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HON. MR. JUSTICE MIDDLETON. MAY 15TH, 1912.

RICKERT v. BRITTON MANUFACTURING CO.

3 O. W. N. 1272.

Discovery—Examination of Witness Pending Motion for Injunction Fishing Excursion — Information Sought beyond what Allowed by Rules—Refusal to Order Witness to Answer.

Motion by plaintiffs, officers of the United Garment Workers of America for an order compelling one Burgess, secretary of the United Garment Workers of Canada, to attend and answer certain questions relative to the organization and conduct of the latter association, and to produce its books, upon his examination as a witness in support of a pending motion for an interim injunction. The action was for an injunction restraining the use of an alleged imitation of the plaintiffs' union label.

MIDDLETON, J., *held*, that as there was clearly a complex legal question to be tried in the action the motion for an interim injunction could not succeed, and the action of the plaintiffs in conducting long and detailed examinations in support of such motion was undoubtedly designed to improperly obtain further discovery than that allowed by the Rules.

Motion dismissed, costs to defendants and Burgess, payable forthwith after taxation.

Motion by the plaintiffs for an order directing Cecil A. Burgess to attend and answer certain questions upon his examination as a witness on pending motion for an injunction, and to produce the minute books, cash books, rule books, and all other books and records of the United Garment Workers of Canada, and to submit to examination as to the organization and conduct of such union and all other matters relating thereto, and in default thereof to be committed to the common gaol.

The action was brought by certain members of the United Garment Workers of America on behalf of themselves and other members of that body and by the United Garment Workers of America for an injunction restraining the use of what is said to be an imitation of the plaintiffs' union label; and a motion was made on 30th March, for an order

for an interim injunction, restraining the use of any such imitation, more particularly a certain label containing the words "Issued by authority of United Garment Workers of Canada, General Executive Board, Registered."

The defendants were a manufacturing company carrying on business at London, Ontario. There was a Canadian trade union, to which certain garment workers belong; and there was an agreement between the defendants and that union under which the defendants were compelled to employ only members of the Canadian union and to affix to the garments manufactured the label of that union.

There appeared to be some conflict between the Canadian and American unions; and, at one time, there was an agreement between the defendants and the American union. This agreement was dated the 1st of April, 1911, and terminated in one year from that date; so that the defendants' obligation towards the American union ceased at the time this action was brought.

The notice of motion for the interim injunction was based upon an affidavit made by one Carroll, in which he said that the label which the defendants were using, and would continue to use, was a fraudulent imitation of the plaintiffs' union label. But, not content with this, it was sought to supplement the material by the depositions of the defendants "and such other persons as the plaintiff may be advised;" and in pursuance of this, the evidence had been taken of some eight persons, from which it abundantly appeared that the plaintiffs' design was to embark, under the colour of this motion for an interim injunction, upon a preliminary cross-examination of those whom they might anticipate would be hostile witnesses at a trial or upon a fishing excursion in which they will obtain discovery greater than that permitted by our practice, and which they might hereafter use, not merely in a contest with the defendants, but in a contest with the Canadian union.

In the course of this examination the plaintiffs desired to enquire fully into the organization, constitution, membership, financial position and domestic concerns of the rival union. Burgess had declined to produce this information and to permit the plaintiffs' counsel free access to the documents.

J. G. O'Donoghue, for the plaintiffs' motion.

C. G. Jarvis, for Burgess and the defendants.

HON. MR. JUSTICE MIDDLETON:—I think that Burgess is within his rights.

Upon the argument, it was stated that the Canadian union have registered a label under the statute, and that this alone would indicate there is such an issue to be tried as to render it unreasonable to suppose that any interim injunction will be granted. Besides this, a very serious legal question arises at the threshold of the plaintiffs' case. There is a wide divergence of view in American cases as to the status of a union label.

In many States the view entertained by Mr. Justice Thayer, in *Carson* v. *Ury,* 39 Fed. Rep. 777, is accepted. He says: "It is, no doubt, true that the union label does not answer to the definition ordinarily given of a technical trade mark, because it does not indicate with any degree of certainty by what particular person or persoms or firm the cigars to which it may be affixed were manufactured, or serve to distinguish the goods of one cigar manufacturer from the goods of another manufacturer, and because the plaintiff appears to have no vendible interest in the label, but only a right to use it on cigars of his own make so long, and only so long, as he remains a member of the union. In each of these respects the label lacks the characteristics of a valid trade mark."

There is also another difficulty. The American Trade Union does not appear to be an incorporated body, and it is hard to see how any property right in a trade label could be vested in such a loose aggregation. On the other hand, the principles upon which equitable relief is granted to prevent unfair competition may be found to reach far enough to afford the plaintiffs some redress, if the label adopted by the Canadian Union is an unfair imitation of the American label. No Canadian case has yet determined a question of this kind; and, according to established principles, a novel and difficult legal question ought not to be dealt with upon a motion for an interim injunction.

All these considerations point to the impracticability of success upon the motion, and emphasize the vexatious nature of the course adopted by the plaintiffs.

Since the argument, the learned counsel for the plaintiffs has, I think, justified the suspicion that the plaintiffs' course is oppressive, by a memorandum which he has handed in, as follows:

"In the case of *Canada Foundry* v. *Emmett*, 5 or 6 years ago, the company got an interim injunction, and then was permitted by one Judge after another, during a period of five or six months, to examine witnesses to the extent of eight or nine thousand questions, before the motion to continue the injunction was heard."

I do not know the circumstances of that case, and, probably, the circumstances justify the course taken; but, this naked statement is apparently relied upon as authority for the proposition that in all trades union cases there ought to be prolonged examination. At any rate, there is nothing in this statement to justify the making of the order now sought.

The motion is dismissed, with costs to be paid by the plaintiffs to the defendants, and to Burgess forthwith after taxation.

HON. MR. JUSTICE MIDDLETON. MAY 15TH, 1912.

RE POLSON IRON WORKS.

3 O. W. N. 1269.

Company — Shares — Transfer — Refusal of Company to Register — Indebtedness of Transferor to Company Arising After Transfer — Companies Act, R. S. C. (1906), c. 79, ss. 64, 67 — Mandamus.

Motion by trustees of the marriage settlement of one J. J. Main to whom 500 fully paid up shares of a company incorporated under the Dominion Companies Act had been assigned and for a mandamus to the company compelling them to register such transfer. The company had refused to register on the ground that at the date of such application the said Main was indebted to the company in respect of calls on other shares.

MIDDLETON, J., *held*, that R. S. C. c. 79, s. 67 permitting the directors to refuse to register a transfer of shares belonging to a shareholder who is indebted to the company applies to an indebtedness existing concurrently with ownership and not to an indebtedness arising after a transfer has been made.

Mandamus granted with costs.

Motion by McWhinney and Brown, trustees of the marriage settlement of John James Main and La Della McCahon, for a mandamus directing the company to register a transfer of five hundred fully paid-up non-assessable shares of the capital stock of the company, from the said J. J. Main to the applicant.

R. McKay, K.C., for McWhinney & Brown.

C. A. Moss, for Polson Iron Works Co.

HON. MR. JUSTICE MIDDLETON: — The five hundred shares in question were acquired by Mr. Main under and pursuant to the terms of an agreement of the 27th June, 1906, between Mr. Main and Messrs. Polson and Miller, by which Mr. Main undertook to transfer to the Polson Company all the assets of the Canadian Heine Safety Boiler Company, in consideration of the issue of these five hundred shares. As part of the same agreement, Mr. Main agreed to subscribe for $25,000 capital stock of the Polson Company, for which he was to pay when calls were made by the Board of that company.

By this agreement certain rights are given to Messrs. Polson and Miller, enabling them to acquire the $75,000 of stock upon payment to Main of the value of the stock as shewn by the books of the company, in the event of Main ceasing to be in the service of the company, or upon Main desiring to sell the stock. This agreement, made originally with Messrs. Polson and Miller, was adopted by the directors and shareholders of the company, by appropriate by-laws.

The five hundred paid-up shares were duly issued, and the 250 other shares were duly subscribed for. The stock is subscribed as follows: "Five hundred shares to be issued as fully paid-up and non-assessable, pursuant to by-law No. 40, and to be held subject to the terms of agreement referred to in said by-law"; the agreement and by-law being those above mentioned.

On the 15th September, 1911, by his marriage settlement, Mr. Main transferred the five hundred paid-up shares to the applicants. This instrument was duly executed on the 16th. At this time no calls had been made upon the 250 shares; but, subsequently, on the 28th day of December, 1911, a call of twenty dollars per share upon all unpaid stock of the company was made by the directors. This call was payable on the 4th January, 1912, and notice was duly given to Mr. Main on the 28th December.

Mr. Main, for reasons which he thinks justify him in doing so, refuses to pay the call; and his counsel states that if any attempt is made to collect payment of the calls Mr. Main is advised that he has a good defence to any action that may be brought.

For some reason the trustees omitted to apply for registration of the transfer until the 5th January, when the

company declined to record the transfer. The secretary of the company, on the 11th January, in reply to the formal demand for registration, writes that the matter had been considered by the directors, and that "I have been directed to inform you that the directors decline to register the transfer of the shares in question belonging to the said John J. Main, owing to his being indebted to the company."

Upon the argument of the motion it was admitted that the only indebtedness is the indebtedness in respect to the calls made upon the 250 shares.

The company is incorporated under Dominion legislation, and the sections of the statute which require to be considered are R. S. C. ch. 79, sec. 64 and sec. 67.

By sec. 64: "Except for the purpose of exhibiting the rights of the parties to any transfer of shares towards each other . . . no transfer of shares . . . shall be valid for any purpose whatever until entry of such transfer is duly made in the register of transfers." By sec. 67, it is provided that the directors may decline to register any transfer of shares belonging to any shareholder who is indebted to the company.

I have read the numerous cases cited upon the argument, but have come to the conclusion that none of them throw much light upon the problem before me, which must be determined upon the wording of these two sections.

Prima facie, a share—or at any rate a paid-up share—of the capital stock of a company is personal property, and may be disposed of by the shareholder freely. And provisions which cut down this right must be construed strictly. Section 67 gives the right to the directors to decline to register any transfer of shares "belonging to any shareholder who is indebted to the company."

I do not think that these shares in question ever belonged to a shareholder who was indebted. Upon the execution of the transfer on September 15th, these shares ceased to belong to Main. They then became the property of the trustees. Section 64 does not invalidate the transfer by reason of the failure to register, for it expressly preserves to the transfer validity "for the purpose of exhibiting the rights of the parties . . . towards each other."

The indebtedness did not arise until the making of the call on the 28th December. Main then became indebted to the company within the meaning of sec. 67; but he had

ceased to own the shares. As I read the statute, the ownership and the indebtedness must be concurrent; and the section cannot be read as if it gave authority to the directors to refuse to register when the transferee is, at the date of the application, indebted. The section itself seems to be carefully worded so as to require indebtedness at the time of the ownership; and the ownership is by sec. 64 made independent of registration.

It was argued that the transfer ought not to be permitted because of the terms of the agreement. In the first place, the transfer is not a sale, which is the only transaction that gives to Polson and Miller any right to purchase under the agreement. In the second place, the agreement in question is an agreement with Polson and Miller, not with the company; and, the trustees taking with full notice of the agreement, will hold, subject to its terms; and any rights that Polson and Miller may have can be exercised against the trustees.

Objection was taken to the remedy sought. It was said that a mandamus would not lie. I think this is determined in favour of the application by the case of *Crawford* v. *Provincial,* 8 U. C. C. P. 263. See also the recent decision in *Rich* v. *Melancthon,* 21 O. W. R. 517; 3 O. W. N. 826.

The order for mandamus will go as sought, with costs.

DIVISIONAL COURT.

MAY 15TH, 1912.

COOPER v. LONDON STREET RW. CO.

3 O. W. N. 1277.

Negligence — Street Railway — Passenger after Alighting—Crossing Tracks—Struck with Car from Opposite Direction.

FALCONBRIDGE, C.J.K.B., gave judgment in favour of plaintiff on findings of jury in an action for damages for injuries sustained by being struck by defendants' car after having alighted from another car and while attempting to cross the opposite track.

DIVISIONAL COURT dismissed appeal with costs.

Wright v. *Grand Trunk Rw. Co.*, 12 O. L. R. 114, 7 O. W. R. 636, followed.

Brill v. *Toronto Rw. Co.*, 13 O. W. R. 114, distinguished.

An appeal from a judgment of HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., in favour of plaintiff.

The appeal to Divisional Court was heard by HON. SIR JOHN BOYD, C., HON. MR. JUSTICE TEETZEL and HON. MR. JUSTICE KELLY.

I. F. Hellmuth, K.C., for the defendants, appellants.

Sir George Gibbons, K.C., for the plaintiff, respondent.

HON. SIR JOHN BOYD, C.:—I think this case could not properly have been withdrawn from the jury, and I am not prepared to dissent from the conclusion reached by the jury and favourably viewed and acted upon by the Chief Justice. The situation of the plaintiff at the rear of the car from which she had got out, with a car approaching her on the same track, coupled with the warning given by one on the car she had left to look out for the car, may well have flurried and perturbed her, as the witnesses say, and have led her, in the face of a strong wind, to lower her head and hurry across the track to her place of destination, not observing the coming upon her on the track she was crossing of the other car which was passing the stationary car. Upon this state of facts the jury may have rightly absolved from contributory negligence: see *Wright* v. *Grand Trunk Rw. Co.*, 12 O. L. R. 116, 7 O. W. R. 636.

On the question of negligence by the company, there was also evidence which ought not to have been withdrawn from the jury. The reception of this evidence by an expert from Hamilton was not objected to, and the effect of it was to indicate that sufficient caution was not observed in approaching this place of crossing the street, at which the car carrying the plaintiff stopped regularly for the discharge and reception of passengers. There was proved to be a habit or custom of those leaving the cars to cross the tracks at that point to get to Albert Street, and this practice was well known to the company. If the view was obscured by the stationary car to the conductor of the oncoming car, that was a strong reason for slackening the speed and exercising conformable caution in the view of probable danger at that crossing. And the jury have found negligence in running the south-bound car at too high a rate of speed when the north-bound car was standing and passengers getting off.

The *Brill Case*, 13 O. W. R. 113, is distinguishable from this in that a duty was cast on the car approaching the place of crossing taken by the passengers for Albert Street to go slow while the passengers were being discharged.

I would affirm the judgment with costs.

HON. MR. JUSTICE TEETZEL and HON. MR. JUSTICE KELLY, concurred.

HON. MR. JUSTICE RIDDELL IN CHRS. MAY 16TH, 1912.

CHAMBERS.

BISSETT v. KNIGHTS OF MACCABEES, ETC.

3 O. W. N. 1280.

Trial — Jury Notice — Motion to Strike Out — Con. Rule 1322 — Change in Practice.

Motion by defendants for order striking out jury notice served in action on insurance policy.

RIDDELL, J., *held*, that Con. Rule 1322 had changed the law in making it incumbent on a Judge in Chambers to decide as to the propriety of the notice.

Stavert v. *McNaught*, 18 O. L. R. 370, 13 O. W. R. 921, 1105, referred to.

Order granted as sought; costs in cause.

Motion by the defendants to strike out a jury notice filed and served by the plaintiff.

J. A. Paterson, K.C., for the defendants' motion.

W. D. McPherson, K.C., for the plaintiff, contra.

HON. MR. JUSTICE RIDDELL:—In this case the plaintiff alleged: (1) that C. B. was insured in the defendants' society; (2) he paid all assessments, etc.; (3) he died; (4) she became administratrix, by letters of administration from the Surrogate Court of the county of Lambton, August, 1910; (5) she furnished the defendants, January, 1911, satisfactory and sufficient proof of the death of C. B.; (6) the defendants refuse to pay. The defendants do not admit any of the above and plead specially: (1) no sufficient proof of death; (2) if C. B. be dead the action is barred; (3) if C. B. be dead the proofs should have been furnished within 12 months, and were not; (4) C. B. did not pay dues up to the time of his death (if he is dead), but omitted so to do for several months, and the insurance, therefore, void; (5) C. B. removed from his usual home, July, 1897, remaining away one year, he did not report to R. C. of his Tent his location, and the insurance is therefore void; (6) until conclusive proof of death is furnished, no benefits are payable, and none such has been given.

The plaintiff replies, that: (1) if default made in furnishing proofs of death this was waived; (2) if the dues not paid this was assented to by defendants and, therefore, the

defendants are estopped; (3) if the condition that he must report to the R. K. of his Tent applies to this insurance, it is unreasonable and not binding, and (4) if conclusive evidence of death be required under the contract that provision is unreasonable.

A motion is made to strike out the jury notice—if the jury notice stand, the case cannot come on for trial until the fall (the venue being at Sarnia and the jury sittings being now over at that town), the case can, if the jury notice be struck out.

Much difference of opinion was expressed in reference to striking out jury notices, by various Judges—the cases may be seen collected and referred to in *Stavert* v. *McNaught* (1909), 18 O. L. R. 370; 13 O. W. R. 921, 1105. In this case, if I understand it, the principle laid down by the Divisional Court was to let the jury notice stand unless it was a clear case of the jury being improper. The Chancellor says: "The direction in actions merely of a common law character and in which the jury would be the recognized forum if sought by either party as to the method of trial, should not be taken out of the hands of the trial Judge." C. R. 1322 was passed 23rd December, 1911, and promulgated 6th January, 1912, has, in my view, changed the practice. This provides that when an application is made to a Judge not in Chambers under sec. 110, if "it appears to him that the action is one which ought to be tried without a jury, he shall direct that the issues be tried . . . without a jury." C. R. 1322 (2), provides that such an order shall not "interfere with the rights of the Judge presiding at the trial, to direct a trial by jury."

