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APPELLATE DIVISION.

JANUARY 23RD, 1914.

LEAR v. CANADIAN WESTINGHOUSE CO.

Master and Servant—Injury to Servant—Liability at Common Law—Workmen's Compensation for Injuries Act—Negligence.

Appeal by the plaintiff from the judgment of the Senior Judge of the County Court of the County of Wentworth in favour of the defendants in an action for damages for injury sustained by the plaintiff while working for the defendants in their factory in attempting to hold up a heavy plate. The plaintiff alleged negligence on the part of the defendants.

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

C. W. Bell, for the plaintiff, the appellant.

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

The judgment of the Court was delivered by BOYD, C.:—The plaintiff cannot recover at common law. There was no defect in the works or appliances; a crane was provided for the hoisting-up of large plates; the smaller ones were handled by men called in for the occasion from other work. It was left to the discretion of the foreman as to how many men should be employed in lifting the smaller plates; and, if he erred in judgment or was negligent in putting on the men too heavy a load, it was the fault of the foreman, who was no more than a fellow-servant, and so (as before the Workmen's Compensation for Injuries Act) the master was not liable. The judgment should be affirmed. No costs.

Young v. Hoffman, [1907] 2 K.B. 646, may be referred to.

It would be well to verify the weight of the small plate: to the man who lifted and strained himself it seemed half a ton: to the foreman who looked on, about 300 pounds; the truth probably lies between.

JANUARY 23RD, 1914.

*LOFTUS v. HARRIS.

Will—Validity—Failure to Prove Testamentary Incapacity or Undue Influence—Solicitor for Testatrix Named as Principal Beneficiary—Suspicion—Removal of—Onus — Absence of Independent Advice—Affirmance of Will after Lapse of Time—Allowance for Improvements Made on Land by Expectant Devisee.

Appeal by the plaintiff from the judgment of the Judge of the Surrogate Court of the County of York upon a contestation by the defendant of the will of Finella F. Harris, the wife of the defendant, propounded by the plaintiff as executor. The plaintiff had been the solicitor and adviser of the testatrix, and took the principal benefit under the will, which was drawn by another solicitor. A former will had been made in favour of the defendant. By the judgment appealed from probate of the will was decreed except as to the devises and bequests to the plaintiff for his own benefit.

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

E. E. A. DuVernet, K.C., for the plaintiff, the appellant.

W. D. McPherson, K.C., for the defendant, the respondent.

The judgment of the Court was delivered by BOYD, C.:—By will dated the 16th October, 1910, the testatrix gives all her estate, worth about $6,000, to the plaintiff, a barrister, absolutely, save as to a bequest of personal effects to Rosie White, and $300 to be allowed to John Watkins in discharge of a debt. The will is on a form, with special disposition, which is short and simple, filled in.

This will was drawn up from directions of the testatrix by Mr. Lewis, K.C., who is one of the witnesses.

*To be reported in the Ontario Law Reports.

The testatrix derived her property from a former husband; and in February, 1906, she married the present defendant, who was then a widower. She made a will in his favour on the 23rd December, 1907, which was drawn by Mr. Loftus, who had acted as her solicitor before this, as well as after. Being dissatisfied with her domestic life, she revoked this and made a will on the 6th January, 1908, in favour of Charles Merton, who had befriended her, and this was also prepared by Mr. Loftus.

It is plainly apparent from all the evidence that she had fully resolved not to give any of her property to her husband, and this for reasons fully explained by her in writing at a later date. I see no reason for supposing that this will to Merton was not a valid instrument, made by one competent, and acting as a free agent. Married women can dispose of their property as freely and fully as married men.

The learned Surrogate Court Judge detects undue influence in some amounts given to Roman Catholic charities in this will larger than those given to Protestant charities—she being a Presbyterian and Loftus a Roman Catholic. But surely this per se is not enough so to hold.

In Parfitt v. Lawless (1872), L.R. 2 P. & D. 462, before a strong Court composed of Lord Penzance, Pigott, B., and Brett, J., the Court refused to extend the rules adopted by Courts of Equity in relation to gifts inter vivos to the making of wills. . . .

