150 per month from August 31	465.00	
	Costs as above in Darrah v. Salvator Silver Mine Limited....	35.80	
	Amount, exclusive of interest, for which both defendants are liable		521.64
December 12.	Wages at $150 from 3rd December for which defendant McLaren only is liable	45.00	45.00
	Total liability exclusive of interest..	$1,115.80	$1,115.80

It is convenient to deal with the liability for costs of the former action and proceedings as above. Interest will run on these several sums from the 28th January, 1914. There will be judgment against the defendant Wright individually for $549.16 with interest; and against the defendant McLaren individually for $45 with interest; and against the defendants jointly and severally for $521.64 with interest and the costs of this action according to the tariff of this Court.

After the evidence had been taken and the case left over for formal judgment, counsel for the defendant McLaren appeared and asked to have the case opened up to enable his client to give *his own evidence* that he was not a director on the 26th August, 1913, and in fact never became a director. Although the Court had then been sitting for nearly two weeks, and this was the last case but one upon the docket, and although there was no reasonable excuse offered for not being present when the case was called, I would have re-opened the case for admission of a legitimate defence. In view, however, of the fact that the defendant McLaren, in his affidavit filed upon entering an appearance to this action, stated that he became a director on the date claimed, and repeated this on oath in his examination for discovery (answers to questions 14, 15, and 59), and had held himself out as a director, and in the absence of his co-defendant, whose individual liability might be seriously increased, I refused the application, but gave both counsel liberty to file a computation as to the amounts for which judgment should be entered. No statement on behalf of this defendant has been filed.

BRITTON, J. NOVEMBER 16TH, 1914.

CONWAY v. DENNIS CANADIAN CO.

Railway—Fire from Locomotive Engine—Destruction of Property—Control of Engine at Time of Escape of Fire—Liability of Railway Company—Evidence—Findings of Jury—Ontario Railway Act, R.S.O. 1914 *ch.* 185, *sec.* 139.

Action for damages for the destruction by fire, alleged to have been started by the defendants, of trees, timber, and fences upon the plaintiff's land in the township of Jones.

The action was tried before BRITTON, J., and a jury, at Pembroke.

T. W. McGarry, K.C., and F. T. Costello, for the plaintiff.

Peter White, K.C., and A. C. Hill, for the defendants.

BRITTON, J.:—The plaintiff alleges that the fire which occasioned the damage was started by a locomotive engine owned and operated by the defendants upon their mill property. This railway was about three or three and a half miles in length. It was called a stub line, and extended from the defendants' mill and mill-yard to the Grand Trunk Railway at a junction point. This engine was used for hauling lumber to and from piling places and for shipping the lumber away, and for such other purposes as required by the defendants.

The plaintiff's contention is, that the Ontario Railway Act, R.S.O. 1914 ch. 185, sec. 139, applies. He launched his case and conducted it upon the proposition that, as the damage done did not in the aggregate amount to $5,000, it was not necessary to prove specific acts or omissions as to negligence. The defendants did not object to this interpretation of the law, and so no question as to negligence was submitted to the jury.

The contest at the trial, as to liability, was limited to two questions: first, was the fire which destroyed the plaintiff's property started by the locomotive engine of the defendants? and, secondly, was the fireman McDonell, who, as was contended by defendants, was in charge of the locomotive and driving it when the fire escaped from it, if it did so escape, about his master's business, or was he a wrong-doer for whose action the defendants would not be responsible?

At the close of the plaintiff's case, counsel for the defendants asked for dismissal of the action on the ground that the

plaintiff had not proved that, when the fire was started by the defendants' locomotive, that locomotive was in the control of and being used by them.

I reserved my decision upon the defendants' motion, and stated that I would leave the first question to the jury and would ask the jury to assess the damages.

Counsel for the defendants then called witnesses, viz., McDonell, who used and drove the engine, and the superintendent of the defendant company. The evidence given by these witnesses was material, and the case must be decided upon the whole evidence and upon the law applicable thereto. So I submitted the following questions, which the jury answered:—

(1) Was the fire which occasioned the damage to the plaintiff started by the railway locomotive of the defendants? A. Yes.

(2) Was the witness McDonell the foreman of the defendants, in the absence of the superintendent of the defendants, on the day and at the time when the fire started? A. Yes.

(3) Was the witness McDonell, who was using and driving the engine at the time the fire started, if you find that the fire was started by that locomotive, acting for the defendants and within the scope of McDonell's authority? A. Yes.

And they assessed the damages at $665.25.

I am of opinion that there was evidence to warrant these findings. The witness would not say that he did not carry mail matter of the defendants to the station of the Grand Trunk Railway at the time when the wife of the witness went with him. The locomotive engine was the property of the defendants and in use by them. It was in control of the witness McDonell, using it for the defendants, even if at the time the wife took that opportunity of going with her husband to the station on her business.

The statute aims at making the owner of a locomotive liable if in its use it starts a fire. McDonell was accustomed to drive the engine; he was in command at the time of the starting of the fire in question; the locomotive was being run on the tracks of the defendants' railway.

Even apart from the Ontario Railway Act, this is a case of the defendants starting a fire upon their own land, and allowing it to spread to the land of the plaintiff; so that, in my opinion, the defendants are liable; also, upon the findings the plaintiff is entitled to judgment.