The law, therefore, is now changed—the Judge in Chambers is called upon to exercise his judgment as to how the case ought to be tried, he cannot pass that responsibility over to anyone else—and if it appears to him that the case should be tried without a jury, he must—"he shall"—direct accordingly.

I have no kind of doubt that this action should be tried without a jury—I think, moreover, that no Judge would try the issues upon the record with a jury (though that does not seem to be important)—and I must, therefore, direct the action to be tried without a jury.

This disposition of the motion will not interfere with the discretion of the trial Judge, C. R. 1322 (2). Nor in

this particular instance will it change the sittings at which the case may be tried (but that fact does not enter into my reasons for allowing the motion).

Costs will be in the cause unless otherwise ordered by the trial Judge.

MASTER IN CHAMBERS. MAY 15TH, 1912.

CAMPBELL v. SOVEREIGN BANK & INTERNATIONAL ASSETS CO.

3 O. W. N. 1285.

Evidence—Foreign Commission—Order for Terms—Discovery to be had First.

Motion by defendants for examination of one Stewart on commission as a witness in their behalf.

MASTER IN CHAMBERS made order on terms that examination for discovery should take place first.

Costs left to discretion of Taxing Officer.

Motion by the defendants for a commission to examine Mr. D. M. Stewart as a witness in their behalf, he having been for some time out of the province, now at New York city.

W. J. Boland, for the defendants' motion.

F. Arnoldi, K.C., and F. McCarthy, for the plaintiffs, contra.

CARTWRIGHT, K.C., MASTER:—Mr. Boland's affidavit in support states that Stewart has agreed to be examined at New York city, but that he expects to leave for the interior of Alaska early in June. It is not said, perhaps because it is not certain, how long he will be away.

It cannot be argued that he is not a material witness. It is said, however, that plaintiffs (for reasons stated on the application by the defendants to have the trial expedited) are not prepared to cross-examine effectively this very important witness. They also say that they wish to examine for discovery Messrs. Jarvis & Jemmett, before the examination of Stewart is had, on the principle of the exclusion of witnesses at a trial. To meet this latter objection Mr. Boland is willing that the officials in question should be examined this week. He is willing to produce them for that purpose as may be convenient to the plaintiffs.

This offer seems to allow of an arrangement fair to all parties.

Let the plaintiffs have the examination for discovery which they require early next week. Then Mr. Stewart could be examined the week following—say about the 28th or 29th. This appears to give each party all they can reasonably ask for.

The costs of this motion and of the commission to be issued thereunder will be left to the taxing officer, unless disposed of by the trial Judge.

MASTER IN CHAMBERS. MAY 16TH, 1912.

CARTWRIGHT v. PRATT.

3 O. W. N. 1279.

Costs — Security — Defendant out of Jurisdiction — Counterclaim — Want of Connection with Plaintiff's Cause of Action — Not Sufficient Property within Jurisdiction.

Motion by plaintiff for security for costs in respect of defendant's counterclaim. Defendant was a foreigner and the counterclaim was in respect of a matter separate and distinct from the plaintiff's claim. No sufficient assets were shewn within the jurisdiction.

MASTER IN CHAMBERS made order as asked, costs in counterclaim to successful party.

Neck v. *Taylor*, [1893] 1 Q. B. 560, followed.

In this case both parties were residents of Buffalo, N.Y. Why the action was brought in this province was not disclosed.

The plaintiff, who had given security for costs, claimed from defendant in all something over $9,000 with interest, in respect of three different joint adventures.

The defendant denied all these allegations and counterclaimed in respect of an alleged agreement by plaintiff to deliver to him 10,000 shares of stock in the Pan Silver Mining Co., and also for payment of one half of a sum of $1,100, paid by defendant on a joint venture of defendant and plaintiff, which was forfeited with the plaintiff's consent.

The plaintiff moved for security for costs in respect of this counterclaim.

G. H. Sedgewick, for the plaintiff.

M. H. Ludwig, K.C., for the defendant.

CARTWRIGHT, K.C., MASTER:—This question was considered in two cases in the C. A., in both of which Lord Esher, then M. R., presided.

In *Sykes* v. *Sacerdote* (1885), 15 Q. B. D. 423, security was ordered; in *Neck* v. *Taylor*, [1893] 1 Q. B. 560, it was refused. In this latter case Lord Esher said (p. 562): "The rule laid down by the cases seems to be as follows. Where the counterclaim is put forward in respect of a matter wholly distinct from the claim, and the person putting it forward is a foreigner, resident out of the jurisdiction, the case may be treated as if that person were a plaintiff and only a plaintiff, and an order for security for costs may be made accordingly, in the absence of anything to the contrary. Where, however, the counterclaim . . . arises in respect of the same matter or transaction upon which the claim is founded . . . the Court . . . will in that case consider whether the counterclaim is not in substance put forward as a defence to the claim whatever form in point of strict law and of pleading it may take. . . . The Court in that case will have a discretion."

Under which class the counterclaim in question comes does not seem doubtful on the material. The various transactions between the parties are dealt with in their respective pleadings as having been separate and not items of a continuous course of dealing in the nature of a partnership. Had that been the fact it would, no doubt, have been so alleged in the counterclaim, as it would have brought the case within the principle of *Neck* v. *Taylor, supra.*

In view of the contradictory affidavits as to the value of the mining claim in which the defendant has a half interest, it does not seem a ground for refusing security, in the absence of evidence of at least one qualified and disinterested person to support the estimate of the defendant.

An order will go for security to be given in the usual form, costs of this motion will be in the counterclaim to the successful party.

COURT OF APPEAL.

MAY 9TH, 1912.

RE CANADIAN PACIFIC RW. CO. AND TOWN OF STEELTON ASSESSMENT.

3 O. W. N. 1199.

Assessment and Taxes—Railway Company—Assessment Act (1904), ss. 44, 45, 77—Construction—Quinquennial Assessment.

Case stated by Lieutenant-Governor in Council under s. 77 of the Assessment Act for an opinion of a Judge of the Court of Appeal. Sec. 45 of the Act in effect provides for quinquennial assessments of the property of steam railway companies.

Moss, C.J.O., *held*, that an assessment under this section must be one made in pursuance of s. 44 of the Act, and based on a new valuation, and that where the assessor, through an erroneous interpretation of the Act, continued the old assessment for a year after the quinquennial period, no assessment had been made within the meaning of s. 45.

Case stated by the Lieutenant-Governor-in-Council, under section 77 of the Assessment Act, for the opinion of a Judge of the Court of Appeal.

Angus MacMurchy, K.C., for the Can. Pac. Rw. Co.

D. L. McCarthy, K.C., for the municipality.

HON. SIR CHAS. MOSS, C.J.O.:—The question raised is as to the proper meaning and effect of section 45 of the Assessment Act, 1904, in relation to the assessment of the real property of steam railway companies.

The provisions of the Act dealing with the subject are secs. 44 and 45, under the heading "Railways."

Sub-section (1) of sec. 44 makes provision for every steam railway company transmitting annually to the clerk of the municipality in which any part of the roadway or other real property of the company is situated, a statement shewing in detail the various kinds of real property whether occupied, in use, or vacant, belonging to the company, and the assessable value thereof. And the statement is to be communicated by the clerk of the municipality to the assessor.

Sub-section (2) prescribes the mode to be adopted by the assessor in assessing the various descriptions of land and property specified in the statement.

Sub-section (3) makes it the duty of the assessor to deliver or transmit by post to the company a notice of the total amount at which he has assessed the land and property, shewing the amount for each description of property mentioned in the statement of the company. The company's statement and the assessor's notice are to be held to be the assessment return and notice of assessment required by secs. 18 and 46 of the Act to be made and given in the case of other assessments.

Sub-section (4) declares that a railway company assessed under this section shall be exempt from assessment in any other manner for municipal purposes except for local improvements.

Then follows sec. 45, which declares that when an assessment has been made under the provisions of sec. 44, the amount thereof in the roll as finally revised and corrected for that year shall be the amount for which the company shall be assessed for the next following four years in respect of the land and property included in such assessment, with a provision for reducing in any year the fixed amount by deducting the value of any land or property which has ceased to belong to the company, and for making a further assessment of any additional land or property of the company not included in such assessment.

The material statements of the case are: that in the year 1905 the lands of the Canadian Pacific Rw. Co. in the town of Steelton were assessed at $15,500 for the year 1906.

That the assessment continued at the same amount annually until 1911 when the amount thereof was increased to $25,936 for 1912.

That in 1910 the assessor after consultation with the mayor concluded under a mistaken idea as to the effect of sec. 45 of the Act that he could not make an increase in the company's assessment until 1911, and therefore assessed the property for 1911 at the same amount as in the preceding year.

That the assessment made in the years 1906 to 1910 inclusive, were made without any inspection or valuation of the lands by the assessor.

That the annual statements of the company's property in Steelton were duly furnished by the company as required by sec. 44 of the Act in the years 1906 and 1910 inclusive.

That the company has paid the taxes for 1911 under the assessment made in 1910.

Upon these facts the Judge of the District of Algoma held upon appeal by the company from the Court of Revision confirming the assessment of the land and property at the sum of $25,936; that the assessor was at liberty to assess in 1911 for 1912 for an amount greater than the amount of the assessment in 1910 for 1911.

The question submitted is whether the judgment is right. I am of opinion that the learned Judge's conclusion is right.

There is, no doubt, much plausibility in the argument presented on behalf of the company that what is provided for is quinquennial assessment, and that the amount of the assessment of which the company is notified upon the termination of a quinquennial period fixes the amount for the next following 4 years.

But, taking sec. 45 in connection with sec. 44, it is apparent that the assessment which is to stand for the next following four years is an actual assessment made in compliance with and following the directions of sec. 44. That is what sec. 45 says in effect. The essential elements of an assessment, so far as the assessor is concerned, are that upon receipt of the statement called for by sub-sec. (1) he shall proceed to assess by placing values upon the various kinds of land and property in accordance with the principles declared by sub-sec. (2), and having in this manner arrived at and ascertained the total amount, deliver or transmit a notice to the company of the particulars specified in sub-sec. (3). This is an assessment calling for inspection and examination of the land and property, and the exercise of judgment with regard to their values. Such an assessment being made, the amount thereof in the roll as finally revised and corrected for that year, i.e., the year in which such an assessment is made, is the amount that is to stand for the four following years.

I do not think that the mere formal receipt by the assessor of the annual statement, and the delivery or transmission of a notice to the company under sub-sec. (3) is an assessment that will bind either party to the amount thereof after the expiration of a quinquennial period. I see nothing to prevent the municipality and the company continuing the amount of an assessment made under sec. 44 beyond 5 years, and until another actual assessment is made. The

effect of sec. 45 is to fix the amount for the four following years at the expiration of which time either party is entitled to an actual assessment.

I think, therefore, that the formal proceedings taken by the assessor in 1910 were not such an assessment as fixed the amount for the four following years.

I answer the question in the affirmative.

I award no costs to or against either party.

HON. MR. JUSTICE MIDDLETON. MAY 3RD, 1912.

DEMERS v. NOVA SCOTIA SILVER COBALT MINING COMPANY.

3 O. W. N. 1206.

Negligence—Master and Servant—Negligence of Fellow Servant—Action under Workmen's Compensation Act — Evidence — "Superintendence"—Question as to—Findings of Jury.

Action by defendant, a carpenter in employ of defendants, for $5,000 damages for injuries sustained by being thrown from wagon by reason of the negligence of the driver of a team employed by defendants to drive workmen from their boarding house to the scene of work, a mile away.

MIDDLETON, J., *held*, that as the driver had no "superintendence" over the workmen driven by him and as he was a fellow-servant of the plaintiff, the latter could not recover. Action dismissed without costs.

Plaintiff brought action to recover damages, which was tried at North Bay on 11th April, 1912, by Hon. Mr. Justice Middleton and a jury.

Plaintiff, a carpenter in the employ of defendants, was engaged upon work a mile or more distant from the company's boarding house. The company supplied a team to drive men from the boarding house to the work in the morning and back in the evening. On 2nd November, 1911, while plaintiff and a number of other workmen were being driven along the road, plaintiff was thrown from the wagon and sustained very severe injuries.

The jury found, upon questions submitted to them, that plaintiff was rightly upon the wagon—in fact, this was not disputed after the evidence was closed—and that the accident was occasioned by the reckless driving of the wagon

by Walker, also an employee of the company. The company were not negligent in employing Walker, as he was, undoubtedly competent.

A. G. Slaght, for the plaintiff.

J. W. Mahon, for the defendant.

HON. MR. JUSTICE MIDDLETON:—At common law, the plaintiff cannot recover, because the negligence occasioning his injury was the negligence of a fellow servant; and I do not think that the Workmen's Compensation Act in any way improves his position, because the common law still prevails unless the fellow servant is one who has superintendence intrusted to him and the accident occurs while he is in the exercise of such superintendence.

The statute defines "superintendence" as meaning such general superintendence over workmen as is exercised by a foreman or person in a like position to a foreman whether the person exercising superintendence is or is not ordinarily engaged in manual labour.

There is no dispute of fact concerning the position occupied by Walker. He was a teamster employed by the defendant company, and was engaged in and about the same undertaking as that upon which the plaintiff worked. He was employed to draw material to the work, and upon two trips during the day he carried the men to and from the work. Upon those uncontradicted facts I think it is clear that it cannot be said that he had superintendence within the statutory meaning.

As a matter of precaution I explained the law to the jury, reading to them the statutory provisions found in the Workmen's Act, and asked them to determine as a question of fact whether Walker had superintendence intrusted to him within the meaning of the statute. The jury first returned the answer: "We do not know"; but after my further explaining the matter to them they brought in the answer "Yes."

The plaintiff's counsel was not satisfied with the way in which I presented the question to the jury, and thought that the question asked was not entirely apt. At his instance I submitted a further question, framed in accordance with his views: "Had Walker superintendence over the wagon and workmen while riding in the wagon?" To this the jury first answered, "Yes, over the team and wagon;

as to the workmen we are not sure." After I had sent them back to consider further, they modified this answer so as to state that Walker had no superintendence over the workmen while riding in the wagon. This is in accordance with the evidence, and the only answer that could properly be given.

Under these circumstances, I very much regret that I am compelled to enter judgment for the defendants; but I do not think I shall award costs, as the plaintiff was very seriously injured by the negligence of the driver.

DIVISIONAL COURT.

MAY 9TH, 1912.

MALOOF v. LABAD.

3 O. W. N. 1235.

Company—Shares—Seized and Sold by Sheriff under Execution — Execution Act, 9 Edw. VII. c. 47, ss. 10, 11—No Proper Service of Notice—Place of Head Office of Company Changed.

DIVISIONAL COURT *held* that a sheriff can only seize stock in an incorporated company under the provisions of and in strict accordance with the conditions set out in 9 Edw. VII. c. 47, s. 11.

Judgment of KELLY, J., 21 O. W. R. 575, 3 O. W. N. 796, affirmed.

An appeal by the defendants other than Sheriff Varin from a judgment of HON. MR. JUSTICE KELLY, 21 O. W. R. 575, 3 O. W. N. 796.

The appeal to Divisional Court was heard by HON. SIR WM. MULOCK, C.J.Ex.D., HON. MR. JUSTICE CLUTE and HON. MR. JUSTICE RIDDELL.

Edward Meek, K.C., for the appellants.

R. McKay, K.C., for the plaintiffs, respondents.

HON. MR. JUSTICE RIDDELL:—In the view I take of this case I do not think it necessary to consider the effect of the alleged collusion, etc., but I would rest the judgment upon the simple ground that the stock was never legally seized.

In the application of a statute making exigible what was not exigible at the common law we must attend to the exact wording of the statute, and where the staute prescribes a

method of procedure, that method must be followed at least in substance: *Goodwin* v. *O. & P. R. Co.*, 22 U. C. R. 186.

There can be no doubt that the stock would not have been exigible at the common law: *Morton* v. *Cowan* (1894), 25 O. R. 525. The first statute in Upper Canada is that of 1831, 2 Wm. IV. ch. 6, and the original of all the subsequent legislation is in 1849, 12 Vict. ch. 23. The statute now in force and so often referred to in the course of the argument, i.e., the statute of 1909, 9 Edw. VII. ch. 47, sec. 11 (1) is the same (with mere verbal differences) as the original Act of 1849, 23 Vict. ch. 23, sec. 2. It, indeed, makes a definite provision that the seizure shall be deemed to be made from time of the service of writ, and notice which had been judicially decided as being the effect of the former statute *Hatch* v. *Rowland*, 5 P. R. 223.

Sub-section (2) of sec. 11 appears for the first time in the statute of 1909; and I do not think it at all limits the effect or generality of sub-sec. 1, which contains the old law. But I think it is of the greatest importance as shewing what the old law was. If it were the law that the sheriff could go outside of his county and serve a company or could serve by sending a letter outside the county there would be no necessity of any such provision. It is needed only if the sheriff cannot find the company within his county and cannot serve in any other way than within his county and by a real "service" not by sending a letter.

The result is, I think, that the statute means that the sheriff may seize (1) if the company, i.e., the head office of the company be within his county, or (2) if the company has within his bailiwick a place at which service of process may be made.

And this accords with the well known limitation of the powers of a sheriff. Like the vice-comes whose place he has taken, his authority is confined to the county of which he is sheriff: if he executed a writ out of his county he was a trespasser.

Watson on Sheriffs, 74, 121; Churchill on Sheriffs; Murfree on Sheriffs, sec. 114 and cases cited; *Hothet* v. *Bessy*, Sir T. Jones, 214; *State* v. *Harrell* (1842), Geo. Dec. 130; *Dederich* v. *Brandt* (1896), 16 Ind. App. 264; *Morrell* v. *Ingle* (1879), 23 Kan. 32; *Baker* v. *Casey* (1869), 19 Mich. 220; *Worbee* v. *Humboldt* (1870), 14 Nev. 123, at p. 131; *Jones* v. *State* (1888), 26 Tex. Ap. 1 at p. 12; *Re Tilton* (1865), 19 Abb. Pr. 50.