Then in 1910 the impeached will was made. As stated by the learned Judge below, "She told Mr. Loftus that Mr. Merton would not fight for her will against her husband in case of her death, and wanted to leave it to Mr. Loftus, who would fight for it."

Mr. Loftus put her off several times, but at last he saw Mr. Lewis and asked him to draw a will, as Mrs. Harris wished to leave her property, and he introduced her to Mr. Lewis.

I quote against from the judgment below: "Mr. Lewis said that she did instruct him as to the will in favour of Mr. Loftus —the manner in which it was to be drawn—but she told him that she had no relations, and that she was not going to leave anything to her husband nor to any one who would not fight for the will . . . I think she came next day and signed the will"—as drawn by Mr. Lewis.

Resting at that point, and on the facts stated, there appears to be enough to shew a good will by a competent testator. There was no weakness of mind and no undue influence exerted. She

had a strong feeling of resentment against her husband—believing that he had married her for her property, and being in possession of letters affecting his manner of life, which would explain her determined course. . . . There was no hallucination in her mind—there was a substantial foundation for her attitude—and we have only the husband's side of the case in the oral evidence, but we have the wife's written declaration shewing a very different picture of the domestic relations.

However, we do not stop at this point. The wife did not die till June, 1913. The will of 1910 was left with Mr. Loftus, accompanied by the wife's declaration written out by a friend, Mr. Watkins, at her dictation, in which she sets forth her reasons for disposing of her estate otherwise than to her husband. The reasons she gives are lucidly expressed and to her appeared sufficient to justify her position; and, whatever opinions may be entertained as to her manifestation of feeling, it cannot be said that her conduct was without sense or without reason.

Over two years afterwards she fell sick of the ailment of which she died, and, when at the hospital, sent for Mr. Lewis and asked about the will. He obtained it from Mr. Loftus and brought it to the hospital. I quote again from the judgment below: "He handed it to her, and she read it over, and then asked if her husband would get anything out of that, and asked if, by reason of his having put labour and material that belonged to her into the building, he was entitled to anything, and subsequently said: 'Now, I want you also to be put in with Mr. Loftus.'" Mr. Lewis refused to change the will.

This again appears to be sufficient evidence to sustain the will. After an interval of two years and over, she calls for her will, reads it over, asks intelligent questions about it, and recognises that Mr. Loftus is sole beneficiary. The act is that of an intelligent person, considering the frame of the will made two years before, and affirming it to be the proper expression of her will as to the disposal of her property after her death.

The learned Judge applied the equitable and proper doctrine that all dealings between solicitor and client are to be viewed with suspicion and are void if obtained by undue influence, and he concludes, without finding that there has been such influence, that the solicitor is not to benefit at the expense of those to whom she ought in all justice to give her property, and that she should justly have given it to her husband. There is the error. It is not a question of what is just to be done as between husband and wife. It is a question of what the wife thought

just; she thought it just to give it away from her husband; and the Judge, without any warrantable evidence, gives it to the husband and frustrates the wife's last will. . . .

[Reference to Barry v. Butlin (1838), 2 Moore P.C. 480, 1 Curt. 637; Fulton v. Andrew (1875), L.R. 7 H.L. 448; Connell v. Connell (1906), 37 S.C.R. 404, 408; Tyrrell v. Painton, [1894] P. 151, 159; Farrelly v. Corrigan, [1899] A.C. 563, 569; Shama Churn Kundu v. Khettromoni Dasi (1899), L.R. 27 Ind. App. 10; Bur Singh v. Uttam Singh (1910), L.R. 38 Ind. App. 13.]

There is no such rule of law as that, in case of substantial benefit to the party drawing the will or procuring it to be drawn, it is essential that the testator should have an independent solicitor or other adviser. It may be expedient to take this precaution, as it will facilitate proof, but it is not a sine qua non. In some cases it may appear that without such advice being available the will cannot stand; in others, such as this, that is not needful. The woman herself has furnished evidence to explain her conduct; and, if that were not enough, she had recourse to her friend Mr. Watkins, and she reviewed the whole situation two years after and during the incipient stage of her last illness, and confirmed what had been done.