There will be judgment for the plaintiff for $665.25 with costs on the High Court scale and with no set-off of costs.

LATCHFORD, J. NOVEMBER 16TH, 1914.

BEHAN v. CANADIAN PACIFIC R.W. CO.

Railway—Animals Killed on Track—Negligence — Neglect to Fence—Proximate Cause—Railway Act, R.S.C. 1906 *ch.* 37, *secs.* 254, 255, 295, 427—*Amending Act,* 9 *&* 10 *Edw. VII. ch.* 50, *secs.* 5, 9.

Appeal by the defendants from the finding of the Judge of the County Court of the United Counties of Northumberland and Durham in favour of the plaintiff for the recovery of $600 damages and costs upon a reference to him as a special referee for trial of the action, which was brought for damages for the killing of the plaintiff's horses upon the track of the defendants.

The appeal was heard in the Weekly Court at Toronto.

W. S. Herrington, K.C., for the defendants.

J. B. McColl, for the plaintiff.

LATCHFORD, J.:—There is evidence amply sufficient to sustain the findings of fact made by the learned County Court Judge.

Section 254 of the Railway Act imposes the obligation of erecting and maintaining fences and gates "sufficient to prevent cattle and other animals from getting on the railway lands:" The word "lands" was added by 9 & 10 Edw. VII. ch. 50, sec. 5.

The defendants, by leaving a large opening in their fence across the plaintiff's lands, violated the obligation imposed by the statute. They did not so construct their fence as to prevent his horses from getting on their lands along which they strayed to an open gate between such lands and the contiguous lands of the Grand Trunk Railway Company, where they were killed.

By sec. 427, a company omitting to do anything required by the Act to be done is liable to a person injured by such omission for the full amount of damages sustained.

The defendants say that it was not their omission which injured the plaintiff, but the omission of some person who failed to close the gate in the Grand Trunk fence at the Massie farm crossing, and that the damages are too remote to be traceable to the defendants' failure to perform the duty cast upon them by the Railway Act. Massie, for whose use, they say, the crossing

was furnished, was bound by sec. 255 to keep the gate closed. Had it been closed, the accident would not have happened, notwithstanding the negligence of the defendants in regard to their fence.

It is also urged that under sec. 295 of the Act, as amended by 9 & 10 Edw. VII. ch. 50, sec. 9, the defendants are relieved from liability, inasmuch as that section provides that no person who suffers damage by reason of the company failing to comply with sec. 254 shall have any cause of action against such company for such damage if it was caused by reason of any person (a) for whose use any farm crossing is furnished failing to keep the gates on each side of the railway closed when not in use.

I agree with the learned referee that the immunity conferred by sec. 295 is restricted to the company supplying the gate—in this case the gate at the Massie crossing, supplied, not by the defendants, but by the Grand Trunk Railway Company. It was, in my opinion, as much the duty of the defendants as of Massie to keep closed the gate between their property and that of the Grand Trunk Railway Company.

The defendants' primary negligence was in not properly fencing their land where it crossed the plaintiff's farm, and the damages sustained by the plaintiff resulted, as a natural consequence, from such negligence. That the accident would not have happened had the gates at the Massie crossing been closed is undoubtedly true. But, even if the defendants were not responsible for the gate being open, the effective cause of the accident —the incident which led to the killing of the horses—was the breach by the defendants of the duty cast upon them by the statute: Halsbury's Laws of England, vol. 21, pp. 378, 379, and the cases there cited, especially Halestrap v. Gregory, [1895] 1 Q. B. 561.

The appeal fails and is dismissed with costs.

MIDDLETON, J., NOVEMBER 17TH, 1914.

RE MINO AND ELLIS.

Will—Construction—Devise to Sons—Substitutional Devise to Issue of Sons—Possible Intestacy in Certain Events—Title to Land—Vendors and Purchasers Act.

Motion by William E. Mino, vendor, for an order, under the Vendors and Purchasers Act, declaring that objections to his title to certain land made by Edith E. Ellis, purchaser, were not valid objections.

M. W. McEwen, for the vendor.
M. F. Muir, K.C., for the purchaser.
J. R. Meredith, for the infants.

MIDDLETON, J.:—The title is derived through a conveyance by the daughter and two sons of the late Mary Ann Beer. By her will, the testatrix provided: "I give devise and bequeath all my estate real and personal . . . unto my daughter Margaret Winnifred Beer for her own use until her marriage or death whichever shall first occur. In the event of the marriage of my said daughter . . . then I give devise and bequeath one-third of my said estate real and personal unto my two sons John Walter Beer and William James Beer to be divided equally between them and in such event I give devise and bequeath the remaining two-thirds of my said estate unto my said daughter Margaret Winnifred Beer absolutely. In the event of the death of my said daughter unmarried then I give devise and bequeath all my estate real and personal to my two said sons . . . to be divided equally between them . . . after the death of my said daughter and if either of my said sons should predecease my said daughter leaving lawful issue then the portion of my said estate which would otherwise have gone to either of my said sons I bequeath to their issue."

After the best consideration I can give this clause, it seems plain that the gift to the issue of the sons is substitutional; and that, in the event of either son dying during the lifetime of the daughter leaving issue, such issue will take, not through the parent, but under the will.

I assume that the daughter is still unmarried, as, if she

marries, the clause has no operation, and the title would pass by virtue of her conveyance.