I do not, of course, suggest that a sheriff may not do any act out of his county which a private individual may do, as, e.g., serve a writ of summons, etc.: what is meant is that he cannot act officially out of his county.

In none of the cases in our Courts in which the matter has come up was there a seizure by a sheriff except when the head office of the company was in his bailiwick.

Robinson v. *Grange,* 18 U. C. R. 260; *Goodwin* v. *O. & P. Rw. Co.,* 22 U. C. R. 186; *In re Goodwin,* 13 C P. 254; *Hatch* v. *Rowland,* 5 P. R. 223; *Brown* v. *Nelson,* 10 P. R. 421; *Merton* v. *Cowan,* 25 O. R. 218; *Brock* v. *Ruttan,* 1 U. C. C. P. 218.

In the first named case, which was an acton against the sheriff of Brant for not seizing certain stock, Sir John Robinson, C.J., says: "As the plaintiff only attempted to prove that there were goods belonging to Banks (the debtor) by shewing that there was some stock in a building society in the county of Brant which might have been used to pay Banks' debt, although it was not stock standing in his name, it was incumbent on him to shew that the sheriff had notice of this stock so situated in time to levy upon it, for this not being like goods visible in the possession of the debtor, the sheriff could not be presumed to have knowledge of it." This, of course, is not conclusive that the head office of the company must (before the amendment of 1909) have been within the bailiwick as that point was not in question, but it is suggestive.

So too in *Nickle* v. *Douglas* (1874), 35 U. C. R. 126, when it was argued that stock in the Merchants Bank whose chief place of business was Montreal the stock being owned by a resident of Kingston was exigible in Kingston by virtue of the C. S. C. ch. 70 (the same as 12 Vict. in substance) the Court of Queen's Bench said p. 143: "Although it was argued that the sheriff could seize and sell the bank stock of a resident of this province which he held in a bank in Quebec, the statutes, which were referred to for the purpose, by no means bear out that argument." This also is not conclusive as the real point in the case was whether such stock could be assessed.

Nowhere, however, can I find any suggestion that the sheriff's power in the case of stock is any greater than in the case of visible chattels.

The Legislature, recognising the limitations of the sheriff's power and that the service by him required by the statute is an official service, have given him power to serve not only when the company is within his bailiwick, but also when there is a place within his bailiwick where he can serve upon the company as though the company were there domiciled. But this is the whole extent of his power.

The company had its head office in Ottawa but did most of its work in Montreal. Assuming that the appointment of Mr. S. White as agent for service was wholly valid, he was not served. Service on MacFie was ineffective, *delegatus non potest delegare.* No other act was done by the sheriff within his bailiwick: and I think the statute had not been complied with.

For this reason only I think no valid seizure was made and no valid sale effected.

The appeal should be dismissed with costs.

COURT OF APPEAL—CHAMBERS.

MAY 9TH, 1912.

DART v. TORONTO RW. CO.

3 O. W. N. 1202.

Appeal to Court of Appeal—Leave to Appeal from Divisional Court—Granted on Terms—Abandonment of New Trial—Costs.

Moss, C.J.O., granted defendants leave to appeal from a judgment of Divisional Court refusing to dismiss plaintiff's action but ordering a new trial, on terms that in case of failure on appeal the judgment at trial should stand and defendants should pay trial costs and costs of appeal to Divisional Court.

Motion on behalf of the defendants for leave to appeal to the Court of Appeal from a judgment of Divisional Court setting aside a judgment entered at the trial in favour of the plaintiff and directing a new trial.

D. L. McCarthy, K.C., for the defendants' motion.

D. Inglis Grant, for the plaintiff, contra.

HON. SIR CHAS. MOSS, C.J.O.:—The plaintiff was driving a sleigh along Wilton avenue going west, and while

crossing Church street at its intersection with Wilton avenue his sleigh was struck by a trolley-car of the defendants coming south on Church street and he was severely injured and the sleigh completely demolished.

The plaintiff seeks to recover damages from the defendants on the ground of negligence in approaching the crossing at an excessive rate of speed with the car not under proper control, without sounding the gong or giving warning.

At the trial, the jury in answer to questions found the defendants guilty of negligence in these respects. But to another question, viz.: "Could Dart by the exercise of reasonable care have avoided the accident?" they answered, "Yes to a reasonable extent." And to the further question, "If Dart could have avoided the accident, in what did his want of reasonable care consist?" They answered, "By lack of judgment."

The jury assessed the damages at $800, for which sum judgment was entered in the plaintiff's favour. From this judgment the defendants appealed to a Divisional Court, upon the grounds, as set forth in their notice of appeal, that upon the findings of the jury the defendants were entitled to judgment dismissing the action: the answers to the questions above set forth amounting to a sufficient finding of contributory negligence. They did not ask for a new trial.

The Divisional Court was of opinion that these answers were so unsatisfactory that the judgment for the plaintiff could not be maintained, but did not deal with the question raised by the defendants that they were entitled to judgment, but instead directed a new trial. The defendants say that what they desire is a decision upon the question of their right to have the action dismissed, and they do not desire a new trial.

In this view of the case, the defendants have not obtained a pronouncement upon the question they raised. And as that is all they seek it seems proper to give them an opportunity of obtaining a decision one way or the other upon the point.

But inasmuch as they repudiate any desire for a new trial it is only reasonable that as preliminary to accepting leave to appeal they should undertake and agree to abandon the new trial, and agree that in the event of the Court deciding that they are not entitled to judgment in their favour, the judgment entered in favour of the plaintiff at the trial shall stand, and that they will pay the costs of the appeal

to the Divisional Court. It would not be just to the plaintiff to permit the defendants to try the experiment of a further appeal while adhering to their new trial in case of non-success upon the appeal.

If the defendants accept these terms, an order for leave to appeal will issue, the costs of this motion to be in the appeal.

If not accepted within two weeks, the motion will stand dismissed with costs.

MASTER IN CHAMBERS. MAY 9TH, 1912.

CONKLE v. FLANAGAN.

3 O. W. N. 1242.

Venue—Change—Hamilton to Toronto—County Court Action—Issues for Trial—Evidence—Witnesses—Convenience—Expense.

MASTER IN CHAMBERS dismissed motion by defendants to change venue in County Court action from Hamilton to Toronto. Costs in cause.

Motion by defendants to have this action transferred from County Court Wentworth to County Court York under the circumstances set out in the judgment below.

J. G. O'Donoghue, for the defendant's motion.

A. M. Lewis, for the plaintiff, contra.

CARTWRIGHT, K.C. MASTER:—It is admitted that a verbal contract was made in March last between the two plaintiffs and Flanagan at which no one else was present.

It was then arranged that a boxing entertainment was to be given before the National Sporting Association Limited at Toronto. The real and only issue is as to the amount which plaintiffs were to receive out of the receipts. They claim one-half of the gross receipts. The defendants say they were only to pay fifty cents for every one who attended the entertainment. This sum has been paid. The plaintiffs sue for the sum of $334.50 alleging that the gross receipts were $1,338. This, while formally denied in the statement of defence is not disputed in the two affidavits of defendant Flanagan filed on this motion. It may, therefore, be not unreasonably thought to be correct. But

whether this is so or not, the exact figures can no doubt be found on examination of the books of the association on discovery, and it should not be necessary to give oral evidence at the trial. Here the main issue is on the plaintiffs who must satisfy the Court of the terms of the agreement as they present them.

It was argued that defendants would have to give evidence of the terms on which such bouts are usually arranged by the managers of other similar associations in Toronto. But such evidence would not be admissible when the plaintiffs are suing on an express agreement. It would, of course, be relevant if the action was on a quantum meruit. I note in passing that the present is another instance of the loss, delay and annoyance to all parties that arises from contracts not being in writing. Considering the short distance between Toronto and Hamilton and the frequent communication which will render it possible to have the trial without the witnesses being absent from home a single night—it does not seem a case for obliging the plaintiffs to conduct the subsequent proceedings in the county of the defendants instead of in their own.

The motion will be dismissed with costs in the cause. If the trial Judge thinks fit he can apportion the costs of the witnesses on application to him for that purpose. See *Rice* v. *Marine Construction Co.*, 3 O. W. N. 1080 and cases cited.

MASTER IN CHAMBERS. MAY 14TH, 1912.

CAMPBELL v. SOVEREIGN BANK.

(4 actions.)

3 O. W. N. 1283.

Trial—Motion to Expedite—Plaintiff not in Default.

MASTER IN CHAMBERS dismissed motion by defendants for an order that the trial of the actions be expedited on the ground that plaintiffs were not in default.

Costs to plaintiffs in cause.

These actions which were proceeding together when defendants moved for an order directing plaintiffs to set the

action down for trial and proceed to trial at the present non-jury sittings, and for an order fixing the date of trial and dispensing with the three weeks' notice required under the rules before a case can be put on the peremptory list. The notice of motion was served on 8th inst.

W. J. Boland, for the defendants' motion.

F. Arnoldi, K.C., and F. McCarthy, for the plaintiffs, contra.

CARTWRIGHT, K.C., MASTER:—It appears from Mr. Boland's affidavit, that these actions were begun in August last; that the statement of claim was delivered in December; and statement of defence and counterclaim on 19th or 20th March.

Assuming that the cases were at issue, there was nothing to prevent the defendants from setting them down if they wished to be in a position to speed the trial. This, however, they did not see fit to do.

It appears, from the facts above mentioned, that the defendants have not, up to the present time, been much in haste to have the matter disposed of. Not that this is a matter for censure. On the contrary it is well known that these same parties are all concerned in a test case which is now standing for argument before the Judicial Committee in July. It also appears from Mr. Arnoldi's affidavit that negotiations for a settlement of all matters in controversy between the parties have been in progress and were only finally terminated unsuccessfully on Saturday last. One result of this has been that plaintiffs have not made the necessary preparations to go to trial in a matter of this importance.

For these reasons the motion should be dismissed with costs to the plaintiffs in the cause.

Had I arrived at a different conclusion it would have been necessary to consider if I had any power to make such an order as was asked for. But if the plaintiffs were in default under Rule 434, they, no doubt, could be put on terms to expedite the trial. But was not the notice served too soon as the counterclaim was only served on 20th March?

DIVISIONAL COURT.

MAY 10TH, 1912.

REX v. HAMLINK.

(THREE CASES.)

3 O. W. N. 1256; O. L. R. .

Prohibition — Co. C. Judge — Jurisdiction—Appeals from Conviction under R. S. C. (1906), c. 85, s. 321—Time for Hearing and Decision of Appeals—Costs—Taxation by Co. C. Clerk—Practice —Discretion of High Court.

SUTHERLAND, J., 17 O. W. R. 275, 2 O. W. N. 186, refused prohibition to County Court Judge and Clerk from taking further proceedings on orders made by said Judge dismissing defendant's appeals from three convictions made under R. S. C. (1906), c. 85, s. 321. On appeal defendant urged that the Co. C. Judge was *functus officio* when delivering judgment, and that the Judge had no right to delegate his duty to fix the costs to the clerk which had been done.

DIVISIONAL COURT *held* that the Co. C. Judge, by simply adopting the clerk's taxation could cure any irregularity and therefore they could exercise their discretion to refuse prohibition.

Historical review of statutes and nature of prohibition discussed.

Judgment of SUTHERLAND, J., affirmed.

Motion by the defendant by way of appeal from the judgment of HON. MR. JUSTICE SUTHERLAND, 17 O. W. R. 275, refusing prohibition.

The appeal to Divisional Court was heard by HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., HON. MR. JUSTICE BRITTON and HON. MR. JUSTICE RIDDELL.

All the facts involved in these three cases are fully set out in the report of the application in which the above decision was given.

W. Proudfoot, K.C., for the defendant, appellant.

M. G. Cameron, for the Crown.

HON. MR. JUSTICE BRITTON:—There is not any further appeal on the merits, and we must assume that the defendant was properly convicted. The convictions were upon informations laid under ch. 85, R. S. C. and the defendant appealed under sec. 335 of the same act. The appeals were properly lodged in due form and were to the County Court of the county of Huron. The convictions are dated 11th

January, 1910. In case of appeal the act requires that it be taken within 10 days and the trial of the appeal must be within 30 days from date of conviction "unless the Court or Judge extends the time for hearing and decision beyond such 30 days," an extension of time for hearing, necessarily involves an extension of time for decision. Where there is any conflict or discrepancy as to what actually took place in formally extending the time, or in fact as to the action of a Judge or Court officer in any matter of routine, the presumption that all was done rightly—should prevail. Where, as in this case, the Judge had the power to extend the time and acted as if such extension was actually made, it would require a very strong and clear case to warrant prohibition because of the omission to formally announce or make a memo in writing of, an extension of time for doing what afterwards was done. As to this objection and also as to the objection that the Judge did not himself fix the amount of costs, I have to say the least of it, grave doubts as to the applicability of the cases cited.

I have given every consideration in my power to the very full and complete arguments addressed to the Court by counsel, I have read the cases cited—and I have carefully considered the judgment of my brother Sutherland and his reasons for refusing the motion. The conclusion reached by me is that it is not a proper case for prohibition.

As I have since going over this case, had an opportunity of reading the reasons for decision of my brother Riddell—and as I agree that the appeal should be dismissed I need not attempt to give further reasons—I may add this that it should be only where there is absolutely no doubt, that a party litigant invoking the aid of the Court to get rid of a conviction should after going a certain length and likely to fail—stop short and deny the right of the Court to go further.

The appeal should be dismissed with costs.

HON. MR. JUSTICE RIDDELL:—The defendant contended that he was entitled to prohibition forthwith. Sufficient reason has been shewn for the delay in taking the appeal—the facts are set out accurately and in sufficient detail in the report already cited. I mention the important dates, etc.

The defendant was 11th January, 1910, convicted before the police magistrate at Goderich under sec. 321 of R. S. C.

(1906), ch. 85: an appeal was taken 17th January under sec. 335 of the Act to the County Court of the county of Huron: the matter came on before the Judge of that Court 7th February, and that learned Judge upon that day made the following order: "I hereby extend the time for hearing the appeal herein for ten days from this date." On the 17th February the hearing was enlarged to 17th March, then on 10th March to 22nd March, and upon 22nd and 23rd March th appeal was heard. (There were in reality three convictions, appeals, etc., but I treat them all as though there were only one.)

It is said but denied that an enlargement was made for argument till 28th March and then till 29th March but this is denied—a note appears in the clerk's book of the enlargement till 28th March. After argument—it is not pretended that full opportunity for argument was not afforded and taken advantage of—judgment was reserved and 30th April the learned Judge handed out his judgment: "I affirm the conviction . . . and order that the sum thereby adjudged to be paid together with the costs of the said conviction and of this appeal shall be paid out of the money deposited by the appellant, etc., etc."

The informant thereupon filed his bills of costs which 16th June were taxed by the clerk of the County Court over the protest of the defendant. 9th June formal orders were taken out dated 30th April, and copies filed in office of the clerk 16th June, which were to the following effect:—

"2. This Court doth order that the said appeal be and the same is hereby dismissed, and the said conviction affirmed, with costs to be paid by the appellant to the respondent such costs to be taxed according to the scale of the costs taxable in this Court, and such costs to be taxed by the clerk of this Court.

"3. And this Court doth further order that such costs when so taxed be paid by the appellant to the clerk of this Court to be paid over by the said clerk to the respondent.

"4. And this Court doth further order that such costs be paid by the appellant within one week of the day upon which the same are so taxed as aforesaid."

A motion was made "for an order that the respondent, The King, Merritt B. Baker, Bernard Louis Doyle Esquire, Judge of the County Court of the county of Huron, and Daniel McDonald, clerk of said County Court, be prohibited

from taking any further proceedings in the said actions or upon three certain orders made thereon, bearing date the 30th day of April and entitled 'In the County Court of the county of Huron' . . . on the following amongst other grounds: 1. The . . . Judge . . . was *functus officio*; 2. . . . the . . . decision was not given within 30 days nor was the time extended; 3. the . . . Judge . . . did not find . . . the amount of costs . . . 4. The Judge having made his final order . . . is now *functus officio* . . . 5. The clerk . . . has no jurisdiction to tax the costs. . . ."

Passing over the novelty of asking prohibition against the King the story continues. The motion came on before my brother Sutherland who for reasons given in the report pp. 282, 283, made the following order. "1. It is ordered that this motion be enlarged for ten days, during which time the Judge of the County Court may be applied to, if the respondent desires, to amend the orders in question by himself fixing the amount of costs which he thinks should be allowed.

2. It is further ordered that if said course is taken this motion be dismissed without costs unless either party desires to speak to the question of costs, in which case they may have liberty to do so.

Apparently the County Court Judge was applied to, although with what result, or even that he was applied to at all, we are not informed.

The defendant appeals from this order and presses much the same grounds as were urged before Mr. Justice Sutherland.

Very many cases were cited either by name or by reference and it becomes necessary to see how the decided cases affect the present if at all.

In considering and applying these many cases referred to expressly or by implication, regard must be had to the history of the legislation.