Having, as I think, fulfilled the requirements of the two rules mentioned, the onus is cast upon the husband to prove a lack of testamentary capacity and a presence of undue influence; but therein there is signal failure.

In Barry v. Butlin, the will prepared by the solicitor of the deceased, under which he took a considerable benefit, one-fourth of the estate (the only son being excluded), was upheld, though the testator was of weak capacity and was 76 years of age. It is a case in many respects like this, as to the estrangement of the relatives and the grounds whereon that arose, and in that case no independent solicitor was employed.

The wife, no doubt, deceived and hoodwinked the husband and gave him to understand that she had made a will in his favour which had not been revoked. On faith of this he expended money and labour and materials in improving the devised land, and in fairness this should be made good to the husband and paid out of the estate and be charged upon the land.

The parties probably can arrive at a proper figure (which should be on the liberal side) without the need of a reference.

This is a case, moreover, in which the litigation has been occasioned by the conduct of the wife, and it is fitting that all costs of both parties, including appeal, should be paid out of the estate.

HIGH COURT DIVISION.

MIDDLETON, J., IN CHAMBERS. JANUARY 17TH, 1914.

RE DACK.

Lunatic—Detention in Asylum for the Insane—Release on Probation—Re-commitment—Habeas Corpus—Application for Discharge—Evidence.

Motion on behalf of Norman Sinclair Dack, upon the return of a writ of habeas corpus, for his discharge from the custody of the Hospital for the Insane at Brockville.

R. H. Holmes, for the applicant.
William Proudfoot, K.C., for the respondents.

MIDDLETON, J.:— . . . The return to the writ, made by the superintendent of the asylum, shews that Dack was committed to the asylum upon the certificate of two medical practitioners, in accordance with secs. 7 and 8 of R.S.O. 1897 ch. 317, then in force, on the 15th February, 1913. The statute prescribes that, upon the certificate of two medical practitioners in a given form, the lunatic may be committed to the asylum. These certificates require that the practitioner shall have made due inquiry into all necessary facts, and shall certify that he found the person in question to be insane. The practitioner is also required in his certificate to specify the facts on which he has formed that opinion, distinguishing the facts observed by himself from the facts communicated by others. These certificates are produced, and shew examination by Dr. Crawford and Dr. Needy, both of Brockville.

In August, 1913, the patient was given into the custody of his father as a probationer under sec. 30 of the statute then in force, 3 & 4 Geo. V. ch. 83, the Hospitals for the Insane Act, which permits the inmate of an asylum to "be committed for a time to the custody of his friends . . . upon receiving a written undertaking, in the prescribed form, by one or more of the friends of such person, that he or they will keep an oversight over him."

The father coming to the conclusion that his son ought to be re-committed to an asylum, some correspondence took place with reference to placing him in a private institution; but it resulted in a telephone message desiring his re-committal to Brockville.

In pursuance of this, a warrant was issued, and he was taken again to Brockville, where he now is; the production of his body on the return of the writ having been dispensed with, by the direction of Mr. Justice Lennox, by whom the writ was granted. Dr. Mitchell, superintendent of the asylum, stated that, from the facts told him by the father, he had come to the conclusion that the patient had become dangerous to be at large.

Section 31 of the statute provides for re-commitment of a probationer who becomes dangerous to be at large; the warrant to be issued by the superintendent by whom the temporary discharge was granted. This implies that it is the superintendent who is to be satisfied of that which appears to be a condition precedent to the re-committal, namely, that the patient is dangerous to be at large.

It may well be that the effect of this is to make the judgment of the superintendent final and conclusive, and that it is incapable of review upon the return of the writ.

Dr. Mitchell further certifies that this unfortunate young man is now receiving special treatment consistent with the mental trouble he is suffering from, and that, in his opinion, this treatment would be much more beneficial to him in the asylum than if the treatment should be discontinued and the patient be at large. Dr. Mitchell further certifies that the patient has not recovered, and, in his opinion, never will recover from his present malady.