Some events have not been provided for by the clause. If there is an intestacy in any possible event, the sons and daughter would take as heirs any interest as to which there is intestacy, and this interest has passed by the deed.

A good title cannot now be made. No costs.

MIDDLETON, J. NOVEMBER 17TH, 1914.

MILLER & RICHARD v. LANSTON MONOTYPE MACHINE CO.

Principal and Agent—Commissions on Sales of Goods—Account —Demand—Payment into Court—Interest — Commissions upon Goods Taken in Exchange—Costs.

Action for an account and payment of commissions.

The action was tried without a jury at Toronto on the 11th November, 1914.

W. N. Tilley and J. D. Montgomery, for the plaintiffs.

D. L. McCarthy, K.C., and Britton Osler, for the defendant company.

MIDDLETON, J.:—Although the transactions giving rise to this action involve much, there is now very little to be determined. I can only again express my regret that it has been necessary to resort to the Courts to have this little determined.

The plaintiffs, as agents for the defendant, are entitled to receive a commission of 10 per cent. on all the business transacted in Ontario. The agency terminated on the 7th July, 1913. At that time and prior to the termination of the agency, the plaintiffs naturally desired to ascertain the amount outstanding in which they were interested. This was of importance, as the commission was payable only as and when the actual money reached the defendant. Commission was payable in respect of the entire business done within Ontario, and not only upon the business transacted through the plaintiffs as agents. It is quite possible that the statements and other information sent to the plaintiffs in the course of this business would have enabled them to compile all the information desired, if sufficient memoranda

had been kept, but no such memoranda were taken as to enable the preparation of an entirely satisfactory statement.

The course of dealing between the parties was that the defendant sent statements of moneys received, at intervals, and at the end of the month the plaintiffs sent a summation of all items known to them on which they claimed commission; the defendant then supplementing this by adding other sums, namely, moneys received upon promissory notes, of which the plaintiffs had no record. These additional items were no trifles, but in many instances exceeded the amount of the plaintiffs' statement and also in some instances exceeded the plaintiffs' items in number.

When the disruption took place, the defendant declined to pay anything further unless specified itemised demands were made by the plaintiffs. The plaintiffs, on the other hand, took the position that they were entitled to receive the commission upon all money which the defendant received, and that it was incumbent upon the defendant to formulate the accounts. The plaintiffs also probably went beyond what they were entitled to when they desired some of the statements asked in the correspondence.

After the action was brought and before the defence had been filed, the sensible course was adopted of sending the plaintiffs' bookkeeper to Philadelphia, where in a few days she ascertained the amount of the outstanding accounts upon which the plaintiffs' firm was entitled to commission, and satisfied herself of the entire accuracy of the defendant's bookkeeping. One would have expected that this would have ended the dispute; but the action proceeded, and, after it had been entered for trial, the defendant paid into Court the amount due for commission up to the date of payment, amounting to a little over $5,000. There was no tender of this amount; there is no plea of tender; the amount is not paid into Court as an admission of liability, but as the price of peace; and this is inadequate to afford any protection to the defendant.

Subject to one item of controversy which I shall mention, there is not and never has been any dispute whatever as to the amount coming to the plaintiffs. The defendant is a large concern, and there never was any real unwillingness on its part to pay the plaintiffs. The whole trouble is well exemplified by the attitude of the witnesses at the trial; its officers thought there was no obligation to pay until a proper demand had been made, and determined to bring matters to an issue upon the question.

In the view taken, I think that the defendant was wrong, and

that the plaintiffs are entitled to recover for all moneys due up to the date of the writ, as a debt, and I take the accounts down to the time the money was paid into Court upon the basis of the information furnished in the particulars and accepted by the plaintiffs as correct, and I find as the balance due the sum paid into Court. I give judgment for the plaintiffs against the defendant for this sum, together with interest from the date of the demand, the 11th November, upon all moneys then due, and for interest upon accruing instalments from the end of each month. The exact amount may be computed by the parties. The money in Court will be paid out, with any accrued interest, on account of this sum.

The question in controversy was the right of the plaintiffs to commission upon machines taken in exchange. Some $13,000 worth of machinery has been so exchanged; $8,050 of machinery, taking the price allowed upon the exchange as a basis, still remains on hand. For the reasons more fully explained at the trial, I think the plaintiffs fail in the contention that the commission is payable in respect of this at the present time. The exchange of machinery was not contemplated by the original agreement. When the course of dealing resulting in exchanges was adopted, the system of paying commission upon the proceeds of the second-hand machinery, as and when it was converted into cash, was adopted; and I do not think that there is any foundation for Mr. Patterson's contention that, although this was the rule during the currency of the agreement, some other principle must now be applied.

The defendant has no right to retain this machinery for an unreasonable time, and liberty may be reserved to the plaintiffs to apply for relief if there is any room for the suggestion that the defendant is not in good faith endeavouring to sell and dispose of the machinery in question. There is, however, no reason to suppose that the defendant intends acting otherwise than in perfect good faith and in accordance with its own interest, which is nine times as great as that of the plaintiffs.

The one remaining question is that of costs. The plaintiffs have not been right throughout, but they have succeeded in recovering a substantial sum of money due to them, and the ordinary rule should apply; costs should follow the event. By reason of the failure of the plaintiffs on the issue as to the second-hand machinery, some allowance should be made; and I, therefore, direct a deduction of $75 from the taxed costs, as representing the costs of this issue.