While at least in some cases the appeal to the sessions from convictions by persons having jurisdiction similar to that of justices of the peace, goes back to the time of the Restoration, 12 Car. II. ch. 2, and from convictions by justices of the peace to 22 Car. II., no power was given to award costs until 1697: 8 & 9 Wm. III. ch. 30, by sec. 3, allows and directs the justices of the sessions "at the same

quarter sessions" to "award and order the party, etc. . . . such costs and charges in the law as by the said justices in their discretion shall be thought most reasonable and just. . . ." As this applied only to certain named appeals, a new provision was ultimately made in 1849 by 12 & 13 Vict. (Imp.) ch. 45, sec. 5, "That upon any appeal to any Court of general or quarterly sessions of the peace the Court before whom the same is brought may if it think fit, order and direct the party or parties against whom the same shall be decided to pay to the other party or parties such costs and charges as may to such Court appear just and reasonable. . . ." It was under this statute that most of the English cases were decided and they laid down: 1. That the same Court which decided the case should fix the costs as Lord Halsbury says in *Midland* v. *Guardians* (1895), 1 Q. B. 357, at p. 362: "The Legislature knew very well that whatever may be the identity of the Court as an abstraction, it occasionally consists of different persons, and they, (i.e., the Legislature), have accordingly provided that the power to order costs shall be exercised by the Court before which the appeal is tried," and 2 the Court must fix the costs and not delegate this judicial duty to a clerk.

As is shewn in the case in 31 O. R. at p. 702, it soon became the practice for the clerk to tax the costs and for the Court to adopt the amount taxed by him and include it in their order, but this had to be done during the same sessions. It then became the practice for parties to consent to the taxation out of sessions and the insertion then in the order; in case of such consent, the Courts would not permit the fact that the taxation was out of sessions to be taken advantage of, and the slightest evidence of such consent was considered enough since the practice was so very common. I do not follow out the Imperial legislation: the practice is substantially founded on Barrie's Act 12 & 13 Vict. ch. 45, already referred to: and the curious may find all the legislation mentioned in Paley on Summary Convictions and Scholefield & Hill's appeals from Justices.

In Upper Canada, the first Act of any significance is (1850) 13 & 14 Vict. ch. 54, which by sec. 1 gave an appeal to the "next Court of General Quarter Sessions of the Peace . . . and the Court at such sessions shall hear and determine the matter of such appeal and shall make such order therein with or without costs to either party as to the Court

shall seem meet . . .” the appeal was tried by a jury sec. 2. A change was made in 1859 at the consolidation but merely verbal—the appeal is to the “first Quarter Sessions of the Peace”—the rest is as before. C. S. U. C. (1859) C. 114, sec. 1: the trial is still by jury, if either party desires. It was under this legislation, i.e., where the Court must proceed “at such sessions” that some of our cases were decided.

In *Re McCumber and Doyle* (1867), 26 U. C. R. 516; *Reg.* v. *Murray* (1867), 27 U. C. R. 134.

Then came the act to assimilate the practice of the provinces of Canada (1869) 32-33 Vict. (Dom.) ch. 31, this by sec. 65 provided for an appeal to the “next Court of General or Quarter Sessions” and provided that “the said Court shall hear and determine the matter of the appeal and shall make such order therein with or without costs to either party as to the Court seems meet . . . .” the trial continues to be by jury if either party so desires sec. 66.

In *Re Rush and Bobcaygeon* (1879), 44 U. C. R. 199, was decided under this statute by Cameron, J. (afterwards Sir Matthew Cameron, C.J.), “It seems clear . . . that the Court of General Sessions at which the appeal is heard must determine . . . whether costs are to be paid: secondly, what costs, that is, costs of the Court below or Magistrate's Court, or costs of the appeal or both and when such costs should be paid. The clerk of the peace may tax the costs at any time during the then sitting of the session, or at any adjourned sitting thereof; but it would seem clear upon the authorities, the Court must adopt his taxation and that an order made without such adoption would be invalid.”

Then came after certain legislation the Code of 1892, 55-56 Vict. ch. 29, consolidating 51 Vict. ch. 45, sec. 8 and 53 Vict. ch. 37, sec. 24. This provides for an appeal in sec. 880 in practically the same words as are found in the present Code secs. 750, 751.

It was under the Code of 1892 that *Bothwell* v. *Burnside* (1900), 31 O. R. 695, came on for decision, there the appeal was to the Court of General Sessions of the Peace for the county of Kent sitting 13th June, 1899, adjourned to June 29th, judgment reserved until July 4th, 1899, the sittings of the Court being then adjourned until July 10th and ending that day.

On July 4th, 1899, the chairman gave judgment "appeal in this case dismissed with costs to be taxed by the clerk of the peace within 5 days." Taxation of costs began July 8th and was closed July 13th; at the next sittings December 12th, an order was made for a warrant of distress. An order nisi was obtained calling upon the chairman, the clerk of the peace and the informant to shew cause why any and every order issued and direction made by the chairman in connection with the matter of the appeal should not be quashed.

No formal order had been drawn up and made in pursuance of the minute. The Court (Armour, C.J., and Street, J.), held that a formal order should have been drawn up "in compliance with the Criminal Code secs. 880e, 897, and which should have contained the amount of the costs awarded." And accordingly the certificate of the clerk of the amount of the costs and that they had not been paid, and the order of the sessions made in December were quashed: but the Court proceeded to say that while the costs under sec. 884 (now sec. 755), would have to be taxed and included in the order of the Court during the sittings of the Court unless taxed out of sessions by consent, there is no such restriction of the power of the Court under sec. 880 (e), (f) now secs. 750, 751, to the same sittings of the Court for which notice of appeal has been given. The Court of General Sessions being a continuing Court, there is "no reason why at the next sittings of the Court of General Sessions of the Peace for the county of Kent, the formal order should not be drawn up and made in pursuance of the said minute and the costs included therein *nunc pro tunc* if necessary," p. 704.

It will be seen that the decision of Mr. Justice Rose in *R.* v. *McIntosh* (1897), 28 O. R. 603, is upon the same statute, as that learned Judge considered that the provisions of secs. 879, 880, must be read into the act under which the prosecution was brought: see p. 606 *ad init.* He then says: "it seems clear that the costs to be awarded are to be such as appear right. Such sum might be awarded in gross. The discretion of the Court fixes the amount. No reference is made to any tariff and as none is provided one may be adopted by the Judge to aid his discretion . . . the Judge fixes the amount which seems to him to be reasonable.

. . . He may think because proceedings were before him as a Judge of the County Court, that the tariff of the County Court will be a reasonable guide . . . the clerk had no power to tax the costs although the Judge might have had a taxation by the clerk for the purpose of assisting him in fixing the amount. Whatever sum the clerk might have certified to him as allowable under any tariff, the Judge might adopt as reasonable or he might not . . . the amount to be named is to be deermined in the discretion of the Judge . . . and I have no jurisdiction vested in me to review his decision. . . ."

Giving these decisions their full force and assuming that they apply to the present, what is the result?

The appeal is to the County Court under sec. 335 of R. S. C. ch. 85: this section provides "2 the trial of any such appeal shall be heard, had, adjudicated upon and decided without the intervention of a jury at such time and place as the Court or Judge hearing the trial appoints and within 30 days from the date of the conviction unless the said Court or Judge extends the time for hearing and decision beyond such thirty days."

The perfectly general "time" for trial is not limited at all if the Judge does extend the time beyond "such thirty days."

Even supposing the very stringent rule laid down in *Power* v. *Griffin*, 33 S. C. R. 39, to apply and the power to extend exercisable only once: and supposing the large powers given in the Code sec. 751 (3) cannot be exercised by the Judge here, I am of opinion that the order extending the time to 10 days after the 7th February, that is to 17th February, more than thirty days after the conviction, made the time wholly at large and wholly in the discretion of the Judge. The extension of the time for hearing the appeal necessary was an extension of the time for decision as well—and, consequently, his order of 7th February, was an order "extending the time for hearing and decision" under sec. 755 (2).

He could sit at any time to hear, adjudicate upon and decide anything and everything the law called upon him to hear, adjudicate upon and decide.

That he had the right to have the clerk tax the costs for his own information is undoubted—if the clerk taxed when the Court was not sitting, this was at most an irregularity

(if even that)—the Court could sit again, if necessary, and have the form of taxation gone through, and insert the amount in the order. The Court is not *functus officio* until everything is done which should be done, as there is no time limit or limit to any particular sittings. The very most that can be said is that the Judge has not stamped with his approval the amount and caused that amount to be inserted in the order.

Prohibition is not *ex debito justitiae,* it is an extreme measure.

Re Birch, 15 C. B. 743; *Re Cummings,* 25 O. R. 607; 26 O. R. 1, and is not granted in case of a mere illegality or irregularity not going to the jurisdiction.

R. v. *Mayor of London* (1893), 69 L. T. 721, or where the judicial officer, having jurisdiction, goes about it in an irregular manner. *R.* v. *Justices Kent,* 24 Q. B. D. 181.

It would, in my view, be absurd to direct prohibition to the County Court Judge forbidding him to act upon an order which he can make right by a few strokes of his pen.

This consideration is, I think, sufficient to dispose of the appeal; my brother Sutherland's order was practically: "Get the Judge to put his order right; if you do, the motion will be dismissed." This is substantially what the Divisional Court did in *Re Hugh* v. *Cavan,* 31 O. R. 189, they said that certain unauthorized papers should be quashed, but further said that the whole matter could be set right at the next sittings of the Court, and gave no costs, as they would have done had prohibition lain.

McLeod v. *Emigh* (2), 12 P. R. 503, and cases cited.

If it were considered that the decisions in cases from the Sessions compelled us to grant prohibition contrary to the opinion just expressed, further considerations would arise.

The cases in our Courts after the change of the language by the Act of 1850, 13 & 14 Vict. ch. 54: "with or without costs to either party, as to the Court shall seem meet," carried into the new practice what had been and has necessarily been the former practice, viz., that the Court exercised at least in form a discretion as to the amount of the costs. In other words, it was considered that "with or without costs to either parts as to the Court shall seem meet" meant the same thing as "award . . . such costs . . . as by the said justices shall be thought most reasonable and just"

or "such costs and charges as may to such Court appear just and reasonable."

This interpretation was, I think, probably due to the constitution of the Court and the desire to keep the former practice in force. It is too late now, at least, for this Court to change the interpretation to be placed upon the words of the statute in the case of the sessions, which has had a long series of appeals from very early times, and a settled practice for as long; but the case is wholly different where an appeal is given to another Court, whose practice is wholly different and equally well suited, having a tariff well established and officers to apply the tariff.

The Act R. S. O. ch. 85, sec. 335, gives an appeal to the County Court as well as to the Sessions at the option of the appellant, or he may appeal to a superior Court. The Code only to the Sessions or in certain cases to a Division Court. And it was to the County Court that the defendant took his appeal.

Suppose now the Act giving an appeal to the County Court had said: "The Court to which such an appeal is made shall hear and determine the matter of appeal and make such order therein, with or without costs to either party, including costs of the Court below, as seems meet to the Court . . . ," would there have been any doubt as to the meaning? Would it not mean that the Court should make such order as seems meet and that this order should be "with or without costs" as seems meet? Would it be construed as meaning "with or without costs as seems meet, and if with costs, costs to such an amount as seems meet?" The Court having a legal tariff, could the Court give any other than the tariff costs if any? Making an order "with costs" means with the costs taxable between party and party in the Court making the order, if nothing more be said. It could not be successfully argued, I think, under such legislation, that the Court could give solicitor and client costs or on the H. C. scale.

O'Farrell v. *Limerick &c., Rw.* (1849), 13 L. R. 365; *Re Bronson & C. A. R.* (1890), 13 P. R. 440; or any more, at all events, than the taxable party and party costs in the County Court.

It may well be that a choice was given in this Act of going to the County Court rather than to the Sessions from just such considerations—the appellant would know pretty

well the worst that could happen to him, and I see no impropriety in making the orders complained of; if it were not for the practice in the other Court, due, as I venture to think, to historical and other considerations, wholly wanting in the case of the County Court, no one would have thought the language of the statute had any other meaning than that I am now suggesting.

At all events there is such "doubt in fact (and) law whether the inferior Court is exceeding its jurisdiction or is acting without jurisdicton" that we should exercise the discretion we have "to refuse a prohibition." Brett, J., in *Worthington* v. *Jeffries,* L. R. 10 C. P. 379, at pp. 383, 384, says: "If the Court doubt as to what is the true state of the facts as to the law applicable to recognised facts, it is indisputable that the Court may decline to proceed further."

See also *Foster* v. *Berridge,* 4 B. & S. 187, cited in the case in L. R. 10 C. P.; *Ex p. Smyth,* 3 A. & E. 719, per Littledale, J., at p. 724; *Martin* v. *Mackonochie,* 4 Q. B. D. 734, per Thesiger, L.J.; *Carslake* v. *Mapledoram,* 2 T. R. 473, per Buller, J.; *Bassano* v. *Bradley* (1896), 1 Q. B. 645, per Russell, L.C.J.; *Ricardo* v. *Maidenhead,* 2 H. & H. 257, per Pollock, C.B.; *In re Birch,* 15 C. B. 734, per Jervis, C.J.

This consideration also enters into the case upon the earlier branch.

I am of opinion that the appeal should be dismissed with costs.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—I agree in the result.

DIVISIONAL COURT.

MAY 11TH, 1912.

RE AUGER.

3 O. W. N. 1264; O. L. R. .

Dower—Basis upon which Dower should be Allowed—Lands Purchased—Mortgages given as Part Payment—Wife Joined to Bar Dower—Question whether Wife Takes Dower in whole Value of Lands or Value Less Mortgage?

DIVISIONAL COURT, *held*, that where a mortgage is given to secure unpaid purchase money the widow of the holder of the equity is entitled to dower based upon the surplus value of the property over and above the mortgage, not upon the total value of the property. *Campbell* v. *Royal Canadian Bank*, 19 Grant 334, followed. Review of authorities.

Judgment of MIDDLETON, J., 20 O. W R. 656, 3 O. W. N. 377, reversed.

An appeal by certain of the next of kin of Michael Auger, the husband of the respondent, from an order of HON. MR. JUSTICE MIDDLETON, 20 O. W. R. 656; 3 O. W. N. 377, declaring the respondent to be entitled to dower in the full value of the lands of which he was seized at the time of his decease, payable out of the proceeds of the sale thereof now in the hands of the administrator in priority to all other claims against the estate of the said Michael Auger."

The appeal to Divisional Court was heard by HON. SIR WM. MEREDITH, C.J.C.P., HON. MR. JUSTICE TEETZEL and HON. MR. JUSTICE KELLY.

D. Urquhart, for the appellants.

J. J. Maclennan, for the respondent, Sarah Auger.

HON. SIR WM. MEREDITH, C.J.C.P.:—Auger owned at the time of his death the equity of redemption in the land as to which the question arises. The land was purchased by him from Henry Gooderham, and the conveyance to Auger bears date 1st November, 1898. The purchase price is stated to be $3,000, and one of the recitals in the conveyance is that it had been agreed that $2,800 of this sum should remain a lien upon the land to be collaterally secured by a mortgage of it.

The release clause, according to the statutory form, is altered to read as follows:

"And the said grantor releases to the said grantee all his claims upon the said lands excepting the said lien for unpaid purchase money and mortgage to be given therefor."

The mortgage bears the same date, and the respondent joined in it to bar her dower.

The mortgage money was reduced by payment to $1,700 in the lifetime of the mortgagor, and he died intestate on 12th May, 1909. The land has been sold by his administrator for $5,250, and the question for decision is whether the respondent's dower is to be calculated on the proceeds of the sale of the land or only upon the proceeds after deducting the amount remaining due upon the mortgage at the time of the death of her husband.

Before any legislation on the subject it had been held, in *Campbell* v. *Royal Canadian Bank* (1872), 19 Grant 334, that where a wife joins with her husband to bar dower in a mortgage to secure the purchase money of the mortgaged lands, and the husband dies and the mortgaged land is sold to satisfy the mortgage, she is entitled to dower in the proceeds after satisfying the mortgage debt, but no more.

The Chancellor (Spragge) delivering judgment said that "by the sale the purchaser stands in the place of the heir and occupies as to the widow the same relative position that the heir had done," and that he thought "it must now be taken as settled that as between the widow and creditors she is dowable only in respect of the value of the land in excess of the incumbrance, *i.e.*, of course in a case where as in this case she is bound by the incumbrance."

These observations do not appear to be limited to cases in which, as in the one he was dealing with, the mortgage is for unpaid purchase money, and it may be that he did not intend them to be so limited.

However, in the subsequent case of *Doan* v. *Davis* (1876), 23 Grant 207, where the mortgage was not given to secure unpaid purchase money, the same learned Judge held that the widow was entitled to dower out of the whole value of the mortgaged premises and not only out of their value beyond the mortgage debt.

Doan v. *Davis*, was approved and followed by Proudfoot, V.-C., in *Lindsay* v. *Lindsay* (1876), 23 Grant 210.

In *In re Robertson* (1878), 25 Grant 486, it was also decided, as the head-note states, "that a woman is entitled to dower in lands on which she and her deceased husband had

joined in creating a mortgage to secure a debt of the husband; and that in ascertaining such dower the value of the whole estate is the basis of computation, not the amount of surplus after discharging the claim of the mortgagee."

That was the conclusion reached by a majority of the full Court on the rehearing of an order pronounced by Proudfoot, V.-C., a report of whose judgment is found in 1877, 24 Grant 442.

The Vice-Chancellor there expressed his approval of the opinion of VanKoughnet, C., in *Sheppard* v. *Sheppard* (1867), 14 Grant, 174, notwithstanding that the same learned Judge in the later case of *Thorpe* v. *Richards* (1872), 15 Grant 493, had expressed a doubt whether he had not gone too far in the former case in giving the wife the value of her dower in the entire estate as against the creditors of her husband, and the learned Vice-Chancellor pointed out that it was not necessary in the later case to consider that question. The Vice-Chancellor also referred to two decisions of Mowat, V.-C., *White* v. *Bastedo* (1869), 15 Grant 546, and *Baker* v. *Dawbarn* (1872), 19 Grant 113, to the effect that "the widow was not entitled as against creditors to the exoneration of the mortgaged estate out of either the personal estate or the other real estate left by her insolvent husband at the time of his death, and distinguished these cases on the ground that there does not appear to have been any surplus from the mortgaged property after payment of the incumbrances."