Notwithstanding this, the discharge is sought upon the strength of certain affidavits. These affidavits were completely met and answered by affidavits of the father, Dr. Mitchell, Dr. Bruce Smith, and others; but it appeared to me to be a matter of such importance that there should be no room for the suggestion that by inadvertence or malice one should be confined in an asylum, unless unquestionably insane and a menace to himself or others, that I thought it desirable that an absolutely independent physician of the highest possible repute should make an examination and report.

This course was at once assented to by both counsel—though Mr. Holmes now impudently denies this—and I nominated Dr. C. K. Clarke to make the examination; selecting him because of his large experience, as he was formerly superintendent of Rockwood Hospital for the Insane at Kingston, and later of the Toronto Hospital for the Insane, and is now the superintendent of the Toronto General Hospital. I did this, not because of any hesitation as to accepting the opinion of Dr. Mitchell or Dr.

Bruce Smith, but because of what seemed to me the rash and intemperate declamation of counsel, who suggested that these men, occupying important public positions, were in league with this young man's father to oppress and imprison him, for the purpose of satisfying some private ends.

I have no doubt that counsel was instructed to make this statement. It seemed to me that it was just the kind of thing which would be expected from one rightly in an asylum; as statements of this kind, indicating persecution, etc., are among the common symptoms of the form of insanity of which this man is said to be the victim. Yet I regarded it as of sufficient moment to warrant the most searching inquiry, so that I might be assured by entirely outside evidence, given by one of my own choice, who occupied such a position as to make the impartiality of his evidence beyond question, before refusing relief. The young man's counsel stated that no possible objection could be taken to Dr. Clarke, though again he now denies this.

Dr. Clarke has now been examined, and has reported at considerable length in an affidavit in which he sets out the result of his examination, giving in detail what took place. I need not here repeat at length the details of the symptoms. Dr. Clarke sums up thus:—

"4. That it is evident that this young man is suffering from the paranoid form of dementia præcox, and should be kept under treatment in an institution, as with such prominent delusions of persecution it is best for himself and society that he should not be at liberty. Briefly stated I base my opinion on the following observations:—

"History of disease as detailed by patient.

"Grandiose delusions.

"Delusions of persecution.

"Absence of judgment.

"Somatic delusions.

"Childish vanity.

"These are the striking characteristics of paranoid dementia præcox, of which the patient is suffering. The case presents no difficulties in the way of diagnosis."

This confirms the views expressed by Dr. Mitchell and by Dr. Bruce Smith. . . .

Against all this evidence, there is not a single opinion of any medical man or any one in any way qualified to express an opinion upon the subject; and one only needs to realise that in the case of this terrible malady a casual acquaintance is easily

deceived, and that for long periods the patient is apparently harmless until his mind is turned in the direction either of his own imaginary greatness or imaginary persecution, to see how idle it is to place much reliance even upon the best evidence given by unskilled persons. But this evidence . . . is in this case exceedingly unsatisfactory. There is not a word from the young man himself, though possibly this is not of any moment. Appleby, referred to in Dr. Bruce Smith's affidavit, is the main actor. He made the original affidavit upon which the writ was granted. After setting out the facts relating to the re-taking by the asylum official, he contents himself with the statement that "the plaintiff is a perfectly sane man and never has been adjudged insane, never was insane, and is now a perfectly sane man." He then sets forth that . . . Norman Sinclair D. is entitled to a large amount of money and property from his mother, which is being withheld by his father, also to a large amount of money as employee of the father and his partners.

The allegation as to money amounts to this. The mother had a small estate, which was distributed except about $100, which the father retained, with the consent of all concerned, to cover his expenses of administration. The son received his share, spent it, and much more. The father attempted to secure employment for the son in his own factory. The son proved to be useless there, yet the father paid him wages out of his own pocket, his partners refusing to pay wages without receiving services.