MIDDLETON, J. NOVEMBER 17TH, 1914.

*McMULLEN v. WETLAUFER.

Malicious Prosecution—Reasonable and Probable Cause—Advice of Counsel—Approval of Crown Attorney—Malice—Finding of Jury—Dismissal of Action—Costs.

An action for malicious prosecution, tried before MIDDLETON, J., and a jury, at Toronto.

The plaintiff was arrested at the instance of the defendant upon informations for forgery and perjury, and was tried and acquitted.

The action was tried before MIDDLETON, J., and a jury at Toronto.

H. H. Dewart, K.C., and R. T. Harding, for the plaintiff.

T. N. Phelan, for the defendant.

MIDDLETON, J.:—I reserved my judgment upon the question of reasonable and probable cause, and allowed the case in the meantime to go to the jury for the purpose of determining the responsibility of the defendant for the prosecution, the question of malice, and to have the damages assessed. (There was no question as to the result of the prosecution.) The jury has found for the plaintiff, with $4,000 damages; and I must, therefore, determine the question reserved. . . .

[The learned Judge then set out the facts and circumstances of the case; the prosecution having arisen from certain letters alleged to have been written by the plaintiff, the authorship of which he denied on oath in a civil action, Davis v. Wetlaufer.]

The jury . . . were well warranted in finding that actual malice existed. The object of the arrest of the plaintiff was, no doubt, to influence the conduct of an action for conspiracy, which was then about to come on for trial, and in which it was known that McMullen (the present plaintiff) would be a witness.

The existence of malice does not warrant a finding of the lack of reasonable and probable cause; but where malice exists a careful scrutiny of the circumstances is rendered necessary, as the lack of good faith removes any presumption that might otherwise exist in favour of the defendant.

Before the information was laid, two experts had given an unqualified opinion that the same hand which had written a certain subpœna had written the letters. McMullen had ad-

*To be reported in the Ontario Law Reports.

mitted having written the subpœna; McMullen, it was known, was interested in the litigation; and it was known that the police would only be set in motion against the Wetlaufers (the defendant and his father) upon the complaint of the father's wife. This, and McMullen's denial of all knowledge of the letters, constitute the material facts as known to the defendant at the time the information was laid; and I think it is my duty to attempt to determine the existence of reasonable and probable cause having regard to the facts as they then appeared to the defendant.

Mr. Godfrey, a barrister and solicitor, who had been acting for the defendant throughout, advised the prosecution. He and the defendant laid the facts before the Crown Attorney, and the Crown Attorney approved of the prosecution and directed the issue of a warrant.

Were I not trammelled by authority, I should hold that the advice of the experts and of the defendant's legal adviser and of the Crown Attorney, while going to negative malice, had no bearing upon the question of reasonable and probable cause. But I think that authorities binding upon me compel me to determine that where the facts are placed fully and fairly before experienced counsel, and in particular where the facts are submitted to the Crown Attorney, and a prosecution is advised, this constitutes reasonable and probable cause.

It has not been suggested that the Crown Attorney or the defendant's legal adviser acted in any way dishonestly. All the facts were known to Mr. Godfrey; he did nothing to mislead the Crown Attorney. In finding in the defendant's favour I base my finding entirely upon the ground that on the authorities the advice given constitutes reasonable and probable cause. The advice of a competent counsel, having knowledge of all the facts, has been determined to be reasonable and probable cause for a prosecution.

I do not think that the prosecution was justified or that there was, apart from such advice, any reasonable or probable cause for its institution.

The case is singularly like Clements v. Ohrly (1847), 2 C. & K. 686. . . . The reasoning of Lord Denman in that case commends itself very strongly to me, but it is opposed to authorities which I feel bound to follow, for the reasons assigned in Longdon v. Bilsky (1910), 22 O.L.R. 4. . . .

The action fails; but I dismiss it without costs, firstly because there was malice; and secondly, because I desire to express in this way disapproval of the course adopted in issuing a warrant in a case which at most justified only the issue of a summons.

MIDDLETON, J. NOVEMBER 17TH, 1914.

*HEALY v. ROSS.

Ditches and Watercourses Act—Award of Township Engineer—Construction of Drain—Appointment of Engineer—Validity—De Facto Engineer—Amendment of Pleadings—Appeal from Award—Time—Ruling of County Court Judge—Land of Infant Affected by Award—Notice of Proceedings Given to Father of Infant—"Guardian of an Infant"—R.S.O. 1897 ch. 285—Infants Act, R.S.O. 1914 ch. 153, secs. 28, 32—Sufficiency of Outlet.

Action to restrain the defendants from proceeding with the construction of a drain under an award made by the defendant Fitton pursuant to the Ditches and Watercourses Act, and for a declaration that the award was illegal and made without jurisdiction, and for damages.

The action was tried without a jury at Toronto.