Campbell v. *The Royal Canadian Bank*, so far as it is a decision that where a wife joins in a mortgage by her husband to secure unpaid purchase money, she is not entitled to dower on the value of the land, but only on the value after deducting the mortgage debt, was never questioned and was referred to with approval by Proudfoot, V.-C., in *Lindsay* v. *Lindsay*, at p. 213, and again in *In re Robertson* (1878), 25 Grant, at p. 501, where he says: "Where the mortgage has been given for the purchase money of the land it is quite reasonable that the widow should only have dower in the value of the land after deducting the amount of the mortgage, for that was the extent of the beneficial interest of the husband. That was the case in *Campbell* v. *The Royal Canadian Bank*."

I refer also to *In re Croskery* (1888), 16 O. R. 207, and in *Re Williams* (1903), 7 O. L. R. 157.

In this state of the decisions, 42 Vict. ch. 22 was enacted. By its first section that Act provides:

"1. No bar of dower contained in any mortgage, or other instrument intended to have the effect of a mortgage or other security, upon real estate, shall operate to bar such dower to any greater extent than shall be necessary to give full effect to the rights of the mortgagee or grantee under such instrument."

And by sec. 2 it is provided:

"2. In the event of a sale of the land comprised in any such mortgage or other instrument, under any power of sale contained therein or under any legal process, the wife of the mortgagor or grantor who shall have so barred her dower in such lands, shall be entitled to dower in any surplus of the purchase money arising from such sale, which may remain after satisfaction of the claim of the mortgagee or grantee, to the same extent as she would have been entitled to dower in the land from which such surplus purchase money shall be derived had the same not been sold."

It has been generally understood, I think, that what led to this legislation was the uncertainty as to the law as evidenced by the conflicting decisions, to some of which I have referred, and that the purpose of sec. 1 was to declare the law as it had been held to be in *Campbell* v. *The Royal Canadian Bank*, and in *Re Robertson*. Section 2 was intended, as was said by Patterson, J.A., in *Martindale* v. *Clarkson* (1880), 6 A. R. 1, 6, to give the wife a new right in cases where she had joined in the mortgage, her husband having at the time the legal estate, and the land was subsequently sold under a power of sale in the mortgage or under legal process. The nature of this new right was considered and explained by Ferguson, V.-C., in *In re Luckhardt* (1898), 29 O. R. 111, the present Chancellor agreeing with the opinion he then expressed.

The principle upon which the Court of Chancery proceeded in holding before this statute that the wife, although she had joined in the mortgage for the purpose of barring and had barred her dower in the mortgaged lands, was that she had barred it only for the purpose of the security given to the mortgagee, and that is what in substance sub-sec. 1 provides, and it follows, I think, that the widow's rights under sub-sec. 1 are no greater than they had been decided to be in the view of the Court of Chancery as to the effect

of the bar of dower before the statute, and that was to have dower in the surplus calculated on the full value of the land, where the mortgage was to secure a debt of the husband, except where the debt was for unpaid purchase money of the mortgaged land, and in that case calculated on the value in excess of the incumbrance.

By a later Act, 58 Vict. ch. 25, sec. 3, it was provided that: "3. In the event of the land, comprised in any mortgage or other instrument hereafter executed by which the mortgagor's wife barred her dower, being sold under any power of sale contained in the mortgage, or under any legal process, the wife shall be entitled to dower in any surplus of the purchase money arising from such sale, which may remain after satisfaction of the claim of the mortgagee or grantee, to the same extent as she would have been entitled to dower in the land had the same not been sold; and the amount to which she is entitled shall be calculated on the basis of the amount realized from the sale of the land, and not upon the amount realized from the sale over and above the amount of the mortgage only. This section shall not apply where the mortgage is for the unpaid purchase money of the land; and nothing in this section contained shall be construed to affect, by implication or otherwise, any question in the case of mortgages heretofore executed."

Except for the provision as to the basis for calculating the amount to which the wife is to be entitled for her dower, this section does not differ in substance from sec. 2 of the Act of 1879.

While sec. 3 applies only to cases in which the mortgaged land has been sold under a power of sale in the mortgage or under legal process, it, like sec. 2 of the earlier Act, provides that the wife is to be entitled to dower in the surplus to the same extent as she would have been entitled to dower in the land had it not been sold, and in the provision as to the basis for calculating the amount to which the wife is to be entitled the legislature indicates, I think, that the draughtsman was under the impression that that would have been the measure of the wife's rights if the land had not been sold.

If the order appealed from is right, as sec. 3 is confined to cases in which the land is sold under power of sale in the mortgage or under legal process, it would follow that in other cases a different rule would be applicable, and in them

the widow's dower would be calculated on the basis of the value of the land irrespective of whether or not the mortgage was given to secure purchase money. I can see no reason for such a distinction, and this affords, I think, an additional reason for construing sec. 1 of the Act of 1879 as I have construed it.

I am, for these reasons, unable to agree with the opinion of my brother Middleton, and am of opinion that the appeal should be allowed and that there should be substituted for the declaration which he made a declaration that the respondent is entitled to dower in the purchase money of the mortgaged land after deducting from it the amount which remained owing on the mortgage at the time of her husband's death, and there should be no order as to the costs of the appeal or the costs of the proceedings before my brother Middleton.

HON. MR. JUSTICE TEETZEL and HON. MR. JUSTICE KELLY agreed in the result.

HON. MR. JUSTICE RIDDELL. MAY 13TH, 1912.

DE LA RONDE v. OTTAWA POLICE BENEFIT FUND ASSOCIATION.

3 O. W. N. 1282.

Insurance—Police Benefit Society—Action for Retiring Allowance—By-laws of Association—Plaintiff Forced to Resign from Police Force—Right to Pension.

Action by plaintiff, formerly Chief of Police of Ottawa, to recover $1,000 retiring allowance under by-laws governing their pension fund. In February, 1910, the Board had forced plaintiff to resign. One of the draft by-laws of the Association provided that no member should be entitled to retire who was in good health and capable of performing his duties.

RIDDELL, J., *held*, 21 O. W. R. 997, 3 O. W N. 1188, that the above by-law had never been adopted by the Association, but in any case it had no application to a case of involuntary resignation.

After further judgment had been reserved in hope that parties might reach a settlement, *held*, that judgment should be entered for plaintiff for $1,000 and costs.

Continuation from 21 O. W. R. 997; 3 O. W. N. 1188.

HON. MR. JUSTICE RIDDELL (13th May, 1912):—The parties not having agreed, I now dispose of this case.

It would, at first sight, appear that clause 10 was adverse to the plaintiff's claim; but a careful examination of that clause shews that such is not the case. That provides for a report being made by the trustees to the Board of Police Commissioners and for what is to be done in case the trustees and the Board disagree; nothing of that kind took place here; and, consequently, clause 10 does not apply. Clauses 18 and 19 are specific that certain sums "shall be paid," and these must be given full effect to. Clause 14 provides that no money is to be paid out by the treasurer unless ordered by the Board of Trustees; but that difficulty may be got over by making the trustees party, and directing them to give such an order.

No doubt the Board of Commissioners will sanction the same.

Judgment directing the pleadings to be amended by making the trustees defendants; declaring the plaintiff entitled to $1000 from the fund; and directing the trustees (as a board) to give an order to the treasurer for payment of $1,000 and interest from the date of the writ of summons. The defendants to pay the costs.

HON. MR. JUSTICE BRITTON. MAY 11TH, 1912.

ROBINSON v. REYNOLDS.

3 O. W. N. 1262.

Principal and Agent—Agent's Commission on Sale of Land—Purchaser Procured who Refused to Carry out Purchase—Right of Agent to Commission.

Action to recover commission on sale of defendant's property. Plaintiff procured one Foster to make an offer for the purchase of the property which defendant accepted. Later Foster refused to complete and plaintiff brought action claiming that their duty had been performed when a binding contract had been entered upon.

BRITTON, J., *held*, that the facts established that the commission was "to be paid out of and form part of the purchase money, and as no purchase money had been paid plaintiffs could not recover. Action dismissed with costs.

See *Hunt* v *Moore*, 19 O. W. R. 73.

An action brought by plaintiffs, as real estate agents, for 2½% commission upon the selling price of defendants' property, viz., King George Apartments in Toronto.

The plaintiffs procured an offer in writing from one John G. Foster, addressed to defendant, offering to purchase this property for $60,000, which offer, the defendant accepted, but, subsequently, Foster refused to carry out the purchase, and he did not in fact purchase, and the defendant did not receive any purchase money from Foster.

The plaintiffs' contention was that immediately upon a contract of purchase and sale being made—through the intervention and agency of the plaintiffs, acting for defendant—they, the plaintiffs, became entitled to their commission no matter whether the actual purchase and sale was carried out or not.

There was an employment by defendant of plaintiffs as defendant's agents to make a sale of the property mentioned. The particulars and real nature of the agreement between plaintiffs and defendant were contained in the offer drawn up by the plaintiffs and signed by Foster—which offer the defendant accepted. In the offer it was stipulated as follows: "The agent's commission to be paid out of and from part of the purchase money at 2½%." There was nothing in writing between plaintiffs and defendant, and defendant contended that the agreement between him and plaintiffs was evidenced in the offer written out as above mentioned.

G. H. Watson, K.C., for the plaintiffs.

C. A. Moss, for the defendants.

Hon. Mr. Justice Britton:—It may be that this special clause was inserted in the offer to prevent any possibility of Foster being liable for commission and also to permit Foster's paying it out of the purchase money and so prevent the money, to the extent of the commission, going into the hands of the defendant. This offer permitted Foster to pay the commission and keep the amount so paid out of the purchase money. I find that the agreement between the plaintiffs and defendant was that in the event of a sale—not merely an agreement for sale—the commission was to be paid out of the purchase money.

This is what the plaintiffs said: If the commission was to form part of the purchase money—as between Foster and defendant—it can come only out of the purchase money as between plaintiffs and defendant. If Foster paid it he would be protected. If defendant got the purchase money; or if sale carried out so that he could be responsible for not getting

it, the defendant would be liable to the plaintiffs. In the acceptance of the offer by defendant, he acknowledges receipt of $500 as deposit. This cheque of Foster's was payable to the order of the defendant—but it was not received by him—nor was it offered to him—nor was he asked to endorse it. It was retained by Mr. Bethune, one of the plaintiffs, for some time, and when presented, payment had been stopped, as Foster repudiated and refused to go on with his proposed purchase. Holding the cheque and all the dealings between plaintiffs and Foster convince me that the real agreement between plaintiffs and defendant was as defendant contends, viz., that the commission was to be paid out of the purchase money. The defendant has acted in perfect good faith throughout. He did his utmost to get Foster to complete the purchase.

The fair inference upon all the evidence is, that the defendant never agreed to pay and the plaintiffs did not intend to charge so large a commission for procuring a person to sign an agreement to purchase, for an amount which the defendant would accept.

No fraud or collusion in this transaction can be imputed to plaintiffs, but to accept their contention would offer a temptation to any real estate agent upon a general retainer or employment, who would be guilty of collusion to procure an offer at a price that vendor would gladly accept, and then have the proposed purchaser retreat or simply decline to carry out the purchase, allowing the agents to collect their commission from the responsible owner. My decision, however, is based upon my view of the evidence in this case and not because of what might happen in some other case.

Then, I am of opinion that the defendant is entitled to succeed upon the ground taken in the amended statement of defence.

The defendant did so draw this agreement as to give to the purchaser, Foster, an opportunity to resist the defendant's claim to have Foster's purchase carried out. It seems to me that the Statute of Frauds affords a good defence to Foster. If the defendant, in good faith, desired to have the purchase carried out, and if the plaintiffs are in any way responsible for that—so that no purchase money was received or can be received by defendant—out of alleged sale by plaintiffs—the defendant is not called upon to pay.

The action will be dismissed with costs—and the counterclaim also will be dismissed with costs. Twenty days' stay.

Annotation by Editor.

See *Hunt* v. *Moore*, 19 O. W. R. 73, where Divisional Court *held* that where the purchaser refused to carry out a contract to purchase property, it was no bar to the real estate agent's right to a commission, as he had a contract signed in proper and intelligible terms.

HON. MR. JUSTICE RIDDELL. MAY 14TH, 1912.

TOAL v. RYAN.

3 O. W. N. 1267.

Will—Testamentary Capacity—Absence of Undue Influence—Proof of Due Execution—Evidence.

RIDDELL, J., dismissed, with costs, plaintiff's action for declaration that a will made by Susan Ryan, deceased, was invalid on grounds of want of capacity, want of due execution and undue influence.

Action for a declaration that the will of the late Susan Ryan was invalid and for revocation of the letters probate thereof.

T. G. Meredith, for the plaintiffs.

E. Meredith, K.C., and W. R. Meredith, Jr., for the defendant Ryan.

N. P. Graydon, for D. J. Toal and Mrs. Fisher.

E. P. Betts, K.C., for the infants.

HON. MR. JUSTICE RIDDELL:—Susan Toal had married one McC., and he had left her a farm, etc., when he died in 1885; she married the defendant Ryan in 1889. In 1910, being then a woman of 58 or 59, and suffering from arterial sclerosis, she was, in September or November, taken violently ill with convulsions. She recovered, but not completely or lastingly, and in July, 1911, took to her bed. The disease, sclerosis, was, of course, quite incurable, as she knew. In September, 1911, her father thought and said that she should make a will, and Richard Code, an unlicensed conveyancer

(the best friend of the solicitor), was sent for. He drew up a will which was admitted to probate by the Surrogate Court of the County of Middlesex, October 17th, 1911.

The father and one of her nephews bring this action, alleging want of testamentary capacity, undue and improper influence by William Ryan, the husband, and non-execution in the manner prescribed by law, and they ask that the will be declared of none effect and probate revoked.

The defendants are the husband, against whom the attack is made, and the next of kin, etc., who submit their rights to the Court (in form), but who really take part with the plaintiff.

The will leaves everything to the husband except small legacies to certain relatives.

No evidence was given of anything approaching undue influence and that was not pressed in argument. The two matters are: (1) capacity, and (2) execution.

Much evidence was given of statements made by the deceased, these were objected to; but I admitted them (subject to the objection) as they bore or might bear upon the question of capacity and the factum of the will.

Sutton v. *Sadler*, 3 C. B. N. S. 87, 99. Whether these statements be admitted or not is in the present case immaterial. I am perfectly satisfied that the testatrix was competent to make a will and so find.

And, while on the evidence of Code it might be doubtful how far it was established that all due formality was observed in the making of the will, that doubt is removed by the evidence of the nurse, Miss Hoy, whose evidence at the trial is to be fully credited. I do not find that any of the witnesses was not trying to tell the truth; Code was confused and "mixed" upon cross-examination, and the plaintiff's witnesses were anxious and rather extreme. But Miss Hoy's evidence at the trial was most satisfactory, notwithstanding the document she gave Mrs. Fisher previously.

I find that the deceased knew she was making a will, knew its effect, knew what property she had and how she was disposing of it, knew those who had claims on her and appreciated all these—the will was drawn according to her instructions and as she wished it—it was signed by her in the presence of the two witnesses as her will, and by them in her presence and in the presence of each other at the same time, etc., also that there was no undue influence.

All due formalities being observed the testatrix being competent and no undue influence being used, the will is valid.

The action will be dismissed with costs payable by the plaintiff to the defendant Ryan and the O. G.—costs of the other defendants I do not order to be paid by the plaintiffs—they are in common case. If the O. G. cannot make his costs out of the plaintiffs, he may receive them from the legacy to the mother of the infants.

MASTER IN CHAMBERS. MAY 14TH, 1912.

ONTARIO & MINNESOTA v. RAT PORTAGE LUMBER CO.

3 O. W N. 1284.

Discovery—Examination of Officers of Company—Con Rule 439 (a).

Motion by defendants for further and better affidavit on production and for examination of certain officers of plaintiff company.

MASTER IN CHAMBERS *held* that no order for further examination of officers of a company can be had when an examination of another officer under an order still in force has not been had.

Hees v. *Ontario Wind Engine*, 12 O. W. R. 774, followed.

That material on motion for further affidavit on production insufficient. Motion dismissed; costs to plaintiffs in cause.

Motion by defendants which in effect asked for a further affidavit on production to include all the books of account and other records of plaintiff company; and for an examination of three persons alleged to be in some way, either as directors or otherwise, connected with plaintiffs, as well as of an officer or officers of the company at Toronto where their head office was.

Neil Sinclair, for the defendants' motion.

Glyn Osler, for the plaintiffs, contra.

CARTWRIGHT, K.C., MASTER:—Dealing first with the question of examination of an officer of the company—a reference to the case of *Hees Co.* v. *Ontario Wind Engine Co.*, 12 O. W. R. 774, shews that no such order can now be made because on 3rd April an order was obtained by defendants

for the examination of the president. This has not yet taken place. Till then no order can be made for the examination of another officer as long as that order is in force.

As the 3 persons named as directors or in some way connected with the company cannot be examined otherwise than under the same Rule 439 (a) cl. 2, it follows that that part of the motion must also be refused, at least for the present.

If any occasion arises for a renewal of this branch of the motion it can then be dealt with on its merits.

The other branch of the motion is supported only by affidavits, and argument that the books, etc., of the plaintiff company should be produced because they must be relevant as they must shew its dealings with the Minnesota company, and other facts alleged in statement of defence set out in the previous motion already referred to. All this, however, is at present only a matter of surmise and conjecture so far as appears on the material. On the argument Mr. Osler stated there were no such dealings as alleged.