One of the son's delusions is, that he and not his father owns the business, or a controlling share in the business, and he desires to discharge all the partners. When the absurdity of this position was pointed out, he said he expected to receive the controlling interest in the business from his father nevertheless, but "the old man is simply an ungrateful old knocker, who wants everything and gives nothing," and he has also stated that his father, by reason of his (the applicant's) immense wealth, is bound that the Government shall keep him in an asylum.

The other affidavit is by one Creighton, a solicitor employed in the office of the applicant's solicitors. He expresses his opinion, as the result of one interview with Dack, that Dack is a sane man.

Allan Macdonald, a druggist, knows and has conversed with Dack, and Dack appears to him "in every way perfectly sane, a young man of good intellect, and approachable (sic) character."

The utter worthlessness of Appleby's evidence is made plain by a second affidavit . . . almost altogether inadmissible. He details at some length accusations made by Dack against his father. As to the truth of these Appleby has no knowledge. He then refers to the affidavit made by Dr. Bruce Smith, to whom he refers as "a Government employ (sic) and said to be Inspector of Hospitals and Public Charities of the Province of Ontario." He says that "I believe the said affidavit is grossly prejudiced in its terms and statements, and that, if such statements were obtained from the said Norman Sinclair Dack, it was done by duress and fraud, and that no fare (sic) and proper investigation or proper examination was made, and that as regards clauses 13 and 14 of said affidavit" (i.e., the clauses in which Dr. Bruce Smith speaks of his conversation with Dack) "I have no hesitation in declaring them to be absolutely untrue." . . .

I asked the solicitor responsible for this affidavit how he could justify permitting any deponent to make such a statement. He told me that all that was meant was that Mr. Appleby found it impossible to believe such a statement. This indicates such ignorance on the part of the solicitor of his obligations and of the meaning of language that one's suspicion is aroused as to the bona fides of the application and the real meaning to be attached to any expressions used.

I have dealt with the case at altogether too great length, as it is really free from difficulty; but I desire to make it quite plain that on the perusal of the papers one cannot entertain for a moment any suspicion that a sane man is being incarcerated.

The application must be dismissed with costs. If it turns out to be the fact that the application was made without instructions, it may be that the solicitors making it have rendered themselves personally liable.

MIDDLETON, J., IN CHAMBERS. JANUARY 19TH, 1914.

MULVENNA v. CANADIAN PACIFIC R.W. CO.

Particulars—Statement of Claim—Action under Fatal Accidents Act—Death of Plaintiffs' Son in Railway Accident—Negligence—Cause of Accident—Res Ipsa Loquitur—Oppressive Order for Particulars—Pleading—Damages.

Appeal by the plaintiffs from an order of the Master in Chambers requiring them to deliver certain particulars of the statement of claim.

E. J. Hearn, K.C., for the plaintiffs.
Walrond (MacMurchy & Spence), for the defendants.

MIDDLETON, J.:—Patrick Mulvenna recently came to this country from Ireland. He there, it is alleged, aided in supporting his parents, and was going to Western Canada with the view of bettering his circumstances and enabling him to render more efficient assistance in their maintenance. While a passenger on a west-bound train of the defendants' railway, a little west of Ottawa, the coach in which he was became derailed and wrecked, and he was instantly killed. His parents, still residing in Ireland, sue to recover damages, alleging that the son's death was caused by the negligence of the defendants.

The defendants demanded particulars of the alleged negligence; and particulars, which were in truth more or less illusory, were served. The negligence, it is said in the particulars, was (a) in permitting the coach to become derailed, (b) in permitting it to become derailed owing to defects in the rails, roadbed, or train, or to negligence in operating the train. The Master has now ordered better particulars. He permits an examination to be had "of the company" before defence is filed, particulars being directed to be delivered after such examination and before defence. The plaintiffs appeal.

I do not think the order can be supported. The plaintiffs can establish negligence without being able to prove exactly how the accident happened. As put by Sir Frederick Pollock in the preface to vol. 133 of the Revised Reports, "When damage is done by something getting out of control which normally ought to be under control of the person using or profiting by it, there is a presumption, i.e., a rational inference of fact, that the mishap is due to the negligence of the user or his servants, unless he can explain it otherwise."