S. S. Sharpe, K.C., for the plaintiffs.

J. M. Ferguson and J. T. Mulcahy, for the defendants.

MIDDLETON, J.:—. . . The lands affected by the award are mainly low-lying and swampy lands, in the township of Mara, upon the shores of Lake Simcoe. The elevation of these lands above the lake level is so slight that it is difficult and perhaps impossible to devise an entirely satisfactory scheme of drainage. Upon the requisition made, the defendant Fitton, an entirely competent engineer and a man of much experience in drainage matters, did his best to solve the difficult problem presented, Other drains had been constructed, and these are not at the present time sufficient. The new work directed by the award in question consists in part of a drain through some cleared land adjoining an elm swamp, to take the place of an old drain which passes through the swamp, overgrown and choked, and quite inadequate. The new drain starts from a point on the borders of lot 24, where it leaves the course of the old drain and reaches Lake Simcoe by a route which is deemed preferable, because, in the first place, it is shorter, and, in the next place, it goes through open land where there is less danger of obstruction, the outlet being not far distant from the outlet of the old drain upon the shores of the lake.

*To be reported in the Ontario Law Reports.

The validity of the award is attacked upon three grounds: first, it is said that there is not a sufficient outlet; secondly, that the engineer was not duly appointed; and thirdly, that the award affects the land of one William Johnston junior, an infant, who was not duly served with notice of the proceedings.

No attack upon Mr. Fitton's position as township engineer is made upon the pleadings, but it was sought to set it up by way of amendment. I reserved judgment upon the motion for leave to amend until I could ascertain what foundation there was for the attack. I am satisfied that the attack entirely fails, and I think that my discretion ought to be exercised against allowing the amendment sought.

The attack upon Mr. Fitton's appointment is based upon a complete misunderstanding of the situation. By a by-law of the township council, passed in February, 1897, Mr. James Sheridan was appointed township engineer. He was not appointed engineer under the Act in question. The by-law is intituled by-law 268 to appoint township officers for the year 1897, and the appointment is to office "until his successor or successors has or have been duly appointed and qualified or until otherwise relieved by this council." A similar by-law was passed in 1898, to appoint officers for the year 1898; Mr. Patrick Kelly was appointed township engineer. In 1899, a by-law was passed, No. 373, "that C. E. Fitton, P.L.S., be and is hereby appointed engineer under the Ditch and Watercourses Act to perform all the duties required of an engineer by the said Act."

The argument is that Mr. Fitton could not be appointed unless and until the appointment of the previous engineers under the by-laws of 1897 and 1898 had been expressly revoked. I can see nothing in this argument. Mr. Fitton was duly appointed under the Act.

Quite apart from this, Mr. Fitton held office under that by-law until the year 1912, and was certainly the de facto engineer of the township, and his actions are not open to question by reason of any possible defect in the mode of his appointment.

Application to amend was also made for the purpose of allowing the award to be attacked upon the ground that an appeal had been had from the award, which the Judge of the County Court ruled was not brought in time. It is said that this ruling was erroneous. If so, possibly proceedings by way of mandamus might have been open to those aggrieved; but it appeared clear to me that this in no way affected the validity of the award. So

far as the matter was gone into, it also appeared that the ruling of His Honour was quite correct.

William Johnston, the father, owned lot 25. His son William Johnston junior, it is said, is the owner of lot 26. At the time of the award, in 1910, he was 17 or 18 years old. Lot 26 was purchased with the father's money. The deed was taken, it is said, to the son. The deed is not produced, and I do not know whether there is anything on the face of it to indicate that the younger man was intended. It was assumed by all that one man, the father, owned both lots. When the engineer's meeting was called and he was upon the ground, Johnston senior stated that his son owned lot 26. The engineer saw the young man, who was present upon the farm, and told him that it was his (the engineer's) duty to adjourn the meeting so that notice might be given to him (the son); but, as all parties were entirely friendly at this time, Johnston junior acquiesced in the proceedings, and, so far as an infant is capable of doing so, waived notice. As he was an infant, I do not think his waiver of notice is effectual. The award cast upon him the duty of maintaining the drain through his land, lot 26. As this is mainly swamp, adjoining the lake, it is possible that it is not fair to put this burden upon him. If the father owned both lots, there would be no unfairness, as far as shewn, in calling upon him to maintain the drain across both lots.

Johnston junior, now of age, is being utilised by two other dissatisfied owners, Healy and McElroy, for the purpose of assisting them in their attack upon the award.

The statute, R.S.O. 1897 ch. 285, requires notice to be given to every "owner," but by the interpretation clause, sub-sec. 3, "owner shall mean and include an owner . . . the guardian of an infant owner . . . ;" and it is now argued that the notice to the father was sufficient, as he was the guardian of his infant son within the meaning of the statute.

I have not been able to find any authority upon this statute dealing with this question; but under the English Partition Act a similar question has arisen. There, a sale might be had instead of partition upon the request of the guardian of an infant. . . .

[Reference to Platt v. Platt (1880), 28 W.R. 533; Rimington v. Hartley (1880), 14 Ch. D. 630.]

I have come to the conclusion that a notice to the father is such a notice as was required by the statute. There could be no guardian ad litem, for there is no lis pending. There could be no guardian appointed by the Surrogate Court without the

father's consent. The statute contemplates that any owner desiring to have the drain constructed should be able to proceed under the Act, even if one of the owners affected is an infant; and, therefore, the notice required is to the guardian, by nature, of the person of the infant, unless he should chance to have some other duly appointed guardian.