The affidavit already made is sufficient on its face. It may be that on examination for discovery some ground may be shewn to justify an order for a further affidavit. But until this has been done in some of the ways pointed out in *Swaisland* v. *Grand Trunk Rw. Co.*, 3 O. W. N. 960, no further affidavit can be required.

The conclusion of the whole matter is that the motion is wholly premature and should be dismissed, but without prejudice to its being renewed in whole or in part as defendants may be advised. It may not be out of place to draw attention to the fact that the sittings at Fort Frances commence on 17th June. Any unnecessary delay in the proceedings may cause a postponement of the trial until the fall sittings.

The costs of this motion will be to the plaintiffs in the cause.

COURT OF APPEAL.

MAY 15TH, 1912.

PATTISON v. CANADIAN PACIFIC RW. CO. AND CANADIAN NORTHERN RW. CO.

3 O. W. N. 1245; O. L. R. .

Negligence—Railway—Servant of two Railways —Person Killed at a Crossing of one Railway by the Other—Negligence of Joint Servant—Liability of Each Railway.

Canadian Pac. Rw. Co. applied to the Dominion Board of Rw. Comrs. for and obtained leave to cross the track of the Can. North. Rw. Co. at a certain point, upon the terms that the applicant should, at its own expense, insert a diamond in the track with interlocking plant; that the Can. North. Rw. Co. should appoint a competent man to be in charge of the crossing; and that the applicant should bear the whole cost of providing, maintaining, and operating the interlocking plant, including the cost of keeping a man in charge of the crossing. A competent man was appointed to the satisfaction of both companies; but, on an occasion when he was acting solely in behalf of and for the benefit of the Can. Pac. Rw. Co., he blundered in his signals and caused the derailment of a Can. Pac. train and the death of a fireman. In an action against both companies by the widow of the fireman to recover damages for his death.

BOYD, C., *held*, 20 O. W. R. 18; 24 O. L. R. 482; 3 O. W. N. 45, that the signal-man was to be regarded as the person employed by the company for which he was, at the time of his negligent act or omission, adjusting the points and giving the signals; and the Can. Pac. Rw. Co. was, therefore, alone responsible for his negligence, whether under the Workmen's Compensation for Injuries Act, s. 3 (5), or at common law, and whether the service was to be considered a joint service or not.

That the whole circumstances of the employment should be looked at, and the real effect of the actual relation existing should not be lost sight of in deference to a formula about hiring and paying.

Hansford v. *Grand Trunk Rw. Co.* (1909), 13 O W. R. 1184, 1187, specially referred to.

COURT OF APPEAL *held*, reversing above judgment, that as the signal-man was hired, paid and subject to the orders and control of the defendants, the Can. North. Rw. Co., he must be considered their servant and not the servant of defendant, the Can. Pac. Rw. Co.

Review of authorities.

GARROW, J.A., dissented.

Judgment against defendant Can. Pac. Rw. Co. set aside and judgment entered against defendant Can. North. Rw. Co. Costs throughout to plaintiff and defendant Can. Pac. Rw. Co.

An appeal by the defendant, The Canadian Pacific Rw. Co., from a judgment of HON. SIR JOHN BOYD, C., at the trial, in favour of the plaintiff, 20 O. W. R. 18; 24 O. L. R. 482; 3 O. W. N. 45.

The following statement of facts were taken from the judgment of HON. MR. JUSTICE GARROW.

The plaintiff sued on behalf of herself and the infant children of her late husband, Samson Pattison, to recover

damages resulting from his death on September 10th, 1910, through the alleged negligence of the defendants or of one of them.

The amount of the damages was agreed upon at the trial at the sum of $4,250.

The deceased, Samson Pattison, was in the employment of the defendant, the Canadian Pacific Rw. Co., as a locomotive fireman. On the occasion in question he was employed upon an engine attached to a train proceeding from the city of Winnipeg easterly. About seven miles east of Winnipeg, at a place called Wood Crossing, the line of railway of the defendant the Canadian Pacific Rw. Co., crosses the line of the defendant, the Canadian Northern Rw. Co., and what there occurred is thus expressed in the statement of claim, and admitted in the statement of defence of the defendant the Canadian Pacific Rw. Co.

"5. Upon approaching the said crossing the train upon which the said Pattison was working was given the through signal from the distance signal, and in pursuance of such signal so given was proceeding along the track, and when nearing the home signal the signal was suddenly, through the negligence of the man in charge of same, reversed and the derail switch thrown open, thus causing the train to be derailed which resulted in Pattison's death."

The man in charge of the signals at the crossing was one Leland, who was afterwards prosecuted for manslaughter and convicted. And the sole question in this case was, which of the two defendants should be held responsible for Leland's negligence.

The facts as to Leland's appointment were as follows:—The defendant, the Canadian Northern Rw. Co., had what is called a spur line of railway leading to certain gravel pits, used only to reach them. The defendant, the Canadian Pacific Rw. Co., desired to cross this line, and made application for that purpose to the Board of Railway Commissioners for Canada for an order permitting such crossing to be made. And an order dated the 29th of April, 1909, was accordingly made. By the terms of the order it was provided, among other things, that the defendant, the Canadian Northern Rw. Co., should appoint and place a man in charge of the crossing, and that the defendant, the Canadian Pacific Rw. Co., should bear and pay the whole cost of providing, maintaining and operating the interlocking plant which the order

directed should be established at the crossing, including the cost of keeping the man in charge at the crossing.

In pursuance of the order, the interlocking apparatus was put in, and the crossing duly established.

The defendant, The Canadian Northern Rw. Co., appointed Leland and placed him in charge at the crossing on April 30th, 1909, and he remained in charge until the accident on September 10th, 1910. He was paid his wages in the first instance by the defendant, the Canadian Northern Rw. Co., but that company was fully recouped in respect of such wages by the defendant, the Canadian Pacific Rw. Co.

The learned Chancellor held, 20 O. W. R. 18; 24 O. L. R. 483; 3 O. W. N. 45, that the defendant, the Canadian Pacific Rw. Co., alone was liable under the circumstances for the damages agreed upon with costs of action.

The appeal to Court of Appeal was heard by HON. SIR CHARLES MOSS, C.J.O., HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH and HON. MR. JUSTICE MAGEE.

I. F. Hellmuth, K.C., and A. MacMurchy, K.C., for the Canadian Pacific Rw. Co.

Hon. Wallace Nesbitt, K.C., and Christopher C. Robinson, for the Canadian Northern Rw. Co.

C. A. Moss, for the plaintiffs.

HON. SIR CHARLES MOSS, C.J.O.:—This appeal, though nominally and in form an appeal against the plaintiffs, is in substance and reality an appeal against the defendants, the Canadian Northern Rw. Co. At the trial and again on the argument of the appeal, it was admitted that the unfortunate accident which caused the death of the plaintiff's husband was due to the gross negligence of one Frank Leland who was operating the points and signals in connection with the interlocking plant at Ward's crossing.

The amount of damages to be paid by the company ultimately held liable was agreed upon and fixed at $4,250.

The only question tried and debated was which one of the defendants was answerable for the consequences of Leland's negligent act.

The solution of that question is to be found by ascertaining from what facts established in evidence whose servant Leland was in fact and law when he committed the negligent

act. And as has been many times observed, the answer depends upon the facts and the proper inferences to be drawn from them. The recent case in the House of Lords of *McCartan* v. *Belfast Harbour Comrs.*, 44, Irish L. T. 223, was one in which action was brought for personal injuries to the plaintiff while engaged in helping to unload a ship. A crane, the property of the defendants, was hired to the master of the ship for unloading purposes. The crane was in charge of and worked by a servant employed by the defendants. The plaintiff was working under employment by the master of the ship and was injured through the negligence of the craneman. There was judgment for the plaintiff, and ultimately an appeal to the House of Lords. It was contended for the defendants that *qua* the work on which he was engaged at the time of the accident the craneman was the servant of the master of the ship and not the defendant's servant. The Lord Chancellor said, "I regard this case as one purely of fact in which no point of law is in dispute. The question on which the decision hinges is this: was the man whose negligence caused the accident, acting as servant of the defendants in doing what led to the mishap or as servant of the master of the vessel which was being unloaded?"

And Lord Dunedin said (p. 226): "There is no principle involved in . . . this case except the principle which I have already mentioned, which is compendiously described by the *brocard respondeat superior*, and as to which no one entertains any doubt. The application of that particular principle depends upon facts and is a question of fact . . ."

The present case having been tried without a jury, and there being no substantial difference as to the facts, we are free of the difficulties which sometimes arise in dealing with findings upon disputed facts. It only remains to endeavour to make the proper application of the facts and the inferences to be drawn from them, in order to ascertain which of the two companies is liable.

The learned Chancellor has held the defendants, the Canadian Pacific Rw. Co., liable, basing his conclusion, as I read his opinion, upon the three grounds, (a) that Leland being the common signalman, the proper legal outcome as to liability in case of negligence is that he was to be regarded as the person employed by the company for which he was adjusting the points and giving the signals; (b) if the order of the Board of Railway Commissioners, coupled with its directions,

be regarded as a *quasi* contract or in the nature of a contract between the companies, the rules of common law would place liability on the company who was making use on its own line of the common servant for the sole prosecution of its sole work at the crossing; (c) or if rejecting the theory of joint service and regarding Leland, appointed and paid in the manner in which he was, as the servant or agent *sui generis* of both companies, then fairness and good sense would support the proposition that the company for whom he was alone acting on the particular occasion was the principal against whom relief should be sought in case of misconduct on Leland's part occasioning injury to an employee of the last-mentioned company.

But however strongly these propositions may appear to be consistent with what should be fair as between the two companies, I am, with deference, unable to think that they can be considered as decisive of the question in issue here. In order to give effect to them it must be first found that Leland was the common servant of the companies. He was, it is true, the common signalman in the sense that he was the only one in charge, but it by no means follows that he was the servant of both companies. It must depend upon the circumstances of his engagement, the nature of the duties he owed to the respective companies, and the extent of the control over his conduct and actions vested in each of them.

The occasion for the employment of a person performing the duties which Leland was engaged in arose out of the application of the Canadian Pacific Rw. Co. to the Board of Railway Commissioners for leave to cross the track of the Canadian Northern Rw. Co.'s spur line to their gravel pit at the point in question. The board granted the leave, but directed that the Canadian Pacific Rw. Co. should, at its own expense, under the supervision of an engineer of the Canadian Northern Rw. Co., insert a diamond on the track of the latter company at the point of crossing, and that the crossing be protected by an interlocking plant, derails to be placed on the line of both companies on both sides of the crossing, the derails to be interlocked with home and distant signals. Then followed directions bearing directly on the question here, viz., (4) that during such period of the year as the line of the Canadian Northern Rw. Co. is not being operated, the signals and derails be set and placed so as to permit the crossing to be safely made by trains of the Canad-

ian Pacific Rw. Co. without stopping, and that during such period it shall not be necessary to have a man in charge of such crossing; (5) that the Canadian Northern Rw. Co. be entitled to place a man in charge of such crossing whenever the said line is to be operated by that company upon giving to the Canadian Pacific Rw. Co. at least 48 hours previous notice in writing of its intention so to do.

Thus far it will be seen that so long as the Canadian Northern Rw. Co. is not operating its line, no necessity for having a man in charge of the crossing exists, and it is only when the Canadian Northern Rw. Co. desires to operate its line that a man is to be placed in charge. Until the arrival of that time the Canadian Pacific Rw. Co. was free to use its line for all proper and legal purposes without any hindrance at the crossing. The next material directions are (7) that the man in charge of the interlocking plant be appointed by the Canadian Northern Rw. Co., and (8) that the Canadian Pacific Rw. Co. bear and pay the whole cost of providing, maintaining and operating the interlocking plant, including the cost of keeping a man in charge of the crossing. With these should be read the stipulations of clause (6) that in the movement of trains of the same or of a superior class over the crossing, the trains of the Canadian Northern Co. have priority.

So that when the occasion for placing a man in charge arises his appointment is to be made by the Canadian Northern Rw. Co. and he is to be paid in the first instance by it. The Canadian Pacific Rw. Co. is to indemnify the Canadian Northern Rw. Co. for the cost of keeping him in charge, but otherwise there is nothing expressed, which would give the Canadian Pacific Rw. Co. any control over or power of interference with him in the performance of his duties. Complete control of the interlocking plant and of the man in charge is left to the Canadian Northern Rw. Co., and in the movement of trains, its trains are to have priority. The evidence shews that the two companies so interpreted the effect of the order. The man in charge was invariably appointed by the Canadian Northern Rw. Co. without any previous communication with the Canadian Pacific Rw. Co., and it nowhere appears that it ever interfered with the man in the performance of his duties. It was, of course, open to the Canadian Pacific Rw. Co. to complain to the Canadian Northern Rw. Co. in case of neglect or failure of the man to

attend to his duties, but it had no power to dismiss or even suspend him. It was, of course, part of his duty to pay attention to the signals from trains of the Canadian Pacific Rw. Co. approaching the crossing and to set and place the signals and derails so as to permit the crossing to be safely made as soon as the traffic in the Canadian Northern Rw. Co.'s line permitted. But such acts as these cannot be so classed as to convert them into orders or directions given to him as a servant of the Canadian Pacific Rw. Co. As the case appears to me it is the simple case of a man employed and paid by the Canadian Northern Rw. Co., subject only to its orders and subject only to dismissal by it, acting on its behalf as the company having sole control of the interlocking plant but under obligation to permit the crossing to be safely made by the Canadian Pacific Rw. Co.'s trains, but in subordination to the Canadian Northern Rw. Co.'s trains.

And in my opinion no question of joint or common employment or agency arises. Leland was at the time engaged in permitting a Canadian Pacific Rw. Co.'s train to make the crossing in response to its signal, and his negligent act was in displacing the points after he had permitted the train to proceed.

I think that negligent act was committed by Leland as the servant of the Canadian Northern Rw. Co., and that it should be held liable for the damages.

This conclusion gives rise to another question which was raised and partially discussed upon the argument of the appeal—the plaintiff has not appealed against the Canadian Northern Rw. Co., or asked that if the judgment against the Canadian Pacific Rw. Co. be set aside, judgment for the damages should be entered against the Canadian Northern Rw. Co. Upon the argument of the appeal, counsel for the plaintiff asked to be allowed to appeal so as to obtain judgment against the Canadian Northern Rw. Co.

The case seems a proper one for giving this relief, and it should be granted. But the Canadian Northern Rw. Co. may be advised that in order to render unnecessary any further argument, it would be proper to submit to judgment in the same way as if an appeal had been brought by the plaintiff in the first instance.

In that case judgment may go setting aside the judgment against the Canadian Pacific Rw. Co., and directing judgment to be entered against the Canadian Northern Rw.

Co., with costs throughout to the plaintiff and the Canadian Pacific Rw. Co.

If, however, it is deemed necessary by any of the parties, the matter may be mentioned again.

HON. MR. JUSTICE GARROW (*dissenting*):—I agree with the conclusion of the learned Chancellor.

Such cases are always in my experience somewhat difficult of easy solution, largely, I suppose, owing to the somewhat nice distinctions and discriminations which must be made. The law itself seems plain and simple enough. It is the facts and the inferences of fact which are troublesome.

The principle of respondeat superior upon which they all rest is thus expounded by Best, C.J., in *Hall* v. *Smith*, 2 *Bing.* 156, p. 160, "The maxim of respondeat superior is bottomed on this principle, that he who expects to derive advantage from an act which is done by another for him must answer for any injury which a third person may sustain from it." And that a person may, while the general servant of one person, become the particular servant as to a particular act of another person, in other words, serve two masters, cannot now be disputed in the light of the authorities.

In *Union Steamship Co.* v. *Claridge*, [1894] A. C. 185, p 188, Lord Watson said, "that the servant of A. may upon a particular occasion and for a particular purpose become the servant of B., notwithstanding that he continues in A.'s service, and is paid by him, is a rule recognized by a series of decisions," to some of which I referred in *Hansford* v. *Grand Trunk Rw. Co.*, 13 O. W. R. 1184, cited by the Chancellor in his judgment.

In a recent case in the House of Lords, *McCarten* v. *Belfast Harbour Comrs*, 44 Irish L. T. R. 223; [1911] 2 Ir. R. 144, in speaking of the value of such cases, the Lord Chancellor said, "Decisions are valuable for the purpose of ascertaining a rule of law. No doubt they are also useful as enabling us to see how eminent Judges regard facts and deal with them . . . but it is an endless and unprofitable task to compare the details of one case with the details of another in order to establish that the conclusion from the evidence in the one must be adopted in the other also."

That the case involved a similar question, namely, which of two alleged masters was liable for the negligence of the servant of one of them to another servant engaged in the same operation. The case had been tried by a jury, and the

question is referred to by more than one of the learned Judges in the House of Lords as a pure question of fact involving no legal principle.

I am afraid I must plead guilty to having spent some time in the "unprofitable task" of seeking comfort and assurance from the judgments of other learned Judges in other cases of a somewhat similar nature, with the result that I am obliged to say, after looking at a great many of them, that in no case do I find the material facts to be of such a peculiar nature as in this case. In all of them there was what there is not here, namely, a voluntary hiring in the ordinary sense of the negligent servant by at least one of the alleged masters, and, therefore, no difficulty in determining whose general servant he was, the difficulty occurring later on when his services had been lent or bargained for temporarily to another. And the test usually applied was who had the power to direct or control him in the doing of the act out of which the negligence arose. See *Waldeck* v. *Winfield,* [1901] 2 K. B. 596; *Donovan* v. *Laing,* [1893] 1 Q. B. 629; *Brady* v. *Chicago, etc., R.,* 114, Fed. R. 100; *Brow* v. *Boston & Albany Rw. Co.,* 157 Mass. R. 399.