Upon the argument, counsel for the defendants appeared entirely to misapprehend the meaning of this doctrine, and pressed for a direction that, if the plaintiffs intended to rely upon the principle res ipsa loquitur, the allegation of negligence should be stricken out of the pleading.

That is not the meaning of the rule. It is, that the occurrence, when proved, warrants a finding of negligence.

The order made by the learned Master appears to me to be oppressive and an abuse of the practice. If it means anything, it means that these people residing in Ireland are not to be permitted to present their case to our Courts unless they can explain to the railway company the cause of the accident by which their son was killed—a proposition so monstrous as to need nothing beyond this statement for its refutation.

While every precaution must be taken against allowing pleadings to become meaningless, by reason of the use of vague and general language, the tendency, now too frequently manifested, of making an order for particulars an instrument of oppression, must be sternly repressed. The particulars here are sought as an aid to pleading. No suggestion is made indicating how the pleader would be aided by the information sought.

The learned Master also made an order requiring particulars of the damages sought. I find it impossible to understand exactly what is meant by the order in question. It is as follows: "It is ordered that the plaintiffs shall deliver to the defendants further particulars of the actual damage suffered by the plaintiffs as a result of the death of the said Patrick Mulvenna in the accident complained of, but not of the special damages, if any, which the plaintiffs may be found entitled to at the trial."

Special damages are not sought in the action, in the ordinary sense in which that term is used. Had they been claimed, particulars might well have been ordered of them. An order for particulars of the damages claimed under the Fatal Accidents Act has never heretofore been made. The damages are to be such as the jury may estimate as representing the probable pecuniary benefit the plaintiffs would have received from the continuance of the life of the deceased. How particulars could be given of this it is impossible to suggest.

Counsel stated that what he really desired was a statement of the benefits that the parents had received in the past from their son. This is not what has been ordered, nor would it be proper that it should be ordered, as it would be compelling the plaintiffs to give particulars of the evidence by which they intend to sup-

port their claim. Moreover, all information which the defendant is entitled to have can be obtained upon discovery.

I think that the appeal should be allowed, and that the motion should be dismissed, both with costs.

MIDDLETON, J., IN CHAMBERS. JANUARY 19TH, 1914.

WINNIFRITH v. FINKELMAN.

Parties—Motion by Defendants to Compel the Addition of New Plaintiffs—Contract—Principal and Agent—Counterclaim.

An appeal by the defendants from an order of the Master in Chambers refusing to add as plaintiffs the National Trust Company and the Toronto Railway Company.

Grayson Smith, for the defendants.
Frank McCarthy, for the plaintiff.

MIDDLETON, J.:—In the form in which this motion is launched it is quite impossible for it to succeed. A plaintiff cannot be added against his will. The fundamental difficulty in the way of the appellants is an entire misconception of the situation.

A contract was made between the plaintiff and one Vandewater, by which Vandewater agreed to sell to the plaintiff certain property for $20,850. At Vandewater's request, $1,000, part of this consideration, was paid to the defendants. Vandewater refused to give a deed, yet the defendants refuse to give up the money; and this action is brought.

Upon the evidence, there is no doubt that in entering into the contract the plaintiff was acting as agent for the National Trust Company or its "client." Mr. Rundle, manager of the trust company, in effect so states in his letter of the 28th November, But, where the contract is entered into with an agent in his own name, he has a right to sue upon it. The fact that he is a mere trustee does not make him a nominal plaintiff, in any real sense of that word. None of the cases cited in any way support the appellants' contention.

Where, as in Murray v. Wurtele, 19 P.R. 288, the plaintiff, pending litigation, parts with his entire interest in the subject-matter of the litigation to another, it is plainly contrary to the practice of the Court to allow that other to continue the litigation

without himself coming before the Court and assuming responsibility for costs. But where the right of action is vested in the plaintiff, because the defendant's contract was made with him, the action cannot be stayed merely because it is shewn that he is in truth an agent for a principal, either disclosed or undisclosed.

Mr. Grayson Smith states his intention to counterclaim for specific performance. If he does so, he can, if he chooses, select his own defendants; and, all parties then being before the Court, he can be protected from any injustice in the matter of costs when the facts are developed at the hearing.