The guardianship of the father is recognised by our statutes. The Infants Act, R.S.O. 1914 ch. 153, takes the father's guardianship for granted. During the lifetime of the father he may be appointed Surrogate guardian, or some other person with the father's consent may be appointed Surrogate guardian, such guardian having authority not only over the person but over the estate of the infant. See sec. 32. Under sec. 28, on the death of the father the mother becomes the guardian of the infant, unless the father has exercised his right of appointing another guardian. The mother or the testamentary guardian appointed by the father would not have any right under sec. 32 over the property of the infant. The statute in question does not require that the person to whom notice was given shall have been constituted guardian of the infant's estate.

The remaining question, that of the sufficiency of the outlet, arises from a misunderstanding of the decision in McGillivray v. Township of Lochiel (1904), 8 O.L.R. 446. No doubt, the statute contemplates that every drain shall be carried to an adequate and sufficient outlet. What was held in that case was that a sufficient outlet was in one sense a condition precedent to the validity of proceedings under the statute so as to justify the diversion of water when third parties were concerned. Under the colour of a drainage award certain persons had brought water on to the plaintiff's property. He sought an injunction and damages. It was held that no award under the statute could justify the bringing of this water on to the lands in question. All that the statute authorised was the taking of water to a proper outlet, that is, some place where it would not injure the land of others.

The drainage scheme here is the discharge of these waters into Lake Simcoe. Lake Simcoe is undoubtedly a proper outlet, and the water, once brought there, could injure no one. It is said that to reach Lake Simcoe the ditch would have to be carried across the lands of certain persons without much fall, and at a level little, if any, above the lake level. The argument is, that this last mile of ditch is not a proper outlet; it is not the outlet at all; the outlet is the lake. This mile forms part of the ditch,

and the owners of the land which it crosses are parties to the award; and, if any wrong was done to them by the engineer, their remedy was by way of appeal from the award.

The true meaning of the statute is, I think, apparent from the judgment of my brother Britton in the case of Chapman v. McEwen (1905), 6 O.W.R. 164. . . .

The action fails and must be dismissed with costs.

LATCHFORD, J. NOVEMBER 19TH, 1914.

RE NELSON.

Will—Construction — Devise and Bequest to Widow—Limitation to "Natural Life"—Application to Devise—Life Estate in Land.

Motion by the executors of the will of William Nelson, deceased, upon originating notice, for an order determining a question arising in the administration of the estate as to the proper construction of the will.

The material portions of the will were as follows: "I give devise and bequeath unto my wife Sarah all my real estate and all the interest or income that may be derived from my personal estate *during her natural life* and if said interest is not sufficient to . . . maintain her then she shall receive annually $100 of the principal sum over and above said interest or income which sums shall be in lieu of her dower. Then after the decease of my wife I give to each of my children . . . the following sums . . . and if any balance after paying said legacies remains the amount shall be divided equally among my surviving children."

The motion was heard by LATCHFORD, J., in the Weekly Court at Toronto.

P. A. Malcolmson, for the applicants.

J. Stanley Beatty, for the executors of the widow.

LATCHFORD, J.:—From the best consideration I have been able to give to the will, I have reached the conclusion that the words "during her natural life" have reference not only to the personal estate of the testator, but also to his real estate; and that, therefore, his widow had merely a life estate in the village lot in Underwood. Costs out of the estate.

BRITTON, J. NOVEMBER 20TH, 1914.

*OSKEY v. CITY OF KINGSTON.

Alien Enemy—Residence in Ontario—Action Begun before War—Right to Continue—Proclamation of August, 1914—Negligence—Death of Husband and Father of Plaintiffs from Electric Shock—Liability of Employer—Failure to Protect Electric Lamp—Liability of City Corporation Supplying Electric Current—Evidence—Onus—Damages.

Action by Julia Oskey, the widow of John Oskey, and by her three infant children, against the Corporation of the City of Kingston and the Frontenac Floor and Wall Tile Company Limited, to recover damages for the death of John Oskey by reason of the negligence of the defendants or one of them, as the plaintiffs alleged.

The action was tried without a jury at Kingston.

A. B. Cunningham, for the plaintiffs.

J. L. Whiting, K.C., and W. R. Givens, for the defendant city corporation.

J. M. Godfrey, for the defendant company.

BRITTON, J.:—The deceased was a workman in the employ of the Frontenac Floor and Wall Tile Company Limited. On the day of his death, he was at work in the company's building, and was asked by the assistant manager to hand to him an electric lamp, which was attached to an extension cord. The deceased, in complying with the request or order, picked up the electric lamp, and immediately received an electric shock causing his almost instant death.

The plaintiffs allege negligence on the part of the company in the arrangement of this portable lamp, and particularly in not having a wooden or some other non-conducting handle, or in not having the lighting wire properly insulated, or in not having the wire screen now covering the glass bulb so insulated that such an accident as happened in the present case could not occur.

The plaintiffs also allege that the Corporation of the City of Kingston was guilty of negligence that caused the death of Os-

*To be reported in the Ontario Law Reports.

key. That corporation is the owner of the power plant that supplies electricity to the company named, to the extent of 110 volts, for lighting purposes.

The plaintiffs charge that the city corporation negligently allowed the wire which carried the current of electricity for lighting purposes to the works of the defendant company, to become foul with a wire of a much higher voltage than 110 volts. This higher voltage caused the electric light wire to be overcharged, and caused the wire screen covering the lamp to be heavily charged, and by reason thereof the deceased was killed; and so the plaintiffs claim to be entitled to recover damages from the city corporation. . . .

I find that the death was occasioned by an electric shock caused by the electric current, carried by the wire to the factory of the defendant company for lighting purposes. . . .