The initial difficulty here is to say that Leland was ever at any time in any proper sense the exclusive servant of the defendant the Canadian Canadian Northern Rw. Co.

That company, it is true, appointed him, but only under the compulsion of a statutory order. And it is also true, that company in the first instance paid his wages, but in the end they were really paid by the other company, at whose instance, and to serve whose purposes the appointment was made. That company, it may fairly be said upon the facts, in the language of the definition of Best, C.J., was the company which expected to derive, and did derive, the chief advantage from his acts. He, in fact, did nothing for the other company, but what had been rendered necessary by acceding to the request of the first-mentioned company. For months at a time, the little spur line of the defendant, the Canadian Northern Rw. Co. was entirely closed, at which time by the terms of the order the signals and derails were so set as to admit of the trains of the other company passing without stopping, and the services of a signalman then wholly dispensed with.

Having regard to all the circumstances, I see no difficulty in construing the order under which Leland was ap-

pointed, as providing, and intended to provide, for the case of a signalman who should be in charge of the crossing and should be in the service of the two companies, acting for each upon its own lines as the occasion required. And in holding that on the occasion in question, Leland, the signalman in charge, was a person in the service of the defendant the Canadian Pacific Rw. Co. as employer, who had charge or control of the points and signals at the crossing in question within the meaning of sec. 3, sub-sec. 5, of The Workmen's Compensation for Injuries Act.

Such a construction violates no rule of law, in my opinion, and is in entire accordance with the justice of the case.

I would dismiss the appeal with costs.

HON. MR. JUSTICE MAGEE:—The Railway Act, 1906 (R. S. C., ch. 37), in sec. 151, clause c, gives each company the power to cross any railway as by clause (d) it gives power to carry the railway across the lands of any person, but by sec. 227, it directs that the cars shall not do so, cross another railway until leave therefor has been obtained from the Board of Railway Commissioners, and upon application for such leave the Board may direct that such works and appliances be installed, maintained, and operated by watchmen or other persons employed, and measures taken as appear to the Board best adapted to prevent danger, and make other directions, and by sec. 229, at any such crossing at rail level the Board may order the adoption of such interlocking switch derailing device signal system and appliances as to render it safe for trains to pass over the crossing without being brought to a stop.

In 1908 the Canadian Pacific Rw. Co., which I may call the Pacific desired to cross the spur-line of the Canadian Northern Rw. Co., which may be called the Northern, and it did not desire to do so overhead or by subway, but at rail level, and it made application to the Board to vary a previous order of December 26th, 1906, by granting permission to use the crossing for other than construction purposes, and by having the crossing protected by home and distant signals. The Board's order of 29th April, 1908, gave (1) the leave to cross, but directed (2) that the Pacific Company at its own expense under supervision of an engineer of the Northern Company should insert the diamond at the crossing, (3) that it should be protected by an interlocking

plant derails to be placed on the lines of both companies on both sides and to be interlocked with home and distant signals, (4) that during such period of the year as the Northern line is not being operated, the signals and derails be set so as to permit the Pacific trains to cross without stopping, and then it should not be necessary to have a man in charge of the crossing, (5) that the Northern Company " be entitled to place a man in charge " of such crossing whenever the line is to be operated by that company upon giving notice to the Pacific Company, (6) that the Northern Company's trains have priority, (7) that the man in charge be appointed by the Northern Company, and (8) that the Pacific Company bear and pay the whole cost of providing, maintaining, and operating the interlocking plant, including the cost of keeping a man in charge of the crossing. By another order of 7th May, 1908, on the Pacific Company's application and on the recommendation of the Board's engineer " the applicant company and the railway company," which I suppose means both companies were authorized to operate trains over the crossing without being brought to a stop.

Among the rules adopted by the Board for interlocking systems at crossing at rail level, one provides that " when the signals on the distant and home posts indicate safety the train can proceed."

In September, 1910, the crossing was in operation and the Northern Company were using the spur line for hauling gravel and other purposes, but the Pacific Company had five or six times as many trains crossing as the Northern Company. A signalman was in charge and operated the signals and derails on both lines from a tower which seems to have been located on the land forming the original right of way of the Northern Company though that is not very clear—no part of that land seems to have been acquired by the Pacific Company.

The Pacific Company's train on which the plaintiff's husband was fireman was proceeding to cross without stopping as the signals indicated safety, and the signalman in the tower negligently and without cause or warning operated the derailing switch on the Pacific Company's property and derailed the train, and the fireman was killed.

The negligent signalman had been selected and appointed solely by the Northern Company and was subject only to its

control and to dismissal by it. He made reports periodically to that company and only to it. The Pacific Company was not consulted or entitled to be consulted as to his appointment or retention, and had had no voice therein. It could not discharge or even suspend him and at the most could only complain of any misconduct by him to his employers the Northern Company—but no doubt had an ultimate right of complaint against that company itself to the Railway Commissioners. His wages were agreed upon between him and the Northern Company, and paid by that company without consultation with the Pacific Company, but were reimbursed by the latter company to the Northern. He was furnished by the Northern Company with its rules for crossings—he also had a copy of those of the Pacific Company, but it does not appear how he obtained them. The rules of both companies are in effect if not literally the same both being approved by the Board. It was necessary for him to have timetables of both companies, and they were furnished to him. The Northern Company superintendent says that company "gave instructions to him in connection with the operation. It does not appear that the Pacific Company gave any instructions. It is stated that generally the senior company—the company whose line is subsequently crossed by another—has the privilege of appointing the signalman at crossings. As the signalman was not required when the Northern Company was not operating that line or before the crossing was made it cannot be said that he was employed for the services of either company as regards danger from its own trains, appliances, or employees. He was authorised to use appliances and perform operations therewith on the Pacific Company's property, but any danger he was there to prevent would be a common danger to both companies, and, therefore, more a danger of the Pacific Company, apart from danger to the Northern Company his employer. In setting the signals and rails properly for "safety" on the Pacific line he was doing no more than saying that his employers' trains or track were not going to interfere with the train. In wrongfully moving the derailing appliance he was saying "There is danger to my employers property as well as to you." What actuated him to do as he did does not appear, but it is not at all likely, and certainly is not proved that he was seeking to save the Pacific train alone from danger on the Pacific line—what

happened was much the same as if the railway watchman at a highway crossing were to signal to a teamster that it would be safe to cross and then drop the bar across the horse's back.

It is true the train was derailed by means of an appliance put on the Pacific track by the Pacific Company, and which that company assented to being used by the Northern Company through its signalman, but they did not assent to his doing so negligently or improperly and there was no negligence in giving such assent.

It is not the fact that the engineer or any employee of the Pacific Company signalled for any movement of the signals or switches either then or ordinarily. The signalman of the Northern Company controlled the right of the Pacific Company's trains to cross, but no employee of the Pacific Company had any authority over the signalman.

It is true the Pacific Company had applied for the protection of the crossing by signals and the signals would necessitate a signalman, but they did not ask for or obtain the control in any way of the signalman. As appears it is usual for the "senior" company at railway crossings to appoint the signalman. In fact the Pacific Company did no more than a municipality might do which asked that a railway company should maintain a watchman at a highway crossing.

From the decision of the Board of Railway Commissioners (Report for 1909, 44 Sess'l. Papers, 1910, 20 c. p. 304), mentioned by the learned Chancellor it is apparent that it was the view of the Board and it would seem of railway companies themselves that in taking the appointment of the signalman the senior company was assuming a serious responsibility which it was felt they should not in future orders be subjected to and the Board decided that in future orders made after 1st October, 1909, it would be provided that the signalman should be regarded as an employee of both senior and junior companies.

Apart from that view upon the facts here it does not appear that the negligent signalman was in fact in any sense in the service of the Pacific Company or that at the moment of his negligent action or in taking the course he did he was for the time being acting otherwise than as the servant of the Northern Company which through him was

unwarrantably placing an obstruction upon the Pacific Company's property in the way of the train.

This appeal of the Pacific Company should, in my opinion, be allowed and the plaintiff should have leave to appeal against the judgment in favour of the Northern Company and I agree in the proposed disposition of the costs.

HON. MR. JUSTICE MEREDITH:—I am quite unable to agree with the trial Judge in his views of this case.

I am quite unable to understand how anyone who does not hire or pay, and who cannot discharge, order or control, a servant employed and paid, and subject to discharge and to the orders and control of another person only, can be considered the master of or answerable for the misconduct of such a servant: manifestly, I would have thought the master could be only he who employed, paid and discharged the servant, and to whose orders and control solely he was subject.

In this case the Canadian Northern Rw. Co. hired, paid and discharged all the signalmen, for the crossing where the accident happened, who were all subject to the orders and control of that company solely. The Canadian Pacific Rw. Co. had no voice in any of these things, they had no power whatever over any of them, nor ever assumed or attempted to exercise any authority respecting them: their only right was that of any other stranger to the contract between master and servant, to complain to the master if they had fault to find with any act of the servant; but even that was never done.

How then is it possible, rightly, to hold the Canadian Pacific Rw. Co. liable for his negligence in the performance of his duties in such a service? Because that company was bound to recoup the other in the amount expended in his wages cannot have any such effect: see *The Slingsby*, 120 Fed. Rep. 748, and *Swanston* v. *North Eastern, &c.*, 3 Exch. D. 341.

The narrow ground upon which the trial Judge held that the Canadian Pacific Rw. Co. is liable was, in my opinion, based upon error in fact as well as in law. It is not a fact that in doing that which caused the accident the signalman was acting upon the request, or at the instance, or for the benefit of that company. When their train was approaching

the crossing the signals of safety were set upon the line which gave them a clear right of way: there was no need for, or to signal for, any service on the part of the signalman; it was the right and the duty of the train to go on as it did; the difficulty arose not from any service needed or asked for by those in charge of the train, but by reason of the other company's tipsy servant interfering with that train's right of way, not at the request or instance of the Canadian Pacific Rw. Co. or for their benefit, but wholly and diametrically opposed to their interests and desires. On the contrary it was for the benefit of the other company, because his actions made their line safe in making the Canadian Pacific Rw. Co.'s line unsafe, and throwing the train off the track and killing the plaintiff's husband. It ought not to be necessary, but it seems to be, to say that in making the one line safe the other is necessarily made unsafe, that is the purpose of the interlocking apparatus: in opening the "derailing" switch on the one line that switch is automatically closed on the other line giving the only safe right of way to the latter.

One might well differ from the trial Judge with greater hesitancy were it not that he was under a misapprehension of some of the very material facts of the case when disposing of it; the Canadian Northern Rw. Co. was not ordered by the railway Board, "to appoint a competent man" to be in charge for the crossing; the order was that they "be entitled to place a man in charge of such crossing," when the line was to be put in use by them, upon giving forty-eight hours previous notice to the other company. The Canadian Northern Rw. Co. did not use at all times this part of their road; and so they were at liberty to withdraw the signalman whenever they saw fit not to use it; at which times if they did their duty they would see that this interlocking switch was securely locked so as to give the right of way all the time to the other company's line; and so the signal service was all the more under their control and in their charge and keeping.

It was also incorrect to say, as the trial Judge did, in his reason for deciding against the Canadian Pacific Rw. Co., that a competent man was appointed to the satisfaction of that company; they were in no way consulted about the appointment of any of the several signalmen and knew nothing about them nor had anything to do with them, but had

to, and did, submit to all such appointments as the other company choose to make.

So too, that the signalman was in the service of the Canadian Pacific Rw. Co., who paid him and concurred in his appointment: and that the service at the time and place in question was being performed solely on behalf of and for the benefit of that company. If these things had been as they are incorrectly stated a very different case would be presented for consideration on this appeal.

Judging only from the quotation from them made by the trial Judge, it seems to me to be obvious that the views expressed by the chairman of the railway Board, upon the application which was then before him, which had nothing to do with this matter, have been misapplied to this case. The chairman was evidently dealing with the question of what should be the form and effect of the order to be made upon an application for crossing facilities; not in any sense as to the effect of the order which was made in this matter; if it had been otherwise I cannot think that anyone could agree with him; as they are even, there may be very different opinions.

It would certainly be a new and unfortunate state of affairs if one were to be held answerable in damages for the misconduct of a servant in whose appointment he had no voice and who was not subject to his orders or control, nor hired or paid by him, and who was not acting upon his request or at his instance or for his benefit, but the very opposite, in the misconduct which caused the injury.

The case seems to me to be a very plain one of liability of the Canadian Northern Rw. Co. at common law; and not of liability of the Canadian Pacific Rw. Co. under the Workmen's Compensation for Injuries enactments or otherwise. Since this opinion was written I have had an opportunity of perusing the ruling of the railway ccommissioners referred to in it, and find that it is entirely in accord with the views I have expressed in all respects. It is there said by the chief commissioner, among other things. "I think in all cases where the Board has made crossing orders the man in charge of the interlocker has been regarded as the employee of the senior"—the Canadian Northern Railway Company—"only in which event if through his carelessness or negligence damages arise to the servants or employees of the junior company recovery must be had against the junior company."

COURT OF APPEAL.

MAY 15TH, 1912.

DANIEL v. BIRKBECK LOAN CO.

3 O. W. N. 1250.

Trial—Action to Recover Money Paid on Shares of Company—Winding up of Company—Leave to Bring Action—Alleged Assignment of Shares—Points not Raised in Pleadings—New Trial Ordered.

LATCHFORD, J., at trial, dismissed plaintiff's action for an accounting in respect of moneys paid on certain shares of the defendant's capital stock held by her, upon an objection by defendants not taken in their pleadings that plaintiff had assigned the shares in respect of which action was brought. Plaintiff who, without legal knowledge or experience, conducted her own case, did not raise the question of surprise at trial nor exact proper proof of such alleged assignment.

COURT OF APPEAL set aside above above judgment and ordered a new trial. No costs of appeal; costs of former trial in action.

An appeal by the plaintiff from a judgment of HON. MR. JUSTICE LATCHFORD, who dismissed the action at trial.

The appeal to Court of Appeal was heard by HON. SIR CHAS. MOSS, C.J.O., HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH and HON. MR. JUSTICE MAGEE.

Plaintiff in person.

No one for the defendants.

HON. SIR CHAS. MOSS, C.J.O.:—No evidence was adduced and no investigation of the merits, if any, of the plaintiff's claim was entered upon but effect was given to a preliminary objection made by the defendants that the plaintiff had made assignments or an assignment of the shares on which the action was brought.

The defence was not set up in the pleadings and apparently the learned Judge's attention was not directed to that fact, as doubtless it would have been if the plaintiff had been represented by counsel, and had not undertaken the conduct of her own cause.

The statement of claim though discursive and not conforming to the ordinary rules of pleading seems to disclose a case which if established in evidence would entitle the

plaintiff to some measure of relief, but whether any and if so, to what extent relief should be granted can only be determined after the testimony on both sides has been adduced.

The defendants besides disputing the plaintiff's claims and putting her to strict proof set up that an order was made in liquidation proceedings pending against the defendants the Birkbeck Company that no acton should be commenced against the company or its liquidator the defendants the London & Western Trust Co. without the permission of the Court and that no consent had been given to the bringing of this action.

At the opening of the proceedings at the trial the defendants' counsel raised the objection that no consent had been obtained. This was contested by the planitiff who stated that if time was given she could produce the order granting permission to bring the action, and after some discussion the learned Judge was prepared to grant an adjournment to enable that to be done. The defendants' counsel then raised the objection as to the assignments and considerable discussion ensued and it is said that in the course of it the plaintiff admitted the fact of an assignment. But this is scarcely correct. She stated that a paper had been executed to her brother but never delivered and that any other assignment was not absolute but merely as security. In truth there was no proof by admission or otherwise of the execution of any assignment.

So far as appeared also any assignment was subsequent in date to the commencement of the action.

In any case the utmost effect that should have been given to the assignments supposing them to have been proved would have been to direct the case to stand over to enable the plaintiffs to procure the consent of the assignees to become co-plaintiffs or failing their consent, to make them defendants.

The plaintiff was placed at a disadvantage in meeting this objection which as already stated was not set up in pleading and no doubt if that fact had been pointed out to the learned Judge he would not have given effect to the objection without first giving the plaintiff an opportunity of meeting it in any manner—which she might be advised was proper.

As it was, a mistake was made for which no doubt the plaintiff was to some extent responsible, but the defendants

were not wholly blameless. The result was that the case was summarily disposed of without trial.

In view of all the circumstances the judgment should not stand. But all that can be done is to direct a new trial. This will not stand in the way of the plaintiff taking such steps as she may be advised, to make the record complete by the addition of proper parties in case it appears that any such proceeding is necessary.

There should be no costs of the appeal but the costs of the former trial should be costs in the action.

HON. MR. JUSTICE GARROW:—I agree.

HON. MR. JUSTICE MACLAREN:—I agree.

HON. MR. JUSTICE MEREDITH:—The entanglements in which the appellant now finds herself in this case have arisen mainly from her lack of knowledge of the practice of the law. If the case had been wisely conducted it seems to me that it might very well have been finally disposed of, upon its merits, long ago, at much less cost than already has been incurred in it, with the merits of the case yet wholly untouched by judicial consideration; and as she has chiefly herself to blame for the embarrassments she is now involved in.

Her claim seems to me to be a simple one, and one which might, and ought to, have been stated in a few words. It is that she has acquired the shares of the Birkbeck Loan Company, which this Court in former litigation considered were not covered legally by the company's mortgage in which they were comprised; and she seeks an accounting by the defendants in respect of them. Her allegations respecting the mortgage of lands to secure payment to the company in respect of such shares and of the sale of the lands by a prior mortgage and payment into Court of the surplus moneys arising from such sale as well as of payments and overpayments on the stock, are but things incidental to an accounting in respect of such shares; and the whole matter, one which a competent Referee ought to be able to fathom and dispose of, according to the very truth of the matters in controversy, speedily and easily.