The appeal will be dismissed with costs to the plaintiff in any event.

FALCONBRIDGE, C.J.K.B. JANUARY 20TH, 1914.

LIVERMORE v. GERRY.

Master and Servant—Injury to Servant—Dangerous Machinery—Want of Guard—Negligence—Contributory Negligence—Findings of Jury—Division of Liability—Damages.

Action by a workman in a factory to recover from his employers damages for injuries sustained by him while at work in the factory, caused by a circular saw.

The action was tried with a jury at London.

N. P. Graydon, for the plaintiff.

G. S. Gibbons, for the defendants.

FALCONBRIDGE, C.J.K.B.:—The jury answered questions as follows:—

1. Were the injuries which the plaintiff sustained caused by any negligence of the defendants? Yes.

2. If so, wherein did such negligence consist? In not having the machine properly guarded.

3. Was the machine a dangerous machine so that it ought to have been, as far as practicable, securely guarded? Yes.

4. If you answer "Yes" to the last question, was it, as far as practicable, securely guarded? No.

5. Was the plaintiff guilty of negligence which caused the accident or so contributed to it that but for his negligence the accident would not have happened? Yes.

6. If you answer "Yes" to the last question, in what did his negligence consist? In not seeing that the machine was properly guarded.

7. Or was the casualty which resulted in the plaintiff's injuries a mere accident for which no one is responsible? No.

8. At what sum do you assess the amount of compensation to be awarded to the plaintiff in case he should be held entitled to recover? The sum of $85.

Their answer to the sixth question amounts to a finding that there was at hand a "splitter" or "divider" which the plaintiff could have used as a kind of guard for the saw, if he had been so inclined. There was abundant evidence to support such finding.

It is evident from the amount of damages which they have awarded, $85, being about half of the damage actually proved, that there was an effort on the part of the jury, unconsciously, to carry out the Quebec rule and make the plaintiff bear part of his own damage, so that I should have been glad if I could have seen my way to carry out their apparent wishes in entering the verdict, but their answer to the question regarding the plaintiff's negligence inexorably prevents any recovery by the plaintiff, under our law.

In any event, it would have been a hollow victory for the plaintiff, as I could not have certified to prevent a set-off of costs.

I, therefore, dismiss the action with costs, if exacted.

MIDDLETON, J. JANUARY 23RD, 1914.

HAIR v. TOWN OF MEAFORD.

Municipal Corporations—Local Option By-law—Action to Restrain Council from Passing—Interim Injunction—Balance of Convenience—Speedy Trial—Rule 221*—Liquor License Act, sec.* 143*a.*

Motion by the plaintiff to continue an ex parte injunction restraining the defendants from passing a local option by-law.

A. E. H. Creswicke, K.C., for the plaintiff.
W. E. Raney, K.C., for the defendants.

MIDDLETON, J.:—To avoid misunderstanding, I think it better to place in writing my reasons for the order made—a speedy trial under Rule 221, and injunction continued meantime.

A by-law was submitted in 1913, and did not receive the approval of at least three-fifths of the electors voting thereon, and the statute provides that no similar by-law shall be submitted for three years.

By a consent judgment in an action brought by a ratepayer, it was declared that, notwithstanding this statute, a similar by-law might be again submitted, this being based upon the theory that such irregularities took place in the election that had the by-law been passed in 1913 it would have been quashed.

This proceeding is attacked—it is contended that there is no legislative sanction for the exception sought to be grafted upon the statutory prohibition. The case seems to me to differ materially from cases in which an injunction has been refused when it has been suggested that a by-law, if passed, would be quashed by reason of irregularities.

The parties would not consent to turn this motion into a motion for judgment, and, as a trial can easily be had before the council is called on to act, I thought the balance of convenience indicated an early trial as the best course, leaving the whole matter to be dealt with at the trial, and without in any way determining the questions to be then dealt with—inter alia, the right of the plaintiff to an injunction.