Immediately after the accident, the city employees made what, in my opinion, was a careful inspection, and found nothing wrong. No defect in the plant of the city was found. . . .

I fully recognise that an electrical company, or any city, town, or village corporation maintaining electric wires over or by which a high voltage of electricity is conveyed, is under the duty and obligation of using every means known to them, and to those having expert knowledge, to render the wires safe for those using premises wired for electricity, and for those working or having occasion to be in close proximity to these wires. As to the city corporation, I have placed the burden of proof upon it; and, in my opinion, the onus has been satisfied.

The plaintiffs have not established their allegation that the death of John Oskey was "caused by the negligence of the defendant the Corporation of the City of Kingston in failing to exercise the proper caution required by concerns engaged in supplying power and light, and in allowing a dangerous volume of electricity to escape from its system along the electric lighting wire with which the portable lamp was connected."

The action as against the city corporation will be dismissed.

The defendant company was negligent, and its negligence occasioned the death of Oskey. Oskey, as an employee about his work, did what was required of him, and in doing so received the shock.

The negligence of the company—of the overseer—was in not testing the insulation of the wire to see if it was properly insulated, and if found defective in not having that defect remedied. There was further negligence in not having a wooden

handle, or a handle of some non-conducting material, so that the light could be safely carried. Then the screen or cage which protected the lamp against breaking in case of a fall was no protection to the workmen. These wires, as in the present case, would, in case of leakage of electricity, become charged, and there was negligence in not having these covering wires insulated, or in not having a covering over or in place of wires as at present. No difficulty exists in having protection to render the portable lamp reasonably safe for persons carrying it.

Upon cross-examination of the widow, one of the plaintiffs, she stated that she was born in Hungary; and so it was argued that, as an alien enemy, belonging to a country with which Canada is at war, she could not maintain this action. About 7 or 8 years ago, the deceased, with his wife, one infant son and an infant daughter, left Hungary and went to the United States. Shortly before the accident, the deceased, with his wife and children, came to Canada, apparently with the intention of making Canada his permanent place of residence. The death occurred, and this action was commenced, before war was declared, and I am of opinion that the plaintiffs are entitled to enforce their claim in our Courts.

In the very recent case of Princess of Thurn and Taxis v. Moffitt, [1914] W.N. 379, Mr. Justice Sargant said that there appeared to be a general impression that during the continuance of a state of war an alien enemy as such was not entitled to any relief as a plaintiff in the Courts of this country; but, in his Lordship's opinion, that proposition was too widely stated, and did not apply to a person in the position of the plaintiff in that case.

In Hall's International Law, 6th ed., p. 388, it is said: "When persons are allowed to remain either for a specified time after the commencement of war or during good behaviour they are exonerated from the disabilities of enemies, for such time as they in fact stay, and they are placed in the same position as other foreigners, except that they cannot carry on a direct trade in their own or other enemies' vessels, with the enemy country." See Wells v. Williams (1697), 1 Salk. 46.

The plaintiffs are within the proclamation of the Governor-General of Canada of the 13th August, 1914. This Proclamation, after reciting that there are many immigrants of Austro-Hungarian nationality quietly pursuing their usual avocations in various parts of Canada, and it is desirable that such persons should continue in such avocations without interruption, is as

follows: 1st. Such persons, so long as they quietly pursue their ordinary avocations, shall not be arrested, detained, or interfered with, unless there is reasonable ground to believe that they are engaged in espionage or attempting to engage in acts of a hostile nature or to give information to the enemy, or unless they otherwise contravene any law, order in council, or proclamation.

It follows that the plaintiffs are entitled to continue this action and to recover.

In such cases as the one now in hand it is always difficult to ascertain what amount would be just to the family and not oppressive to the defendants. The deceased was a good worker and a good provider. Up to the time of his death he had been receiving as wages $80 a month. He was in the prime of life—not more than 40—and his wife nearly the same age; the son John 15 years old, the daughter Anna 11, and Marguerite about 7.

I assess the damages at $2,000, and I allot the same as follows: $1,200 to the widow, $200 to the son John, and $300 each to the daughters Anna and Marguerite. The infants' money will be paid into Court to their credit for them.

The action against the city corporation will be dismissed, with costs if demanded.

There will be judgment against the defendant company for $2,000, with costs. If the sum of $2,000 is reduced by reason of costs, the amounts allotted will abate pro rata.

RE HAMILTON IDEAL MANUFACTURING CO. LIMITED—KELLY, J., IN CHAMBERS—NOV. 16.

Company—Petition for Winding-up—Inspection of Affairs and Management—Inspector's Report—Meeting of Shareholders to Consider—Companies Act, R.S.O. 1914 *ch.* 178, *sec.* 126.] —Petition for a winding-up order. The learned Judge said that the petitioners represented practically three-eighths in value of the paid-up capital stock; and some of them in their affidavits expressed a desire to have an inspection of the affairs and management of the company, to which they were entitled under the Ontario Companies Act, R.S.O. 1914 ch. 178, sec. 126. When the petition was first presented, the learned Judge appointed an inspector to make the investigation; and later the inspector gave evidence of the result of his investigation. His report then given contained much information in detail, not available to the

shareholders in any of the statements shewn to have been issued to them; and it was advisable that that information should be laid before them before the application was further dealt with. The shareholders should be called together and the information submitted to them; and the result of the meeting, including a report of what proportion in value of the shareholders were in favour of a winding-up, should be added to the material supplied for or against the petition; after which the petition would be disposed of. C. V. Langs, for the petitioners. G. Lynch-Staunton, K.C., for the company.