The defendants assert that the claim is frivolous and imaginary, important only that it has long delayed and is

still delaying the winding-up of the company, and delaying it to the great prejudice of all who have real and substantial claims against it. But if that be so do not these things call rather for a final disposition of the claim upon its merits, than obstructing it; even though the obstruction be upon valid and proper legal grounds?

As far as I can see, there has never been any adjudication, in any tribunal, upon the merits of the plaintiff's claim. The proceedings in the winding-up matter never went so far as that; there was never anything like a judgment against which either party might appeal.

Then, after many vicissitudes, the case came for trial in May, 1911, and when the defendants first objected to a trial, of the merits, on two more or less technical grounds, namely: (1) because of the winding-up proceedings which stayed all actions against the company without leave, and it was asserted that no leave had been obtained, and (2) because of a Chambers' order staying all proceedings in this action until the costs of another action had been paid; and it was asserted that such costs had not then been paid. The appellant then, conducting her own case, as she had throughout, very unwisely because of her incompetence as a lawyer—answered that the leave had been given and the costs paid, as she could prove, but not then; and asked for a postponement of the trial until she could do so; and that was about to be done when the defendants, firmly objecting, interposed another point and insisted upon the dismissal of the action. This point was that the appellant had assigned absolutely all her claims in this action to a foreign corporation; and they produced that which purported to be a copy of such an assignment. The appellant did not deny that she had made an assignment, but asserted that it was not absolute, but only as security for money which she had borrowed to enable her to prosecute this action. She also seems to have admitted making another assignment, but asserted that as to it the assignees were bare trusetes for her.

The learned trial Judge thereupon dismissed the action with costs, on the ground that the appellant had absolutely assigned all her rights in the subject matter of this action.

In that I think he erred; it is now firmly settled that a party cannot, against his will, be non-suited upon his opening of the case merely; that may be insufficient to shew a good cause of action; but the evidence may supply all that

is needed; and this case seems to me to have been especially one for adducing the facts upon oath; the appellant being very plainly incompetent as counsel not only because of want of legal knowledge, but because taken possession of so engrossedly by it that she seems to be able to discern nothing else than that which seems to her to be its unspeakable righteousness. I repeat that the case is especially one in which a trial Judge should do all in his power to elicit the actual facts concerning it.

There was really no evidence of any assignment by the appellant; and the admission was of assignments which still left in her the most substantial interest in this action. It did not appear when the assignments were made; but, possibly, after the commencement of the action; but even if before I cannot think it was right to dismiss the action under the circumstances; it would, no doubt, be right to require the appellant to make the assignees parties to the action, within a reasonable time, so that one action should determine all things concerning the appellant's claims; and, as to the other objections the course which the trial Judge had determined to take was a reasonable one, as it did not appear that any notice had been given to the appellant that she would be met with these preliminary objections when she came down to a trial on the merits. The postponement should have provided that in the meantime the appellant should take such steps as would make any judgment pronounced binding on all outstanding interests in the subject matter of this litigation.

The appellant is, I think, strictly entitled to a new trial, upon the terms I have mentioned as to outstanding interests.

But I venture to suggest to the appellant that she has had enough experience of her lack of knowledge of the law and practice of the Courts to call for the employment of a competent trustworthy solicitor—such as the Official Guardian—to conduct her case in the future and to bring it as soon and as cheaply as possible to a final disposition on its merits; and, to both parties, that, that being done, there be the usual reference, in cases such as this, to one of the several competent Referees of the Court, either here or in London, to hear and determine all the matters in controversy upon the merits in the usual manner.

I have inquired of the learned County Court Judge before whom the winding-up proceedings were taken and are now pending, who has informed me: (1) that although the appellant's claims were under investigation before him, no adjudication from which there might be an appeal was made upon them; that they were too indefinite and intangible for anyone among several who represented the appellant as well as herself, to present anything that might be so ajudicated upon; (2) that he gave leave to bring an action on the condition that the costs of a former action were paid within 30 days; and (3) that such costs were not paid within that time, but have since been. He also informed me that some question as to his power to grant leave to sue did arise, owing to some changes in the winding-up enactment.

The taxable cost of this appeal should, I think, be costs in the action to the appellant in any event; but there should be a set-off of costs now if any are now payable by the appellant to the respondents.

COURT OF APPEAL.

MAY 15TH, 1912.

GOODCHILD v. THE SANDWICH, WINDSOR & AMHERSTBURG RAILWAY CO.

3 O. W. N. 1252.

Negligence—Street Railway—Person Injured Driving Across Track—Judgment for Plaintiff—On Findings of Jury.

Plaintiff while driving a team was injured by collision with a street car of defendant's at a street intersection in Windsor. The jury found negligence on part of defendants and negatived contributory negligence on part of plaintiff.

COURT OF APPEAL dismissed with costs an appeal from a judgment of DIVISIONAL COURT affirming a judgment of BOYD, C., at the trial in favour of plaintiff entered upon the findings of the jury.

Appeal by the defendants from a judgment of a Divisional Court affirming a judgment of HON. SIR JOHN BOYD, C., at the trial, upon the answers of the jury to the questions submitted to them.

The action was to recover damages for personal injuries to the plaintiff and the death of one horse and injuries to

another and to the plaintiff's waggon, occasioned by the negligence of the defendants' servants in the operation of one of their street cars.

The plaintiff while driving south on McDougall street in the city of Windsor, and crossing the track of the defendants' railway upon Wyandotte street, at the intersection of the two streets, was struck by a car proceeding east with result above stated.

The jury found that the injuries were caused by the defendants negligence, that the negligence was in the motorman not having his car under control; that the plaintiff took reasonable care in approaching and endeavouring to cross the track; that the plaintiff took reasonable care to save himself from injury; that the motorman had time to avoid the collision after he became aware that the plaintiff intended to cross the track, that the plaintiff had not time to turn away from the track or to stop the team after he had an opportunity of seeing the coming car; and that the defendants were to blame for the accident, and they assessed the damages at $1,910. No complaint was made as to the amount of damages.

The appeal to Court of Appeal was heard by HON. SIR CHAS. MOSS, C.J.O., HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH and HON. MR. JUSTICE MAGEE.

D. L. McCarthy, K.C., and W. G. Bartlett, for the defendants.

J. H. Rodd, for the plaintiff.

HON. SIR CHARLES MOSS, C.J.O.:—If the evidence warrants these findings the judgment should stand beyond question.

The case was submitted to the jury in a charge to which no exception was taken directing the jury's attention specially in a manner quite favourable to the defendants, to the plaintiff's conduct as detailed in the testimony in approaching the crossing and in looking out for cars coming either way upon the track, and as to the duties and responsibility of the motorman in nearing a crossing.

There was a conflict of evidence as to whether the gong was sounded, but the jury have not found against the defendants in that respect.

There was also a conflict of testimony as to the speed at which the car was going when nearing the crossing. The motorman and conductor swore that it did not exceed 7 or 8 miles an hour, while others placed the speed at a much higher rate; one witness, Sloake, who said he had been a street-car man at one time, placing it as high as 20 miles an hour. The jury's finding that the motorman had not his car under control, implies that they were of the opinion that the speed was greater than was proper when approaching a crossing.

The motorman admitted that the crossing is a dangerous "one of the worst" on the whole route—his answers on this point are as follows:—

"Q. This is a dangerous crossing? A. Yes.

Q. And you know that you have to take extra precaution at this point? A. Yes.

Q. Perhaps the most dangerous crossing on your whole route is it not? A. It is one of the worst.

Q. One of the most dangerous? A. Yes, that is on that side—when you are going east.

Q. And it is pretty dangerous when you are coming west? A. Yes—it is worst when you are going east.

Q. Because the other building is a little further back? A. Yes."

The building referred to is a barber's shop on the north-west corner of McDougall and Wyandotte street, which obscures the view of any one going south on McDougall street, and prevents him seeing a car approaching from the west on Wyandotte street. In this instance the car was coming from the west going east. The motorman, therefore, should have recognized what he well understood—the necessity of proceeding with great caution.

The plaintiff was seated in a waggon with a long reach and would not be able to get a clear view along Wyandotte to the west until his body had cleared the barber's shop. There are obstructions to the vision in the shape of a telephone pole and some trees.

He said he looked to the west just as he was coming to the front of the barber's shop, but could not see very far, and he neither saw a car nor heard a gong. He then looked to the east where he had a clear view and seeing nothing drove on. When the horses were on the north rail of the track he

saw the car, and before he could do anything they were struck.

The motorman said that he saw the plaintiff when the car was about 70 or 80 feet from the centre of the crossing, and he thought that the plaintiff did not realize what was going on. The motorman did not then prepare to stop the car, but contented himself with taking up some of the slack of the brake, and it was not until he was within 10 feet of the horses that he reversed, too late to avert the collision.

There was a conflict as to the distance the plaintiff and his waggon were carried after the collision. The jury evidently credited the witnesses who swore that the car went across McDougall street and some distance beyond, before it came to a stop, thus shewing that the speed must have been much greater than the motorman and the conductor put it at.

If the motorman had had the car under control, there is very little reason to doubt, that when he saw the plaintiff and became aware that he did not realize the situation he could have stopped in time to avert the collision.

The jury might well have thought that the plaintiff should have exercised more caution when approaching this dangerous crossing, but there is evidence upon which they could reasonably find as they did, and it was for them to say. But even if they had taken an adverse view to the plaintiff upon that question, they could well find as they did that the motorman had sufficient time to avoid the collision after he became aware of the plaintiff's intention to cross and that he did not appear to realize the situation.

The appeal must be dismissed with costs.

HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, and HON. MR. JUSTICE MAGEE, concurred.

HON. MR. JUSTICE MEREDITH:—No reasonable man could find that the plaintiff was not guilty of negligence; he looked when looking was useless; but he failed entirely to take any such precaution when, if taken, it should have saved altogether this lamentable accident.

But the jury have found that notwithstanding such negligence the defendants might, exercising ordinary care, have saved the situation; and, therefore, if there be any reasonable evidence to support that finding, the verdict must stand.

There was evidence that the motorman took no effective means to stop the car, although it was said to be going at an excessive rate of speed, until the car was only a little more than five feet from the horses; if that, or anything like it, be true the finding cannot reasonably be found fault with. The car was going much faster than the horses, if some of the testimony be true five times faster, so that, at a distance much greater than anything like five feet, the imminent danger of the plaintiff must have been very apparent, and the motorman testified that he saw the horses and waggon from the first, and that he realized the danger when 70 or 80 feet away; in the presence of such imminent danger—when it became evident—the failure to take "emergency" steps to stop the car was negligent, very negligent; it may very well be that if such steps had been taken the accident would have been avoided; or even if collision were wholly unavoidable it might have been harmless, or almost so.

If wrong is done, the doing of it rests upon the jury, who are the sole judges of the facts regarding which the testimony is such that reasonable men might find as they have found.

The appeal must be dismissed.

HON. MR. JUSTICE MIDDLETON. MAY 15TH, 1912.

RE SOLICITOR.

3 O. W. N. 1274.

Solicitor — "Retainer" — Law Reform Act, 9 Edw. VII., c. 28, ss. 22 et seq.—Obligation of Solicitor to Account—Bill of Costs to be Delivered and Taxed.

Motion by client for delivery by solicitor of bill of costs referred by Master in Chambers to a Judge in Chambers, 21 O. W. R. 948.

The client, a foreigner in gaol, awaiting transference to the Central Prison, retained the solicitor to take proceedings to quash his conviction and gave the solicitor $300, signing a writing that it was given as a retainer.

MIDDLETON, J., *held* that on the solicitor's own shewing the amount given was not given in pursuance of a definite agreement as to the sum to be charged and so allowable under 9 Edw. VII. c. 28, s.-s 22 et seq., nor was it a "retainer" as it was not understood by the client as such.

Order made for delivery and taxation of bill, costs reserved until after taxation.

Motion by a client for an order requiring the solicitor to deliver a bill and to account for certain moneys received by him from the client, and in the alternative, if it should be held that the solicitor made an agreement respecting payment for his services, the motion to be for an order re-opening the agreement and directing the delivery of a bill and for taxation.

The motion was originally made before the Master in Chambers, and was enlarged by him before a Judge in Chambers, 21 O. W. R. 948, and upon the return of the motion before HON. MR. JUSTICE MIDDLETON, it was agreed by counsel that the motion should be dealt with either as a motion in Court or Chambers, if this made any difference.

Falconbridge, for the client, Canale Demetrio.

Arnoldi, K.C., for the solicitor.

HON. MR. JUSTICE MIDDLETON:—This case, as far as I know, is the first application in which the provisions of the statute 9 Edw. VII., ch. 28, sec. 22, et seq., are required.

Before this statute, known as the Law Reform Act, 1909, it was incompetent for a solicitor to make a bargain with his client for remuneration upon any other or higher scale than that allowed by law. Charges made by solicitors for services rendered by them were subject to review by the Court, and any attempt to obtain more than the law permitted was most sternly dealt with. See, for example, *Re Solicitor,* 14 O. L. R. 464.

This statute has introduced a new era. It permits an agreement in writing between the solicitor and the client respecting the amount and the manner of payment for either past or future services; and this agreement may be either for the payment of a salary, a lump sum, or a percentage; but the agreement as to percentage is permitted only in non-contentious and conveyancing business, so that champertous bargains are not yet sanctioned.

In this case Canale Demetrio, who describes himself euphemistically as a labourer and as having a very imperfect knowledge of the English language, had apparently likewise a very imperfect knowledge of Canadian law; as on the 7th October, 1911, the police magistrate at Porcupine found, upon evidence, that the Nugett Saloon—of which Demetrio

was then the proprietor—was a disorderly house, a bawdy house, and a house for the resort of prostitutes; and sentenced Demetrio to six months' imprisonment with hard labour in the Central Prison; a fact which probably justifies the description Demetrio now assumes.

At this time Demetrio had five hundred dollars in the bank; and, not relishing the proposed change of occupation, he procured the jailer at North Bay, where he then was, to send for a lawyer. The jailer thereupon selected Mr. Bull. Mr. Bull waited upon Demetrio, and the subject of remuneration appears to have been immediately discussed. Mr. Bull says, "in all my criminal practice I exact a retaining fee before undertaking the case; my experience having been that if I did not so protect myself, in many instances and after heavy disbursements, I would never receive any remuneration."

In pursuance of this he informed Demetrio that he would undertake an application for the latter's release, but that he would require "a retaining fee of three hundred dollars;" and this being agreed to he "wrote out an agreement calling for a retainer of three hundred dollars and at the request of Demetrio made out a cheque for three hundred dollars, both of which were signed by the said Demetrio."

It is said that this agreement and cheque were read and explained to Demetrio and he appeared to understand the same. Bull is corroborated by a series of three affidavits made by the jailer, in which he confirms Bull's affidavit by instalments.

In launching this application, Demetrio says that he is not aware that he made any agreement with Bull in regard to remuneration, or if he did sign any document purporting to be an agreement, he did so without independent advice, and that he has no recollection of any such document being signed. He also says that he signed a blank cheque which he gave to Bull and which he now finds is filled in for three hundred dollars. The cheque is not produced, but the agreement is. It is in the words following:

"North Bay, October 20th, 1911. I hereby retain George L. T. Bull, barrister-at-law, to make application for my release from jail; and herewith deliver to him cheque for three hundred dollars as retainer. C. Demetrio."

The motion for discharge was then made, and heard by by brother Sutherland. He refused to make the order sought. See 20 O. W. R. 524, 3 O. W. N. 313. An application for leave to appeal was heard by myself and dismissed: 20 O. W. R. 999, 3 O. W. N. 602. Mr. Arnoldi appeared for Demetrio on these two applications. What he charged is not stated.

Upon the material I would find against Demetrio's statement as to the filling in of the cheque. I must also find that he understood the document which he signed. But this does not conclude the matter. I must in the first place find that this document is an agreement in writing with the client respecting the "amount and manner of payment for the services of the solicitor in respect of the business done or to be done by him." On the solicitor's own statement it is not. The payment made was not to be remuneration for the services but was to be a retaining fee; and, as put in Mr. Arnoldi's affidavit, "the payment of a substantial retainer enables the professional man to exercise an option whether he will charge for his services or not;" and Mr. Arnoldi's first contention on behalf of Mr. Bull is that this money was received, as it is said, "as a retaining fee;" and Mr. Bull now elects to render his services gratuitously and has therefore no bill to deliver; an attitude which is quite consistent with the wording of the document, and justifies the holding that it cannot be relied upon as an agreement under the statute.

Nor can the solicitor retain this three hundred dollars without accounting for it, under the guise of a retaining fee. It has more than once been stated that a retainer is a gift by the client to the solicitor. It is something outside of and apart from his remuneration, and something which he is not bound to bring into account. Its true nature must be known to and understood by the client.

That is not the situation here. Mr. Bull's own account of the transaction justifies me in taking the view. that the real situation was that he declined undertaking these proceedings unless and until his client placed him in funds to the extent of three hundred dollars, and that when the client paid this three hundred dollars it was not with the intention of being regarded as a gift but rather either as a security to the solicitor for his remuneration or as payment of the remuneration. In either case the solicitor is bound to deliver to the client a bill of his actual charges and to account for

the three hundred dollars, if I am right in thinking that the memorandum signed does not constitute a sufficient agreement under the statute.

Two affidavits have been filed by counsel, expressing opinions with regard to the propriety of Mr. Bull's conduct. I think that these affidavits are most improper.

I direct the delivery of a bill and that it be referred for taxation and reserve the question of costs until after the taxation.