To refuse the motion would be to usurp the functions of the trial Judge, as the by-law would be passed in the interval, and he could then do nothing.

The position of the plaintiff might be prejudiced, as the very extraordinary jurisdiction conferred by sec. 143a of the Liquor License Act, as enacted by 8 Edw. VII. ch. 54, sec. 11, might be held to attach, even though there never was any right to submit the by-law at all. Indeed, it was stated by the plaintiff's counsel that the licenses had already been cancelled, presumably under this section, though no local option by-law has been passed at all, much less quashed on a "technical ground."

MCLEOD v. ROREY—FALCONBRIDGE, C.J.K.B.—JAN. 19.

Contract — Penalty—Breach—Damages—Mortgage Claim — Set-off—Interest—Costs.]—Action on a mortgage to recover $500 and interest and for a sale of the land. The defendant counter-

claimed for damages for breach of a covenant by the plaintiff contained in an agreement. The learned Chief Justice said that the $3 a day mentioned in the agreement should be regarded as a penalty, and not as liquidated damages. The defendant should be allowed $250 damages, plus a sum sufficient to balance the plaintiff's claim for interest. From the plaintiff's claim for $500, there should be deducted the defendant's set-off or counterclaim of $250, leaving a balance of $250 due to the plaintiff. The balance of the costs of the action on one side and of the counterclaim on the other fixed at $75 in the plaintiff's favour. Judgment for the plaintiff for $250 and $75 costs. G. N. Weekes, for the plaintiff. M. P. McDonagh, for the defendant.

CARIQUE v. CATTS AND HILL—LENNOX, J.—JAN. 20.

Fraud and Misrepresentation—Purchase of Interest in Invention—Contract — Rescission — Amendment of Pleadings—Damages.]—Action to set aside a sale by the defendants to the plaintiff of an interest in a patented lamp invention and for the return of $5,000 paid. The learned Judge discussed the evidence, and finds that the defendants conspired to deceive and cheat the plaintiff, and made false representations to the plaintiff, whereby he was induced to buy the interest and pay the money, and that the plaintiff has not ratified or confirmed the contract. The learned Judge gives all parties leave to amend in conformity with the evidence and to reply to the amendments. If difficulties arise, application may be made to the learned Judge. He is also of opinion that it is better that the plaintiff, instead of pursuing his rights against the defendant Hill under an agreement for reimbursement, should directly claim to recover against the two defendants by reason of the concerted fraud and misrepresentation; and the plaintiff is to have leave to amend accordingly if he desires to do so. Judgment setting aside the contract entered into with the defendant Catts so far as it affects the plaintiff, and against both the defendants for the loss sustained by the plaintiff, with costs; but the record will not be endorsed until the amendments are made. R. B. Henderson, for the plaintiff. H. D. Gamble, K.C., for the defendants Catts. W. E. Raney, K.C., for the defendant Hill.

STROH v. FORD—DUENCH v. FORD—KELLY, J.—JAN. 20.

Fraud and Misrepresentation — Sale of Bonds — Evidence —Failure to Make Case against Defendant.]—These two actions arose out of purchases by the plaintiffs of bonds of the National Agency Company Limited, from or through the defendant. The purchases were made in 1911 and 1912. The bonds bought were of the aggregate face value of $8,500. The plaintiffs alleged that the sales of the bonds were induced by fraud and misrepresentation on the part of the defendant. The learned Judge reviews the evidence and comes to the conclusion that the plaintiffs have not proved against the defendant such fraud or misrepresentation or statements as would justify a decision in their favour. Actions dismissed with costs. W. H. Gregory, for the plaintiffs. N. Jeffrey, for the defendant.

CORRECTION.

RE ONTARIO POWER CO. OF NIAGARA FALLS AND TOWNSHIP OF STAMFORD.

RE ELECTRICAL DEVELOPMENT CO. OF ONTARIO AND TOWNSHIP OF STAMFORD.

In these two cases, ante 718 and 721, it is stated that "MAGEE, J.A., dissented." This is a mistake. MAGEE, J.A., agreed in each case with the judgment of MEREDITH, C.J.O.