NIXON v. NICKERSON—LENNOX, J.—NOV. 16.

Fire — Destruction of Property — Negligence — Evidence — Damages—Remoteness.]—Action for damages for the destruction of the plaintiff's property by fire set out by the defendant's servant. The action was tried by LENNOX, J., without a jury. The learned Judge said that it was not suggested that William Clarke had any profit or end to gain by giving false evidence. His statement that he was working on the defendant's property and set out a fire north-west of the plaintiff's mill on the 28th June, was corroborated by several witnesses. That Clarke was the servant and agent of the defendant was not and could not be disputed. That the fire which destroyed the plaintiff's mill and personal property originated in the fire set out by Clarke was overwhelmingly established. The amount which the plaintiff should recover was not so clear, and in this case, of common misfortune, the learned Judge was disposed to give the defendant the benefit of any doubt. The plaintiff might have lost $240 in cash; but of a loss so easily asserted there should be very clear proof. The existence of the money should not be left in doubt. Enough was not shewn to entitle the plaintiff to the allowance of this item. The $250 for medical attendance, loss of time, and suffering, was honest enough, but it was not recoverable damage—it was too remote. There were a number of small items for which he should be allowed in all $105.15. For the loss of the mill, $750 should be allowed. Judgment for the plaintiff for $856.15, with costs. F. L. Smiley, for the plaintiff. Franklin Pumaville, for the defendant.

McDOUGALL v. TOWN OF NEW LISKEARD—LENNOX, J.—NOV. 16.

Water—Unlawful Obstruction of Stream by Dams—Right of Lower Owner to Flow of Water—Mandatory Order for Removal of Obstructions—Injunction—Damages—Agreement—Expropriation.]—The plaintiff, the owner of land in the township of Harris, in the district of Temiskaming, used as a dairy farm, brought this action to restrain the defendants from diverting the water of a stream and for damages and other relief. The action was tried by LENNOX, J., without a jury. The learned Judge said that the water in question was a constant stream or watercourse, with defined banks throughout, and a visible source, which the defendants had unlawfully diverted by dams and other appliances and applied to their own use. Before these dams were erected, this water always flowed to and over a portion of the plaintiff's land, and it would still flow there at all times and seasons of the year but for the acts of the defendants. It was a large stream of excellent spring water and valuable to the plaintiff. The defendants had not been guilty of an intentional wrong. At the time they erected the dams, they were mistaken as to the boundary of the plaintiff's land. It was essential to them to have this water, or a portion of it, for the use of the town, and it was now proposed to acquire this right by agreement with the plaintiff or by expropriation proceedings. Judgment for the plaintiff for $150 damages, a mandatory order directing and compelling the defendants to remove the dams in question and all obstructions, upon their land, to the regular and accustomed flow of the water to and upon the plaintiff's land, and a perpetual injunction restraining them from obstructing the flow of the water in question to the plaintiff's land; and for the costs of the action. If the defendants allow the plaintiff to tap the water supply at their dam, under the direction and supervision of their engineer, by a two-inch pipe, and to carry this pipe across their land, and to the land of the plaintiff, and to draw such water as he requires through this pipe for the next six months, and upon payment of the damages awarded and the costs when taxed, the entry of judgment will be stayed for six months. If expropriation proceedings are taken, any damages sustained by the defendant subsequent to the 16th November, 1914, will be proper to be taken into account by the arbitrators. The right is reserved to the defendants to apply for further delay, if due diligence is observed in the meantime, and further time is required. In any event there will be a stay for 30 days. The plaintiff in person. F. L. Smiley, for the defendants.

THERIEN v. MOUNTJOY LUMBER CO.—LENNOX, J.—NOV. 16.

Contract—Supply of Ice—Evidence—Payment according to Superficial Area.]—Action to recover $1,314.40, the balance alleged to be due to the plaintiff for ice furnished to the defendants under a contract. The learned Judge finds, upon the evidence, which is reviewed in a written opinion, that the rate of payment under the contract had reference only to superficial area and was wholly irrespective of the cubical contents of the blocks of ice furnished. Judgment for the plaintiff with costs for $1,314.40, with interest from the date of the writ of summons, less the sum, if any, paid into Court with its accrued interest, which is to be paid out to the plaintiff. A. G. Slaght, for the plaintiff. H. E. Rose, K.C., and J. Y. Murdoch, for the defendants.

SCHMIDT v. SCHMIDT—LATCHFORD, J., IN CHAMBERS—NOV. 17.

Pleading—Statement of Claim—Addition of Cause of Action not Endorsed on Writ of Summons—Rule 109—*Alimony.*]—Appeal by the plaintiff from the order of the Master in Chambers, ante 228. The appeal was dismissed with costs in the cause to the defendant Schmidt. George Wilkie, for the plaintiff. A. McLean Macdonell, K.C., for the defendant Schmidt.

CORRECTION.

In WEBB v. PEASE FOUNDRY CO., ante 212, in the last line of p. 213, insert, after "carried out," the words "or that it should remain on foot and be carried out," and change the next word from "in" to "on."